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REVERSE ONUS OF PROOF

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The decade of action for road safety began in 2011. It is a global plan conceived by the United Nations whose purpose is to “reduce the forecasted level of road fatalities by increasing activities conducted at national, regional and global levels.”

One of the five pillars of the plan is “post-crash responses”. One of the activities to be implemented as part of that pillar is an “effective legal response”. Specifically, the UN wants jurisdictions around the world to create better legal systems to deal with road safety.

Presently, in many jurisdictions, cyclists and other vulnerable road users who are involved in motor vehicle accidents and suffer losses at the hands of negligent motorists are forced to prove fault. They must marshal the evidence to discharge this “onus of proof” on a balance of probabilities. The problem is that owing to their injuries cyclists often lack an accurate memory of what happened. Absent a clear recollection, vulnerable road users are then put to the significant risk and expense of reconstructing the accident through experts. The cost of those post-accident investigations is borne by the cyclist and if, at the end, of the day they cannot prove negligence, they face financial disaster.

A few bike friendly jurisdictions have recognized the injustice to many innocent persons who lack the wherewithal to prove fault, and have reversed the onus of proof. In these jurisdictions, an example being the Netherlands, it is accepted that automobiles are dangerous, and the legal onus to disprove negligence is on the motorist and/or its insurers.

Dr. Lionel Ireland suffered career ending injuries in a bicycle accident on Henderson Road, two lane asphalt surfaced roadway on Vancouver Island. He had no memory of events three days before and three days after the accident owing to a head injury. He could only advance a theory as to what happened. He alleged that the Defendant driver approached him on a collision course and when attempting to pass him struck his left side. He alleged she failed to pass him at a safe distance and that she was wholly liable for the accident. She and her passenger denied this, and argued that as they were passing him he turned to look to his left



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and steered his bike directly into the side the car. The Plaintiff retained an engineer to try to reconstruct the accident. Dr. Ireland's case was dismissed because he failed to meet the ultimate onus of proof. He could not tip the scales in his favor because he could not offer any testimony of his own as to what occurred. The Judge found that the physical damage to the vehicle was not inconsistent with the Defendant's version of events. If this accident had occurred in the Netherlands the result would have been different. Dr. Ireland's significant losses will never be recovered.

In my view, which I will express at the upcoming Velo-City Conference in Vancouver, any civilized system of law should require the operator of an automobile to disprove negligence when a collision with a vulnerable road user occurs.

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