CYCLING SAFETY IN NEW ZEALAND: AN ANALYSIS OF LAW AND POLICY

A thesis submitted in fulfilment

of the requirements for the degree

of

Masters of Laws

at

The University of Waikato

by

VASHINI PURUSRAM

THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

2015

Abstract

After a number of cyclist deaths over recent years in New Zealand, cycle advocates and policy makers have been pondering the issues relating to safety of cyclists on New Zealand roads. Press reports have highlighted a number of recent cyclist deaths and the subsequent public dismay as to how guilty motorists often walk off with a lenient sentence. There is strong public feeling that, in the absence of an appropriate penalty system, the roads are not safe to cyclists.

The present New Zealand law provides for specific offences and related penalties when the driver, who drives carelessly or dangerously, kills or injures another road user. This thesis investigates whether the law as understood through both the legislative regime and the interpretation of the law by the courts, is sending the right deterrent message against careless or dangerous driving, hence making the roads safer to the cyclist. This is explored through an analysis of the legislative provisions on road safety and their interpretation by the courts in cases of collisions by the careless or dangerous driver and an assessment of the severity of the penalties and consistency of the penalties imposed in similar cases. The study draws on existing literature which indicates that safety, real and perceived, or rather a lack of safety, remains a significant barrier to cycling. It then explores the extent to which road safety is made a top priority on the agenda of different stakeholders, particularly, policy makers, legislators and judges. The study also draws a comparison with the policy and legislative regime in more cycle friendly countries like the Netherlands. The severity of the penalties imposed on the careless or dangerous driver in England is also addressed.

This study concludes that the promotion of road safety is key to a modal shift in New Zealand. To allow this, it is not merely the right policies that are called for, but also for all stakeholders to have a shared contribution. The study comes up with a number of recommendations that would help pave the way towards law reform with a view to promoting cyclist safety on New Zealand roads.

Acknowledgements

I am very grateful to the University of Waikato, more particularly Professor Barry Barton, my Supervisor who has paid tribute to my competencies and awarded me the CEREL Energy Cultures II Scholarship, which has substantially financed my study. I owe him my deepest gratitude for his unparalleled patience and wisdom in vetting each draft chapter which culminated in this end product. My gratitude is extended to the Energy Cultures team at the University of Otago, most particularly Dr Janet Stephenson, Director of the Centre for Sustainability and Dr. Ben Wooliscroft, Associate Professor, University of Otago who have kindly offered their valued guidance and advice on my writing. Even though this study did not involve any empirical research, I am also grateful to Patrick Morgan, spokesperson at the Cycling Advocates Network, and Atom Emet, Road Safety Advocate, who have spared me much of their hectic time to share their thoughts on my research.

On a personal note, I would first like to thank my husband, Deepak Purusram. The writing of this study would have been a more arduous task without the constant support I had from him. I am most grateful to my parents, my brother and my two sisters who are far from me but closest to my heart and always there for their unconditional love and support. I would also like to thank my friends, Jennifer Campion, Subject Librarian at the University of Waikato, Ingrid Leersnyder, Steven Farnworth, Jagdeep Singh-Ladar, Mike Walmsley and Phoebe Parson, team members of the Centre for Environmental, Resources and Energy Law (CEREL), University of Waikato, whose invaluable thoughts and advice have been much appreciated. Also thanks to Christine McHardie who has proofread my thesis. I also extend my word of thanks to my relative Krishna Bhaga and his family and equally my friend Sydney Ta'akimoeaka in Hamilton for their support throughout my studies.

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List of Abbreviations

ACC	Accident Compensation Corporation
ARTA	Auckland Regional Transport Authority
ASI	Avoid, Shift, Improve
AT	Auckland Transport
CA	Crimes Act 1961
CAS	Crash Analysis System
CDCD	Causing Death by Careless Driving (England and Wales)
CDDD	Causing Death by Dangerous Driving (England and Wales)
CMS	Case Management System
CO	Carbon Monoxide
CO_2	Carbon Dioxide
CPA	Criminal Procedure Act 2011
CPS	Crown Prosecution Service
EC	Energy Cultures
EE&C	Energy Efficiency and Conservation Act
EECA	Energy Efficiency and Conservation Authority
EU	European Union
GHG	Greenhouse Gas
GPS	Government Policy Statement on Land Transport
GIZ	Deutsche Gesellschaft fur Internationale Zusammenarbeit (German society for International Cooperation)
IEA	International Energy Agency
IPCA	Independent Police Conduct Authority
LTA	Land Transport Act 1998
LTMA	Land Transport Management Act 2003
LTMAA	Land Transport Management Amendment Act 2013
MoT	Ministry of Transport
NCDD	Negligently Causing Death or serious injury by Driving (the Netherlands)

NIP	National Infrastructure Plan
NTLP	National Land Transport Programme
NZEECS	New Zealand Energy Efficiency and Conservation Strategy
NZES	New Zealand Energy Strategy
NZTA	New Zealand Transport Agency
ORS	Oregon Revised Statutes
PM_{10}	Particulate Pollution
PPS	Police Prosecution Service
RLTP	Regional Land Transport Plan
RTA 1994	Road Traffic Act 1994 (the Netherlands)
RTA 1988	Road Traffic Act 1988 (England and Wales)
RUR	Land Transport (Road User) Rule 2004
SA	Sentencing Act 2002
SAA	Sentencing Amendment Act 2007
SUTP	Sustainable Urban Transport Project
SWOV	Dutch National Institute for Road Safety Research
TCD	Land Transport Rule: Traffic Control Devices 2004
TPB	Theory of Planned Behaviour
VKT	Vehicle Kilometres Travelled
VL	Land Transport Rule: Vehicle Lighting 2004
VRA	Victims Rights Act 2002
VRU	Vulnerable Road User
WHO	World Health Organisation

Chapter One: Introduction

1.1 Background

Countries around the world, developed and developing countries alike, have witnessed a rise in the popularity of cars. The desire for personal cars is "powerful and pervasive".[1] To many people, a private car helps cope with the pressures and demands of modern living. This fascination with the private car has also influenced New Zealanders. The *Annual fleet statistics* 2014 record a significant rise in the ownership per capita of light vehicles over the period 2000 to 2005.[2] It is observed that light vehicle ownership was at its peak in 2007, at a rate of 698.2 per one thousand population. Though ownership of light vehicles started to decline from 2007, the rate was at 697.4 in December 2013, almost near to the peak rate registered in 2007.[3]

It is undisputed that the private car does offer many advantages to the global citizen of the 21st century. However, the invention of the car has also damaged the fabric of society. Apart from the environmental challenges we face today due to the high prevalence of cars, another problem has emerged, New Zealand roads have become more dangerous with the increasing number of vehicles.

The popularity of cars also brings a decline in the use of more environmentally friendly modes of transportation like the bicycle. Cycle use across different countries around the world, however, has wide disparities, from near absence in some countries to widespread use in others like the Netherlands, Denmark and Germany. The bicycle was introduced in New Zealand in the form of velocipede or boneshaker, and can be traced back to the 1860's.[4] Although the 1950's witnessed a rise in the number of motor vehicles on the roads, this was drastically hit by the

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[1] D Sperling and D Gordon *Two Billion Cars – Transforming a Culture - TR News 259* (Transportation Research Board, Washington DC, 2008).

[2] Ministry of Transport *Annual fleet statistics 2014* at 8 <www. transport.govt.nz>.

[3] At 8.

[4] Jonathan Kennett *Ride - The Story of Cycling in New Zealand - The Christchurch City Council - A report on cycling in metropolitan Christchurch, past, present and future* (1st ed, Kennett Brothers, Wellington, 2004) at 9.

waves of the Oil Shock in 1973,[5] followed by the 1976 recession in New Zealand. The economic crisis has triggered the resurrection in the popularity of the bicycle on the roads of New Zealand.

However, cycling is still considered a less popular means of transport and the car remains the preferred option. The New Zealand Household Travel Survey reports in September 2015 that cycling contributes to only 1.6 per cent of total time travelled.[6] The survey also indicates that about 25 million hours are spent cycling annually, over a distance of a total annual rate of 313 million km. This is very low compared to 820 million hours spent driving a car or van over an annual distance rate of 30, 374 km.[7] A more detailed statistical overview of cycle use that account for the low cycling rate in New Zealand is given in Chapter 2 under 'current trend of commuting'.

1.1.1 The rationale for encouraging cycling

In view of meeting important challenges like scarce oil resources, air and noise pollution, obesity , limited land use, traffic congestion and more importantly, the problem of climate change, developing a sustainable and efficient transport system has become a growing cause of concern to many countries, including New Zealand. Cycling "offers society a partial solution to all these problems in a low cost manner".[8] Wooliscroft & Wooliscroft also adds many governments and pressure groups, recognising the potential solution of cycling, have had recourse to policies in view of raising the number of cycle trips rather than those made by motor vehicles.[9]

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[5] At 43.

[6] Ministry of Transport *Cycling New Zealand Household Travel Survey 2011-2014* (September 2015) at 5-6 <www.transport.govt.nz>.

[7] At 6.

[8] B Wooliscroft and AG Wooliscroft "Improving conditions for potential New Zealand cyclists: An application of conjoint analysis" (2014) 69 Transportation Research Part A 11 at 11.

[9] At 11.

1.1.1.1 Social costs

New Zealand's high rate of cars is not socially sustainable. They have cost the lives of many people. Increased car use has been accompanied by a higher road toll due to the danger it causes, especially to cyclists and pedestrians. The road toll statistics indicate that the rate of people losing their lives on the roads is still alarming with 278 deaths resulting from road crashes from July 2013 to June 2014, 294 over the period from July 2012 to June 2013 and 285 from July 2011 to June 2012.[10] Nevertheless, a slight decrease in road deaths is registered from 1 January 2015 to 12 October 2015 at a figure of 245.[11]

If some people manage to escape the dangers of motor vehicles, they cannot escape the health hazards created. The damage caused to the health of people cannot be underestimated. In 2010, exposure to outdoor air pollution, with motorised vehicles as a major contributor, led to 3.2 million premature deaths worldwide.[12] In New Zealand, a study conducted by Fisher and others in 2007, reveals that air pollution caused by motor vehicles for the year 2001, resulted in a 500 premature death cases, 414 cases associated with release of particulate pollution (PM_{10}) and 178 with carbon monoxide (CO).[13] The study also indicates that there were 163 hospital admissions recording acute respiratory problems and 83 admissions recording acute cardiac admissions, and all associated with exposure to air pollutants from motor vehicles.[14] In *Updated Health and Air Pollution in New Zealand Study* in March 2012, 255 premature mortality cases caused by air pollution from motor vehicles were recorded for 2006 and 91 hospital admissions for respiratory problems linked to motor vehicle air pollution.[15]

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[10] Ministry of Transport *Road Toll Report, Year Ended June 2014* at 2 <www.transport.govt.nz>.

[11] NZTA *Road Death Statistics Road fatalities in New Zealand as at 12 October 2015* <www.nzta.govt.nz>.

[12] JD Miller and C Facanha International Council on Clean Transportation *The state of clean transport policy: A 2014 synthesis of vehicle and fuel policy developments* (ICCT, USA, 2015) at 3 <www.theicct.org>.

[13] G Fisher and others *Health and Air Pollution in New Zealand Executive Summary* (HAPINZ, New Zealand, 2007) at 7 <www.hapinz.org.nz>.

[14] At 7.

[15] Gerda Kuschel and others *Updated Health and Air Pollution in New Zealand Study Volume 1: Summary Report* (HAPINZ, New Zealand, 2012) at 31<www.hapinz.org.nz>

Another way in which health of people is jeopardised is that over reliance on the motor vehicle contributes to a high level of inactivity of people. A 2012-2013 New Zealand Health Survey showed that every one person in three is obese with a further 34 per cent being overweight.[16] The adult obesity rate in New Zealand has increased three fold from 1970's to 2011-2013, from 10 per cent to 30 per cent respectively.[17] Obesity causes a number of related diseases like diabetes, cardiovascular problems, stroke and cancer and reduces life expectancy.[18] Whilst many New Zealanders might like walking and cycling as a leisure activity, few consider them for the purposes of daily commuting.[19]

In terms of social sustainability, a cycle friendly environment also helps increase community liveability. The term 'community liveability' refers to "the environmental and social quality of an area"[20] as assessed by its inhabitants and outside visitors. Cycling not only helps make a community "more liveable, vibrant and active,"[21] but also helps stimulate the value of residential and retail properties.[22]

So, cycling helps the individual to improve their own health by reducing obesity, heart diseases and diabetes. It, in turn, benefits society in terms of a "fitter and healthier population"[23] thereby reducing costs on the health system and creating liveable communities.

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[16] Ministry of Health *Obesity data and stats* (updated July 2014) <www.health.govt.nz>.

[17] Ministry of Health *Understanding excess body weight New Zealand Health Survey* (2015) at 23 <www.health.govt.nz>.

[18] At 1.

[19] Hans-Josef Fell *Global cooling: Strategies for climate protection, Sustainable Energy Developments* (CRC Press, Florida, 2012) at 46.

[20] NZTA *Integrated planning toolkit* (2010) at 2 <www.nzta.govt.nz>.

[21] New Zealand Transport Agency *National business case for investing in making cycling a safer and more attractive transport choice strategic assessment* (July 2015) at III Appendix D <www.nzta.govt.nz>.

[22] At III Appendix D.

[23] NZTA *Integrated planning toolkit*, above n 20, at 3.

1.1.1.2 Economic costs

A rapidly growing number of cars coupled with other related factors like heavy reliance on imported fuel and increased provision of infrastructure costs make a country economically unsustainable in various ways.

The different sectors that generate energy demand can be classified under four categories: transportation, residential, commercial and industrial. Whilst energy demand has gone up in each of these, transport remains the major sector with the highest energy consumption.[24] The major triggering factor for this growth lies principally in the rapid rise of personal vehicles propelled by fossil fuels.

The International Energy Agency, in 2014 (IEA) contends that the percentage of fossil fuels in primary energy demand will only register a gradual fall from its "current 82 per cent to 76 per cent by 2035".[25] The IEA also predicts that energy use could rise as much as 70 per cent by 2050, in the absence of more policies aimed at "efficiency, alternative vehicles/ fuels and modal shifting".[26] Therefore, the oil markets, not only for New Zealand but also the international platform would have to face heightened pressure because of constraints on the supply of oil.

Therefore, the high pressures linked to constrained supplies of fossil fuels make the economy of New Zealand a vulnerable one. Cycling, though it is conceded, would not bring a complete solution to the alarming increase in oil demands, it could however bring a partial solution.

Moreover, it has also been estimated that an increase in cycling can also bring down the costs of providing for urban road and parking infrastructure. The Queensland Department of Transport and Main Roads, Australia estimates that the reduced costs of providing for infrastructure through cycling and other active modes of

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[24] K Kojima and L Ryan *Transport Energy Efficiency Implementation of IEA Recommendations since 2009 and next steps* (IEA, Paris, 2010) at 5 <www.iea.org>.

[25] International Energy Agency *World energy Investment Outlook Special Report* (IEA, Paris, 2014) at 24 <www.iea.org>.

[26] John Dulac *Global transport outlook to 2050 targets and scenarios for a low-carbon transport sector* (IEA, Paris, 2012) at 8 <www.iea.org>.

transport would be about 5.2 cents per kilometre.[27] Providing extra road capacity to cater for increasing number of vehicles on the roads would be a big financial burden to the New Zealand economy, unless a mode shift to cycling or walking is promoted.[28]

An increase in cycling could potentially pave the way to a more efficient transport system by drastically reducing the problem of traffic congestion. A study by the European Cyclists Federation indicates the economic benefits associated with traffic congestion reduction through cycling are estimated in the European Union (EU) at € 24.2 billion per year in 2010.[29] In New Zealand, a reduction of 3.6 per cent in traffic volumes was recorded following the Hastings iWay project in New Zealand.[30]

Reduction in motorised traffic congestion and in the costs of providing for more urban roads and car parks and creating a healthier population would also inevitably bring a rise in the economic productivity of the country. Moreover, promoting recreational and tourist cycling is another productive method of benefitting the economy. Holger Haubold, the European Cyclists' Federation Fiscal and Economic Policy Officer believes that apart from benefitting a thriving tourism industry, an increase in cycling commuting creates jobs, "...the cycling economy creates three times more jobs than the motoring economy for every million euro of turnover".[31] Research done at the University of Auckland in 2014, reveals that, spending about $630 million on the right kind of cycling infrastructure will bring a "net benefit in tens of billions of dollars".[32]

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[27] SK Mertz and Pricewaterhouse Coopers *Benefits of inclusion of active transport in infrastructure projects* (Queensland Department of Transport and Main Roads, 2011) at 6 <www.cbdbug.org.au>

[28] NZTA *National business case*, above n 21, at III Appendix D.

[29] F Kuster & B Blondel *Calculating the economic benefits of cycling in EU-27* (European Cyclists Federation, Belgium, 2013) at 3 <www.ecf.com>.

[30] NZTA *National business case*, above n 21, at 9.

[31] Jeremy Rose "Bikeconomics: Unlocking the cycling economy" (2014) Radio New Zealand <www.radionz.co.nz>.

[32] A Macmillan and others "The societal costs and benefits of commuter bicycling: simulating the effects of specific policies using System Dynamics Modelling" (2014) 122 (4) Environmental Health Perspectives 335 at 341.

1.1.1.3 Environmental costs

Pursuing energy efficiency in transport is of heightened importance. The Centre for Advanced Engineering defines energy efficiency as "the provision of energy services at lower total economic, environmental and social costs".[33] The significance of energy efficiency has been stated by Eusterfeldhaus and Barton:[34]

> Energy efficiency improves human wellbeing. It improves economic wellbeing by reducing energy costs and waste. It produces great environmental benefits by reducing the damage associated with the production and use of the production of greenhouse gases from the combustion of fossil fuels; and it reduces vulnerability to energy security by reducing reliance on fuel supplies, especially imports.

Cycling is an effective way of promoting energy efficiency in transport by addressing the problems associated with an inefficient transport system as identified by Eusterfeldhaus and Barton above.

Environmental sustainability has become a serious issue to many countries across the globe, including New Zealand. Each of our activities, driving cars, farming or burning coal affects the earth's climate. They result in the production of greenhouse gases (GHGs) which contain carbon dioxide, methane and nitrous oxide.[35] These substances, when accumulated in the atmosphere trap the sun's heat and this has the result of increasing the earth's temperature.[36]

The global transport sector contributes significantly to carbon dioxide (CO_2) emissions. In 2010, the sector alone released 8.8 billion metric tons of CO_2 into the atmosphere and this amount, it is anticipated will increased to 15 billion metric tons of CO_2 by 2030.[37] It has been estimated that if greenhouse emissions continue to rise at the current rate, global temperatures will increase by 4°C by 2100.[38] This, in

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[33] New Zealand Centre for Advanced Engineering, *Energy Efficiency A Guide to Current and Emerging Technologies* Volume 1 Transportation and Buildings (NZCAE, Christchurch, 1996) at 3.

[34] M Eusterfeldhaus and B Barton "Energy Efficiency: A Comparative Analysis of the New Zealand Legal Framework" (2011) 29 (4) Journal of Energy & Natural Resources Law 431 at 432.

[35] Ministry for the Environment *New Zealand's Climate Change Target - Our contribution to the new international climate change agreement* at 5 <www.mfe.govt.nz>.

[36] At 5.

[37] Miller and Facanha, above n 12, at 1.

[38] New Zealand Government *New Zealand's climate change target*, above n 35, at 5.

turn, would bring environmental as well as economic repercussions. In New Zealand, the calamities that are likely to result from climate change include sea level rise, floods, drought, wildfires and other negative repercussions for the farming and fishing industries.[39]

Greenhouse gas emissions in New Zealand have been constantly on the rise since 1990. Today the gross gas emissions can be estimated at about 73 million tonnes CO_2.[40] In 1990, methane's contribution to NZ's gross emissions was more or less equal to that of CO_2, but now due to the rapid increase in the demand for road transport, CO_2 has overtaken methane and is now the NZ's main contributor to greenhouse gas emissions. In 2011, transport contributed 19 per cent to NZ's greenhouse gas emissions.[41] The New Zealand Government has set a target on carbon-emissions, that by 2030, they should be 30 per cent below 2005 levels, that is 11 per cent lower than the 1990 levels.[42] New Zealand has also set a longer term target of bringing emissions level down to 50 per cent of the 1991 levels by 2050.

Even though a shift to bicycle trips would not bring a tremendous change to climate change problem, it would definitely bring a valued contribution. A study by the Australian Bicycle Council revealed that a 5 per cent shift in car trips to bicycle ones could bring down carbon emission by up to 8 per cent.[43] Another study by the Queensland Department of Transport and Main Roads revealed that:[44]

> An average car in the Australia will emit around 0.23 kg of CO_2 per kilometre. As a consequence, for each kilometre walked instead of being driven, a saving of approximately 0.23 kg of CO_2 can be achieved

As stated earlier, cycling may not be the only appropriate solution to all the challenges we are facing, it can nevertheless, play a significant contribution.

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[39] New Zealand Government *New Zealand's climate change target*, above n 35, at 5.

[40] Office of the Prime Minister's Science Advisory Committee *New Zealand's changing climate and oceans - The impact of human activity and implications for the future* (July 2013) at 18 <www.pmcsa.org.nz>.

[41] At 18.

[42] Ministry for the Environment *Intended Nationally Determined Contribution, Submission to the ADP* (July 2015) <www.mfe.govt.nz>.

[43] Australian Bicycle Council *Gearing up for active and sustainable communities National Cycling Strategy 2011-2016* (2010) at 9 <www.bicyclecouncil.com.au>.

[44] Mertz and Pricewaterhouse Coopers, above n 27, at 38.

In view of the numerous benefits cycling brings in terms of addressing the social, environmental and economic costs of the motor vehicle, it is, therefore, important that all stakeholders make concerted efforts at addressing concerns of the cyclist, with a view to encouraging more people to cycle.

The aim of the present research is to assess whether law and policy in New Zealand, in respect of road safety, produce a climate that encourages cycling. This includes an assessment of the cogency of policies, an overview of road safety rules over which decisions are made by judges and the prosecution, the extent to which the present legal framework addresses safety of the cyclist and a consideration of reform options.

1.2 Methodology

The study is part of the Energy Cultures (EC) II project, University of Otago. EC II, funded by the Ministry of Business, Innovation and Employment (MBIE), explores ways to encourage people to adopt practices towards a more energy efficient transport system and ways for markets and other stakeholders to deliver them.[45] It adopts, therefore, a multi-disciplinary approach and aims at analysing an interplay of the social, psychological, economic and legal factors that promote or deter efficient transport systems. This thesis, in line with this multi-disciplinary approach, first draws on the social perspectives of cycling based on existing literature, then makes an analysis of the legislative framework aimed at protecting the cyclist and of the manner in which legislative provisions are interpreted and applied by the courts.

For the purposes of legal analysis, the thesis adopts the method of conventional legal analysis. By analysing legislation, judicial decisions, legal reports and other documents to better understand the court's approaches when determining cases where a careless or dangerous driver collides with a cyclist and in collisions where the cyclist is not involved. Conventional legal analysis involves looking at the interpretation by the courts and reflecting if it is in line with the objectives of the

[45] Centre for Sustainability, *Energy Cultures 2 Delphi (*University of Otago) <www.otago.ac.nz>.

legislation and general principles of the legal order concerned.[46] The main legislation studied are the Land Transport Act 1998 and the Sentencing Act 2002. An interpretation of these two Acts will also be done through an analysis of case law. The thesis addresses the law as it stands at present and addresses the issue how it could be reformed. The method of comparative analysis is used to draw an analogy between jurisdictions, especially those of more cycle friendly countries like the Netherlands and Germany and also our common law model, England and Wales. An overview of the criminal provisions on serious traffic offences in the chosen foreign jurisdictions and of their interpretation by their respective courts will be given.

The research did not require ethical approval as it did not involve any empirical study. It made use of existing primary and secondary legal sources including statutes, case law and other published and non-published materials. A number of non-legal academic journals have also been used, especially in Chapter 2.

1.3 Chapter Outline

The thesis has seven chapters. Chapter 1 sets the background of the research by underlining most particularly the rationale behind the promotion of cycling as a transport mode.

Chapter 2 gives an account, on the basis of existing literature, of the factors that deter cycling in New Zealand. This chapter seeks to explore the considerations that influence the decision of people to cycle, generally and how this applies to New Zealand. The findings indicate that safety, real and perceived, remains a significant barrier. The rates of collision involving cyclists are used to reflect on the idea that fears that existing or potential cyclists face, could be justified.

Having drawn upon the major negative factors of cycling, that is, safety concerns, Chapter 3 addresses the policies and strategies of the government gives an overview of land transport policies and specifically those pertaining to cycling. It also

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[46] Bocken Hubert "Financial Guarantees in the Environmental Liability Directive: Next Time Better" (2006) 15 European Energy and Environmental Law Review 13.

addresses other policy documents like those aimed at promoting energy efficiency in transport that can be said to be indirectly promoting sustainable modes of transport like cycling. The chapter also identifies weaknesses in government policies that may hamper the process of prioritising cycling on the political agenda.

