

# Report on Strict Liability

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## Executive Summary

- The philosophy underpinning strict liability is a desire to see the interests of vulnerable road users, like cyclists, given priority over drivers of motor vehicles.
- The UK is one of only five countries in Europe that does not operate strict liability for road users despite acknowledgement from ministers and within official reports concluding that the system has merit.
- There has been reluctance in the UK to change the system of liability due to a belief that motorists and cyclists should be treated as equals under the law by ensuring that both cyclist and driver are innocent of any wrongdoing until proven guilty.
- Additionally, there has historically been a great deal of popular resistance to any changes in liability law stemming from rivalrous behaviour between cyclists and motorists and continuing misperceptions over the rights and responsibilities of both these groups. In the European countries studied for this report, strict liability is an accepted state of affairs.
- Not all strict liability regimes are created equal, and there are country-specific variations to these regulations that allow for individual national cultures and circumstances.
- In Denmark and France, strict liability was introduced in direct response to the need to reduce traffic accidents. The systems in both countries are relatively rigid and motorists must meet an extremely high burden of proof in order to absolve themselves of financial liability in any incident with a cyclist or other vulnerable road user.
- The system in the Netherlands is more flexible, with motorists offered more leeway in their defense, whilst the system still, broadly speaking, favours cyclists.
- In the European nations studied in this report strict liability is widely believed to be a key element within a package of measures for encouraging safer road use for cyclists.
- In the USA, road traffic liability laws are determined by individual states. No state, however, has strict liability and a strong car culture virtually precludes the introduction of strict liability well into the foreseeable future.

## Arguments for and against strict liability for bicycle safety

In most Western European countries, the liability in any collision involving a car and a bicycle lies with the motorist, until or unless proven otherwise, on the basis that they are responsible for operating the heavier, more powerful vehicle.

Though an in-depth study of the liability laws in Britain was not undertaken given Cycle Law Scotland's expertise in this area, the UK operates a fault-based liability scheme. This is the case as well in Ireland, Romania, Cyprus and Malta. In this system, the driver is considered innocent until proven guilty. Unlike in criminal proceedings, a claimant has to prove their case "on a balance of probabilities" meaning that they must persuade the court that their version of events is *more likely than not* to be the correct one (Aylott 2012). This has the effect of limiting the compensation an injured cyclist typically receives from a road traffic accident.

The question is whether there is a fair and proportionate basis for any special legal protection for the vulnerable road user and whether this might be ultimately conducive to a policy of encouraging more people on to the roads with their bikes.

Proponents for "strict liability", where it is always the motorist who is at fault when they collide with a more vulnerable road user, believe that it is both a more proportionate system for cyclists as well as encouraging more careful driving.

As the commentator Mark Lynas has put it, as UK law currently stands, "Motorists are the only group of people in modern society still allowed to kill with impunity" (2007). Others have argued that the propensity to excuse a driver who "didn't see" the cyclist before crashing into him or her has engendered a dangerously casual attitude to inattentive or bad driving, which can, when cyclists are involved, cause fatal injuries. A change in the law would, it is claimed, force motorists to acknowledge that they are in fact in possession of a dangerous weapon which requires from them extreme caution and diligence.

In 2004, following a steep rise in the number of accidents outside schools, the Department of Transport conducted a study called *Children's Traffic Safety: International Lessons for the UK* to identify good practice and innovation from other countries that could improve traffic safety in the UK. While most of the statistics and data it uncovered related to pedestrians, it included children on bikes and noted that the top performing countries had strict liability legislation. It concluded that more consideration should be given to the introduction of legislation over driver responsibility for the UK, although little movement has happened since the publication of the report.

On the Continent, there is a greater acknowledgement that policy can improve traffic safety through the use of liability laws when set alongside other measures including the regulation of speed limits, enforcement, road design and education. A paper produced in 2004 by the Katholieke Universiteit Leuven in Belgium, noted that, "If there is no government intervention, people do not take into account the full cost of their driving and they will drive too fast and too much. In our setting, the government can use three instruments to influence the behaviour of people: speed limits, strict liability and a kilometre tax" (Delhaye).

Strict liability is certainly not a unique concept in UK law as it is already used, for example, to provide compensation for injuries to consumers from faulty products, to employees from defective work equipment and to the general public from runaway animals. These precedents, where there is a hierarchy of care, would seem to add weight to the argument for greater protection for more vulnerable road users by placing the burden of proof on the party more likely to cause injury or death.