The thesis then seeks to address the question as to whether the legislative and judicial responses reflect the extent to which safety concerns of cyclists have been addressed. With this aim in mind, Chapter 4 gives a summary of the legislation that address the road safety rules related to driving offences. It then provides a closer look at how the criminal law operates in New Zealand to deal with the careless and dangerous driver on the roads. Cases involving collisions with the cyclists and cases not involving cyclists are both analysed and compared. The account includes provisions of the Land Transport Act 1998 on careless and dangerous driving and the respective penalties and their interpretation by the courts. The loopholes in our legislation are also addressed. The high degree of variation as observed in case law leads to an analysis of the aims and objectives of the Sentencing Act 2002, an interpretation and an assessment as to whether it has promoted consistency in sentencing. The inconsistency in sentencing is considered a weakness of the system and impedes road safety, which then brings us to a comparative analysis of the sentencing guidelines that already exist in England, and how this could help improve the New Zealand legal system. When assessing the practical reasons underlying variation in sentencing in driving related offences, an analysis is also made as to the discretion the police exercise in their charging decisions and investigating road deaths and deciding whether to prosecute or not. And the chapter also analyses the potential for reform.

As regards the cases picked on for the purposes of this study, I wish to state that there are few cases tried before the New Zealand District Courts which were not readily available in spite of efforts to locate them via the University databases. These cases are quoted and are mostly referred to in the beginning of Chapter 4. I have considered them important and referred to those cases as they are reported on the online newspaper sources.

Chapter 5 contains a comparative study of the policy and legislative framework and judicial interpretations of equivalent offences in more cycle friendly countries

especially the Netherlands and other European countries like England. In view of the difficulties in finding Dutch materials in English language, there has been extensive reliance on secondary sources.

Chapter 6 identifies shortcomings of the legislative framework that fail to address safety of the cyclist. Here, the legislative provisions that are identified are those other than the driving related offences as discussed under Chapter 4. Two key documents, the Coronial Review on cyclist safety 2013[47] and the Cycling Safety panel report[48], are used as the platform for reform options in this chapter. A brief comparative analysis with other jurisdictions on different legal aspects of cycling, like the use of footpaths, is also made.

The findings reached in the thesis lead to a conclusion chapter, which includes a number of recommendations with a view to enhancing cycling safety and, in turn, promoting cycling in New Zealand.

[47] Coroner Gordon Matenga *Cycling Safety in New Zealand: A Coronial Review* (11 November 2013) <www.justice.govt.nz>.

[48] Cycling Safety Panel Safer journeys for people who cycle – Cycling safety panel final report and recommendations (December 2014) <www.saferjourneys.govt.nz>.

Chapter Two: The socio-psychological concerns of safety to cyclists

2.1 Introduction

Policy makers and other stakeholders have always sought to promote cycling as a means of active and sustainable travel, yet, cycling levels in New Zealand remain low, far behind to countries like the Netherlands and Germany. These low levels have raised questions as to what influences the decisions of people to make travel choices. An insight into the factors influencing cycling behaviour is called for, in order to develop the right policies and the right mindset amongst all the stakeholders.[1] The unchallenged significance of such an understanding especially to policy makers was pointed out by Schwanen and others: "transport academics now agree that at least some level of behaviour change is unavoidable if carbon emissions from transport are to be reduced significantly".[2] The purpose of this chapter is to identify, through an analysis of existing literature, the major concerns of cyclists and in turn see how they are reflected in policy decisions, legislation and court judgments.

2.2 Current trend of commuting in New Zealand

Many researchers reveal that globally, growth in car use was the norm before 2009 and that this continued growth, measured in vehicle kilometres travelled (VKT) halted in the 2009.[3] The phenomenon is known as 'peak car' and was described by Metz in 2013 at the "fourth era of travel".[4] Peak car phenomenon is where there is stagnation in the per capita daily travel and it has been felt in many countries in 2009. In New Zealand, Ministry of Transport statistics seem to support this,

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[1] E Heinen and others "Bicycle use for commuting - a literature review" (2010) 30 (1) Transport Reviews 105.

[2] T Schwanen and others "Rethinking habits and their role in behaviour change: the case of low-carbon mobility" (2012) 24 Journal of Transport Geography 522.

[3] Debbie Hopkins and Janet Stephenson "Generation Y mobilities through the lens of energy cultures: a preliminary exploration of mobility cultures" (2014) 38 Journal of Transport Geography 88.

[4] D Metz "Peak Car and Beyond: The Fourth Era of Travel" (2013) 33 (3) Transport Reviews 1.

registering a more or less stagnant rate in VKT (in billions) over the period 2010 to 2014, ranging between 31.1 to 31.5 for light passenger vehicles, between 2.6 to 2.7 for trucks, between 6.0 and 6.7 for light commercial vehicles.[5] The possible causes of peak car during this period, was identified by Newman and Kenworthy in 2011, to include:[6]

- Exceeding the one hour average time budget for urban travel, also referred to as 'the Marchetti wall';
- the revival and growth of public transport provisions in urban areas;
- the reversal of urban sprawl, with urban population density a key multiplier on the use of active and public transport modes;
- the rising average age of city dwellers;
- the growth of a culture of urbanism, for both retired 'empty nesters' and young people and
- rising fuel prices.

Debbie Hopkins chose for her study, young people between 18 and 35 years old in Auckland, Dunedin and Balclutha, both rural and urban areas. Her study generated some of the following positive findings on car use decline:[7]

- Many participants in her study revealed a higher keenness at valuing freedom and autonomy;
- The financial costs involved in running a car tended to reduce car dependency for many participants;[8]
- Those who had strong feelings about environmental concerns perceived driving and car ownership as "wasteful" and "environmentally unfriendly";[9]
- Some tended to value more a specific goal like owing a house or overseas travel.

The findings in Hopkins' research seem to correspond with those of the Ministry of Transport (MoT). Recent research carried out by the MoT reveals that teenagers in New Zealand applying for a driving licence has dropped, which supports the worldwide trend known as 'driving ambivalence' equally prevalent among 16-19

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[5] Ministry of Transport *Transport volume - Vehicle travel TV 002 Road vehicle kilometres travelled (VKT) by vehicle type* (September 2015) <www.transport.govt.nz>.

[6] P Newman and K Kenworthy "Peak Car Use: Understanding the Demise of automobile dependence" (2011) 17 World Transport Policy and Practice 31 as cited in Hopkins and Stephenson, above n 3, at 2.

[7] Hopkins and Stephenson, above n 3, at 49.

[8] Hopkins and Stephenson, above n 3, at [5.2.1].

[9] Hopkins and Stephenson, above n 3, at [5.2.5].

year olds in New Zealand. The MoT made the following findings in a 2008-2013 study period:[10]

> Auckland had a 21 percent decline, while Wellington shows the biggest decline with the number falling by 56 percent. Dunedin and New Plymouth, both smaller cities, had a 25 percent drop, while smaller districts such as Opotiki had a 42 percent decline and Gore showed a 16 percent slump.

In spite of findings to the effect that there is a general current trend that points to declining car use, cycle use remains low in New Zealand. Not only are fewer people cycling but they are also cycling less frequently.[11] The Netherlands and Denmark have an average of 864 km and 513 km respectively of bicycle travel per person per year.[12] In New Zealand, this average only comes to 73 km. The period from 1990 to 2014 registered a decline by 75 per cent in the number of people cycling to work and school.[13] Walking and cycling by New Zealanders in urban areas accounts for only 19 per cent of all trips for the period 2010 to 2014.[14]

With a view to finding the right way for promoting cycling, it is important to address the factors that affect people's decision to cycle.

2.3 A theoretical approach to the factors affecting cycling

Empirical research on this mode of choice is widely dispersed. For the purposes of addressing the role of policy makers, legislators, police and judges in promoting road safety and in promoting cycling at large, it is pertinent to see first the extent to which safety and other related factors that discourage people from taking up cycling as a commuting mode.

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[10] Ministry of Transport *Future Demand, Peak car - does it exist and is it evident in New Zealand* (November 2014) at 12< www.transport.govt.nz>.

[11] New Zealand Transport Agency *National business case for investing in making cycling a safer and more attractive transport choice strategic assessment* (July 2015) at 6 <www.nzta.govt.nz>.

[12] At 6.

[13] NZTA *National business case*, above n 11, at 6.

[14] Ministry of Transport *Travel Patterns: Household Survey* (December 2014) <www.transport.govt.nz>.

2.3.1 An overview of the factors affecting the decision to cycle

Heinen and others categorised the major determinants of cycling as a mode choice as follows – the built-up environment, the natural environment, socio-economic factors, psychological factors and lastly factors like time, cost, effort and safety.[15]

Among the factors seen as either promoting or deterring cycling, more in depth studies have been done on the influence of the psychological factors like attitudes. Gatersleben and Uzzell found that people who cycle have a more favourable attitude to the practice when compared to those who do not.[16] Heinen and others, following a survey conducted in two cities in the Netherlands, found a correlation between a positive attitude to cycling and a higher rate of cycling.[17] However, a study by Dill and Voros indicates that attitudes of most people are more positive towards car use than towards cycling.[18] Stinson and Bhat were interested in the influence on the attitudes of people of the evaluation of outcomes. To them, if people have a negative evaluation of car use outcomes, this is more likely to result in an increased likelihood of cycling for transport.[19]

2.3.2 The Theory of Planned Behaviour

Travel behaviour literature is grounded principally in the Theory of Planned Behaviour (TPB), developed from the Theory of Reasoned Action, propounded by Martin Fishbein together with Icek Ajzen in 1975.[20] This model analyses the factors that influence the individual's decision-making process. According to the TPB, human action is determined by three factors: firstly, behavioural beliefs which are

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[15] Heinen, above n 1.

[16] B Gatersleben and D Uzzell "Affective appraisals of the daily commute: comparing perceptions of drivers, cyclist and users of public transport" (2007) 39(5) Environment and behaviour 416.

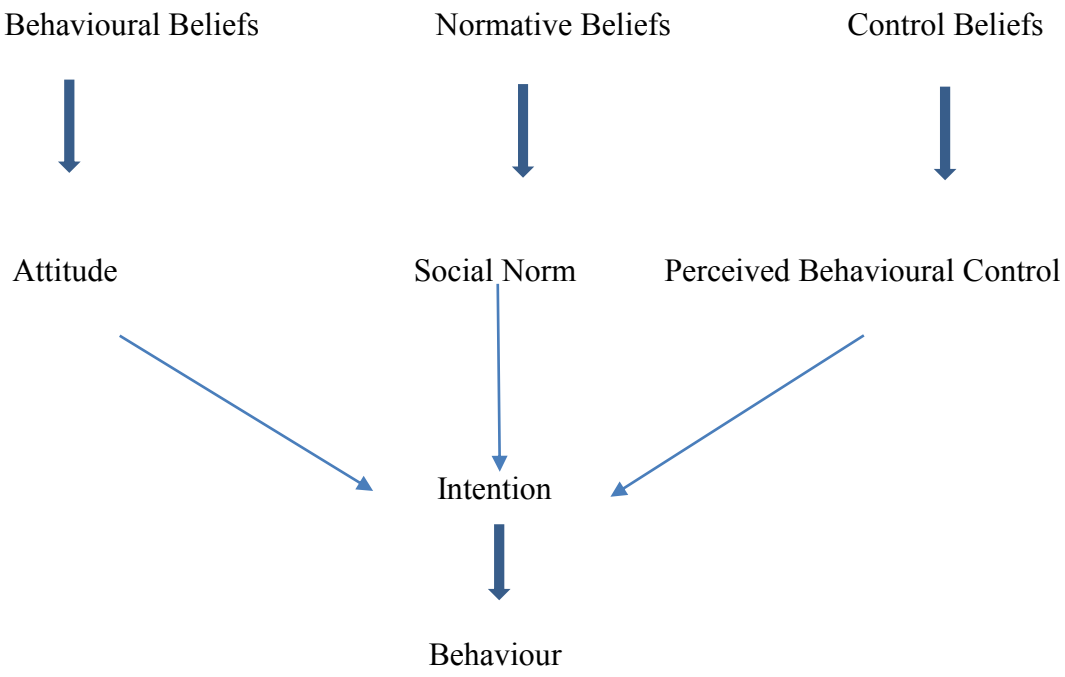
[17] E Heinen and others "The effect of work-related factors on the bicycle commute mode choice in the Netherlands: The role of attitudes toward characteristics of bicycle commuting on the choice to cycle to work over various distances" (2011) 16 (2) Transportation Research Part D 102.

[18] J Dill and K Voros "Factors affecting Cycling Demand: Initial Survey Findings from the Portland Region" (Transportation Research Board, Washington DC, 2007).

[19] MA Stinson and C R Bhat "A Comparison of the Route Preferences of Experienced and Inexperienced Bicycle Commuters" (Transportation Research Board, Washington DC, 2005).

[20] I Ajzen "The Theory of Planned Behaviour" (1991) 50 Organisational Behaviour and Human Decision Processes 179.

beliefs about the consequences of the behaviour; secondly, normative beliefs which are beliefs about the expectation of others and thirdly, control beliefs which are beliefs about the presence of factors that may encourage or deter performance of the behaviour.[21] Ajzen argues that it is those beliefs that constitute the foundation of behaviour and changes in those beliefs should result in changes of behaviour.[22] To Ajzen, behavioural beliefs form the basis of a positive or negative attitude towards the behaviour.[23] He also adds that social pressure or social norm will result from the normative beliefs and control beliefs give rise to perceived behavioural control, which he defines as "people's perception of the ease or difficulty of performing the behaviour of interest".[24] Control beliefs indicate both intention and behaviour.[25] A summary of the relationship between the correlates can be mapped out as below:



The TPB seems to suggest that human social behaviour is rational by nature. According to the theory, attitudes of people, social norms, and perceived behavioural control are assumed to flow reasonably from beliefs. These, in turn,

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[21] Ajzen, above n 20.

[22] I Ajzen *Attitudes, Personality and Behaviour* (1st ed, Open University Press, England, 2005).

[23] Ajzen, above n 20.

[24] Ajzen, above n 20.

[25] Ajzen, above n 20.

lead to behavioural intention, and ultimately to behaviour which is in line with such beliefs. Therefore, research from the 1970's onwards assumed that individual variables like attitudes and perceptions constitute the dominant drivers of behaviour.

In more recent years, these approaches have, however, been subject to criticism for the following major reasons:

1. They ignore the influence of habits on behaviour pattern of people;
2. They neglect the influence of structural and contextual factors in shaping individuals' behaviour.

2.4 Findings on the influence of habit on travel mode

Bamberg and Schmidt disagree that the everyday choices people make are not controlled or consciously done, contrary to what the TPB suggests.[26] Instead, the actions and choices they make are mostly influenced by habits.

Verplanken and others made an assessment of habit travel mode and found that when people are in the habit of relying on other modes of transport, they are less likely to consider cycling as an option. The researchers concluded from their findings that, "it has frequently been demonstrated that measures of past behaviour or habit predict future behaviour over and above measures of attitude and intention".[27] Support for the influence of habit can be found in other studies. Dill and Voros came to the conclusion that cycling during childhood would potentially increase the likelihood of cycling in adulthood.[28] Stinson and Bhat found a direct link between cycling to work over a prolonged period of time and frequency of cycling.[29]

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[26] S Bamberg and others "Choice of travel mode in the theory of planned behaviour: The roles of past behaviour, habit, and reasoned action" (2003) 25 Basic and Applied Social Psychology 175.

[27] B Verplanken and others "Habit, information acquisition, and the process of making travel mode choices" (1997) 27 European Journal of Social Psychology 539.

[28] Dill and Voros, above n 18.

[29] MA Stinson and Bhat "Frequency of bicycle commuting - Internet-based survey analysis"(2004) 1878 Transportation Research Record 122.

Rose and Marfurt pointed that travel habits can, in fact, be changed. Their study reveals that the mere trying out of other travel modes such as the bicycle is enough to break travel habits and bring changes in mode choice.[30] Darnton concurs with this idea and adds for the habits to be easily changed, the attachment to using a car should be a weak one.[31]

2.5 The influence of structural and contextual factors in shaping individuals' behaviour

Other researchers believe that the TPB ignores the impact of structural and contextual factors on people's decision to use a transport mode. In support of this criticism, Schwanen and others state that in these studies, travel behaviour is regarded as the outcome of both choice and constraints.[32]

This part of the study will therefore be devoted to the literature on the factors that are seen to influence the attitude of people to cycle. The Energy Cultures (EC) framework offers an integrated understanding of the link between norms, material culture and practices of the people.[33] Here, the safety concerns of people can be linked to the norms, that is, perceptions of what people think should be safe; the need for a good material culture, that is, the contextual/ infrastructural matters like the cycle lanes and both contribute to changing the practices of people to take up cycling or not.

The following detailed literature review demonstrates that while safety perceptions may not be the only factor, they do play a significant role in influencing behaviour. The barriers that have been identified as highly influential on people's cycling behaviour include the feeling of being a vulnerable road user in traffic, specifically

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[30] G Rose and H Marfurt "Travel behaviour change impacts of a major ride to workday event" (2007) 41 Transportation Research Part A 351.

[31] A Darnton and others "Habits, routines and sustainable lifestyles - A summary report to the Department for Environment, Food and Rural Affairs" (2011) AD Research & Analysis, London.

[32] T Schwanen, and others (2012) "Rethinking habits and their role in behaviour change: the case of low-carbon mobility" (2012) 24 Journal of Transport Geography 523.

[33] J Stephenson and others "The Energy Cultures framework: exploring the role of norms, practices and material culture in shaping energy behaviour in New Zealand and the Pacific" (2015) 7 Energy Research and Social Science 117.

attributed to a lack of segregated or dedicated cycling routes;[34] parents' perception of their children's safety when cycling;[35] good infrastructure does not necessarily guarantee an increase in cycling as it is, in fact, concerns over safety that dominate;[36] segregating cyclist routes from traffic may bring a higher uptake of cycling.[37] Further support in favour of conclusive findings to the effect that more bicycle friendly infrastructure paves the way for more cycling use can be found in the studies by Dill[38] and Krizek and Johnson[39]. One common feature in most of those studies is the finding that the biggest barrier to cycling is safety, actual or perceived, which is further endorsed by research done in 2011, by Kingham and others[40] and Winterset and others[41]. A quite recent study by the New Zealand Transport Agency (NZTA) indicates that perception of cycling as a dangerous activity by the participants does change through experience.[42]

The above analysis of factors indicates that lack of safety can be a major factor explaining the low level of cycling in New Zealand. Safety concerns will now be addressed in more detail and also the kind of infrastructure and other related factors that impede cycling safety.

2.6 Safety concerns of the cyclist

Many people, in New Zealand and abroad, perceive cycling, especially commuter cycling, as extremely dangerous. Non-cyclists, aware of the vulnerability of cyclists

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[34] KJ Krizek and others "What is at the end of the road? Understanding discontinuities of on-street bicycle lanes in urban settings" (2005) 10 Transportation Research, Part D 55.

[35] K Bickerstaff and S Shaw *Evaluation of the walking bus at Pirehill First School* (The Centre for Alternative and Sustainable Transport, Staffordshire University, UK, 2000).

[36] D Davies and others A quantitative study of attitudes of individuals to cycling –TRL Report 481 (Transport Research Laboratory, Crowthorne, 2001).

[37] SD Fraser and K Lock "Cycling for transport and public health - a systematic review of the effect of environment on cycling" (2010) 8 European Journal of Public Health 1.

[38] J Dill "Bicycling for transportation and health - the role of infrastructure" (2009) 30 Public Health Policy (2009) S95.

[39] KJ Krizek and P J Johnson "Proximity to trails & retail - effects on urban cycling & walking" (2006) 72 J.Am.Plan Assoc. 33.

[40] S Kingham, and others *Assessment of the type of cycling infrastructure required to attract new cyclists New Zealand Transport Agency research report 449* (NZTA, 2011).

[41] M Winterset and others "Motivators and deterrents of bicycling - comparing influences on decisions to ride" (2011) 38 Transportation 153.

[42] Paul Smith and others I'll just take the car - Improving bicycle transportation encourage its use on short trips New Zealand Transport Agency Research Report 426 (NZTA, 2011) at [5.2.3.2].

on the roads, often hold a more negative attitude to cycling because they express a real fear of being hit or run over by car drivers. The fear is known as perceived or subjective safety and is calculated in terms of self-experiences or those of other users. Actual or real safety also has an important bearing on the person's choice to cycle. Those two kinds of safety can highly correspond with each other and can also be said to differ from one another but, for the purpose of this thesis, it will be assumed that the factors accounting for real safety (like crash rates) will have a bearing on the perceived safety of riders or potential riders. Perceived safety will be assumed to have a greater impact on the individual's choice of travel mode. The potential of both perceived and actual safety to deter cycling was aptly summarised by Kingham and others in 2011, as follows:[43]

> A person's perception of safety can contribute significantly to their fear of cycling; therefore it is important to address 'perceived' safety as much as, or more than, 'actual' safety. On the other hand, 'actual' safety also needs to be addressed, and a balance between choosing infrastructure that is appealing to people interested in cycling, and 'actual' safety, needs to be reached.

2.6.1 Factors that affect perceived safety on the road

Cyclists are normally sensitive to the features of the built-up environment.[44] Many studies have sought to explore the relationship between the built environment and the pattern of travel behaviour. Noland and Kunreuther identified cycling as the riskiest mode of travel.[45] However, McClintock identifies that cycling is not in itself a dangerous activity, but, in fact, it is the traffic environment that makes it dangerous.[46] McClintock added that cycle routes and driver behaviour do have an impact on the level of cycling.[47] Further evidence favouring the creation of a safe transport environment can be found in the work of Allen-Munley and others[48];

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[43] Kingham and others, above n 40.

[44] DA Rodriguez and J Joo "The relationship between non-motorized mode choice and the local physical environment" (2004) 9 Transportation Research Part D 15.1.

[45] RB Noland and H Kunreuther "Short-run and long-run policies for increasing bicycle transportation for daily commuter trips" (1995) 2 Transport Policy 67.

[46] H McClintock "The mainstreaming of cycling policy" in H Mc Clintock, *Planning for cycling: principles, practice, and solutions for urban planners* (CRC Press and Woodhead Publishing Ltd, UK, 2002) at 1.

[47] Mc Clintock, above n 46.

[48] C Allen-Munley and others "Logistic model for rating urban bicycle route safety" (2004) 1878 Journal of the Transportation Board 107.

Hopkinson[49]; McClintock and Cleary[50]; Pucher and Buehler[51]. Whilst Hopkinson[52] and Pucher and Buehler[53] identified the provision of cycling facilities as the key factor contributing to more cycling, this observation does not find support, however, in the research of Davies and others[54] especially amongst non-cyclists. Cyclists and non-cyclists alike seem to agree that safety improvements are essential to the promotion of cycling activity.[55]

2.6.1.1 The impact of infrastructure

Before analysing the impact of the kind of infrastructure on people's decision to cycle, it is important to consider briefly the effect of trip distance. Research indicates that distance can be significant factor. Cycling is most often used for travelling distances between 0.5 and 3.5 km.[56] The recommendation by the World Health Organisation (WHO) is that active transport modes, including cycling, are appropriate for trips less than 5 km.[57] The lower the distance travelled the more likely people are to commute by bike. The question then is what are the factors that may create shorter distances. A number of studies, like those by Parkin and others[58] and Pucher and Buehler,[59] support the contention that when urban areas are denser, the distances between different locations are shorter, thus, paving the way to a higher mode choice. Another study which supports these findings is by Dill and Voros, who conclude that there is a higher tendency to cycle among people who

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[49] P Hopkinson and M Wardman "Evaluating the demand for new cycle facilities" (1996) 3 Transport Policy 241.

[50] H McClintock and J Cleary "Cycle facilities and cyclists' safety: experience from Greater Nottingham and lessons for future cycling provision" (1996) 3 Transport Policy 67.

[51] J Pucher and R Buehler "Cycling trends and policies in Canadian cities" (2005a) 11 World Transport Policy & Practice 43.

[52] Hopkinson and Wardman, above n 49.

[53] Pucher and Buehler, above n 51.

[54] D Davies and others *Guidelines for cycle friendly infrastructure* (The Institution of Highways and Transportation, London, 1996).

[55] Hopkinson and Wardman, above n 49.

[56] E Heinen *Bicycle Commuting Amsterdam* (IOS Press, Netherlands, 2011) at 24.

[57] World Health Organisation *Health Topics Physical Activity* (2015) <www.euro.who.int>.

[58] J Parkin and others "Estimation of the determinants of bicycle mode share for the journey to work using census data" (2008) 35(1) Transportation 93.

[59] J Pucher and R Buehler "Why Canadians cycle more than Americans - a comparative analysis of bicycling trends and policies" (2006) 13(3) Transport policy 265.

live closer to city centres.[60] Another important contributing factor to lower levels of distance travelled is the availability of facilities in the neighbourhood like shops, hospitals schools and restaurants.[61] However, in New Zealand in spite of short distance of many trips, cycling is hardly used for them. An estimate made by the Auckland Regional Transport Authority (ARTA) reveals that about 43 per cent of morning trips, during peak hours, are less than 5 km. However, about 67 per cent of those trips are done by car and not bicycle.[62]

Provision of the right kind of infrastructure matters a lot to the cyclist. Whilst there is a general preference among cyclists for bicycle paths to bicycle lanes, there can be some mixed feelings as regards the importance attached to bicycle facilities. Inexperienced cyclists and women, as opposed to the experienced cyclists, may view cycling facilities as more important.[63] On road car parking facilities may deter cycling as they are perceived as creating dangerous situations to the cyclists.[64] This is because cyclists are always at risk of hitting against an opening car door. Another key aspect of the right infrastructure is the continuity of bicycle infrastructure.[65] Stinson and Bhat made further findings to the effect that if a cycle lane or cycle path includes a segment with no cycling facilities, this is likely to deter people from cycling.[66] This finding is said to be related to safety concerns among cyclists. The more the cyclist needs to negotiate traffic junctions or intersections, the more demotivated they are to cycle. In a study conducted in New Zealand, a large number of participants stated that their "preferred cycling facility was a comprehensive, consistent network of cycle-only paths with separation from motor vehicles".[67] As regards the presence of traffic lights and other mechanisms for controlling traffic, there are mixed feelings by cyclists on these. Whilst some cyclists may find them

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[60] Dill and Voros, above n 18.

[61] A V Moudon and others "Cycling and the built environment - a US perspective" (2005) 10 Transportation Research Part D 245.

[62] NZTA *National business case*, above n 11, at 6.

[63] Stinson and Bhat, above n 19.

[64] Stinson and Bhat, above n 19.

[65] Heinen, above n 56, at 26.

[66] Stinson and Bhat, above n 19.

[67] S Kingham and others, above n 40.

as favourable,[68] others find it inconvenient to ride in places where there are many stops.[69]

2.6.1.2 Segregation or integration

It has been an ongoing debate as to what best promotes cycling; whether segregating cyclists from the traffic or integrating them. While separation could be perceived as a barrier to the speed lover cyclist, it is nevertheless a good method at ensuring the safety of the cyclist. Ker and others support the idea that segregating cyclists from motorised traffic would create an environment conducive to cycling.[70] Further support is derived from the work of Jensen who found that cycle paths brought about a twenty percent increase in traffic, when compared to cycle lanes which only brought a minimal rise in the uptake of cycling.[71] On-road provision may often mean that the cyclist is denied their rights. In Chile, cycle lanes are not respected by other road users and this calls for the need for better cycling facilities.[72] However, a full segregation does not fully resolve the matter. Cycle facilities like shared footpaths lead to another set of problems like a higher tendency of cyclist-pedestrian collisions. The main concerns that may lead to pedestrian-bicycle collisions have been identified as including speed differentials between cyclists and pedestrians, unpredictable user behaviour, users with ancillary equipment, sudden entry onto a path, and lack of courtesy.[73]

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[68] L Aultman-Hall and others "Analysis of bicycle commuter routes using geographic information systems - implications for bicycle planning" 1578 Transportation Research Record 102.

[69] P Rietveld and V Daniel "Determinants of bicycle use - do municipal policies matter?" (2004) 38 Transportation Research Part A 531.

[70] I Ker, and others *Pedestrian-Cyclist Conflict Minimisation on Shared Paths and Footpaths - Austroads Research Report* (Austroads Inc, Australia, 2006).

[71] SU Jensen"Bicycle Tracks and Lanes - a Before-After Study" (2007) 40 Accident Analysis and Prevention 742.

[72] De Dios Ortúzar and others "Estimating demand for a cycle-way network" (2000) Transportation Research, Part A 353.

[73] Ker and others, above n 70.

2.6.1.3 Sharing road space

No matter how segregated cyclists are from motorised traffic, there will be a point where they will need to share the same space with motorists. It is then that the conflict between the two modes of transport will raise safety issues. Lack of safety can be mainly attributed to the incompatibility between motorised and non-motorised traffic.[74] The British Medical Association found that a higher influx of traffic and higher speeds makes it more difficult for motorists to take evasive actions and collisions that result will entail serious injuries. Their study in 1992 reveals a vast number of cycling deaths or serious injuries are attributed to motor vehicles crashes.[75] In New Zealand, more than 1300 cyclists were hospitalised for injuries between the period 2002 and 2006, and 48 cyclists died from their injuries.[76] In 2014, 117 cyclists were admitted to hospital following injuries sustained from motor vehicle crashes.[77] Furthermore, 328 cyclists were recorded to have been hospitalized, in the same year, from traffic incidents which did not involve a motor vehicle.

Jensen and others share the view that in most of the collisions involving a motor vehicle and a cyclist, the accident occurred because either the cyclist or the driver failed to understand each other's movements or simply failed to see each other.[78] This is supported by a study by Turner and others in 2006 who reported that the main reasons cyclists came up with when reporting accidents are, "traffic failed to notice me" (with 48 per cent reporting this reason) and "traffic failed to give way" (28 per cent).[79] The Ministry of Transport 2007 further reveals that in 64 per cent of collisions involving the bicycle and the motor vehicle, it is the motorist who was

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[74] T Godefrooij "Segregation or integration for cyclists? The Dutch approach" in *The greening of urban transport: planning for walking and cycling in western cities(* 2nd ed. RS Tolley, New York, 1997) at 229.

[75] British Medical Association *Cycling Towards Health & Safety* (Oxford University Press, UK, 1992).

[76] Ministry of Transport *Cyclists Crash Fact Sheet - Crash Statistics for the Year Ending 31 Dec 2006 Strategy and Sustainability* (2007) <www.transport.govt.nz>.

[77] Ministry of Transport *Cyclists* (2015) at 5 <www.transport.govt.nz>.

[78] Jensen and others *Collection of Cycle Concepts* (Road Directorate Copenhagen, Denmark, 2000).

[79] Turner and others (2006) *Predicting accident rates for cyclists and pedestrians – Land Transport New Zealand Research Report 289* (NZTA, 2006) at 11.

at fault.[80] McKenna and Whattling in 2007 note that policies aimed at the promoting of cycling hardly address the behaviour of drivers as an impediment to cycling.[81] Pucher and Dijkstra underlined the significance of legislation in promoting cycling:[82]

> Traffic regulations in Germany and The Netherlands strongly favour pedestrians and bicyclists. Even in cases where an accident results from illegal moves by pedestrians or cyclists, the motorist is almost always found to be at least partly at fault.

However, an account of the legislative provisions on serious traffic offences in Netherlands and Germany in Chapter 5 seems to conclude otherwise, that is, the legislation in the two countries and an interpretation thereof by the courts do not particularly indicate very harsh penalties imposed on the convicted driver who hits the cyclist or pedestrian. It could be that Pucher and Dijkstra, in this averment, are referring to strict liability which operates in civil law in Netherlands and Germany, where the driver is found at least partially at fault, when involved in collision with a cyclist or pedestrian. But a study of the civil law, strict liability is not within the scope of this thesis.

On the other hand, there is support for the fact that drivers of motor vehicles who are also cyclists are more likely to understand cyclists' behaviour and needs on the roads.[83] Lawson and others in 2013 further support the view that beyond the physical environment, careless and reckless driver behaviour heavily impacts on the perceived safety of cyclists.[84]

2.6.1.4 Safety in numbers

Research has consistently shown that when more people cycle, the safer bicycling becomes. The theory of "safety in numbers" was first propounded by the public

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[80] Ministry of Transport (2007), above n 76.

[81] J McKenna and M Whatling "Qualitative accounts of urban commuter cycling" (2007) 107 Health Education 448.

[82] J Pucher and L Dijkstra "Promoting Safe Walking and Cycling to Improve Public Health - Lessons from the Netherlands and Germany" (2003) 93 (9) American Journal of Public Health 1509.

[83] British Medical Association, above n 75.

[84] MR Lawson and others "Perception of safety of cyclists in Dublin city"(2013) 50 Accident Analysis and Prevention 499.

health researcher, Peter Jacobsen in 2003.[85] After having analysed the crash data from various communities where bicycle ridership had fluctuated over time, he concluded "where, or when, more people walk or bicycle, the less likely any of them are to be injured by motorists. There is safety in numbers."[86] This phenomenon has been confirmed by the findings in many countries. In the Netherlands, between 1978 and 2006, the fatality rate of cyclists declined by 81per cent while the kilometres cycled by the Dutch people registered an increase of 36 per cent.[87] Wittink came up with conclusive findings that cities and countries that have high levels of cycling have lower levels of serious or fatal accidents.[88] Wittink sought to explain the rationale behind such occurrences. To him, when cyclists are greater in number, this brings a heightened awareness among car drivers of the presence of cyclists and they therefore become more vigilant.[89]

2.6.2 Actual safety- Why are safety concerns among cyclists justified?

An important factor that potentially affects the perceived risk of the cyclist or non-cyclist is the frequency and gravity of road crash involving bicycles, commonly referred to as "actual safety". It is obvious that merely following the road code does not guarantee safety of the cyclist, and this is apparent from the alarming figures of cycling crash report. According to the recent report issued by the Ministry of Transport New Zealand, 10 cyclists died while 158 were seriously injured and 573 sustained minor injuries in reported crashes on New Zealand roads.[90] The figures represent 6 per cent of the total number of casualties of the police reported crashes involving motor vehicles in 2014.[91] Crashes involving both cyclists and motor vehicles have led to a yearly average of nine to ten deaths and more than three

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[85] PL Jacobsen "Safety in numbers: more walkers and bicyclists, safer walking and bicycling" (2003) 9 Injury Prevention 205.

[86] Jacobsen, above n 85.

[87] J Pucher and R Buehler "Making Cycling Irresistible - Lessons from the Netherlands, Denmark and Germany" (2008) 28 (4) Transport Reviews 495 at 508.

[88] R Wittink "Planning for cycling supports road safety" in S R Tolley *Sustainable Transport* (Woodhead Publishing Ltd, UK, 2003).

[89] Wittink, above n 88.

[90] Ministry of Transport *Cyclists (*2015), above n 77 at 4.

[91] Ministry of Transport *Cyclists* (2015), above n 7 at 4.

hundred admissions in New Zealand hospitals over the past ten years. [92] The fatality rate in New Zealand is estimated at 28.2 cyclists killed per billion km travelled.[93] This places our fatality rate at almost three times that of the Netherlands. In 2001, New Zealand, among countries that contributed to the International Road Traffic and Accident Database (25 countries), had the eighth lowest rate of cyclist fatalities, at 2.2 per cent of total road fatalities.[94] The social costs of crashes where cyclists and motorists are involved are about $870 million over the past five years.[95] NZTA feels there is an increased need to accelerate steps towards enhancing cycling safety in New Zealand, failing to do so, risks having more cyclist deaths and injuries and the social costs will keep on rising.[96]

2.6.2.1 Responsibility of motorist in collisions involving cyclists

A statistical overview in New Zealand reveals that for the period 2010-2014, the primary responsibility of cyclists for cyclist-vehicle crashes is 22 per cent, whilst the percentage of no cyclist fault in fatal and injury crashes is estimated at 65 per cent.[97] Among the percentage of cyclists who had primary responsibility, 37 per cent of the at-fault cyclists failed to give way to other road users and 24 per cent of them failed to see the other party with whom they had a crash.[98]

Australia is equally faced with an alarming death rate of cyclists on their roads and the year 2013 registered the death of 50 cyclists. A study was conducted by the Centre for Automotive Safety Research at the University of Adelaide.[99] They collected police data and investigated the circumstances of every collision where a cyclist was involved and admitted to the Royal Adelaide Hospital from 2008 to 2010. Their findings concluded that in 79 percent of these collisions the driver was

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[92] NZTA *National business case*, above n 11, at 6.

[93] NZTA *National business case*, above n 11, at 6.

[94] Turner and others, above n 79, at 44-45

[95] NZTA *National business case*, above n 11, at 6.

[96] NZTA *National business case*, above n 11, at 6.

[97] Ministry of Transport *Cyclists* (2015), above n 77, at 9.

[98] At 10.

[99] V L Lindsay *Injured cyclist profile: an in-depth study of a sample of cyclists injured in road crashes in South Australia* (Centre for Automotive Safety Research ,University of Adelaide, Australia, 2013) <www.casr.adelaide.edu.au>.

at fault and in only 21 percent was the cyclist responsible for the accident.[100] Whilst balancing the consequences of the collisions of the cyclists against those of the driver, the study concluded that it is cyclists who are in a worst position with prolonged hospitalisation whilst the drivers often find themselves with a mere traffic violation.[101]

Sean Sampson, from the Amy Gillett Foundation, is particularly concerned about the police investigation and says "We are pushing police to be more thorough in their investigations into cycle accidents and to charge motorists at fault appropriately."[102] He cites the case of the Brisbane cyclist Craig Cowled in support.[103] The cyclist was heading to work when he was clipped by the side mirror of a Jeep. As a result of the accident, Cowled sustained severe injuries and lost a lot of blood. He was very disturbed by the fact that the Police did not take any statement from him nor viewed the video recording he has captured from his helmet camera.[104] To his surprise, he later discovered that the Police officer had written the statement for him, with a number of inaccuracies about how the accident occurred. The cyclist subsequently complained about this malpractice at the Queensland police and following an internal inquiry, the officer involved were merely given an order to go for "education and training".[105]

In another case, a cycling instructor, Adrian Emilsen was equally disturbed by the failure of the police to lay any charges against a motorist who crashed into the back of a cyclist, throwing him over the vehicle.[106] The Police seemed to have been swayed by the motorist version of the incident. It was only after Emilsen lodged a complaint with the Police Ombudsman and a private crash investigator was appointed to investigate the circumstances of the accident that the cyclist's version

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[100] At 8.

[101] Lindsay, .above n 99 at 11.

[102] Greg Bearup "Are cyclists fair game in Australia" *The Australian* (online ed, Australia, 19 April 2014) <www.theaustralian.com.au > at 5.

[103] At 5.

[104] Michael O'Reilly "Cyclist hit by car challenges police over fine, video evidence" *The Sydney Morning Herald* (online ed, New Zealand, 9 September 2013) < www.smh.com.au>.

[105] Bearup, above n 102, at 5.

[106] Bearup, above n 102, at 5- 6.

of the cyclist was accepted and an infringement notice issued to the motorist for having failed to keep a reasonable distance from the cyclist.[107]

These Australian case studies show how cases of clear indication of driver's fault can be taken very lightly by the authorities. In New Zealand, similar frustrations are also strongly felt among cyclists as figured in a number of press report lately, as the case of Jane Farrelly, addressed in Chapter 4.

2.6.2.2 Location where most cycling crashes occur

Findings, in New Zealand, on road crashes where the cyclist is involved reveal that about nine out of ten reported cyclist casualties occurred on urban roads, where the speed limit is about 70 km per hour.[108] For the period 2010-2014, whilst 56 per cent of cyclist deaths and injuries in motor vehicle crashes occurred on major urban road and urban state highway, 36 per cent occurred on minor urban road and 8 per cent on open roads.[109]

The figures call for improvement of the cycling infrastructure, such as proper road signs, repairing potholes and maintenance of road surfaces, which have to be of the utmost priority in order to reduce accidents. Bicycle infrastructure is closely related to actual safety. Reduced driving speed and bicycle side paths are important for car drivers to be able to detect the cyclists and thus reduce bicycle related crashes. Car parking facilities have also been assessed as a danger to cyclists compared to roads without car parking facilities. This is because the former involves risks to the cyclist in terms of passengers exiting their parked cars.

An analysis of the accident rates also indicates that road junctions and intersections are more prone to bicycle crashes. In the UK, the finding was reached that cyclists were 10 to15 times more prone to accidents at roundabouts than cars.[110]

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[107] Bearup, above n 102, at 6.

[108] Ministry of Transport *Cyclists 2015*, above n 77 at 8.

[109] Ministry of Transport *Cyclists 2015*, above n 77 at 8 from pie chart.

[110] M Brown *The Design of Roundabouts - State-of-the-Art-Review* (Transport Research Laboratory, London, 1995)

The major types of cycle accident that have occurred at roundabouts are when crossing (no turn) at the right angle, and 9 per cent occur at roundabouts. Furthermore, road injury collision data collected for 2006 to 2010 in New Zealand show that 58 per cent of reported urban cycle collisions are at intersections.[111] And the type of junction at which there are more serious and fatal urban crashes involving cyclists are at T-type junction, with 32.8 per cent of all other junction types. The major types of reported cycle accidents at T-junction traffic signals have been when cyclists are making right turns.[112] As regards accidents at major cross roads, it has been observed that the most reported types of cycle accident have been those involving a cyclist turning right or crossing.

2.6.2.3 Types of vehicles mostly involved in cycling crashes

As regards the type of vehicles mostly involved in crashes with the cyclists, a good proportion involves car and truck collisions. An analysis of the percentage of vehicles involved in urban cyclist deaths for the period 2003 to 2012 show that 39.5 per cent of urban cyclist deaths involved collisions with cars.[113] A similar percentage is recorded for urban cyclist deaths where the cyclist collided with a truck. A relatively less percentage of buses is involved in cycling collisions, only 2.6 per cent.[114]

2.6.2.4 Speed of motor vehicles in cycling crashes

Speed is a major contributing factor to road crashes and in many cases proves fatal to the cyclist. Almost half of cycle fatalities occur on high speed roads, roads with over 80 km per hour.[115] A car travelling at 60 km per hour, has an estimated

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[111] NZTA *High-risk intersections guide - Draft for consultation* (2012) <www.nzta.govt.nz>.

[112] NZTA *Making cycling safer and more attractive - The New Zealand Transport Agency's cycling safety action plan* (August 2015) at 4, from pie chart <www.nzta.govt.nz>.

[113] NZTA *Making cycling safer and more attractive*, above n 112 at 4, from pie chart.

[114] At 4.

[115] Dr Glen Francis Koorey *New Zealand Chief Coroner's Inquiry into Cycling Deaths- Evidence* (June 2013) at 3 <www.can.org.nz>.

stopping distance of 12 metres.[116] When a vehicle travelling at a speed of 65 km per hour, hits a child or elderly pedestrian, they will almost inevitably be killed. The same applies in the case of a collision with a cyclist.[117] The Bicycle Federation of America Report investigated the link between injuries sustained by pedestrians and cyclists and motor vehicle speeds in UK. The reported findings are that when vehicles travelling at 32 km per hour hit pedestrians and cyclists, only 5 per cent were killed and injuries sustained would be minimal whilst if they were travelling at a speed of 64 km per hour, about 85 per cent of pedestrians and cyclists were killed.[118]

In New Zealand, speed is seen to be the major contributing factor in 74 fatalities, 305 serious injury crashes and 988 minor injury crashes in the 2013. [119] The total social costs are estimated at about $678 million in crashes where speed is involved by motorists and this is 22 per cent of the social cost of all injury crashes.[120] For the period 2011-2013, speeding and/or alcohol/drugs were found to contribute to about 42 per cent of all fatal crashes on New Zealand roads.[121]

With a view to addressing the problem of speeding by motor vehicles, many countries have adopted traffic calming techniques and devices especially in major urban routes. Zein and others analysed the effects of traffic calming in neighbourhood areas in Vancouver, Canada. Their study revealed that the implementation of traffic calming brought a reduction in the number of crashes involving all modes of transport by 40 per cent.[122] Another study by Davies and others in 1997 revealed that crashes where cyclists are involved decreased from a

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[116] Michael Yeates *Towards a safe urban speed limit - Report of the Cyclists Urban Speed Limit Taskforce* (Bicycle Federation of Australia, Australia, 1996) at 32.

[117] At 32.

[118] Bicycle Federation of America *Killing speed – a national goal. Pro Bike News: 7* (BFA, USA, 1993) as cited in S Turner and others *Cycle Safety: Reducing the Crash Risk – New Zealand Transport Agency Research Report 389* (NZTA, October 2009) at 45.

[119] Ministry of Transport *Speed (*2014) at 4 <www.transport.govt.nz>.

[120] At 4.

[121] Ministry of Transport *Speed,* above n 119, at 5.

[122] Zein and others *Safety benefits of traffic calming - Transportation Research Record 1578* (Transportation Research Board, National Research Council, Washington DC, 1997) as cited in S Turner and others *Cycle Safety: Reducing the Crash Risk* (October 2009) NZTA Research report 389 at 43.

yearly average of 1.51 crashes to a yearly average of 0.96 crashes, and that the number of serious and fatal crashes also decreased.[123] Therefore, traffic calming is a proven method of not only reducing the number of crashes but also their severity. The Danish Road Directorate publication is of the view that on traffic lanes shared by both cyclists and motor vehicles, the recommended speed for the motor vehicles should be less than 40 km per hour.[124] This concurs with the findings of a study the Wisconsin Department of Transportation did, to the effect that cyclist injury rate tends to be lower at a speed limit lower than 40 km per hour.[125] In 1993, the Centre for Research and Contract Standardisation in Civil Engineering, Netherlands recommended a maximum speed of 30 km per hour on a road with 1000 vehicles per hour and a maximum speed of 50 km per hour for 550 vehicles per hour.[126]

In view of the identified factors that play a significant impact of the person's decision to cycle, it is important that those aspects of safety are taken into account in any policy decision, or reflected in the legislation of New Zealand. This includes addressing the dangers at intersections and roundabouts, the need to control speed of motor vehicles, the kind of infrastructure that mostly promote cycling safety, amongst others. Therefore, an analysis of the policies and the legislation, in the forthcoming chapters, will seek to unveil whether those safety issues have been considered and resolved.

2.6.2.5 Under reporting of cycle accidents

Under reporting of cycle crashes seems to be a conspicuous phenomenon in many countries. Even in the cycle friendly countries the reporting rate is low. In Denmark,

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[123] D Davies and others *Cyclists at road narrowings- Transport Research Laboratory Report 241 (*Transport Research Laboratory, Crowthorne, UK, 1997).

[124] Jensen, above n 78, as cited in S Turner and others Cycle Safety: Reducing the Crash Risk – New Zealand Transport Agency Research Report 389 (NZTA, October 2009) at 44.

[125] Wisconsin Department of Transportation *Winconsin bicycle transportation plan 2020* (Winconsin Department of Transportation Madison, USA, 1998) as cited in S Turner and others *Cycle Safety: Reducing the Crash Risk – New Zealand Transport Agency Research Report 389* (NZTA, October 2009) at 45.

[126] Centre for Research and Contract Standardisation in Civil Engineering *Sign up for the bike, design manual for a cycle-friendly infrastructure* (CRCSCE, Netherlands, 1993) as cited in Kerry Wood "Bicycle Crashes in New Zealand" (Master's thesis, revised version, Lincoln University, 2008 edition) at 35.

only about 10 percent of crashes involving minor injuries are reported and in the Netherlands reported crashes are only 20 percent of all crashes. [127] In New Zealand, people involved in a crash have a legal duty, under s 22 (3) of the Land Transport Act 1998 (LTA), to report the crash to the police. But there is no obligation for the police to enter those crashes in the Crash Analysis System (CAS) database nor is there any kind of monitoring system to ensure they do so.[128] It has been estimated that only about 10 per cent of collisions involving cyclists are reported. In an attempt to redress this problem, the '0800CYCLECRASH' system was introduced in Nelson, New Zealand. This allows anybody involved in a crash to report it and they will be recorded in the CAS as non-police reported crashes. This system has helped provide a more accurate figure on actual crashes when combined with those reported in CAS.[129]

The under reporting of cycle crashes may impinge on the level of investment by stakeholders to address safety concerns of the cyclist. This, in turn, can be said to have a detrimental effect on the levels of cycling in a country as attempts at promoting the activity are thwarted by under reporting.

2.6.3 Impact of accidents on victims

A person's perception of safety can be highly affected by a negative incident which includes a crash. That person may potentially be put off using that transport mode. Adams further adds that a person is not merely influenced by an inherent propensity to take risks when making a decision but is also influenced by experiences of losses resulting from accidents.[130]

The cyclist is inevitably exposed to greater danger of serious injuries in a road accident. Collisions between cyclists and motor vehicles are considered as having

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[127] S Turner and others *Cycle Safety: Reducing the Crash Risk – New Zealand Transport Agency Research Report 389* (NZTA, October 2009) at 49.

[128] At 48.

[129] Turner, above n 127, at 5.

[130] JGU Adams *Risk* (University College London Press, London, 1995).

led to the most severe injuries and longest hospital stays.[131] Collisions with motor vehicles tend to raise the risk of hospitalisation of the cyclist by almost four times.[132] Head injuries are often the reason for fatalities, but other common injuries identified include contusions, sprains, and fractures often to the hand, wrist, shoulder and leg.[133] The most vulnerable class of cyclists (children and adolescents) face more risks of sustaining cycling injuries. The travel surveys conducted by Tin, and others in New Zealand revealed that from 1989/90 to 2005/08, a decrease from 28 to 8 minutes is witnessed in the average time spent weekly cycling.[134] A more drastic decrease is noted from 52 minutes to 12 minutes for the age group of 13 to 17 years. The same trend is highlighted in terms of cycling to school, where the recorded decrease is from 12 per cent to 4 per cent from 1989/90 to 2004/08. Parents have expressed their concerns about the safety of their children as being the main concern which influences their decision to prevent their children from cycling to school.[135]

In addition to the physical injuries sustained, the aftermath of the accident is often accompanied by considerable psychological repercussions. It becomes a big obstacle to get back to cycling on the roads or cycling even in one's own neighbourhood.

In terms of the psychological injuries, cyclist victims normally develop a considerable level of psychological distress. Such medical conditions seem to arise due to either the direct result of physical injury, or may also occur because of having experienced perceived threat to life or physical self.[136] Blanchard and others further

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[131] Lee Robert James Kannis-Dymand; thesis: "Psychological distress following a road accident: Investigation of two neglected road-user groups" (PhD (thesis), University of Canterbury, 2002) at 57.

[132] FP Rivara and others "Epidemiology of bicycle injuries and risk factors for serious injury" (1997) 3 Injury Prevention 110.

[133] B Mellion Morris "Common Cycling Injuries – Management and Prevention" 11 (1) Sports Medecine 52 at 53.

[134] Tin, Tin and others "Injuries to pedal cyclists on New Zealand roads, 1988-2007" (2010) 10 BMC Public Health 655.

[135] LM Wen and others "Factors associated with children being driven to school- Implications for walk to school programs" (2008) 23(2) Health Educ Res 2008 325.