Equally, it is a system not without its checks and balances. Strict liability entitles a crash victim to compensation unless the driver can prove the cyclist was at fault. However, the emphasis remains irrevocably on protecting the more vulnerable road user. As Lord Denning said in 1982, “There should be liability without proof of fault. To require an injured person to prove fault results in the gravest injustice to many innocent persons who have not the wherewithal to prove it.”

Strict liability, if introduced, would be a matter of civil rather than criminal law so that it would not affect criminal prosecutions, and this is seen by some to be a weakness. It does not, therefore, relate to punishment for the death of cyclists, but only to matters of insurance and compensation in the event of injury or death. The view is that ultimately only criminal punishment has the power to alter the behaviour of drivers.

Other critics cite insurance issues as barriers. It is believed that strict liability would push up the premiums for car owners. Moreover, under strict liability, cyclists would be liable in collisions with pedestrians; it is believed that they too would need to take out insurance, adding an unnecessary barrier to the greater uptake of cycling.

Perhaps the most influential criticisms centre on a seemingly mutual antipathy between motorists and cyclists. In 2002, the EU Fifth Motoring Directive tried to harmonise car insurance laws across Europe which would have seen strict liability introduced for all member states. The reaction at the time was vehemently against this preferential treatment for cyclists, with figures like Jeremy Clarkson and even some MPs lambasting the “bicycle guerrillas” who felt cyclists didn’t need any more encouragement to ride “badly” on roads that were meant for cars. This popular resentment of cyclists led to the Directive being defeated.

In the same vein, in 2011, the minister for cyclists and pedestrians, Liberal Democrat Norman Baker, said that introducing liability laws would face too much public opposition. In a letter to a Labour MP, Mr Baker strikes a favourable tone towards strict liability before concluding that pushing for a law that would be “very contentious” (“Presumed Liability (and Strict Liability) 2011).”

Mr Baker also quotes research that says driver behaviour change is more likely to be motivated by serious personal consequences, whether it be death or injury to themselves or others, or criminal punishments such as loss of their licence or imprisonment, than they are by any insurance issues.

Another argument against strict liability is that cyclists “don’t pay road tax”. However, “road tax” is a tax on cars and other vehicles, not simply for access to roads. Motorists do not pay directly for the roads, as roads are paid for via general and local taxation. Moreover, roughly 90 per cent of

cyclists are also car drivers and so will have paid the required tax. This specious argument, however, continues to live on.

In Scotland, though road traffic legislation is considered to be a reserved area, strict liability is attracting increasing interest, with the Scottish Government reviewing the issue as part of its Cycle Action Plan. Some organisations, like the group Spokes, the Lothian Cycle Campaign in particular, has also called for the burden of proof in an incident to lie with the user of the heavier vehicle.

In parliament, Green MSP Alison Johnstone has been a champion of strict liability. In a letter co-signed with Jim Eadie MSP to Transport Minister Keith Brown MSP, she stated “the issue of strict liability could be key in addressing road safety fears” and that “work on this area could be sped up” (Spokes 2012).

There are no imminent plans to use Scotland’s devolved power over civil law matters to introduce strict liability.

## **The situation abroad**

### **Denmark**

In the 1970s and 1980s, in response to rising levels of motor vehicle traffic, the Danish government recognised an emerging need to keep the interests of the human at the centre of road safety considerations. Strict liability was introduced in 1986, which saw automatic fault in any road accident placed on the driver of the motor vehicle unless they could prove that the accident was unavoidable and not due to any negligence on their part.

According to Ginnie Henriksen at the Danish Motor Insurers’ Bureau, the Danish system of strict liability only applies to personal injuries and is restricted to motor liability whilst property damage remains fault-based (2010). All victims of motor vehicle accidents are entitled to compensation under the law and the upper limit of compensation is €13.8 million for personal injury and €2.8 million for property damage.

Additionally, anyone buying a car in Denmark must also buy third party liability insurance which provides cover for strict liability in accordance with the law. There is no opt-out for strict liability and insurers are obliged to indemnify third parties in their product offerings.

Though all victims of motor vehicle accidents are entitled to compensation, this compensation may be reduced or eliminated altogether if contributory gross negligence is proved on the part of the injured or killed person. In practice, if this standard is indeed met, compensation is typically reduced by no more than a third and is dispensed with entirely only in extremely rare cases.

Monetary losses include damages for medical expenses; damages for temporary loss of earnings; and damages for any permanent loss or impairment of earning capacity. Non-financial losses are related to temporary pain and suffering and are set at a specific daily amount. Such damages are awarded if the injured person has been subjected to medical treatment during the

period of temporary impairment. Maximum damages are also set at approx. €6,900 (European Parliament 2007).

### **Effect on bicycle safety**

In a personal interview, Thomas Johnsen, Director of the Danish Bicycle Dealers Association has said that little research had been done on strict liability's impact on bicycle safety. However, he said that neither cyclists nor drivers really take note of the laws around liability and it is just one component of an already very favourable national situation for cyclists.

Along with extensive infrastructure and a culture geared towards cycling, Mr Johnsen noted anecdotally that the liability laws might make drivers more cautious when they get behind the wheel, a view that is widely held.

The laws around strict liability are not under any sort of threat and are considered an accepted part of the legal landscape in Denmark. Though recent laws passed regarding bicycle safety have included a requirement that cyclists use front and rear lights at night-time as well as one mandating that all bikes have brakes due to the increasing hazard posed by brakeless, fixed-gear bikes, there has been no movement on changing the liability system in any way.

Mr Johnsen confirmed that though insurance fraud around stolen bikes (ie- by claiming more than the bicycle's value) poses a problem for insurers, cases of personal injury fraud arising from motor vehicle-bicycle accidents were extremely rare. Both drivers and cyclists use the system in good faith.

## **France**

Prior to 1985, France operated a fault-based liability system similar to that found in the United Kingdom. Many felt that the system was unfair given that those who appeared to suffer most from a road traffic accident, like cyclists and pedestrians, were not being given adequate compensation. This feeling, combined with France's continuing reputation for poor road safety, led to a wholesale change in liability laws in the country in 1985.

That year saw the introduction of legislation which introduced a strict liability regime for road traffic accidents. *Loi n. 85-677 du 5 Juillet 1985*, also known as *Loi Badinter* after the Minister of Justice who introduced it, moved the French system to one based on the automatic liability of the driver. Under the provisions of the law, the driver of a motorized vehicle is deemed liable for all harm caused by the vehicle without any defence of *force majeure* (unavoidable accident) and with significant restrictions on contributory negligence. In fact, contributory negligence can only be claimed where it is shown that inexcusable fault on the part of the victim was the sole cause of the accident. If inexcusable fault has been demonstrated, the victim is not entitled to any compensation and this all-or-nothing approach has meant in practice that judges are very restrictive in their interpretation of fault.

The French Civil Code provides for the principle of full compensation for personal injuries if the following criteria are fulfilled: a traffic accident occurred; the plaintiff has suffered an injury; a motor vehicle was involved in the accident; there is a causal link between the accident and the

injury; and the person whose liability is sought is the driver or owner of the vehicle involved. Once these criteria are met, the victim has a right to compensation under the law.

The judge cannot award compensation for injuries that have not been claimed by the victim. Assessment is traditionally based on objective considerations (medical expenses, loss of income, occupational disability, permanent total or partial incapacity) and subjective considerations (pain, aesthetic detriment and loss of amenity).

Concerning monetary losses, the law covers medical expenses and loss of income and has no limit to the compensation that can be received. In principle, the level of damages will reflect the exact amount of money that the victim has lost, or has spent, in consequence of the injury. The victim may be awarded compensation for temporary loss of earnings. Loss of future earnings is generally the main item of financial loss and is estimated by the judge by contrasting the position of the victim before and after the accident. A judge can also use a more personalised approach where damages are assessed on the basis of the circumstances of the case at hand. In such occurrences, a percentage figure linked to the victim's degree of incapacity is applied to his or her annual earnings to obtain the annual loss of earnings. In any event, the Court has considerable freedom in assessing losses (European Parliament 2007).

The award of non-financial (or non-pecuniary) damages is interpreted quite broadly in France and there are virtually no limits on the recoverability of non-pecuniary damages. Non-pecuniary losses include elements such as mental suffering, fear, anxiety, neurosis and impact on quality of life.

### **Effect on bicycle safety**

Since the law's passage, bicycle safety has improved markedly. In fact, according to the most recent OECD statistics, the fatality rate for cyclists has decreased by 66 per cent since 1990 alone (2012) despite a relative dearth of cycling-specific safety legislation.