[136] EB Blanchard and others "The impact of severity of physical injury and perception of life threat in the development of post-traumatic stress disorder in motor vehicle accident victims" (1995) 33 Behaviour Research and Therapy 529.

estimate that about 50 per cent of road accident survivors do develop post-traumatic stress disorder.[137] Fecteau and Nicki added that road accidents are " ... relatively common events that frequently result in distressing and sometimes disabling psychological reactions".[138]

2.7 Conclusions

Safety (whether perceived or actual) remains an important factor influencing a person's decision to cycle. Simply installing cycle lanes and providing adequate cycling facilities may not suffice to increase safety. "Promoting cycling solely through improvements in the physical conditions for cyclists is an expensive strategy, which moves relatively few motorists to bicycles, but reduces the number of bus and train passengers in the larger towns".[139] It is equally important to create an interest and desire in existing and potential cyclists. As Koorey and others put it "…people interested in cycling have several motivations encouraging them to investigate utilitarian cycling and have usually overcome obvious barriers..."[140] The types of infrastructure, speed limits and safety related aspects of the road, accident rates, especially those involving cyclists, are likely to have an undue influence on the cyclist and deter them from taking up cycling again. Therefore, the intervention of all state actors, policy-makers, legislators, judges and prosecutors alike, is highly recommended with a view to keeping the New Zealand's roads safe and to adequately protect the cyclist. The chapters that follow will seek to unfold this through an analysis of the policies and the legislation and the court's approach on issues relating to safety of the cyclist. An overview of those safety concerns from a socio- psychological perspective is important and will set the background to this study and assess the extent to which the pulse of the cyclist, in respect of their safety

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[137] Blanchard, above n 136.

[138] G Fecteau and R Nicki "Cognitive behavioural treatment of post-traumatic stress disorder after a motor vehicle accident" (1999) 27 Behavioural and Cognitive Psychotherapy 201 at 201.

[139] Jensen and others, above n 78, at 22.

[140] G Koorey, S Kingham and K Taylor "Attracting the next 10% of cyclists with the right infrastructure" (Paper presented at the 7th New Zealand Cycling Conference, New Plymouth, 2009).

needs, is felt through the adoption of the right policies or strategies or legislative amendments.

Chapter Three: Overview of strategies and policies for land transport and cycling

3.1 Introduction

Cycling is a "wonderfully liberating" experience in the right kind of environment, but is "difficult and unpleasant if the environment is not suitable".[1] The success or failure of cycling in a country can be largely attributed to the policies adopted in that country. Government plays a significant role in promoting an activity through its strategic planning policy. In New Zealand, in spite of former strategies and investment in cycling, the NZTA in a recent report, made a number of adverse findings including, recognition that cycling is a risky mode of transport when compared to other modes; perceptions that cycling is "unsafe, unattractive and inconvenient"[2] do not favour the promotion of an efficient transport system; and that the requirements of the cyclist or the potential cyclist is still not fully understood which hampers the potential for investments.[3] This chapter seeks to give an overview of the different strategies that the government has brought forward not only in relation to land transport but more specifically to cycling and the funding arrangements that have been allocated to this activity. It also makes an assessment of the extent to which the policies aim at promoting cycling safety.

3.2 Legislative framework for policy and planning

Land transport covers all land-based transportation systems that provide for the movement of people, goods and services, which include inter alia, road networks

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[1] J Parkin and G Koorey "Network Planning and Infrastructure Design*"* in *Cycling and sustainability* (Published online, March 2015).

[2] New Zealand Transport Agency *National business case for investing in making cycling a safer and more attractive transport choice strategic assessment* (July 2015) at 3 <www.nzta.govt.nz>.

[3] At 3.

from the state highways to local roads, public transport network as well as provision for pedestrians and cyclists.

In order to consider the different policies that have been designed to promote cycling in New Zealand, it is important to have an overview of the different strategic planning and funding schemes in land transport and the legal matrix providing for their development.

The Land Transport Management Act 2003 (LTMA) is the key statute providing for the legislative mechanism for developing of strategies and funding arrangements for transport in New Zealand. The LTMA has been amended by the Land Transport Management Amendment Act 2013 (LTMAA) so that its aim is more safety focused. Section 3 of the LTMA now states that the purpose of the Act is to contribute to an effective, efficient, and safe land transport system in the public interest. The Act also establishes and empowers the New Zealand Transport Agency (NZTA) to, inter alia, manage funding and regulatory requirements of the land transport system.[4]

The enactment of the Land Transport Management Amendment Act 2013 reformed the regional and national transport plans strategies & policies. The three key national & regional transport planning documents are now:

(i) Government Policy Statement on Land Transport (GPS);
(ii) National Land Transport Programme (NTLP);
(iii) Regional Land Transport Plans (RLTPs).

The GPS is the key tool of the government to state what it seeks to achieve in land transport and the funding it provides for different activities it is seeking to promote through the land transport system. The NLTP is another statutory document drafted by the NZTA. This document is used to give effect to the GPS. The RLTPs are in fact devised by local government and should be consistent with the provisions of the GPS.[5]

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[4] Land Transport Management Act 2003, ss 93 and 95.

[5] NZTA *The NTLP framework* <www.nzta.govt.nz>.

3.2.1 The Government Policy Statement on Land Transport (GPS)

The Government Policy Statement (GPS) is an important statutory document and plays a significant role in outlining the Government's strategy to plan land transport investment over a period of 10 years.[6] Under the LTMA 2003, the Minister must issue a GPS on land transport before the beginning of a financial year and it should cover a period of 6 years.[7] The land transport goals of the government, the funding it allocates to the different activities it contemplates and the results it is seeking to achieve through that investment are set in this policy statement.

The recent *Government Policy Statement on Land Transport 2015/16- 2024/25* (*GPS 2015*) was issued in December 2014 by the Minister of Transport and came into force on 1 July 2015. The *GPS 2015* continues to move in the direction of the GPS 2012, as the Minister of Transport, Simon Bridges pointed out "prioritising economic growth and productivity, road safety and value for money".[8] The GPS works in line with the Safer Journeys Programme and 'Safe System' approach aiming at creating safer roads and roadsides, speeds, vehicles and road users.[9] The *GPS 2015* aims at the creation of a land transport system that principally:[10]

- addresses current and future demand for access to economic and social opportunities;
- provides the right transport choices
- is resilient;
- is a safe system, increasingly free of death and injury;
- mitigates the effects of land transport on the environment
- delivers the right infrastructure and services to the right level at the best cost.

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[6] Ministry of Transport *Government Policy Statement on Land Transport* 2015/16- 2024/ at [53].

[7] Land Transport Management Act 2003, s 66 (1).

[8] Minister of Transport, *Government Policy Statement 2015*, above n 6, at 1.

[9] Minister of Transport, *Government Policy Statement 2015*, above n 6, at [38].

[10] Minister of Transport, *Government Policy Statement 2015*, above n 6.

The objectives that relate to cycling are the second, third, fourth and fifth, as they address the social and environmental effects of transport and include cycling as a means to achieve that, as will be discussed further below.

To realise the goals for land transport as stated under the GPS, the government provides funding of $3.4 billion and expects that this projected funding will be increased to $4.4 billion in 2024/25.[11]

3.2.1.1 GPS and cycling strategies

As regards provision of the appropriate transport choices, the Government is committed to promote increased safe cycling through improvement of cycle networks. It recognises that whilst cycling only plays a small role in the total transport task, the existing available cycling facilities are fragmented.[12] It also recognises that safety concerns are still strong barriers to cycling and to address this, more investment is needed in promoting safe cycling facilities in urban areas. The *GPS 2015 will* allow:[13]

- extension of the dedicated cycle networks in the main urban areas;
- improved suburban routes for cyclists.

The investment, it says, will also be supplemented through a dedicated Urban Cycleways Programme.[14] In 2014, the Prime Minister of New Zealand, John Key had announced that an additional funding of $100 million will be released for the Urban Cycleways Programme.[15] In January 2015, funds of $9.92 million were already provided to start the first phase of the projects, which are underway in Auckland, Hamilton, Palmerston North, Wellington, Christchurch and Dunedin.

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[11] Minister of Transport, *Government Policy Statement 2015*, above n 6, at [150].

[12] Minister of Transport, *Government Policy Statement 2015*, above n 6, at [114].

[13] Minister of Transport, *Government Policy Statement 2015*, above n 6, at [116].

[14] Minister of Transport, *Government Policy Statement 2015*, above n 6, at [117].

[15] NZTA *Urban Cycleways Programme* <www.nzta.govt.nz>.

The remaining figure of about $90 million, the government says, will be invested for the period between 2015 and 2018.[16] Mr. Key adds:[17]

> This funding builds on significant investments the government is already making, with projects in Hastings and New Plymouth showcasing how cycling can be a safer, more reliable and realistic transport option.

The investment of $ 90 million is divided as follows, cycleways for State Highways and Local Roads. The government plans to allocate, for the purpose of the Urban Cycleways (State highways) Programme, funds of $15 million for the year 2015/16, $15 million for 2016/17 and $10 million for 2017/18. As regards the investment for the Urban Cycleways (Local Roads) Programme, it plans to allocate funds as follows: $20 million for 2015/16, $15 million for 2016/17 and $15 million for 2017/18.[18]

The Urban Cycleways Programme comprises 2 parts: firstly the $100 million investment over the four years starting 2014/15; secondly, the setting up of an Urban Cycling Investment Panel, whose membership is drawn from central government, local government and other organisations to explore ways to expand and improve the cycling network through investment in urban cycleways.[19]

The Transport Minister, Simon Bridges recently announced that he will "change the face of cycling"[20] and that there will be a further investment of $333 million in urban cycleways. He added that in addition to the existing 13 cycleways underway, there will be a further 41 cycleways projects.

The rationale for this increased investment by the Government in the Urban Cycleways Programme is that a cycling strategic network in a main urban area will

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[16] NZTA *Urban Cycleways Programme*, above n 15.

[17] Gerry Brownlee *$ 100 million for urban cycleways* <www.beehive.govt.nz>.

[18] Minister of Transport, *Government Policy Statement 2015*, above n 6, at 34, Table 5.

[19] Brownlee, above n 17.

[20] Simon Bridges *Government delivers $ 333 million urban cycleways* (June 2015) <www.beehive.govt.nz>.

enable cycling to major destinations like schools, workplaces and/or shops. The NZTA also adds that an investment should be prioritised which:[21]

- accelerates, completes or significantly develops primary cycling corridors;
- leverages local share contribution towards completing cycling strategic networks;
- is on corridors that have medium to high benefit costs ratios;
- will substantially complete projects or corridors within 4 years;
- considers agreed actions following the government's decisions on the Cycling Safety Panel's recommendations.

3.2.2 The National Land Transport Programme (NLTP)

Section 19A LTMA 2003 empowers the NZTA to prepare and adopt a NLTP for the following three financial years, before 1 September of the financial year to which it applies.[22] The NLTP is a collection of all the land transport activities that the NZTA anticipates to manage and fund for the next three years.[23] The recently issued *National Land Transport Programme 2015–18* (NLTP 2015) is designed to aim at, inter alia, the buttressing of economic growth, promoting safer journey and encouraging value for money,[24] thereby drawing on the objectives set in the *GPS 2015*, as stated above.

One of the most important features of the NTLP, relevant to this study, is the emphasis on road safety. As will be noted in the forthcoming chapter, safety concerns remain a significant barrier to cycling. The NLTP considers that it is imperative to have a transport system increasingly free from death and serious injury.[25] In its NLTP document, the NZTA gives an overview of its strategic planning and investment. The investment that the NZTA is injecting into road safety is $3.2 billion, which is about 23 per cent of the total investment. This figure represents an increased investment of $550 million in road safety when compared to the investment made for the 2012-15 period.

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[21] NZTA *Urban Cycleways Programme,* above n 15, Appendix E at III.

[22] Land Transport Management Act 2003, ss 19A(1) and 19A(2).

[23] NZTA *National Land Transport Programme 2015-18* at 1 <www.nzta.govt.nz>.

[24] NZTA *National Land Transport Programme 2015*, above n 23, at 4.

[25] NZTA *National Land Transport Programme 2015*, above n 23, at 16.

The NZTA considers that managing speed is a key means to achieving a safer road network and states that "small reductions in speed can make a big difference".[26] The NZTA also considers that road safety promotion programmes, through education and advertising do play a significant role in supplementing "investment in infrastructure, regulatory change and road policing".[27] The NZTA anticipates that, for the *2015-18 NLTP*, an amount of $132 million will be invested in road safety promotion activities, from which $67 million towards national activities by the NZTA itself and $65 million towards local activities to be done by local councils. The NZTA is also gearing an amount of $960 million towards road police to allow the New Zealand Police to embark on programmes aimed at addressing road safety risks. The NZTA also envisage, though its *2015 NLTP*, huge investment in improvement in state highways to maintain safer roads. With a view to encouraging the maintaining of safer vehicles such that to avoid risk of being in a crash, the NLTP aims at funding for safety promotion campaigns.

3.2.2.1 NLTP and cycling strategies

The NLTP includes cycling as a viable option in its attempt to achieve the aim of the GPS of creating a land transport system that "mitigates the effects of land transport on the environment"[28] and "provides appropriate transport choices".[29] It underlines that there is a misconception that investment in transport is only about investing in cars and roads and adds that "effective transport choices such as cycling, walking and public transport are integral to any modern transport network-especially in urban setting".[30]

The NZTA considers that many New Zealanders do not opt for cycling as a transport mode unless our roads are equipped with good quality separation for cyclists. It supports its contention based on the research findings of S Kingham and others in *Assessment of the type of cycling infrastructure required to attract new*

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[26] NZTA *National Land Transport Programme 2015*, above n 23, at 16.

[27] NZTA *National Land Transport Programme 2015*, above n 23, at 16.

[28] Minister of Transport, *Government Policy Statement 2015*, above n 6, at 23.

[29] Minister of Transport, *Government Policy Statement 2015*, above n 6, at 20.

[30] NZTA *National Land Transport Programme 2015-18 - NLTP Investment - National Land Transport Programme at a glance - providing transport choices* <www.nzta.govt.nz>.

cyclists in October 2011 to the effect that "preferred cycling facility was a comprehensive, consistent network of cycle-only paths with separation from motor vehicles".[31] Another reason people fail to consider cycling as a viable option is the lack of connected cycle networks. The NZTA supports this observation by citing a report finding by Auckland Transport that "55,000 of our customers (3.9 per cent of Auckland) have told us that safety and connectivity are the biggest barriers to cycling".[32] Another important observation that the NZTA makes is that many people in New Zealand would wish to carry out their whole trip, from their point of departure to destination, on 'safe, connected networks'. If they will have to negotiate dangerous intersections or roundabouts other kinds of infrastructure, this is likely to undermine the effectiveness of any other improvements that the government invests in.[33]

We have to agree with the NZTA. It serves no purpose in investing millions in the infrastructure if it is not safe to ride on it. In many parts of New Zealand, cycle lanes are usually located in between the parking curb and traffic lanes. This is the most serious hazardous kind of infrastructure to the cyclist. They cannot, in these cases avoid the door zone of parked vehicles as they are legally obliged to remain within the confines of the cycle lane whilst riding. Getting doored has proved to be deadly to many cyclists who are more likely to land on traffic lanes with passing vehicles when hit by an opening door. It is therefore imperative that the government considers this crucial hazard when investing in infrastructure for the purposes of cycling.

The NZTA therefore seeks, through its NLTP, to address those fragmented cycle networks through a more coherent planning in cycling infrastructure. The injecting of a considerable amount of investment in this direction is therefore a key means towards addressing those strong concerns and creating the right conducive environment for cycling.

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[31] NZTA *National business case*, above n 2, at 7.

[32] NZTA *National business case*, above n 2, at 7.

[33] NZTA *National business case*, above n 2, at 7.

The *NLTP 2015-18* will have an investment of $251 million dedicated to cycling and walking, and that includes the funding allotted for the Urban Cycleways Programme. The NLTP emphasises:[34]

> It is estimated that between $350 m and $400 m will be invested in cycling in the three years to 2018. This also includes investment in cycling and walking facilities incorporated in state highway and local road projects, as well as projects outside the NLTP, such as the New Zealand Cycle Trail. This is aimed at improving walking and cycling infrastructure (both urban and rural) and support programmes such as cycle skills programme such as cycle skills training, national guidelines for cycling infrastructure design and public education campaigns to promote sharing the road safely.

3.2.3 Regional Land Transport Plans (RLTPs)

Each regional council in New Zealand, except that of Auckland, must, every 6 financial years, make sure the relevant regional transport committee prepares a Regional Land Transport Plan on behalf of the Regional Council and approve the Plan by a date specified by the NZTA.[35] In the case of Auckland, it is different. Auckland Transport is a Council itself and represents all transport and functions of the city under one organisation.[36] Auckland Transport must, every 6 financial years, prepare an Auckland Regional Land Transport Plan and approve the Plan by a date as stated by the NZTA.[37] The RLTP, therefore constitutes all the land transport activities that a region "intends to progress over a six-year period".[38]

The Regional Transport Committee must make sure, before it submits the RLTP to a Regional Council or Auckland Transport, that the RLTP contributes to the purpose of the LTMA 2003 and that it is consistent with the GPS on land transport.[39] Additional considerations to the Regional Transport Committee include:[40]

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[34] NZTA *National Land Transport Programme 2015*, above n 23, at 17.

[35] Land Transport Management Act 2003, s 13(1)(a).

[36] NZTA *The role of regional authorities* <www.nzta.govt.nz>.

[37] Land Transport Management Act 2003, s 13(1)(b).

[38] NZTA *Regional Land Transport Plans* <www.nzta.govt.nz>.

[39] Land Transport Management Act 2003,s 14(a).

[40] Land Transport Management Act 2003, ss 14 (b) and (c).

- Alternative regional land transport objectives contributing to the purpose of the LTMA;
- Feasibility and affordability of those alternative objectives;
- Any national energy efficiency and conservation strategy.

3.2.3.1 Auckland RLTP

A brief overview of the Auckland RLTP will be given and assessed as to whether it reflects adequate measures of promoting cycling. In its *RLTP 2015-25*, Auckland Transport (AT) indicated its five strategic themes, one of which is to "transform and elevate customer focus and experience by delivering road, public transport, cycling and walking services which are user friendly, customer oriented, and meet the demands of the people of Auckland."[41] It also stated its core policies that are aimed at providing an integrated and connected cycle network and some of these policies are:[42]

> • Complete 70 per cent of the Auckland Cycle Network (metros and connectors) by 2022;
> • Ensure cycle facilities are safe enough to attract new riders of all ages and abilities;
> • Ensure all transport projects consider cyclists and pedestrians as priority road users;
> • Support local boards to develop local transport projects which meet community needs;
> • Support Auckland businesses, business areas and tertiary institutes to encourage travel by walking, cycling and public transport through the Commute programme.

As far as the safety policies are concerned, Auckland Transport aims at having road environments, speeds, vehicles and road users that create a climate conducive to reducing the occurrence of death or serious injuries on Auckland roads.

As regards funding for the purposes of investments by local councils, the RLTP is the basis for request of funding from the National Land Transport Fund. The NZTA will then assess, through its Investment Assessment Framework about the projects that particular Council will invest in. In the case of AT, Central Government also invests directly in transport related activities in Auckland. Revenues for the AT also

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[41] Auckland Transport *Auckland Regional Land Transport Plan 2015-2025* at 18 <www.at.govt.nz>.

[42] At 34.

come from fares from most public transport services, parking revenues and enforcement.[43]

3.3 Assessing the link between investment and cycling promotion

The NZTA notes that whilst there is considerable funding made available to local councils through the National Land Transport Fund (about $30 million provided for a year under the *GPS 2012-15*), investment in cycling and walking tends to be "in the lower half of the funding range".[44] Local authorities explain this is due to the need to fit investment criteria as per the strategic requirements of the NZTA. But NZTA views that local councils are failing to make cycling investment a priority compared to other priorities or do not dedicate themselves to the programme that has been approved by the NZTA. NZTA notes "there has been systemic under-delivery of cycling projects relative to those that are approved through planning processes. As a result there has been a lack of progress for urban cycle networks."[45]

3.4 Other strategies aimed at promotion of cycling

3.4.1 Cycling Safety Action Plan: Making Cycling safer and more attractive

Following a coronial review on cyclist safety in 2013, Coroner Gordon Matenga requested the setting up of an expert panel with a view to addressing the high cyclist death rate and to find ways to avoid them.[46] The Cycling Safety Panel (the Panel) was set up in December 2014.[47] Its recommendations have addressed various weaknesses in terms of the existing legislation and policy. Those recommendations are viewed as a key tool for the government to act upon. The NZTA published in August 2015, a report entitled *Making cycling safer and more attractive*, stating

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[43] Auckland Transport A*uckland Regional Land Transport Plan 2015*, above n 41, at 38.

[44] NZTA *National business case*, above n 2, at 13.

[45] NZTA *National business case*, above n 2, at 13.

[46] Coroner Gordon Matenga *Cycling safety in New Zealand: A Coronial Review* (11 November 2013) at [22] <www.justice.govt.nz>.

[47] Cycling Safety Panel *Safer journeys for people who cycle – Cycling safety panel final report and* recommendations (December 2014) <www.saferjourneys.govt.nz>.

therein, the actions and measures it is embarking upon following the Panel's recommendations. The NZTA will publish a paper to report progress on their action plan in December 2016 and July 2018.[48] An analysis of those two key documents will be made in Chapter 6, where the reform options are addressed. On 2 September 2015, Associate Transport Minister, Craig Foss shares that the government is already acting upon a number of the Panel's recommendations with a view to committing itself to making cycling safer and more attractive. He adds that these recommendations are reflected in the 'Urban Cycleways Programme, Safer Journeys and the transport planning and investment process'.[49]

3.4.2 Cycle Trails

For the New Zealand cycling community, 2009 was a memorable year, with the introduction of the 'Model Community' project which is discussed below. In the same year, the Prime Minister, John Key proposed the New Zealand Cycle Trail project which was an outcome of the government Employment Summit 2009.[50] For the purposes of this project, 18 Trails were selected and by October 2013, 12 of these were operational. All together these trails run along a track of 2, 500 km.[51] It is estimated that the 2015/2016 summer will see the opening of most of the Great Rides trails.[52]

The cycle trail was primarily based on the idea to create jobs with a view to addressing the global economic problems prevailing in 2009.[53] It was also intended to provide an appealing cycling route to both local and foreign cycle tourists. John Key stated his vision in the following words, "I see the national cycleway

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[48] NZTA *Safer cycling* <www.nzta.govt.nz>.

[49] Craig Foss "Government committed to cycle safety*" The National* (online ed, New Zealand, 2 September 2015) <www.national.org.nz>.

[50] Ministry of Business, Innovation and Employment (MBIE) *Nga Haerenga- The New Zealand Cycle Trail Evaluation Report* (2014) at 1<www.mbie.govt.nz>.

[51] At 1.

[52] The New Zealand cycle trail *discover nga haerenga - the New Zealand cycle trail* <www.nzcycletrail.com>.

[53] Jonathan Kennett *The New Zealand Cycle Trails Nga Haerenga a Guide to New Zealand's 23 Great Rides* (Random House, New Zealand, 2013) at 6-7.

developing from a series of 'Great Rides' through some of New Zealand's most beautiful scenery." [54]

There was huge investment in this project. Funding of $46.4 million were allocated for the construction of cycle trails and a co-funding of $34.7 million was obtained from other applicant bodies.[55]

An evaluation carried out by the MBIE on this project revealed high satisfaction among users of the cycle trails, most of whom are New Zealand residents.[56] The Evaluation Report also recorded an increase in the number of international tourists mountain biking in New Zealand, 35, 000 foreign visitors for the year ending June 2013.[57] Though Jonathan Kennett, project manager of the cycle trails project says that most trail users are New Zealanders.[58] The project also brought a rise in the number of thriving businesses around the cycle trails. Many jobs were also generated from the project. About 175 people worked on the trails in any month over the period January 2011 to august 2013.[59] Kennett adds that the economic return for most trails is very promising.[60]

However, it is noted that this project had the primary aim of creating jobs and aimed at achieving that. The project involves the development of cycle tracks in scenery spots of New Zealand and hence was geared at promoting recreational cycling. This huge investment has not guaranteed the needs of the commuter cyclist who seeks a continuous trip to their destinations, either in the city or the rural areas. The linking of the cycle trails to key destinations could better help bring more commuter cyclists at the forefront. Probably it is the model communities project which has helped enhance rather the needs of the commuter cyclist rather than those of the recreational cyclist as will be seen below.

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[54] Chris Daniels "Cycleway gets $ 50 m-now a series of 'Great Rides' says Key" *New Zealand Herald* (online ed, New Zealand, May 2009) <www.nzherald.co.nz>.

[55] MBIE *Evaluation Report*, above n 50, at 5.

[56] MBIE *Evaluation Report*, above n 50, at 7-8.

[57] MBIE *Evaluation Report*, above n 50, at 11.

[58] Jonathan Kennett NZ "Cycle Trails Radio New Zealand" (2013) <www.radionz.co.nz>.

[59] MBIE *Evaluation Report*, above n 50, at 15.

[60] Kennett, above n 53.

3.4.3 Model communities

In 2009, the NZTA started the process of selecting one or two New Zealand walking and cycling model communities. Councils were invited to send expressions of interest. After reviewing of proposals, New Plymouth and Hastings were selected as model communities.[61] The concept of 'Model Communities' refer to urban environments where walking and cycling are presented to the community as the easiest transport mode choices.[62] The New Plymouth District Council describes the model community as a package of work that helps to ''fast track a community that can change travel behaviour through improved transport choices".[63] The purpose of the 'model communities' project is to "create efficient, high quality integrated active transport networks that could serve as a model for other communities to emulate."[64]

The Councils of New Plymouth and Hastings were awarded a combined amount of about $7 million over two financial years starting 2010 to develop walking and cycling initiatives.[65]

Let us see how New Plymouth succeeded in making cycling an integral part of its people's lives. New Plymouth adopted strategies that had the result of changing the focus from recreational cycling to cycling for commuting purposes.[66] It had a vision to double its 2006 cycling and walking rate which stood at 3 per cent and 7 per cent respectively. It then set out to achieve that vision through the Let's Go programme, bringing its initiatives under the 3 E's-Enable, Educate and Encourage. Under the means of 'enabling', New Plymouth extended its "existing network of safe and accessible shared use off-road cycle and walking pathways to link key destination

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[61] NZTA *Walking and cycling model communities announced* (2010) <www.nzta.govt.nz>.

[62] NZTA *The Walking and Cycling Community Story with New Plymouth and Hastings* (July 2013) at 9 <www.nzta.govt.nz>.

[63] New Plymouth District Council *The Let's Go Project* (November 2014) <www.newplymouthnz.com>.

[64] At 13.

[65] New Plymouth District Council *The Let's Go Project*, above n 63, at 13.

[66] New Plymouth District Council *The Let's Go Project*, above n 63, at 14.

points including schools, industrial areas, city centre and residential areas".[67] It also set out to educate its population, through innovative campaigns, of the value of cycling and walking and encouraged this mode of commuting through events and other tools. Some of the infrastructural development is described as follows:[68]

> For cyclists, there are also now over 20 kilometres of roads with defined cycle lanes and plenty of bike racks in popular parts of the city, while barriers have been widened on 33 access ways making them more accessible for all users.

Behind the success of New Plymouth model community was a dedicated team comprising of a project manager, a travel planner and a travel coordinator who set up the Let's Go project and embarked on a number of related initiatives.[69] The initiatives involved primarily an increased focus on schools and included, inter alia, cycle and scooter skills training, introducing safe walking routes, installing new scooter racks and regular communication with schools to favour more active travel.[70] The initiatives targeting the schools were very successful. A survey in September 2012 indicated a 62.5 per cent increase in active travel to and from school, when compared to the rate in August 2011.[71]

At stage two of its project, the New Plymouth District Council is also conducting an intensive monitoring programme, bringing together 'quantitative and qualitative performance measures', results from surveys, census and other data collected.

Hastings owes its success of the model communities to its dedicated system of arterial routes of 5 to 10 km (Havelock arterial of 5.5 km, Omahu arterial of 6.2 km, Flaxmere arterial of 7 km, Whakatu / Clive arterial of 10.8 km) linked to workplaces, schools and shopping areas[72]. Hastings is also famous for its cycling tourism, with many people cycling past vineyards, orchards and farmland.

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[67] New Plymouth District Council *The Let's Go Project*, above n 63, at 21.

[68] New Plymouth District Council *The Let's Go Project*, above n 63, at 23.

[69] New Plymouth District Council *The Let's Go Project*, above n 63, at 26.

[70] New Plymouth District Council *The Let's Go Project*, above n 63, at 31.

[71] New Plymouth District Council *The Let's Go Project*, above n 63, at 31.

[72] NZTA *The walking and cycling model community story with New Plymouth and Hastings* (2013) at 40 <www.nzta.govt.nz>.

It is noted that many of the local councils only make vague goals and objectives in their RLTP. They will have to adopt more concrete steps as New Plymouth and Hastings. If more coherent and consistent measures are implemented as the model communities have done, there would be no failing in the promotion of cycling in different communities.

3.4.3.1 Lessons to draw on cycling promotion from the model communities

The success of the model communities can help policy makers understand that having a dedicated cycling network with the following attributes would result in a higher uptake of cycling: a cycling network that links to key destinations like schools and workplaces, that prioritise cyclists, has continuous routes, high cycling safety levels, is easy to navigate with "coherent signage and route branding", offers cycle parking facilities at important destinations and is highly visible.[73] It is important equally to address and resolve the wide perception among locals that cycling is an unsafe transport mode or that it is too inconvenient or less socially acceptable. The NZTA shared the lessons it learnt from the success of New Plymouth and Hastings as follows:[74]

- Developing a transport network conducing to cycling and walking must be seen as a key component in "an integrated approach to ensure it contributes to delivering an integrated, multi-modal, one network transport strategy";
- Establishing strong relationships, both internally and externally is equally significant;
- It is important to understand the community and make them aware of what the project is all about, hence community engagement is very important;
- Another key requirement is the implementing of "a coordinated package of infrastructure, educational and promotional activities, supported by aligned strategy and land use policies".

[73] New Plymouth District Council *The Let's Go Project*, above n 63, at 57.

[74] New Plymouth District Council *The Let's Go Project*, above n 63, at 61.

In view of promoting a wider uptake of cycling and enhancing cycling safety, it is high time that policy makers consider the allocation of funds for specific cycle geared projects and follow the steps as adopted by the District Council of New Plymouth and Hastings. It is futile to only generate general objectives and strategies which then become burdened with gaps in the system that hamper the realisation and progress of cycling projects.

3.5 Other key policy documents relevant to planning in land transport

Apart from a number of strategies which have directly aimed at encouraging cycling as a practice, there are various other policy documents which have emphasised the need for an efficient transport system, thereby indirectly promoting more sustainable means of transport like cycling.

3.5.1 Connecting New Zealand: A Summary of the Government's Policy Direction for Transport (Connecting New Zealand)

Connecting New Zealand is a key policy document issued by the MoT and released in August 2011. The purpose of *Connecting New Zealand* was to sum up the broad policy direction of the government over the next ten years. In so doing, it brings together the policy direction set in a number of different policy documents over the past two years and these include: the National Infrastructure Plan, the GPS on Land Transport Funding 2012/13- 2021/22, the *New Zealand Energy Efficiency and Conservation Strategy* (NZEECS), the KiwiRail Turnaround Plan and Safer Journeys: New Zealand's Road Safety Strategy 2010-2020.[75]

Like the other strategic policy documents (GPS and NLTP), the key themes that set the vision and direction for transport are economic growth and productivity, value for money and safety.[76]

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[75] Ministry of Transport *Connecting New Zealand: A Summary of the Government's Policy Direction for Transport* (August 2011) at 3 <www.transport.govt.nz>.

[76] At 3.

The Government has stated its commitment to reduce congestion and, in turn, improve safety both to the pedestrian and the cyclist.[77] It believes that having more targeted activities like the model communities of Hastings and New Plymouth would yield a higher level of return rather gear the funding towards a greater number of activities.[78] Targeted investments, will not only provide New Zealanders with more transport choices but will help address the crisis of high fuel prices.

3.5.2 New Zealand Energy Strategy

The Energy Efficiency and Conservation Act 2000 (EE&C Act) established the Energy Efficiency and Conservation Authority (EECA). Another important aspect of the EE&C Act is that it requires a national energy efficiency and conservation strategy to be in force at all times and it created the New Zealand Energy Efficiency and Conservation Strategy (NZEECS).

The *New Zealand Energy Efficiency and Conservation Strategy* (NZEECS) is said to be working hand in hand with the *New Zealand Energy Strategy* (NZES). The NZEECS is a statutory document lasting for five years.[79] Two of the six broad objectives that the NZEECS has set that will contribute to the overall aim of the *New Zealand Energy Strategy 2011-2021* are:[80]

- Transport: A more energy efficient transport system, with a greater diversity of fuels and alternative energy technologies.
- Public Sector: Greater value for money from the public sector through increased energy efficiency.

In relation to transport, the Strategy states the Government will have to commit itself to the following four specific policies: [81]

- Continue to support improvements to road and public transport, including electrifying the Auckland rail system and upgrading the Wellington rail system;

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[77] Ministry of Transport *Connecting New Zealand,* above n 75 at 30.

[78] Ministry of Transport *Connecting New Zealand*, above n 75 at 30.

[79] New Zealand Government *New Zealand Energy Strategy 2011-2021 Developing our energy potential and the New Zealand Energy Efficiency and Conservation Strategy 2011-2016* (August 2011) <www.mbie.govt.nz>.

[80] At 18.

[81] New Zealand Government *New Zealand Energy Strategy 2011-2021,* above n 79 at 19.

- Continue to fund transport infrastructure to support people to make energy efficient transport choices, including encouraging the use of different modes of travel, particularly in urban areas for example, walking, cycle ways and public transport systems, as well as reducing congestion on the roading system;
- Promote efficient business fleet management through provision of information and audit programmes, such as professional driver training under the Safe and Fuel Efficient Driving New Zealand (SAFED NZ) brand;
- Encourage the entry of alternative transport fuels and electric vehicles in the New Zealand market.

The policies, especially the second one, reflect that the Government commits itself to the promotion of sustainable modes of transport like cycling.

Unlike the NZEECS, the NZES is not created under the EE&C Act, but is of equal significance to the NZEECS and has the main objective of ensuring that the New Zealand economy delivers "greater prosperity, security and opportunities for all New Zealanders."[82] With a view to increasing energy efficiency, one of the ways that the Government could achieve this is by bringing "improvements to infrastructure for walking and cycling funded through the National Land Transport Fund".[83]

3.5.3 Safer Journeys- New Zealand's Road Safety Strategy 2010-2020 (Safer Journeys)

This strategy aims at bringing down the number of road users killed and injured on the roads and is geared towards guiding improvements in road safety for the year 2010 to 2020.[84] The vision of the strategy is the creation of a safe road system free of death and serious injury. This is to be achieved by addressing the major areas of concern which are, inter alia, safe roads and roadsides, safe speeds, light vehicle and heavy vehicle safety, young drivers, impaired drivers, walking and cycling and high risk drivers.[85]

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[82] New Zealand Government *New Zealand Energy Strategy 2011-2021,* above n 79 at 2.

[83] New Zealand Government *New Zealand Energy Strategy 2011-2021,* above n 79 at 10.

[84] New Zealand Government *Safer Journeys A safe road system increasingly free of death and serious injury* <www.saferjourneys.govt.nz>.

[85] New Zealand Government *Safer Journeys A safe road system increasingly free of death and serious injury* <www.saferjourneys.govt.nz>.

After drawing on the high rate of cyclist fatalities and injuries in New Zealand, the Government expressed its intent to promote the safety of cyclists and pedestrians through active measures to improve roads such as improving mixed-use arterial roads and intersections.[86] Another key measure that the Government is actively encouraging that in turn reflects the enhancing of cyclist safety is the promotion of safe speeds. The Government recognises that the speed which is safe in particular conditions like wet weather should be made obvious to the road user. It also adds that it is imperative that speed limits that are to be adjusted to the standard of safety features present on particular roads.[87]

Equally conscious of the potential danger that heavy vehicles present to the cyclist and other road users, the Government indicated that the best way to improve the safety of heavy vehicles "will be to work with the industry to support and encourage heavy vehicle fleet owners to be increasingly safety conscious".[88]

In *Safer Journeys*, it was announced that there would be a review of the penalties for offences causing injury or death to make sure they do reflect more adequately society's views of the culpability of drivers who kill or injure other road users.[89] The Ministry of Transport has recently revisited the cost benefit ratio of increasing the penalty in both cases of careless and dangerous offences. In the case of careless driving, a rise in the term of imprisonment to 3 years from the existing 3 months and to a maximum fine of $10,000 from the existing $4,500, and raising the disqualification period from 6 months to a year was contemplated.[90] This was abandoned however when balancing the social costs against the high costs of prison and other costs, whilst the deterrent effect that was estimated was unlikely to be achieved.[91]

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[86] New Zealand Government *Safer Journeys Safe speeds* <www.saferjourneys.govt.nz>.

[87] New Zealand Government *Safer Journeys Safe speeds* <www.saferjourneys.govt.nz>.

[88] New Zealand Government *Safer Journeys Heavy Vehicle Safety* (2015) <www.saferjourneys.govt.nz>.

[89] Ministry of Transport *Advice on why drink driving causing death does not automatically result in a manslaughter charge* (2010) at 5 <www.parliament.nz>.

[90] At 6, Table 9.

[91] Ministry of Transport *Advice on drink driving*, above n 89, at 7-8.

3.5.4 The National Infrastructure Plan

The NZTA is also guided by another key policy document when planning its investment strategies- the National Infrastructure Plan (NIP). The most recent NIP is the *National Infrastructure Plan 2015: Thirty Year New Zealand Infrastructure Plan* (NIP 2015). The NIP 2015 identifies a number of significant challenges that we are facing over the next 30 years and these include:[92]

- The number of aging infrastructure networks we have that call for renewing;
- Our aging population;
- Rapid technological advances;
- Our changing climate and pressures on our natural resources.

The purpose of the *NIP 2015* is to find ways and means to make our way through these challenges. And to achieve that purpose the *NIP 2015* has set a vision that:

> in 2045 New Zealand's infrastructure will be resilient and coordinated, and contribute to a strong economy and high living standards.

It is noted however that though the NIP will provide key strategic goals and planning in different sectors like energy, water and land transport, little is provided for the purposes of cycling promotion in New Zealand. The contemplated planning infrastructure with a view to enhancing of cycling facilities is only seen for Auckland City Centre. The *NIP 2015* plans to embark on a City Centre Integration Project. This includes "an optimised new bus network supported by high quality bus interchanges and much higher quality cycling and walking facilities."[93]

3.5.5 The 2015-16 strategic policy programme

The Ministry of Transport (MoT) is currently working on two strategic policy projects, which are aimed at looking at how transport could be regulated in 2025,

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[92] National Infrastructure Unit *National Infrastructure Plan 2015 - Thirty Year New Zealand Infrastructure Plan* at 7 <www.infrastructure.govt.nz>.

[93] At 69.

and the wider public transport system in 2045.[94] The Ministry of Transport reviews that the transport system has an investment of over $4 billion ever year, is regulated by about 270 pieces of legislation, contributes to about 18 per cent of total carbon emissions in New Zealand and have a social cost of above $3 billion annually in terms of roads deaths and injuries. It adds:[95]

> This is no small amount, and we must do all we can to make sure it is invested wisely. Every infrastructure transport decision has an influence on the future, affecting further demand, supply, behavioural choices and the impacts that these have on society, the environment and our economy.

The first limb of the project, Regulation 2025 is probing into the question as to how regulation in 2025 would be different and what mechanisms should be available to shape behaviour.[96] The second limb, Public Transport 2045 will look at the long term future of public transport, with the challenges and opportunities that will arise over the next thirty years. It addresses how the impact of factors like an aging population, changing travel choices and other technological impact will affect people's mobility needs.[97]

3.6 Conclusions

Significant efforts are taking place at all levels of Government, central and local Government aimed at the promotion of cycling as a mode of transport, especially in urban centres. However, in light of the success story of New Plymouth and Hastings, it is important that policy makers do consider the steps that have been taken by the District Council of the two model communities, rather than just specifying broad goals and objectives, difficult or impossible to be met. Safety concerns need to be at the heart of any policy decision or strategy to be adopted. It would be an unproductive investment to continue to link bicycle lanes if bicycle lanes are considered as highly unsafe, if they run along parked lanes for cars. Much is hoped to be achieved through the cycleways programme, which is underway in many cities in New Zealand but only time will tell if it is successful or not. Funding

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[94] Ministry of Transport *Strategic Policy Programme* (September 2015) <www.transport.govt.nz>.

[95] Ministry of Transport *Strategic Policy Programme*, above n 94.

[96] Ministry of Transport *Strategic Policy Programme*, above n 94.

[97] Ministry of Transport *Strategic Policy Programme*, above n 94.

is another key influential factor that would help promote or demote an activity. The weakness in the link between the NZTA and the local council needs to be addressed. There has to be a proper system of monitoring the investment criteria of local councils to ensure a higher degree of accountability over their investment projects. It is of prime significance that the Government also takes account of policies adopted in other countries, and principally in integrating a number of policies discouraging car use like those adopted in the Netherlands and the Avoid, Shift, Improve approach adopted by GIZ, a German-based international organisation, as will be addressed in Chapter 5.

Chapter Four: Overview of road safety rules over which decisions are made by judges and prosecution

4.1 Introduction

The high road toll as pointed out in Chapter 1 raises questions as to whether road safety has been considered a top priority by the relevant authorities. For the purpose of this research, the role of the legislator, judges, police, and prosecution as watchdogs for compliance with road transport laws will be considered to reflect on the extent to which attempts are made at promoting road safety. These actors play a significant role in ensuring cyclist safety through enacting or amending of legislation on driving related offences or through interpretation of the law and punishing offending drivers. This chapter explores the legislative provisions on serious driving related offences, the types of sentence that the court imposes for such offences, and the role of the prosecution in bringing the right charge and how this, in turn, impacts on cyclist safety.

4.2 Penal Liabilities of road users under the Land Transport Act 1998 (LTA 1998)

The LTA 1998 was enacted to reform the Land Transport legal structure, and is currently the primary statute in that area. The main objectives of the LTA 1998 include:[1]

> (a) to promote safe road user behaviour and vehicle safety; and
>
> (b) to provide for a system of rules governing road user behaviour, the licensing of drivers and technical aspects of land transport, and to recognise reciprocal obligations of persons involved;

When the Land Transport Bill was referred to the Transport and Environment Committee, it was highlighted that the bill also contained some major policy

[1] Land Transport Act 1998, long title.

changes, such as:[2]

> These have been designed to address New Zealand's poor road safety record; the road toll is still too high. New provisions, set out in this bill, focus on those driver behaviours which pose the greatest safety risk: drinking and driving, and speeding. As well as tougher penalties and greater deterrents, the bill sets out measures which will help us get serious and repeat offenders off the roads.

It is relevant to consider the extent to which the rationale behind the enactment of the LTA 1998, that is, to condemn 'driver behaviours which pose the greatest safety risk', has been reflected in the court's interpretation of provisions of the LTA when deciding cases of careless and dangerous driving offences.

The safety of cyclists is of increased significance, given that they are more vulnerable road users. The Land Transport Act 1998 aims to address this concern by attributing criminal liability for careless or dangerous driving by motorists which may cause harm to cyclists. However, a cyclist is also defined as a 'driver' under s 2 of the Act, and must comply with all the safety requirements imposed by it and other road user regulations.

Part 2 of the LTA gives a brief outline of the responsibilities of the road user, including cyclists. Part 2 provides for (i) drivers to hold the relevant licence; (ii) vehicles to be safe and operated in compliance with the rules; (iii) the drivers not to be careless or dangerous or inconsiderate; (iv) the need for drivers to comply with ordinary and emergency rules; (v) their responsibilities concerning use of alcohol or drugs and to comply with directions of enforcement officers.[3]

Parts 5 and 6 of the LTA refer to a wide range of driving offences but the focus of this thesis is limited to serious road traffic offences such as careless or dangerous driving because it is those infringements of the law that pose a significant risk to safety of cyclists.

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[2] Transport and Environment Committee, "Land Transport Bill (Report)" [1996-1999] LXV AJHR 844-845.

[3] Land Transport Act 1998, ss 4-13.

4.3 Concerns from press reports

Some recent press reports show that sentences, imposed on the convicted driver who hits the cyclist, are too lenient. Patrick Morgan, spokesman at the Cycling Advocates Network (CAN) was dismayed at the sentence of 175 hours' community work, and a disqualification period of 10 months imposed on the convicted driver who caused the death of cyclist Patricia Fraser.[4] He said: [5]

> [t]he light sentence in this case sends a message that killing another road user has few consequences. That is appalling…This is not a story about cycling - it's about accountability…Why does the life of Patricia Fraser mean so little?

Christopher David McClelland caused the death of Mrs Fraser when his car veered onto the cycle lane, hitting the rear wheel of Mrs Fraser's bike. Another cyclist was killed on 12 March 2009. Stephan Stoermer was a German, on a cycling tour in New Zealand. The truck driver, Troy Roberts, had fallen asleep whilst driving, having exceeded his driving hours. Judge Geoghegan in the Tauranga District Court sentenced him to two years and three months in prison and a two years driving disqualification.

A young student who hit a number of cyclists along Tamaki Drive, Auckland, was disqualified for 6 months and had to pay $ 1,000 to each of the victims. One of the victims, who had suffered brain injury said that the sentence was too lenient:[6]

> Our feeling is that these go a long way toward explaining why New Zealand's roads are so hazardous, unfortunately the light sentence given to the truck driver is not going to act as enough of a deterrent to other drivers (or trucking companies) to make any difference at all to the road toll, life comes cheap in New Zealand.

And the article further added, "soft sentences are the norm in crashes involving cyclists".[7]

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[4] Patrick Morgan "Community work for cycle death crash" (Cycling Advocates Network, New Zealand, 14 March 2011) <http://can.org.nz>.

[5] Morgan, above n 4.

[6] Admin "Stephan Stoermer's killer sentenced to short prison term - updated" (10 July 2010) <http://e2nz.org>.

[7] Admin, above n 6.

These press reports and many others criticise the approach of the courts as being too lenient when it comes to collisions where cyclists are involved. An analysis of case law will follow to show the sentencing practice of the courts in serious traffic offences, especially careless and dangerous driving offences in New Zealand and Chapter 5 makes a comparison with equivalent offences in the Netherlands, and England and Wales.

4.4 General principles of sentencing

Before we move on to the court's interpretation of the legislation on serious driving offences, it is important to briefly consider the sentencing principles governing the sentencing practice of judges. The New Zealand sentencing structure is derived from legislation and judicial rulings. When exercising their discretion, the sentencing judge is guided by sentencing principles set out in the Sentencing Act 2002 and related case law. The Sentencing Act defines the purposes of sentencing and identifies principles that the sentencing judge needs to consider. Deterrence, denunciation and retribution are identified as the principal purposes of punishment when sentencing for traffic offences.[8] The Court of Appeal in *R v Beaman*[9] highlighted the need for penalties to increase public awareness as to the appalling consequences of irresponsible driving:[10]

> They [penalties imposed] must include the denunciation of such behaviour, the need to mark society's condemnation of it by sufficiently severe punishment, and the deterrence of others from reckless driving.

The principles as laid out in the 2002 Act include the gravity of the offending, the culpability (blameworthiness) of the offender, the maximum penalty prescribed for the offence, the desirability of consistency of sentences for similar offending, the personal circumstances of the offender including personal characteristics which may make a sentence disproportionately severe upon that particular person, and whether any restorative justice agreements or terms have been reached.[11]

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[8] Sentencing Act 2002, ss 7 (f), (e) and (a).

[9] *R v Beaman* CA 177/82, 16 November 1982.

[10] At [9].

[11] Sentencing Act 2002, s 8.

These sentencing principles promote consistency in sentencing, but at the same time gives differing degrees of discretion to judges. This can be very challenging, given that judges have to balance the varying circumstances between the offending and the offender. Further considerations for the judge include the need for a speedy decision, and the duty to ensure that justice is seen to be done.[12]

4.5 Sentencing pattern in fatal and non-fatal offences

After giving a critical outline of the policy framework on cycling in the previous chapter, it is now appropriate to assess the adequacies or inadequacies in the law in addressing safety concerns of cyclists. Whilst Chapter 6 deals with road user rules which affect cyclist safety, the aim of this chapter is to identify provisions of the law that condemn driving related offences and how courts interpret them. And whilst addressing the sentencing patterns in major driving offences, this chapter seeks to assess:

(a) whether in cases of collisions with a cyclist, the driver of the motor vehicle normally walks off with a lighter sentence and

(b) mainly and in line with the general aim of this present study, whether safety of the cyclist as a vulnerable road user can be said to be reflected in sentencing practice by the courts.

Each of the serious road traffic offences will be dealt with in turn.

4.5.1 Motor Manslaughter

4.5.1.1 Legislative provisions on motor manslaughter

A sentence for manslaughter under the Crimes Act 1961, arising from the use of a motor vehicle, attracts higher penalties when compared to fatal offences under the Land Transport Act 1998 (LTA). Section 150A of the Crimes Act 1961 (CA) states that for a person to be liable under this section, his or her omission to discharge or

[12] *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256.

perform a legal duty or his or her neglect of a legal duty is a "major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances."[13] Sections155–157 specify the legal duties that give rise to criminal responsibility. Of particular relevance to a manslaughter charge is s 156 CA which undoubtedly applies to motorists. Motorists are under the legal duty, under s 156, when operating a motor vehicle, to avoid danger to human life and are criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.[14]

4.5.1.2 Case law analysis of the offence of motor manslaughter

The major departure test under s 150A of the Crimes Act, as stated above, was applied in *R v Powell*,[15] where it was referred to as 'gross negligence'. The judge in *Powell* further explained that the absence of the degree of negligence required under s 156 or one of the other sections in Part VIII of the Crimes Act prevents a charge of manslaughter but may trigger charges under the Land Transport Act 1998.[16]

The requirement of satisfying the major departure test from the *Powell* decision is different to the approach adopted in an earlier Court of Appeal authority established in *R v Skerrett.*[17] In *Skerrett,* it was stated that manslaughter charges will be preferred where the maximum sentence under the transport legislation is deemed inadequate. However, the consideration of aggravating and mitigating factors in *Skerrett* has served as an important guideline in many cases decided after its decision. The assessment of those factors helps the court in determining whether there has been a major departure from the standard of reasonable care.

The aggravating and mitigating yardstick in the *Skerrett* decision has been a helpful tool for judges to navigate their way to come to a final sentence once they have set

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[13] Crimes Act 1961, s 150A.

[14] Crimes Act 1961, s 156.

[15] *R v Powell* [2002]1 NZLR 666.

[16] At [24].

[17] *R v Skerrett* CA236/86, 9 December 1986.

a starting point for a sentence. Such an application can be seen in the Court of Appeal decision of *R v Grey*[18] where a term of eight and a half years' imprisonment for two charges of manslaughter was upheld on appeal. The Court underlined a number of aggravating factors arising from the facts: driving at a grossly excessive speed, consumption of alcohol and drugs, a history of very bad driving, and the indifferent attitudes of drivers after the collision.