However, road safety in France in general had been improving in the years before the law's introduction (although improvements accelerated somewhat after its passage) and the country has witnessed a particularly dramatic improvement in road safety since 2002 after President Jacques Chirac made it a priority of his administration. Since then, determined road safety policies focused on improving driver behaviour have been developed, with new speed management measures, drink driving, seatbelt and license demerit laws all contributing to a steep and continuing decline in fatalities and injuries.

It should also be noted that, according to figures from the European Cyclists' Federation, rates of bicycle usage in France remain low, roughly on par with those found in the UK. Moreover, cycling fatalities are higher than in the UK (measured by fatalities per billion-kilometre cycled) despite the presence of strict liability and improving road safety conditions (2010).

### **The Netherlands**

The basis for compensation in traffic accidents between automobiles in the Netherlands is fault liability. However, since the mid-1990s, if an accident involves a motor vehicle and a non-



motorised road user (pedestrian or cyclist), a flexible system of strict liability applies. In cases where the injured cyclist or pedestrian is younger than 14 years old, the driver is automatically 100% liable. If the pedestrian or cyclist is over 14 years old, the driver is assumed to be 50% liable. The amount of the compensation for the remaining 50% is dependent on the degree of fault of all the parties involved.

In an email interview, Tom Godefrooij, Senior Advisor at the Dutch Cycling Embassy in Utrecht, said that “in the law there is a distinction between ‘guilt’ as defined in the criminal law and ‘liability’ according to the civil law” (2012). This means that, in theory at least, a cyclist or pedestrian can get a fine when he or she is at fault – by breaking traffic rules, for instance – whilst at the same time still receiving compensation for their injuries.

Even before the introduction of strict liability, judicial decisions more often than not favoured the cyclist over the motorist, especially if the motorist could not prove that they had done everything in their power to avoid the accident. In practice, judges largely considered that the mere use of a motor vehicle to constitute a great risk to non-motorised road users and were therefore presumed to be liable for this risk.

The change in law therefore acted to codify what had been standard judicial practice, with added measures aimed at simplifying the settlement process between insurance providers.

According to the Dutch Civil Code, all monetary losses must be compensated, including harm to goods. However, significant exceptions to the principle of full compensation apply in the Netherlands and the right to compensation for non-financial losses is subject to significant restrictions: the individual at fault is bound to compensate the victim only for damages that he or she directly caused; judges may reduce damages if they deem necessary; and the law allows for the legislature to impose ceilings for certain types of liabilities.

Regarding non-pecuniary losses, the law gives the courts a wide margin of discretion in assessing the amount of damages to be received. Judges are not bound by the normal rules of evidence; when they deem the facts to be sufficiently clear they can proceed to find that non-pecuniary damage has been suffered and to quantify an appropriate amount of damages. In general, though, it is fair to say that the right to obtain compensation in the Netherlands is more limited than what occurs in other neighbouring countries like France.

### **Effect on bicycle safety**

In a nation where bike usage is extremely high, and where a high proportion of cyclists are also motorists, Dutch cyclists are amongst the safest in the world. By some measures, it is five times as safe to cycle in the Netherlands as it is in the US and three times as safe as in the UK (Buehler and Pucher 2008). In fact, of the 19,200 people seriously injured in road traffic accidents in 2010, 50 per cent resulted from bicycle accidents (bicycle alone, bicycle-bicycle and bicycle-pedestrian) (OECD 2012). Special attention is now being given to this expanding group of individuals.

In common with the other nations studied, it is hard to isolate the effect strict liability has had on the overall safety of cycling in the country. Indeed, the Netherlands was already known as a haven for cyclists even before the law’s introduction. In addition to the favourable civil code, the

Dutch, over decades, had also built an extensive network of bicycle infrastructure in their towns and cities and riders are also afforded some natural protection through safety in numbers.

However, as the law has served to tighten restrictions around road accident liability, it has done nothing to harm general road awareness and safety.

Strict liability appears to be accepted as the law of the land and the focus of the Dutch seems to have shifted from one concerned with protecting cyclists from motorists to one concerned with protecting cyclists from themselves and pedestrians.

Mr Godefrooij indicated that the public did raise some concerns as to the distinction between the above-mentioned distinction between criminal “guilt” and civil “liability” but that this issue has now subsided.

Some also suggested that the law would be a license for bad behaviour on the part of cyclists and pedestrians, a debate that has since ended as these predictions failed to actually come to fruition.