Other cases where manslaughter charge was preferred include- *R v Abraham,*[19] *R v Goodwin-Lomax,*[20] and *R v Whiu*[21]. In *Whiu*, a woman, who had previous convictions, was driving at extremely dangerous speeds at night. She hit one car but she kept going and eventually hit another car and killed the driver. The judge adopted an initial starting point of eight to nine years and sentenced her to seven and a half years. O'Regan, Arnold and Wilson JJ, recognising that there has been a hardening of the court's attitude to these offences since the *Skerrett* decision,[22] did not make any finding that the sentence imposed was manifestly excessive.

The hardening attitude to sentencing in manslaughter convictions as illustrated above is, however, not consistent in all manslaughter cases studied. The *Skerrett* formula has been applied in a number of subsequent cases. In spite of the existence of variation in the terms of imprisonment, no court has departed from imposing a custodial sentence for a manslaughter charge. Notwithstanding the enactment of the Sentencing Amendment Act 2007 (SAA), which empowers the court to impose a sentence of home detention if it would have imposed a "short-term sentence" of imprisonment[23] (a sentence of two years' imprisonment or less[24]). This is an important observation. Whilst the analysis of cases chosen below, indicate that, in almost all of these cases, the courts have not departed from a custodial sentence, it remains to be determined whether the convicted driver charged for manslaughter

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[18] *R v Grey* (1992) 8 CRNZ 523 (CA) at 525.

[19] *R v Abraham* [1993] 10 CRNZ 446.

[20] *R v Goodwin-Lomax* CA 215/95, 20 July 1995.

[21] *R v Whiu* [2007] NZCA 591.

[22] At [20].

[23] Sentencing Act 2002, s 15A.

[24] Short-term sentence has same meaning as short-term sentence as defined in the Parole Act 2002, s 4.

who kills a cyclist has been given more or less the same punishment, that is, a custodial sentence.

The table below summarises the sentences imposed in some motor manslaughter cases over the last decade.

Case	**Starting Point (Terms of imprisonment)**	**Final Sentence after assessing aggravating/mitigating features (Terms of Imprisonment)**
R v Hughes[25]	Five and a half years	Three and a half years
R v Prescott[26]	Seven years	Four years
R v Silbery[27]	Seven years	Four years eight months
R v Mika[28]	Nine years	Six years nine months
R v Hepi[29]	Ten years	Seven and a half years
R v Barclay[30]	Seven and a half years	Five and a half years
R v Ah Chong[31]	Five years	Three years
R v Luke[32]	Three and a half years	Twenty months
R v Copping[33]	Three years and six months	Two years and six months
R v Drinnan[34]	Eight years	Six years

[25] *R v Hughes* HC Auckland CRI-2004-004-957, 7 November 2004.

[26] *R v Prescott* HC Auckland CRI-2004-004-19706, 15 July 2005.

[27] *R v Silbery* HC Christchurch CRI-2005-009-12625, 12 April 2006.

[28] *R v Mika* [2013] NZHC 2357.

[29] *R v Hepi* HC Hamilton CRI-2005-019-2278, 14 July 2005.

[30] *R v Barclay* HC Nelson CRI-2006-042-4085, 31 May 2007.

[31] *R v Ah Chong* HC Auckland CRI-2004-004-10735, 9 August 2007.

[32] *R v Luke* HC Rotorua CRI-2007-070-3532, 19 October 2007.

[33] *R v Copping* HC Tauranga CRI-2007-270-104, 26 September 2008.

[34] *R v Drinnan* HC New Plymouth CRI-2008-021-838, 4 March 2009.

R v Herewini[35]	Eight and a half	Seven and a half years

Table 1: Length of custodial sentence imposed over the last decade in some motor manslaughter cases

An observation of the cases in Table 1 indicates there are quite a number of cases like *Luke*[36] (twenty months), *Copping*[37] (two years and six months),where offenders have enjoyed a lighter term of imprisonment, whilst others a longer term like *Herewini*[38] and *Hepi*[39] (seven and a half years). The sentencing judge in *Luke* emphasised street racing as a strong aggravating feature when he said, "racing cars on public streets is a prescription for disaster."[40] Other aggravating features that were considered in this case included the following: that the offender was driving at a very high speed above 100km/h in a speed zone of 50km/h on a public road where there were a number of people present. The court balances these against the following mitigating factors: the guilty plea, the good driving record and character of the offender, their co-operation with the police, youth, remorse and acceptance of responsibility expressed. Similar circumstances seem to arise in *Copping* which involved street racing as in *Luke's* case and a number of mitigating factors were present such as youth, co-operation with police, and prior good character. The aggravating factors identified here, were street racing, the nature of the driving, and the absence of any remorse by the offender. The disparity between the 20 months imprisonment sentence in *Luke* and, on the other hand, two years six month leads us to the question whether the absence of remorse by itself justifies such a difference.

In *Herewini*, a sentence of seven and a half years was imposed. Here, the aggravating circumstances were considerable. The offender was not only racing on the highway, he had consumed alcohol and drugs before driving at a grossly

[35] *R v Herewini* HC Hamilton CRI-2007-019-10174, 14 May 2009.

[36] *Luke*, above n 32.

[37] *Copping,* above n 33.

[38] *Herewini,* above n 35.

[39] *Hepi,* above n 29.

[40] *Luke*, above n 32, at [8].

excessive speed and he had previous convictions for drink-driving and drink-related offences. The term of imprisonment imposed in this case is 70 months, five years and 10 months more than in *Luke*.[41] The decision seems to be based on the consequences of the offence rather than culpability of the offender. The sentence imposed in *Herewini* appears to reflect a high threshold for a long term of imprisonment to be imposed.

Another point to note is that in many cases where a lighter sentence was imposed, as in *Luke* and *Copping*, the offenders were relatively young and the court has underlined that the youth was an important mitigating factor weighed in the balance. However, there are, on the other side of the spectrum, cases where young offenders have faced long terms of imprisonment. In *R v Time*, [42] an 18 year old was imposed 8 years imprisonment and *R v Pori*[43], a sentence of seven and a half years of imprisonment was imposed on an 18 year old. In *R v Prescott* , Allan J expressed that young offenders would receive little by way of discount on account of their young age, due to the need to protect the public from avoidable death and injury.[44] So, in *Time*[45] and *Pori*[46], where there were multiple deaths involved, it seems that the court has placed undue weight on the consequences of the accident, and inadequate weight on the young age of the offender to mitigate the sentence. This approach seems to differ from that adopted in cases like *Luke*.

Some major observations that flow from the above analysis include:

(i) A custodial sentence was imposed in all the motor manslaughter charges;

(ii) There seems to be a high variation. In some cases, the courts seem to have given undue consideration to the youth of the offender whilst in others, this was not a factor taken into account to mitigate the sentence. So, it is the variation in the consideration of such factors

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[41] *Luke*, above n 32.

[42] *R v Time* [2004] 21 CRNZ 31.

[43] *R v Pori* CRI 2004-204-118, 5 Oct 2004.

[44] R v Prescott, above n 26.

[45] *Time*, above n 42.

[46] *Pori*, above n 43.

that lead to observations that in some cases, road safety is more enhanced, regardless of the age of the offender, whilst in others, this signal is not sent.

4.5.1.3 Sentencing for motor manslaughter where cyclists are involved

The sentencing in fatal road crash cases do not follow a uniform pattern but are heavily reliant on the aggravating and mitigating factors identified on a case by case basis. It is still relevant to assess the extent to which the identified absence of uniformity in sentencing also impinges on cases where the cyclist is a victim.

The sentence in *R v Baker*[47] was delivered by the High Court in Palmerston North. Here, the court imposed a sentence of nine years imprisonment with ten years disqualification against a driver who was extremely drunk and driving at about 150kph, hitting a cyclist who died on the spot. Heron J concluded that this case was classified as a worse example given that the driver was a mature man with previous drink-driving convictions and recent convictions for class B drug offences. His Honour deemed it necessary for the sake of deterrence to maintain the nine years imprisonment and the ten year disqualification period.

Another manslaughter case involving the death of a cyclist is *R v Hape*[48] which was decided after *Baker* but which seems to go to the lower end of the sentencing scale. *Hape* was concerned with the appeal by the driver against his sentence for manslaughter. *Hape* had driven his unroadworthy car whilst disqualified and in a careless manner. He failed to stop after hitting two cyclists, killing one. Consideration was equally given to the five drink driving convictions and six convictions for driving whilst disqualified. The court paid attention to the views of the sentencing judge that the former s 56 Transport Act 1962 carries a maximum sentence of three months, and expressed on appeal that a three month sentence would have been totally inadequate. Bearing in mind the imposition of concurrent sentences which were imposed and the fact that the driver was convicted only for

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[47] *R v Baker* T 26/93, 12 November 1993.

[48] *R v Hape* [1994] 1 NZLR 167.

one charge of manslaughter, the court concluded that three years imprisonment was too long for the single offence and reduced the sentence to two years imprisonment.[49]

However a very high sentence was imposed in *R v Williams*[50]. Goddard J was called upon to adjudicate in a manslaughter case which involved a series of serious aggravating features. The driver, aged 24 years drove at an excessive speed whilst drunk and disqualified, and collided with a cyclist who died. Williams escaped instead of assisting the victim and attempted to conceal his conduct by spray painting the damage and selling the vehicle the next day. The court followed the guidelines set in *Skerrett*[51] and took into account the long list of aggravating elements including (i) the consumption of alcohol and cannabis; (ii) speeding at 90kph in a 50kph area, (iii) being disqualified for the eighteenth time, (iv) the state of the vehicle, (v) the failure by the driver to render assistance to the victim after the accident, (vi) the criminal acts in attempting to conceal the crime. The mitigating factors like genuine remorse or youthfulness seemed to have weighed little in the balance. The driver was sentenced to eight years imprisonment and 10 years disqualification.

Another relevant case is *R v Aiomanu.*[52] Here, the sentencing of the driver for manslaughter was reached by considering a number of aggravating factors, including driving whilst forbidden and with excess alcohol, failing to stop and also his previous conviction. At about 6 am, the driver was driving in a reckless manner and collided with the cyclist, who died. The driver was later found with a breath alcohol reading of 358 mgs of alcohol, though the pre-sentence report revealed he had consumed cannabis as well. The court reached the finding that a starting point of 8 years imprisonment would be appropriate. The mitigating factors like his young age, remorse and guilty plea were taken into account in crediting off 2 years and reaching a sentence of 6 years imprisonment for manslaughter and a disqualification term of 6 years.

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[49] At [26].

[50] *R v Williams* [1997], HC, Palmerston North S 6/97.

[51] *Skerrett*, above n 17.

[52] *R v Aiomanu* HC, Christchurch CRI 2004-009-6616, 7 October 2004.

More recently in *R v Bishop*[53], following a guilty plea of manslaughter, the driver was sentenced to three years six months imprisonment and three years disqualification. The car was unroadworthy and dangerous to drive and had significant modifications made to it. The driver drove at excessively high speed and skidded for some 100 metres along a grass verge before colliding with and killing the cyclist. The court however considered his young age, willingness to attend a restorative justice conference and his guilty plea in reducing the sentence which was at a starting point of five years.

No conclusive findings can be made to the effect that judges were particularly lenient with offenders in manslaughter cases where cyclists were killed. But the case studies reveal some variation between the sentences imposed. Similar findings were made in the cases studied above in collisions where no cyclist was involved.

4.5.2 Drink driving

4.5.2.1 The general approach

Drink driving offences causing the death of the victim have a harsher penalty than careless or dangerous driving offences and are addressed under ss 61 and 62 of the LTA. Section 61 of the LTA 1998 gives rise to an offence where a person in charge of a motor vehicle causes bodily injury to or death of another whilst:[54]

(i) the alcohol level is in excess of 400 micrograms per litre of breath;[55] or

(ii) the alcohol level in the driver's blood, as confirmed from analysis of his blood specimen, is in excess of 80 mg per 100 ml of blood;[56] or

(iii) the driver is under the influence of drink or drugs, or both to such an extent as to be incapable of having proper control of the vehicle. [57]

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[53] *R v Bishop* [2012] NZHC 2761.

[54] Land Transport Act 1998, s 61.

[55] Land Transport Act 1998, s 61(1)(a).

[56] Land Transport Act 1998, s 61(1)(b).

[57] Land Transport Act 1998, s 61(2)(a).

The penalty under s 61, if death is caused, is a maximum of ten years imprisonment or a maximum fine of $20,000 and a mandatory minimum disqualification of one year.[58] In the event of bodily injury, the conviction under s 61 may carry a maximum imprisonment of up to five years or a fine not exceeding $20,000, together with a disqualification term of one year or more.[59]

Section 62 of LTA 1998 is applicable in circumstances not covered under s 61, and includes where the driver, through careless driving whilst under the influence of drink or drug or both, causes bodily injury to or death of a person.[60] However, the degree of seriousness seems to be to a lesser extent than that under s 61. Offences under s 62 carry a lower penalty, including a maximum imprisonment of three years or a fine not exceeding $10,000, and a mandatory disqualification of at least one year.[61] The court has deemed it appropriate to deal with repeat drink-drivers more severely by applying harsher penalties. This is in line with s 9(1)(j) of the Sentencing Act 2002 which entitles the judge to consider previous convictions as an aggravating factor.

In *Rogers v Police*, the court considered the three previous convictions for driving with excess breath/blood alcohol and the convictions for driving while disqualified before concluding that 15 months' imprisonment under the circumstances was not excessive.[62] Similarly in *Quinn v Police*, the court took into account the excessive speed by the driver with level 76 mg of alcohol per 100 mililitres of blood, in utter disregard of the weather conditions, coupled with the lack of a warrant of fitness, which caused the death of the victim.[63] An imprisonment period of 15 months and 3 years disqualification was imposed.

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[58] Land Transport Act 1998, s 61(3AA)(a) and (b).

[59] Land Transport Act 1998, s 61(3)(a) and (b).

[60] Land Transport Act 1998, s 62(1)(a).

[61] Land Transport Act 1998, s 62(2).

[62] *Rogers v Police* HC Nelson M21/94, 4/7/94.

[63] *Quinn v Police* HC Auckland AP167/93, 18/8/93.

However, it should be noted that the sentencing term is limited by the effect of sections 7-9 of the Sentencing Act 2002. Also, the general jurisdictional maximum penalty of 3 years imprisonment by the District Court, creates a jurisdictional barrier for the District court to have recourse to the ten years maximum imprisonment penalty under s 61 LTA. The appellate courts have emphasised the difference between the jurisdictional maximum and statutory maximum. This was addressed in *Ngaamo v MOT*, where the driver was sentenced to 3 years imprisonment, it being the maximum sentence the District Court judge could impose, though this maximum jurisdictional power is 2 years less than the maximum sentence that may be imposed under the statutory regime regulating the offence.[64] On appeal to the High Court, the sentence was reduced to 2 years to ensure that the sentence reflected the jurisdictional maximum instead of statutory maximum. Tomkins J in *Ngaamo* said, "... in such circumstances, the maximum should be regarded as that which is within the jurisdiction, not the maximum in the Statute".[65] However, a line of authorities subsequently departed from the decision in *Ngaamo*. In *Slattery v MOT*, the preferred view was that the District Court judge is entitled to have recourse to the statutory maximum sentence to impose a sentence to the maximum jurisdictional level,[66] this also met the criteria under s 8(c)(d) SA 2002.

The above cases indicate that although the maximum penalty is 10 years of imprisonment, the sentencing judge in most of the drink driving cases discussed has imposed a sentence ranging from one to two years of imprisonment. This raises the question as to whether the sentencing judge is sending the right deterring message as to the need to keep drunk drivers off the road, the more so that drink driving is considered a serious offence in New Zealand legislation. However, there are cases where the judge has expressly stated their contempt as to the offence of drink driving such as in the case of *Ten Bohmer v Police*.[67] In this case, the appellant

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[64] *Ngaamo v MOT* [1987] 1 NZLR 170.

[65] At 14.

[66] *Slattery v MOT* (1990)6 CRNZ 419.

[67] *Ten-Bhomer v Police* 20/4/00, HC Wellington AP63/00.

driver killed a motorcyclist when he suddenly turned in his way. Ellis J, in dismissing an appeal to suspend the sentence, said:[68]

> I am of the view, as was the sentencing Judge, that the public alarm and concern at the effects of driving while intoxicated is so great that a deterrent sentence is required. The death may not have been a direct result of the consumption of alcohol. However, the test result of 802 is twice the allowable limit, and so the level of intoxication is a very significant factor in assessing blameworthiness and penalty.

4.5.2.2 Consideration of cyclist victims in drink driving sentencing

It has been noted that the above analysis of the drink-driving cases revealed a fluctuating trend in the term of custodial penalty, but it is important to note that the convicted drivers in the cases discussed above have all had custodial sentences imposed. The next question to address is whether the same pattern has been adopted when it comes to drink driving sentencing where a cyclist was involved.

As regards the cases of drunk drivers convicted for the death of cycling victims, it is worth starting the analysis by addressing the highly publicised case: the trial of Philip Hamilton before the Christchurch District Court.[69] Philip Hamilton was driving his car in a drunken state with 661 microgram of alcohol per litre of breadth when he hit a cyclist, Jens Richardson, who died on the spot. Instead of attaching weight to the seriousness of drink-driving and failing to stop for an injury accident, Moran J seems to have given more importance to the high element of remorse exhibited by the driver followed by the act of the cyclist's widow in kissing the defendant, to finally hold the view that "public outrage at the offending and the need for deterrence could be achieved without jailing Hamilton".[70] The driver was sentenced to 12 months' home detention in November 2009. The subjective approach which the judge seems to have adopted is a complete departure from the general sentencing pattern studied so far. The conduct of victim's family may have had a deep impact on the sentencing outcome of the judge. The marking of a conviction with a custodial sentence should not reflect a potential fulfillment of the wishes of the victim's family.

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[68] At [15], [16].

[69] Martin Van Beynen, "Southbridge man sentenced for hit and run" *The Press* (New Zealand, 8/02/2010) <www.stuff.co.nz>.

[70] Van Beynen, above n 69.

Strong criticisms were also leveled at the decision reached in the case of *R v Downer.*[71] Similar aggravating factors to those in the Hamilton decision were present in this case. A number of aggravating factors were highlighted by Judge Atkins QC in his judgment, including:

i. breath alcohol level, it being 716 mcg. That result was obtained at 6.00 pm, a little over one hour after the accident.[72]

ii. damage and harm resulting from the offending

iii. the very nature of the driving by weaving across the road into the path of oncoming traffic

iv. the previous convictions for drink driving.

In terms of the mitigating factors, his Honour not only gave proper attention to the early guilty plea and remorse, but also considered the age of the offender, who was 71 years. The offender was sentenced to 2 years and 2 months imprisonment and 8 years disqualification.

Critics state that the sentencing in *Hamilton*[73] and *Downer*[74] were too lenient. Although Downer was sentenced to undergo a term of imprisonment, Hamilton was given home detention sentence. It makes one ask whether the judicial discretion is being stretched too far. The absence of more strictly defined parameters to assist in determining penalties seems to bring inconsistency, if not injustice.

Equally noteworthy is the case of *R v Schweiger.*[75] Here, the driver had been drinking for hours followed by an attempt to drive home. When trying to avoid a collision, the offender crossed the centre line to collide with the victim's vehicle leading to the victim's death. The difference was that in *Schweiger*[76], the offender was charged with manslaughter and even the Court of Appeal deemed it appropriate

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[71] *R v Downer* CRI-2009-031-1954, 3/2/2010.

[72] *Downer*, above n 65, at [22].

[73] Van Beynen, above n 69.

[74] *Downer*, above n71.

[75] *R v Schweiger,* CA228/93, 3/8/93.

[76] *Schweiger*, above n 75.

not to interfere with the sentence of six years imprisonment which remained unchallenged.

Similarly in *R v Pentecost*, the offender was sentenced to serve 4 years' imprisonment for dangerous driving causing death.[77] The list of aggravating factors leading to the sentence included:

- the excessive speed of 160 km/h in a 50 kph zone
- failure to negotiate an S-bend
- the crash into a lamp-post at an approximate speed of 124 kph
- the death of the rear seat passenger, who was thrown from the vehicle
- serious injuries sustained by two other passengers
- the alcohol level being around 80 mg per 100 ml of blood at time of accident as per expert opinion
- only brief assistance to the victim before fleeing.

However the court applied the reasoning in *R v Fallowfield* to concentrate on the actual driving but also considered mitigating factors such as an early guilty plea, youth, and good character to impose a sentence of four years' imprisonment for manslaughter together with two years' imprisonment to be served concurrently for dangerous driving causing injury.[78]

The sentencing in *Pentecost*[79] and *Schweiger*[80] illustrate that there is undoubtedly a disparity in sentencing when compared to the drink driving cases of *Hamilton*[81] or *Downer*[82]. The requirement to impose home detention or a lower prison term in *Hamilton* or *Downer,* where both cases involved a cyclist victim, does not seem to fit within the equation which was followed in earlier cases.

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[77] *R v Pentecost*, HC Christchurch T12/98, 2/7/98.

[78] *R v Fallowfield* [1996] 3 NZLR 657.

[79] *Pentecost*, above n 77.

[80] *Schweiger* above n 75.

[81] Van Beynen, above n 69.

[82] *Downer,* above n 71.

4.5.3 Dangerous and reckless driving causing death and injury

4.5.3.1 Legislative provisions

The general duty imposed on the motorist not to drive in a dangerous manner is provided for under s 7 of the Act which states that the driver may not operate their motor vehicle in a dangerous or reckless manner and/or not to drive their vehicle at a speed which causes danger to other road users. The elements required for this charge to be made are reproduced in ss 35, 36 and 36AA of the LTA 1998. Those sections provide primarily for the different penalties depending on the consequences of the accident. If death results from the collision then a charge under s 36AA is triggered, which obviously provides for higher penalties.

As regards the elements of the offence, s 36(1), by way of example, states that a person commits an offence if the person:[83]

> (a) drives or causes to be driven a motor vehicle recklessly and by that act or omission causes an injury to another person; or
>
> (b) drives or causes a motor vehicle to be driven at a speed or in a manner which, having regard to all the circumstances, is or might be dangerous to the public or to a person and by that act or omission causes an injury to another person.

4.5.3.2 General sentencing powers under the Land Transport Act 1998

The sentencing powers are regulated by Parts 5 to 7 of the Act, which confer a wide range of sentencing options to the adjudicators, including disqualification, demerit points, license suspension and even vehicle impoundment. Cyclists have, on numerous occasions, been victims of fatal road accidents in relation to drink driving. With the aim of reducing drink related road accidents, recent legislative developments have been introduced, such as the imposition of interlock devices[84] and amending the alcohol limit for drivers by the Land Transport Amendment Act (No 2) 2014. The provisions of the Act came into force on 1st December 2014 and are aimed at lowering the drink driving limit. Following the amendment in 2014,

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[83] Land Transport Act 1998, s 36(1).

[84] Land Transport Act 1998, s 65A inserted by section 30 of the Land Transport (Road Safety and other Matters) Amendment Act 2011.

alcohol limit for drivers over 20 years of age has been lowered to 250 mcg of alcohol per litre of breadth, whilst before the amendment, the alcohol limit was 400 mcg.

It is appropriate at this stage to cite Hon Phil Goff on drink driving:[85]

> …some of the figures for re offending are absolutely appalling. One in five drunk drivers who survived fatal crashes in 1986 were caught drink-driving again within 4 years... If killing somebody is not enough to stop people from drinking and driving, for God's sake, what will it take to stop them from indulging in that form of behaviour?

A hierarchy of penalties is provided for in the case of dangerous driving under ss 35, 36 and 36AA of the LTA. Upon a finding of dangerous or reckless driving but where no injury is sustained by nor any death caused to the victim, the sentencing judge is faced with similar maximum penalties similar to those in the case of careless driving with injury or death under s 38 of the LTA. The penalties are a maximum term of imprisonment of three months or a maximum fine of $4,500 and a minimum disqualification period of six months.[86] In the event of injury sustained by the victim as a result of the collision, the dangerous driver may, in addition to a disqualification period of one year minimum, he may be imprisoned for a maximum term of five years or imposed a fine not exceeding $20,000.[87] If death occurs following the collision, the penalties the convicted driver will face will be harsher, that is, a term of imprisonment not exceeding ten years or a fine not more than $20,000, together with a disqualification period of more than one year.[88]

4.5.3.3 Case law analysis of dangerous driving

English case law has been helpful in guiding New Zealand courts on sentencing for dangerous and reckless driving. A good example is *R v Guilfoyle*, which sets the hierarchy as follows:[89]

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[85] (10 Nov-24 Nov 1998) 573 NZPD at 13531.

[86] Land Transport Act 1998, s 35 (2).

[87] Land Transport Act 1998, s 36(2).

[88] Land Transport Act 1998, s 36AA(2).

[89] *R v Guilfoyle* (1973) 57 Cr App R 549, [1973] 2 All ER 844 (CA).

> Where a driver who has a good driving record is convicted following a road accident, he should be fined and disqualified for a minimum statutory period, unless he can show "special reasons" for disqualification not to be imposed;
>
> If drivers have acted in disregard for the safety of other road users or their passengers, or recklessly, a custodial sentence with a long period of disqualification is the appropriate sanction.
>
> If a bad driving record is revealed, the period of disqualification should be one that is aimed at potentially relieving the public of a danger over a long time.

In *R v Ellison*[90], the New Zealand Court of Appeal relied on three landmark cases that helped set out basic principles on sentencing for reckless or dangerous driving causing death, *R v Skerrett*[91]; *R v Yatri*[92] and *R v Fallowfield*[93]. The Court of Appeal in *Ellison* commented as follows:[94]

> *Skerrett* identified aggravating and mitigating factors; *Yatri* noted the range of circumstances in offending of this nature precluded fixed tariffs or starting points; and *Fallowfield* emphasised the relevance of the consequences of the driving.

Ms Ellison, pleading guilty to two charges of reckless driving causing death and one of reckless driving causing injury, she was sentenced to two years six months for the first two charges and on the injury charge, the judge sentenced her concurrently to 12 months imprisonment and disqualified her from driving for five years. The Court of Appeal restored the previous sentence underlining the aggravating circumstances in the case as follows: driving without a licence, having previously been warned not to do so; consumption of cannabis shortly before driving; driving with younger passengers; driving at a clearly excessive speed; ignoring the advisory sign; and causing the death of two passengers and serious injury to another. The Court of Appeal, in dismissing the appeal, observed that more recent cases revealed a starting point range for offences under dangerous driving causing death and injury between two and five years.

A line of cases are addressed to assess whether the courts have adopted such a pattern when sentencing for the offence of dangerous driving causing death. In

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[90] *R v Ellison* [2007] NZCA 549.

[91] *R v Skerrett*, above n 17.

[92] *R v Yatri* CA 72/92, 13 July 1992.

[93] *Fallowfield*, above n 78.

[94] *Ellison,* above n 90 at [14].

Police v King, on a Crown appeal from a sentence of nine months' imprisonment, Chilsholm J, before reaching his decision emphasised:[95]

> …every time there is a death or serious injury as a result of bad driving there is devastation for a family. For that reason the Courts have consistently seen the need for sentences to carry an element of deterrence.

The aggravating factors in this case involved grossly excessive speed and alcohol balanced strong mitigating factors like a guilty plea, absence of previous convictions, good character, remorse, and loss of a close friend. But the court, emphasising the need for a deterrent message to be passed to drink-drivers imposed a sentence of 15 months.

In *Khan v Police,* Rodney Hansen J changed a sentence of two years' imprisonment to 12 months' imprisonment. His Honour recognised the hard task of establishing a starting point for judges when he says:[96]

> The Court of Appeal has never attempted to establish a tariff or define a starting point in cases of this nature. The correct approach is to take the maximum penalty of five years imprisonment and to "endeavour to arrive at a sentence which will mark the concern of society for the loss of innocent life but at the same time allow for the degree of fault by the offending driver": *R v Yatri* (CA 72/92, 13 July 1992).

In *R v Fenton*, which involved high speed and alcohol, the young offender with no previous conviction, received a sentence of 18 months imprisonment reduced from a starting point of two and a half years. [97]

Venning J in *Andersen v Police,* commented:[98]

> From my review of the relevant authorities, I detect a general hardening of the Court's attitude to such offending over the last two to three years. The number of authorities referred to disclose that reckless and or dangerous driving leading to death remains a major social problem, particularly amongst young offenders.

Quite surprisingly the same judge might reach totally different sentences, even with minor changes in the facts of cases brought before them. In *R v Seyb*, French J imposed 12-months' home detention for a charge of dangerous driving causing

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[95] *Police v King* HC CHCH CRI 2007-409-000206 6 December 2007 at [17].

[96] *Khan v NZ Police* HC AK A89/01 24 July 2001 at [14].

[97] *R v Fenton* High Court, Wellington Registry, T4779-01, 11 April 2003.

[98] *Andersen v Police* HC Auckland CRI-2008-404-80, 10 April 2008 at [19].

death. Her Honour observed that she would not normally be minded to impose such a sentence but did so because of "the particular circumstances" of the case.[99] And one year later, in *Barnes v Police*[100] French J was faced with her previous decision reached in *Seyb,*[101] but her Honour noted that this was not a "tick-box exercise"[102] and also the hardening of judicial attitudes in response to the "continuing road toll"[103]. French J dismissed the appeal and found that the two years' imprisonment was a correct one.

The case where a near maximum sentence was imposed is *R v Delany*.[104] In this case, the accused faced three charges of reckless driving causing death and one charge of reckless driving causing injury, and was sentenced to four years' imprisonment. The court summarised the high speed driving, the act of the driver in consuming beer and shots as the 'driving of a lunatic';[105] the judge stated that the grief and anger of the victim's family is a factor not to be overlooked and he qualified them as "genuine and heartfelt expressions".[106] The judge quoted what was said in *Fallowfield,* "To the extent that harsher penalties deter potential offenders it represents support from the courts for those who strive to reduce injuries sustained on the roads"[107] and the Court of Appeal in *R v Takiwa,*[108] "..Deterrence is of fundamental importance in this area especially when there is such gross irresponsibility. … ",[109] the judge also bore in mind what was stated by the Court of Appeal in *R v Grant*:[110]

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[99] *R v Seyb* HC Timaru CRI-2007-003-416, 11/9/08 at [30].

[100] *Barnes v Police* HC Timaru CRI-2009-476-18, 16/10/09.

[101] *Seyb,* above n 99.

[102] *Barnes*, above n 100 at [23].

[103] *Barnes*, above n 100, at [23].

[104] *R v Delany* HC Christchurch T95/02, 16/4/03.

[105] At [14].

[106] *Delany,* above n 104 at [15].

[107] *Delany*, above n 104 at [21].

[108] *R v Takiwa* CA77/99, 11/5/99.

[109] *Delany*, above n 104, at [22].

[110] *Delany*, above n 104, at [25].

> It is always a matter of great concern when a young man is sentenced to a lengthy first term of imprisonment. However, as the Judge noted, it is an unfortunate fact that these cases frequently involve young men of about this age who cause death through criminally irresponsible acts of driving.

The sentencing judge, relying on *R v T* (a sexual offending case) noted:[111]

> …that it is all too easy, because of the frequency of such offending to treat it as, in a sense, not unusual. That is the same with driving. Unless we are personally involved it is easy to become blasé and accept it as a normal occurrence that high numbers of people, especially young people, will be injured, maimed or killed on the roads.

From the decision reached in *Delany,* it seems that the courts have put the threshold too high to impose a near maximum sentence, as in this case, the offender faced three charges of reckless driving causing death and one charge of reckless driving causing injury. An analysis of earlier cases reveals the imposition of a minimum of two years or even less in quite a number of cases. This seems to suggest that the courts have been swayed by the consequences, bringing a higher term when the tragic accident had more victims who died.

Generally, it can be observed that in most cases where dangerous driving was charged, a custodial sentence was imposed. However, there are cases, where a home detention was imposed, for which there does not seem to be a rational basis and to make matters worse, the same judge who imposed home detention departed from her earlier decision in another case brought before her. In view of deterring dangerous driving and making our roads safer for the cyclist and other vulnerable road users, it is imperative that variation in sentencing should be avoided as far as practicable.

4.5.4 Careless driving causing death and injury

4.5.4.1 Legislative provisions

The starting point is s 8 of the LTA. The list of duties owed by the motorist to other road users include the general duty under s 8 not to drive a vehicle, or cause a

[111] *Delany,* above n 104, at [27].

vehicle to be driven, carelessly or without reasonable consideration for other persons.

There is no statutory definition of 'careless driving' but it has been defined by case law. Suffice at this stage to refer to Professor Hank Weiss's attempted definition that careless errors are where the motorist failed to "see" due to their own personal limitations, where the motorist had misjudged the traffic and could not measure the movements of the vulnerable user and the motorist was distracted by a number of legally permissible activities like eating, smoking, attending to pets or children in the car, manipulating an audio player or other car devices.[112]

The law also condemns aggravated careless driving. Exceeding the speed limit or reckless overtaking, may constitute aggravating factors, triggering a charge under s 39(1) of the LTA.

Other forms of aggravated careless driving are provided for under s 62 of the LTA 1998, which is read as follows:[113]

> A person commits an offence if the person causes bodily injury to or the death of a person by carelessly driving a motor vehicle:
>
> (a) while under the influence of drink or a drug, or both; or
>
> (b) if the blood of the person driving, as ascertained from an analysis of a blood specimen subsequently taken under s 73, contains evidence of the use of a controlled drug specified in Schedule 1 of the Misuse of Drugs Act 1975.

The law provides for a more lenient sanction for careless driving as opposed to dangerous/reckless driving. On conviction for careless driving in breach of s 8, the penalties that the defendant will face, in the absence of any injury or death, are a maximum fine of $3,000 and any term of disqualification that the court considers appropriate in the circumstances.[114] If the victim suffers injury or dies after the collision, the maximum penalty to be imposed on the convicted driver is three

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[112] Harold Hank Weiss and Aimee L. Ward, "Is it time to advocate for a vulnerable road user protection law in New Zealand?" (2013) The New Zealand Medical Journal at 3.

[113] Land Transport Act 1998, s 62.

[114] Land Transport Act 1998, s 37.

months' imprisonment or a maximum fine of $4,500 and the court has to disqualify them from driving for a minimum period of six months.[115]

If a convicted driver has been charged with aggravated careless use of vehicle, he may face imprisonment with a maximum term of three years or a maximum fine of $10,000, and be disqualified for a period of more than one year.[116] Similar penalties are imposed on the careless driver, whose driving was impaired by alcohol, or drugs or both, or a controlled drug as provided for under Schedule 1 of the Misuse of Drugs Act 1975.[117]

The penalties for a breach of s 8 are covered under ss 37 and 38. Section 37 is triggered where no injury or death has been caused and inevitably imposes less harsh sanctions as opposed to s 38 as stated above. An analysis of sentencing under s 38 will follow.

Sentencing in cases of careless driving causing injury and death is no easy task for the judge. This is because, contrary to dangerous or reckless driving, here the offender's culpability is likely to lie at the lower end of the scale. The degree of culpability of the offender is reflected in a number of judgments as being a key factor considered by the courts. This is in line with the statutory sentencing guidance, to the effect that courts must consider 'the gravity of the offending'.[118] It is appropriate to mention that since the enactment of the Sentencing Amendment Act 2007, judges are now empowered to impose community based sentences and home detention.

4.5.4.2 Case law analysis

In measuring the culpability of the offender, courts have sought to classify cases for carelessness in two main categories: "momentary inattention or misjudgment" and

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[115] Land Transport Act 1998, s 38.

[116] Land Transport Act 1998, s 39.

[117] Land Transport Act 1998, 62(2).

[118] Sentencing Act 2002, s 8(2).

"selfish disregard for the safety of other road users"- *Paintin v MOT.*[119] This approach is derived from the case of *Guilfoyle*,[120] the case discussed under dangerous driving. The principle was applied in *Rutherford v Police*, where Penlington J classified the case as being midway between the two categories of the *Guilfoyle* case. His Honour in *Rutherford* stated:[121]

> This was a case which involved more than momentary inattention or misjudgment. On the other hand, it did not evidence a selfish disregard for the safety of other road users or any degree of recklessness on the part of the appellant.

The appellate judge, in emphasising that justice requires that the consequences of a person's actions should not be allowed to outweigh the culpability of the driver, reduced the 18 months imprisonment to nine months. Another case in which the court demonstrated that the primary focus should be on the culpability of the driving and not the victim consequences is *Davis v R.*[122] The cases discussed below seem to agree with the principle stated so far.

In *Edgeworth v Police*, the consequences were said to be 'dreadful', where an 18 year old boy was killed.[123] But, the degree of carelessness was not judged very high. On appeal, a sentence of periodic detention was quashed and replaced by a sentence of 160 hours' community service. In *Guthrie v Police*, the offender, on appeal, was sentenced to 250 hours of community work and disqualified for two years on two charges of careless driving causing death and one charge of careless driving causing injury.[124] Another case where death resulted is *Roberts v Police*, the appellant was sentenced to six months' periodic detention and a total of $8,580 in financial penalties and faced 5 years' disqualification. [125]

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[119] *Paintin v MOT* Tauranga, AP 25/90 at 5.

[120] *R v Guilfoyle*, above n 89.

[121] *Rutherford v Police* HC Hamilton AP7/94, 9 March 1994 at [24].

[122] *Davis v R* HC Auckland AP 177/01, 4 June 2002.

[123] *Edgeworth v Police* HC Christchurch AP 320/93, 22/10/93 at [5].

[124] *Guthrie v Police* HC Rototurua CRI-2007-463-120, 6 November 2007.

[125] *Roberts v Police* HC Rotorua AP53/99, 26 August 1999.

However, another school of thought seems to be based on a different line of reasoning, whereby judges have emphasised on the consequences of the offence. In *Lee v Police*, the court held that the offender was driving while suspended, and the consequences of the offending warranted imprisonment and imposed nine weeks imprisonment plus disqualification on charges of careless driving causing death, careless driving causing injury and driving while suspended. [126]

In *Quinn v Police*, the appellate court opines that, "the ordinary consequence of death or serious injury resulting from an alcohol-impaired driver's handling of the vehicle will be imprisonment"[127] and upheld the sentence of one year and three months imprisonment and three years' disqualification. However in *Taylor v MOT*, the Court of Appeal concluded that a prison sentence was not appropriate, despite the fact that the carelessness of the offender was judged at a higher level and death resulted.[128]

To underline further the inconsistency in sentencing for careless driving causing death or injury, in *Whitton v MOT*, a four months' periodic detention sentence was quashed in spite of the death of the victim as a result of the careless driving.[129] The appellate judge found that a fine and 12 months disqualification were adequate sanction in that case.

In *Shaw v Police*, Lang J, dismissing an appeal recognised the wide disparity in sentencing for careless driving and said: [130]

> at one end, the court may convict and discharge an offender whilst at the other end, an offender can expect to receive either a short sentence of imprisonment or a lengthy sentence of community work.

On the one hand, an accident may occur as a result of the gross carelessness on the part of a driver, hence involving a high culpability of the driver but the consequences may be very minor. There may also be cases where a very small

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[126] *Lee v Police* HC Hamilton CRI-2006-419-62, 11 May 2006.

[127] *Quinn v Police* , above n 63 at [11].

[128] *Taylor v MOT* HC Timaru AP92/89, 14 December 1989.

[129] *Whitton v MOT* HC Wanganui M28/91, 22 May 1991.

[130] *Shaw v Police* HC Rotorua CRI-2007-463-127, 7 November 2007, at [33].

degree of carelessness was involved and yet the accident bore the most horrific consequences. But it seems, whilst some cases put more emphasis on the culpability of the driver, others on the consequences that resulted from the accident. Sentencing guidelines are warranted in these cases to guide the sentencing judge as to the appropriate factor that should be given weight and to determine accordingly the sentence to be imposed. If left entirely to the individual judge to determine what factor is to be given undue weight in the light of the circumstances, this will lead to increased variation in sentencing. This will, in turn, leave the public expressing more indignation and questioning the rational basis behind the reaching of a court decision in serious traffic offences.

4.6 An analysis of the trend as regards the imposition of driving disqualification

In cases involving offences of dangerous driving and careless driving, the court must impose a minimum disqualification of one year and six months in each respective offence.[131] The power to disqualify under a charge of manslaughter is provided for under ss 124 and 125 of the Sentencing Act and the court has discretion to decide on an appropriate term.

The immediate question that is raised is whether the disqualification period imposed by judges is adequate for keeping bad drivers off the road. Before analysing the pattern of judges in imposing a disqualification period, I shall first address the basic principles that guide judges when determining an appropriate term.

R v Cooksley is a landmark English decision which has been referred to for useful guidance to the effect that factors that are relevant in considering the term of imprisonment of the offender are the same that should be used to fix the length of disqualification.[132] The English Court of Appeal explained:[133]

> The main purpose of disqualification is as the panel [the Sentencing Advisory Panel] advised, 'forward looking and preventative rather than backward looking and

[131] Land Transport Act 1998, ss 36 and 38.

[132] *R v Cooksley* [2003] 3 All ER 40.

[133] At [40].

> punitive'. It is designed to protect road users in the future from an offender who had shown himself to be a real risk on the roads.

In view of the above, therefore, disqualification is an effective tool in helping to keep the careless and/or dangerous driver off the road. Let us now address the approach of our courts in imposing this sanction.

The Court of Appeal in *Cooksley* also provided some useful guidance as to how to determine a range for appropriate length of disqualification as follows:[134]

> Shorter bans of two years or so will be appropriate where the offender had a good driving record before the offence and where the offence resulted from a momentary error of judgment. Longer bans, between three and five years, will be appropriate where, having regard to the circumstances of the offence and the offender's record, it is clear that the offender tends to disregard the rules of the road, or to drive carelessly or inappropriately.

A cautionary step should be however adopted when relying on this guidance and importing them into the New Zealand system as we have a minimum of one year disqualification for dangerous driving here as opposed to two years in the UK.

While a lengthy term of disqualification was emphasised to be crucial in some cases, in others, the court was minded to disqualify the offending driver for a long time. The rationale behind imposing disqualification is the protection of the public from an offender who has persistently acted in utter disregard of the life and limb of other road users. In such cases, a lengthy disqualification period is adequately justified – four years in *Hirsi v Police*[135] was held to be appropriate and three and a half years in *Kauhou v Police*[136]. In *Laing v Police*, Gendall J upheld the five years disqualification formerly imposed. Though the judge, on appeal, acknowledged that it was a substantial term, he said it was required for the protection of the public.[137]

The words of Chisholm J in *Police v King*, are worthy of mention here: "Those who engage in such [appallingly bad] driving must expect to be kept off the road for a lengthy period. … I quash the 12 months disqualification and substitute an 18

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[134] *Cooksley*, above n 132 at [42].

[135] *Hirsi v Police* HC Wellington AP 179/00, 27 September 2000.

[136] *Kauhou v Police* HC Hamilton A 93/02, 10 December 2002.

[137] *Laing v Police* HC Wellington AP 19/00, 28 March 2000 at [12].

months disqualification."[138] And in *R v Maumau,* even though Panckhurst J was ready to reduce a sentence of two and a half years to two years imprisonment, he was against disturbing the five year disqualification imposed.[139] This apparent hardening approach of judges is echoed in the case of *Rickerby v Police*, where Anderson J underlined:[140]

> It is important to bear in mind that the presumptive application of a period of disqualification will occur in circumstances of the most minor injury up to death. The legislature in referring to the circumstances of the offence plainly has in mind that the overriding consideration in these cases is the degree of carelessness, not the chance of the seriousness or otherwise of injury. This is not to say that injury will always be irrelevant.

However, at the other end of the spectrum, it seems a different line of reasoning is being pursued. Courts have underlined that a long period of disqualification can be counter-productive and can eventually defeat the purpose for which it was primarily imposed, that is, protection of the public. The very long periods that the driver is disqualified can be so daunting that it increases the likelihood of reoffending. The following are examples of cases where such a line of reasoning was adopted: *Ford v Police HC*, where four years' disqualification was brought down to three years;[141] *Hitchens v Police*, ten years' disqualification was reduced to seven years;[142] in *Barron v Police*, Andrews J observed that the courts need to strive for consistency and found that a ten-year period was outside the usual range and brought it down to three years;[143] *R v Hodgson & Yousif*, four years of disqualification were reduced by a year where the court found no aggravating factors.[144] The Court of Appeal emphasised that "consistency of approach on the basis of the established culpability is an essential part of the administration of justice."[145]

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[138] *Police v King*, above n 95, at [27].

[139] *R v Maumau* HC Christchurch Registry, A108/02, 23 October 2002.

[140] Rickerby v Police HC Auckland AP263/95, 8 December 1995 at [7].

[141] *Ford v Police* HC, Hamilton AP 13/97, 25 March 1997.

[142] *Hitchens v Police* CA 380/03, 25 March 2004.

[143] *Barron v Police* HC Rotorua CRI-2010-470-10, 22 April 2010.

[144] R v Hodgson & Yousif [2008] NZCA 132.

[145] At [24].

When it comes to imposing disqualification in cases of careless driving, guidance can be sought from the case of *George v Police*, where Nicholson J concluded that in determining the period of disqualification:[146]

> … the six months disqualification should be regarded as a minimum and nothing more and that the actual period of disqualification must depend on the variety of different circumstances that arise in different cases. I prefer it to the view [that] the minimum period of disqualification should not be exceeded unless there were aggravating circumstances. It is primarily a matter in each case of balancing culpability and circumstances.

The judge in *George* also referred to *Mawhinney v Police*,[147] which is the authority for supporting the proposition that only the presence of aggravating circumstances in cases would justify the court imposing more than six months disqualification.

The following cases are indicative of successful appeals sought over disqualification: in *Tupu v Police*, nine months' disqualification was reduced to six months,[148] in *Roberts v Police*, Salmon J allowed an appeal as to the five-year term of disqualification imposed and substituted it with a sentence of two years' disqualification.[149] Another case where a period of disqualification imposed was brought down to two years is *Lee v Police*.[150]

It is also noteworthy that the court has deemed it improper to impose disqualification in cases of first time offending. In *Owen v Police*, the disqualification of three months for a 19 year old with no previous convictions, was quashed on appeal.[151] The reasoning reached in *Maguire v Police* was applied, where Holland J stated:[152]

> It is extraordinary for a first offender on a driving charge to receive a disqualification from driving in respect of a charge of careless use of a motor vehicle where the only damage that has been caused was to his own property.

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[146] *George v Police* HC New Plymouth AP14/00, 29 June 2000 at [20].

[147] *Mawhinney v Police* HC Auckland AP99/94, 13 June 1994.

[148] *Tupu v Police* HC Wellington AP101/03, 8 July 2003.

[149] *Roberts*, above n 125.

[150] *Lee v Police*, above n 126.

[151] *Owen v Police* HC Christchurch AP21/95, 12/4/95.

[152] *Maguire v Police* 22/3/90, HC Timaru AP11/90 at [3].

Another principle emerged from the case of *Mikaere v Police*, decided under the former Transport Act 1962, as to the need to distinguish between a case where death has occurred and one where the victim only suffered injury.[153] An appeal was brought before the High Court appealing against the disqualification period of 12 months imposed. In this case, Hammond J concluded:[154]

> this is a situation in which the appellant must demonstrate that the sentence was manifestly excessive. In my view, in this particular case, that cannot be said to be so. In the first place, I have to have regard to the totality of the sentence imposed. Secondly, I think it is true to say that as a general principle the criminal law, and this is a serious charge, focuses on the harm caused. There is a world of difference in my view between causing injury and causing death.

As stated above, disqualification is an appropriate sanction that can help send the strong signal of the need to make the roads safe and free from the careless or dangerous driver. It is important that the court adopt a more consistent approach in imposing disqualification. A more comprehensive set of guidelines is warranted to help guide the sentencing judge.

Many of the serious traffic charges decided by the courts, as indicated by a discussion of the case law so far, show that there is still a high degree of variation in the sentencing practice of the courts. Let us now see how this problem has been addressed by our legal authorities and whether it has been resolved.

4.7 Shortcomings in the system explaining sentencing inconsistency

Maintaining consistency in sentencing is not only a "desirable trait of all legal institutions, but a fundamental principle of justice".[155] Because of its ability to ensure "transparency and predictability in sentencing practice",[156] it therefore enhances the "legitimacy of the criminal justice system and fosters public confidence in sentencing".[157]

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[153] *Mikaere v Police* 15/5/95, HC Hamilton AP 22/95.

[154] At 4.

[155] J Pina Sanchez and R Linacre "Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales" (2014) J Quant Criminol 731 at 732.

[156] At 732.

[157] Sanchez and Linacre, above n 155, at 732.

4.7.1 The Sentencing Act 2002 and attempt at resolving sentencing inconsistency

The system of sentencing in New Zealand is based on the common law model.[158] Parliament, through legislation, prescribes the maximum penalties for most of the offences and the categories of sentences, whether custody, fines or community service. When bearing this maximum penalty in mind, the judge uses their discretion to come up with a sentence in each individual case.[159]

Prior to the Sentencing Act 2002, the judge would be guided by appellate decisions and pre-sentence reports to decide on a sentence. In the past, the convicted New Zealander had no right of appeal against their sentence until 1939, when appeals against sentences in summary cases were allowed.[160] From the late 1970's, criticism about judges' sentencing levels started to be heard.[161] This culminated in the enactment of the Criminal Justice Act in 1985. The Act presented a wider range of sentencing options and general principles of sentencing, especially in relation to more serious violence offences.[162] This led to citizens initiated referendum in 1999, calling for "reform of the criminal justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences."[163] The reform as promised by the 1999 new Government, culminated in the Sentencing Act 2002.

The enactment of the Sentencing Act 2002 has embodied and codified in a single statutory document a detailed and thorough statement of the sentencing principle and purposes. Part 1 of the Act sets out the purposes and principles of sentencing.

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[158] Warren Young and Andrea King "Sentencing Practice and Guidance in New Zealand" (2010) 22 Federal Sentencing Reporter 254 at 254.

[159] At 254.

[160] Dickie v Cunningham [1939] NZLR 1004, cited in Justice Graham Pankhurst "A Sentencing Council: Enlightened or Folly" (2008) 14 The Canterbury Law Review 191 at 195, n 5.

[161] Young & King, above n 158, at 255.

[162] Justice Graham Pankhurst "A Sentencing Council: Enlightened or Folly" (2008) 14 The Canterbury Law Review 191 at 196.

[163] Young & King, above n158, at 255.

Section 7 of the Act lists eight purposes for sentencing, which include, holding the offender accountable for harm done to promote a sense of responsibility in that offender, providing for the affected victim's interests, providing reparation for harm done, denouncing the conduct in which offender was involved, deterring the offender and others, protecting the community from offender and assisting the offender's rehabilitation and reintegration.[164] The above purposes must be considered in line with the contents of s 7(2) of the Act which confirms that the way the purposes are listed does not mean that any one purpose is to be given any greater weight than the other.