## United States of America

Bicycle safety laws, in common with road safety laws more generally, are dealt with at the individual state level. Though the federal National Highway Traffic Safety Administration seeks to push cycling as an alternative to motor vehicle travel and encourage mutual respect between the two groups, it exists to prod states to take action, rather than impose any top-down legislation.

All states currently operate a system of liability similar to that in the United Kingdom whereby cyclists are considered to have the same rights and responsibilities as cars. This comes with all the attendant difficulties of providing adequate compensation for injured cyclists in the aftermath of car-bike road accidents as the principle of contributory negligence restricts the compensation, if any, cyclists are likely to receive.

This attitude towards liability is unlikely to change any time soon, given America’s overwhelming car culture. For instance, in 2010, Colorado’s Republican gubernatorial nominee, Dan Maes, attacked his Democratic opponent, John Hickenlooper, for promoting cycling initiatives during his tenure as mayor of Denver, warning that they “could threaten our personal freedoms” (Osher 2010).

Whilst there is little in the way of cycling infrastructure outside of metropolitan areas, helmet laws have been more widespread. At present, 21 states and Washington DC have mandatory helmet legislation in place (Bicycle Helmet Safety Institute 2012):

State	Ages/Conditions	Effective Date
<b>Alabama</b>		
	Under 16	1995
<b>California</b>		
	Passengers under 5	1987
	Riders under 18	1994
	Under 18 - Scooters, skateboards,	2003

	inline skates	
<b>Connecticut</b>		
	Under 16	1993/1997
<b>Delaware</b>		
	Under 18	1996
<b>District of Columbia</b>		
	Under 16	2000/04
<b>Florida</b>		
	Under 16	1997
<b>Georgia</b>		
	Under 16	1993
<b>Hawaii</b>		
	Under 16	2001
<b>Louisiana</b>		
	Under 12	2002
<b>Maine</b>		
	Under 16	1999
<b>Maryland</b>		
	Under 16	1995
<b>Massachusetts</b>		
	Passengers under 5	1990
	Riders under 17	1994/2004
<b>New Hampshire</b>		
	Under 16	2006
<b>New Jersey</b>		
	Under 17	1992/05
<b>New Mexico</b>		
	Under 18	2007
<b>New York</b>		
	Passengers under 5	1989
	Riders under 14	1994/2004
<b>North Carolina</b>		
	Under 16	2001
<b>Oregon</b>		
	Under 16	1994
<b>Pennsylvania</b>		
	Riders under 12	1995
<b>Rhode Island</b>		
	Under 16	1996/1998/2007
<b>Tennessee</b>		
	Under 16	1994/2000
<b>West Virginia</b>		
	Under 15	1996

### Effect on bicycle safety

Though varied by state, overall, the picture of bicycle safety in America is one that is improving, with bicycle-related injuries falling since 1990 (OECD 2012). However, research

by the Network of Employers for Traffic Safety (NETS) has found that two per cent of vehicle-related deaths are cyclists, despite bicycle trips accounting for just one per cent of all trips taken in the US (2006). More work clearly needs to be done.

There is also a lingering impression that cycling is an activity mainly for urbane cosmopolitan types that has stunted the development of a cycle culture. Whilst there is support for cycle safety programmes for children and legislation around bike helmets, visible manifestations of a proactive programme of investment in cycle safety, such as infrastructure, is often deemed expensive, unnecessary and, indeed, even a threat to American values.

Car ownership is more widespread in America than in Europe and therefore any challenges to the car's pre-eminence, from traffic-calming restrictions to an increase in petrol taxes, will not find much favour from the wider public. Strict liability would fall into this category as well.

## **Conclusion**

It is clear from the above that in those nations with high rates of cycling and high levels of cycle safety, strict liability exists as part of a kaleidoscope of policies designed to enable safe cycling. Education, infrastructure and common sense measures (like lights) all contribute to a road safety environment that is very favourable for cyclists.

But the potential importance of strict liability and cycle safety shouldn't be underestimated either. Though there hasn't been much research isolating for the effect of strict liability on road safety, anecdotal evidence from the countries studied indicates that at the very least, strict liability encourages drivers to become more cautious in their approach on the road.

The one factor keeping more Scots from taking up cycling is the impression that it is an unsafe activity. Strict liability would help reverse this impression. With that particular barrier lessened and more Scots on their bikes, perhaps then the Scottish Government would take the additional steps necessary to achieve its vision of a cycling nation.

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