As regards the consistency in sentencing to ensure equal treatment, s 8(e) of the Sentencing Act 2002 provides that the Court:

> must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances..

The feeling of the judge can be reflected in the following:[165]

> the text in s8(e) confirms the courts' approach to seeking both consistency in sentencing in the interests of equal treatment of like offending and offenders, and full evaluation of the circumstances to achieve justice in the individual case.

The Act also ensures that there is transparency in the use of judicial discretion and this is achieved by operation of s 31 of the Act. Under s 31(1)(a), Court must give reasons "for the imposition of a sentence or for any other means of dealing with the offender." Section 31(2) provides that the reasons for the sentence may be balanced with the level of particularity which is appropriate to the particular case.
Authorities have pointed out the need to remedy inconsistency as it is considered not to favour the attainment of justice. In the case of serious traffic offences, the need for consistency is required for two major reasons:

(i) to ensure a uniform approach in sentencing even when it comes to sentencing the convicted driver who has collided with a cyclist;

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[164] Sentencing Act 2002, s 7.

[165] At [38].

(ii) the need to send the signal, through a uniform and consistent approach, that there are factors that will bear undue weight by the courts so as to enhance further road safety and protect all the road users.

4.7.2 Criticism by the Law Commission and response by the Government

Some of the six problems as identified by the Law Commission could be summarised as follows:[166]

i. There continues to be inconsistency in sentencing among different courts in New Zealand, with some judges imposing more severe sentences than others.

ii. Appellate decisions which would be of guidance to the sentencing judge are themselves limited by many constraints. Appellate courts usually hear cases on the higher scale of seriousness but not the vast number of cases brought before the District Courts. So, many cases on the lower scale of seriousness have no guidance.

iii. Many of the sentencing patterns and guidance reflected in the appellate decisions are not accessible to the public or to the politicians. This lack of transparency therefore results in lack of public confidence in the system.

iv. Cost effectiveness of the sentencing options is not a factor considered by the judge. Therefore governments should respond to the resource constraints, in terms of limited prison space, required by the sentencing system.

In view of the above loopholes in the system, the Law Commission proposed the establishing of a Sentencing Council for the purposes of drafting sentencing and parole guidelines. The Law Commission argues that a Sentencing Council would help determine the right sentencing policy and promote transparency in sentencing policy, would promote consistency and would open up avenues for executive to have a say in sentencing policy.[167]

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[166] Young & King, above n 158, at 257.

[167] The Law Commission *The Law Commission Sentencing Guidelines and Parole Reform* (NZLC, R 94, August 2006) at 11.

The Parliament consequently enacted the Sentencing Council Act 2007, Sentencing Amendment Act 2007 and the Parole Amendment act 2007.

There are provisions in the 2007 Act which are aimed at enhancing public confidence in the justice system. The following sections explain how this is to be achieved. By sections 13, 14 and 16, the Council must make public the draft guidelines and consult interested parties before they are approved and presented to the Minister of Justice. Section 8 (d) provides that Council needs 'to inform and educate the public about sentencing and parole policies and decision making with a view to promoting public confidence in criminal justice system'. But regretfully, the National Government, when it came into power, chose not to proceed with the setting up of the Sentencing Council.

4.7.3 Brief comparison with sentencing in road traffic offences in England and lessons to be drawn

In cases of serious traffic offences, the need to promote consistency in sentencing has been stated above. It is worthwhile to consider at this stage how the sentencing guidelines adopted in England could be incorporated into our system and help us achieve more consistency in sentencing. Different jurisdictions have their own specific ways at promoting consistency in sentencing. In England, the guidelines seek to achieve consistency by requiring courts to follow a number of steps in their sentencing exercise.[168] The factors guiding the English judge to come to a figure, when sentencing the convicted driver, are addressed below.

The first step involves the judge determining the offence level. In assisting the judge to make this decision as to the level he would grade the offence, the guidelines provide them with a non- exhaustive list of factors that would indicate greater or lesser harm, higher or lower culpability. Level 1 encompasses the most serious offences relating to driving and would include a "prolonged, persistent and deliberate course of very bad driving and /or consumption of substantial amounts

[168] Julian V Roberts "Sentencing Guidelines in England and Wales: Recent Developments and emerging Issues" (2013) 76 Law & Contemporary Problems at 5.

of alcohol or drugs leading to gross impairment."[169] A level 2 driving offence is one which has created a substantial risk of danger and has one of the following factors:[170]

- Greatly excessive speed, racing or competitive driving against another driver or
- Gross avoidable distraction such as reading or composing text messages over a period of time or
- Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs, failing to take prescribed medication or as a result of a known medical condition.

For the offence to be categorised as a Level 3 offence, the driving should be one that created a significant risk of danger and includes one of the following factors:[171]

- Driving above the speed limit/ at a speed that is inappropriate for the prevailing conditions or
- Driving when knowingly deprived of adequate sleep or rest or knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded or
- A brief but obvious danger arising from a seriously dangerous manoeuvre or
- Driving whilst avoidably distracted or
- Failing to have proper regard to vulnerable road users.

At step 2, the sentencing judge has recourse to the starting point range to be able to come up with a sentencing range. The different starting points and sentencing range for CDDD in the UK are given in the table below.[172]

Nature of Offence	Starting point	Sentencing range
Level 1	8 years custody	7-14 years custody
Level 2	5 years custody	4-7 years custody
Level 3	3 years custody	2-5 years custody

Table 2: Guidelines by the Sentencing Guideline Council for the offence of causing death by dangerous driving (CDDD)

A list of non-exhaustive factors is also provided for the judge to consider whether to raise or decrease the starting point. Some of the aggravating factors include

[169] Sentencing Guidelines Council *Causing Death by Driving, Definitive Guidelines* (2008) at 10. <www.sentencingcouncil.org.uk>.

[170] At 10.

[171] Sentencing Guidelines Council, above n 169.

[172] Sentencing Guidelines Council, above n 169, at 11.

previous convictions for driving offences, the death of more than one person resulting from the offence, driving in disregard of warnings to driver.

The sentencing judge then goes through seven more steps towards the final disposition of the sentence. These include, the court considering whether to reduce the sentence of the offender if he has provided or offered to provide assistance to the prosecutor or investigator; court considers a reduction if a guilty plea is recorded; the judge has to give reasons for and explain the effect of the sentence he has come to.[173]

The available guidelines constitute a key tool in the hands of the sentencing judge. Therefore, in major driving related offences, there is a pre-set sentencing range within which the sentence would fall. The comprehensive set of guidelines not only helps the judge in their sentencing work, but equally promotes sentencing consistency. This therefore ensures a higher degree of confidence by the public in the judicial system. This more consistent approach in sentencing also helps in sending the right deterrent message to the public as to how severely the courts deals with driving offenders and therefore safety on the roads is further enhanced. It is therefore a worthwhile step to try to incorporate the sentencing guidelines prevalent in England into New Zealand's system.

Another aspect of the guidelines which can better serve sentencing practice, especially in cases where a cyclist is involved is the court taking into account the vulnerability of the victim. A Level 3 driving offence in England, includes the failure to have proper regard to other vulnerable road users as a factor which raises the culpability of the offender. This is an important consideration that would encourage drivers to take extra care when driving past vulnerable road users including cyclists. Such an inclusion in the law in New Zealand would definitely raise more awareness about the need to exercise greater care when driving along or past a cyclist.

In New Zealand, there have been moves towards the adoption of similar guidelines but as stated above, the setting up of the Sentencing Council has not occurred. Other

[173] Sentencing Council, above n 169 at 6.

changes that were brought to the New Zealand legal system include the enactment of the Sentencing Amendment Act 2007. Some of the reforms the Act brought to the criminal justice system included the establishment of a clearly defined hierarchy of sentences, bringing two new community based sentences (intensive supervision and community detention) and the reviewing of the sentence of imprisonment. Hence the sentencing options available to the sentence have broadened.[174]

The Government has approved the introduction of many non-custodial sentencing options, especially for lower risk offenders. The rationale behind the introduction of the two community based sentences in New Zealand was addressed in the Cabinet Policy Committee paper as follows:[175]

> Such sentences can hold offenders accountable for their offending, provide rehabilitative opportunities, enable offenders to make reparation to the community, and slow or halt an offender's progression up the sentencing hierarchy to imprisonment.

In the absence of any concrete guidelines such as in England, it is hard to conceive how the sentencing judge will adopt a consistent approach when determining whether to impose a custodial or a community based sentence for a particular offence. The trend in sentencing therefore raises the need for a comprehensive set of guidelines aimed at creating more consistency in sentencing and meeting the needs of justice. This will, in turn, determine a more uniform approach in sentencing in collision cases, whether or not a cyclist is involved, and enhancing road safety.

4.8 The role of the prosecution in serious traffic offences

There is an interplay of different factors that ultimately leads to a particular sentence being imposed and this includes police investigation, accuracy of the appropriate charging standard, evidence brought by the prosecution in the course of the hearing. Therefore, the charge the prosecution lays and the manner in which the initial

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[174] Stephen O'Driscoll, Professor Geoff Hall and Tracy Mellor, Seminar, Sentencing Update, Continuing Legal Education (NZLS, Wellington, September 2007) at 1.

[175] Cabinet Policy Committee "Paper 6: Community based sentences" (2006) at [6] <justice.org.nz>.

enquiry is done will all have a bearing on the sentence reached, and thus potentially contribution to the degree of variation in sentencing.

4.8.1 Critics in the press as regards the role of prosecution in collisions involving cyclists

In recent newspaper articles it has been observed that not only is the negligent or dangerous driver able to walk away with a lenient sentence but that the injuries that cyclists sustain in a vehicle collision do not always result, in the driver of the vehicle being prosecuted. The New Zealand Herald reports that in July 2013, the Police's decision that they were not proceeding with the prosecution of the truck driver who killed Jane Farrelly surprised her bereaved family.[176] Inspector Kevin Taylor, Bay of Plenty Road Policing Manager said:[177]

> I am aware there is significant commentary around sharing of the roads and cyclists and other motorists. In relation to decisions made on this crash, only the information taken from this police investigation was considered in assessing any driver culpability.

The Green Party transport spokesperson, Julie Anne Genter, following the police decision not to prosecute in the case of Jane Farrelly commented "Vulnerable road users like Jane Farrelly deserve better protection from the Police who are failing to prosecute drivers who pass them dangerously."[178] She also added "Police need to step up their enforcement role to make cycling safer for a growing number of people who want to ride bicycles."[179]

In 2009, there was a total of 10,106 Police-reported casualty crashes, and Leo Mortimer at the Ministry of Transport reported that evidence gathered reveals that

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[176] Andrew Koubaridis "Police call on cyclist's death stuns her family" *The New Zealand Herald* (18 July 2013) < www.nzherald.co.nz >.

[177] Andrew Koubaridis "Police call on cyclist's death stuns her family" *The New Zealand Herald* (18 July 2013) < www.nzherald.co.nz >.

[178] Julie Anne Genter MP "Greens challenge Police to protect people on bicycles" (Green Party Aotearoa New Zealand, 9 July 2014) <https://home.greens.org.nz> .

[179] Julie Anne Genter MP "Greens challenge Police to protect people on bicycles" (Green Party of Aoteraroa New Zealand, 9 July 2014) <https://home.greens.org.nz> .

the driver of at least one vehicle was 'at fault'.[180] Out of this total number of reported crashes, only 1004 drivers were convicted of careless driving causing death or injury; and only 291 were convicted of dangerous or reckless driving causing injury or death.[181] Critics of the police investigation and prosecution for serious road offences, as illustrated above, have pointed out that Police Prosecution do not always prosecute, even in some cases where the driver seems 'at fault'.

This part of the chapter will seek to address the question whether the prosecution system in New Zealand is one which can be said to be reflecting a transparent and accountable criminal justice system and the failings of the prosecution system, if any, how they impact on the decisions to charge in serious road traffic offences.

4.8.2 Brief overview of working of the prosecution system in their decision making process

The prosecution process plays a crucial role in the criminal justice system by enabling a case not only to reach Court but building a foundation for the proper sentence to be imposed. It is useful to start with an analysis of the structure of the prosecution for criminal charges in New Zealand. By contrast to other jurisdictions where the tasks of prosecution remain the responsibility of a separate prosecution body, the Police Prosecution Service (PPS) in New Zealand is entrusted with summary prosecutions, whereas more serious offences are prosecuted by the Crown Solicitor.[182] The Crown Solicitors are the " the 15 private sector lawyers who hold warrants to conduct indictable prosecutions in New Zealand and who also conduct some summary prosecutions."[183] Crown Solicitors, whose office was established in 1992, form an independent system supervised by the Solicitor General and the Attorney General.[184]

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[180] Leo Mortimer *Regulatory Impact Assessment, Completing the actions to address alcohol impaired driving* (Safety, Road & Rail Group Ministry of Transport, New Zealand, 24 June 2010) at [73] <www.transport.govt.nz> .

[181] At [73].

[182] John Spencer *Review of Public Prosecution Services* (New Zealand Government, September 2011) <www.crownlaw.govt.nz> at [62].

[183] At [37.4].

[184] Law Commission *Criminal Prosecution - A Discussion Paper* (NZLC PP 28, 1997) < www.nzlii.org.nz > at [204], [205].

The PPS was established in 1999 following severe criticism raised at independence of police prosecutors' decisions.[185] Today the PPS operates as a body separate from criminal investigation, enjoying discretion to prosecute. In 1997, after assessing the failings and strong points of the working of the prosecution system, the Law Commission reports that the discretion to prosecute should be retained.[186] It also observed that the discretion is not an unfettered one and should be exercised as per the Guidelines, as discussed below, to promote consistency and fairness in prosecution decisions.[187]

Even though New Zealand's criminal justice system is primarily based on that of England, it has not established a Director of Public Prosecutions nor a Crown Prosecution.[188] Therefore, unlike many commonwealth jurisdictions, there is no central body responsible for decision making in relation to prosecutions. Therefore, in all cases of traffic collisions, whether or not a cyclist is involved, it is the police that will make the initial decision whether to bring any charge to the driver.

The prosecution decision is not, however, an uncontrolled one. Section 185 of the Criminal Procedure Act 2011 (CPA) brings on a statutory footing the Solicitor-General's longstanding duty of "maintaining general oversight of the conduct of public prosecutions".[189] Other forms of supervision include that exercised by the Solicitor General of the conduct of the Crown Solicitor as per the Cabinet Directions for the Conduct of Crown Legal Business 2012 and the Crown Prosecution Regulations 2013.[190]

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[185] Spencer, above n 182 at [305].

[186] Law Commission, above n 184 at [322].

[187] Law Commission, above n 184 at [322].

[188] Law Commission, above n 184 at [46].

[189] Criminal Procedure Act 2011, s 185.

[190] Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) < www.crownlaw.govt.nz > at [3.2], [3.3].

The current Prosecution Guidelines 2013 make express reference as to the requirement that the charges to be filed be reviewed by a senior prosecutor.[191] Let us now see, in more detail, provisions of the Prosecution Guidelines.

4.8.3 Prosecution Guidelines 2013

The decisions to prosecute or not and the decision to lay the appropriate charge are all governed by the Prosecution Guidelines 2013.

The prosecutor has to prosecute for an offence if the two tiered test is satisfied:

1. the evidential test, that is "the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction"[192] and
2. the public interest test, that is, "prosecution is required in the public interest."[193]

The following criteria are to be met for the purposes of satisfying the first limb of the test, the evidential test:[194]

(a) prosecution needs to be able to identify, on the basis of evidence it has, the person who has committed the offence;
(b) prosecution must have evidence "which is capable of belief", hence credible evidence;
(c) evidence that prosecution can adduce means evidence that is or will "reliably" be available and they should admissible in court, in line with the rules on admissibility, and this includes the obtaining of such evidence not tainted with impropriety;
(d) the prosecutor should form their judgment and anticipate likely defences and hence assess the prospect of a conviction in an objective manner;

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[191] At [9.1].

[192] Crown Law *Prosecution Guidelines 2013*, above n 190, r 5.1.1.

[193] Crown Law *Prosecution Guidelines 2013*, above n 190, r 5.1.2.

[194] Crown Law *Prosecution Guidelines 2013*, above n 190, r 5.4 (table).

(e) the evidence relied upon should prove the case beyond reasonable doubt, the very high standard of proof required in criminal law;
(f) the evidence available should be assessed to satisfy each of the ingredients of the offence.

In determining the threshold for 'public interest' test, the Guidelines state firstly there is a presumption that public interest requires prosecution whenever a provision of the criminal law has been flouted.[195] The Guidelines then provide a non-exhaustive list of factors that may point in favour of or against prosecution, hence that either confirms or rebut the presumption.

At the time Spencer wrote the Prosecution Review, he took into account the then prevailing Prosecution Guidelines 2010. The new Prosecution Guidelines 2013 have been amended to incorporate some of the recommendations of the 2011 review.

As to the choice of the charges to be laid on the suspect, the Guidelines state that the number and the nature of the charges should reflect the criminality of their offensive conduct and equally the public interest in bringing the appropriate charge or charges against the suspect.[196]

The interest of the public lies in ensuring that all its members pay due respect to the law and one way of ensuring this is done is to punish those who break the law.[197] Spencer in the Prosecution review 2011 finds a link between the concept of public interest and what came to be known as the Shawcross principle used by Attorney-Generals in many commonwealth countries. He quotes what Sir Hartley Shawcross, a former Attorney-General of England and Wales said in 1951:[198]

> It has never been the rule in this country- I hope it will never be-that suspected offences must automatically be the subject of prosecution.

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[195] Crown Law *Prosecution Guidelines 2013*, above n 190, r 5.7.

[196] Crown Law *Prosecution Guidelines 2013*, above n 190, r 8.1.

[197] Spencer, above n 182 at [125].

[198] Spencer, above n 182 at [121].

However, it is unclear whether the prosecution, even when deciding for charges of serious traffic offences are abiding by the guidelines in determining their decisions. Nor is there any finding to the effect that the police prosecution are failing in their duty to have recourse to the guidelines when deciding to lay or drop charges.

4.8.4 Options for reform in New Zealand

As to the issue of the appropriateness of charging, Spencer reports in his Review that the Criminal Bar Association, the New Zealand Bar Association and the New Zealand Law Society all showed their concern of police, Crown solicitors and other enforcement agencies imposing a stricter charge. He also reports that other stakeholders like a judge and a Crown Solicitor felt the problem of Police imposing a lower charge is even more acute.[199] This observation, he adds, seems to correspond with findings by the Independent Police Conduct Authority (IPCA) and the Office of the Ombudsmen to the effect that complaints registered for decisions not to prosecute are more than those for decisions to prosecute.[200] Further support in favour of this contention is derived from the police records that for the year 2009/2010, 10.7 per cent of summary prosecution cases were withdrawn at the PPS.[201]

In the Law Commission Report, *Alternative Pre-trial and Trial Processes*, the Commissioners drew on salient critical features of the criminal justice system that call for reform.[202] But it should be noted that those reforms were advocated in the case of sexual offences[203] and it is desired that these be warranted in the case of traffic offences as well. They call for reform to the effect that the complainant is able to request that the initial charging decision, as to whether or not to charge and as to the specific charge to be laid. They draw attention to the significance of the

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[199] Spencer, above n 182 at [252] and [255].

[200] Spencer, above n 182 at [256].

[201] Spencer, above n 182 at [246].

[202] Law Commission *Alternative Pre Trial and Trial Processes - Possible Reforms* (NZLC, 2012).

[203] At 13.

Victims' Rights Act 2002 which places a duty on the prosecutor to provide all the relevant information to the victim all throughout the criminal process.[204]

Section 12 of the Victims' Rights Act 2002 (VRA) lists all the details that the victim should be made aware of, whether by the investigating authorities, by members of court staff or the prosecutor and this includes:[205]

> (a) the progress of the investigation of the offence:
> (b) the charges laid or reasons for not laying charges, and all changes to the charges laid:
> (c) the victim's role as a witness in the prosecution of the offence:

The prosecutor is obliged, under Section 7 of the 2002 Act and the Victims of Crime, Guidance for Prosecutors to:[206]

> (a) treat the victim with courtesy and compassion; and
> (b) respect the victim's dignity and privacy.

The Law Commission explains the consequences of the victim not having the opportunity to have a say about the withdrawal or any amendment to charges made and this as follows:[207]

> Firstly, it may enhance the sense of alienation that many victims already feel and increases the perception that they are merely incidental to the process. Secondly, it may prevent information relevant to the decision from being provided to the prosecutor. In either case, the overall justice and fairness of the process is likely to suffer

Another reform advocated by the Law Commission in 2012 is that the victim should be able to request a review of any decision to amend or drop charges. It also adds that this review is to be done by a senior prosecutor if the decision was made by a police prosecutor and a Crown Solicitor from a different area if the decision was

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[204] Law Commission, above n 202 at 14.

[205] Victims' Rights Act 2002, s 12 (a) to (e).

[206] Crown Law *Victims of Crime-Guidance for Prosecutors* (2014) <www.crownlaw.govt.nz> at [6].

[207] Law Commission, above n 202, at 14.

made by a Crown Solicitor.[208] This reform, the Report adds, can be extended to other offences as well.[209]

Even with the establishment of the PPS, there is no evidence that the police assuming prosecutorial functions are totally distinct from those carrying out investigatory functions. There is no evidence, however pointing in the direction of over-charging or under-charging practices by the prosecution. It is important that there is adequate monitoring of the prosecution decision to make sure that the appropriate charge is preferred in cases of serious traffic offences.

The above discussion, in this part of the thesis, however, has no indication of the police prosecution not bringing the appropriate charge, or being confused about the right charge to prefer or deciding that no charges should be laid at all. But, the shortcomings identified in the system of prosecution generally reflect a lack of transparency and accountability by the prosecution. The reforms as advocated by the Law Commission, especially when it comes to rape victims being informed of all the steps the prosecution is embarking on, this need of being informed could be extended to victims of road fatalities as well. This would help the public understand the prosecution decision process and avoid victims or victims' family being completely annoyed with prosecution decisions being taken.

In England, the Crown Prosecution Service (CPS) drafts specific guidelines, assisting prosecutors in their charging decisions and more specifically to driving offences, they have the "Guidance on Charging Offences arising from Driving Incidents."[210] Having a similar comprehensive set of charging guidelines specific to driving offences, and cases where a vulnerable victim is involved will result in more consistent and coherent prosecution decisions in New Zealand.

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[208] Law Commission, above n 202, at 15.

[209] Law Commission, above n 202, at 15.

[210] Crown Prosecution Service Road Traffic Offences - Guidance on Charging Offences arising from Driving Incidents (2007) <www.cps.gov.uk>.

4.9 Conclusions

In the light of the above, it is apparent that determining the sentence is not a purely mathematical exercise by the courts. There is, inevitably an interplay between the circumstances relating to both the offender and the offending. The judicial method of proceeding on a case by case basis definitely brings justice to the individual offender who feels that the circumstances peculiar to their case have been duly considered before they are sanctioned. However, the other side of the coin cannot be ignored. The analysis above with respect to the different driving offences, manslaughter, dangerous or careless driving have provided an overview of different sanctions. The inconsistency in terms of sentencing cannot be overlooked and explains the criticisms raised at the judiciary by the lay observer who feels a sense of injustice.

The difficulties associated with consistency in sentencing and the consideration of all the facts are evident. No universally applicable formula can be adopted to calculate the exact sentence, but the decision in *Skerrett*[211] and subsequent cases have indicated how courts are required to navigate through the aggravating and mitigating factors before reaching a conclusion. Yet it is conceded that the ultimate decision as to fixing of the penalty lies in the hands of the individual judge, and some decisions[212] which aroused public and press concerns have left the impression that there is no real logical basis behind some sentences.

The issue of inconsistency in sentencing have been raised and addressed by New Zealand authorities but regretfully, the recommendation by the Law Commission to establish a Sentencing Council was abandoned. It is submitted that in order to promote safety needs of cyclists on the roads, it is of increased significance that there is a set of comprehensive guidelines, similar to those in England, to provide a consistent approach in sentencing for serious traffic offences. As regards the prosecution decision process, though the system has undergone many changes, there is still a lot to be done to ensure that the decision to prosecute is adequately monitored by an independent assessor to make sure the right charge is made in cases

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[211] *Skerrett,* above n 17.

[212] Van Beynen, above n 69.

of serious traffic offences. And, it is important that the cyclist victim or their bereaved family be informed of each step that the prosecution takes.

Chapter Five: Comparative assessment of policy and legislative framework of cycling in more cycle friendly countries

5.1 Introduction

This chapter aims to identify the policy and legislative framework of cycling in more cycle-friendly countries, especially the Netherlands, with the objective of better understanding the potential shortcomings in New Zealand's policy and legislative regime. This chapter will first address the policies that have been adopted by the Netherlands Government, followed by a discussion of its legislation and an interpretation thereof on serious traffic offences. The strengths in other policy and legal systems are highlighted to serve as a guide for reform and to better strengthen the current cycling law and policy.

5.2 Overview of cycling use in the Netherlands, Germany and England and Wales

In spite of concerted efforts by the New Zealand Government to promote active travelling modes, cycling remains a marginal practice in the country as noted in Chapter 2, under the section 'current trend of commuting'. The question is, are New Zealand's cycling levels at a par with those in European countries or do they still lag far behind. There are significant differences between cycling levels in major developed countries across the world. Bike share of trips is at the lowest scale in Australia, Canada and United States with only 1 per cent of all trips, and about 2 per cent in the United Kingdom.[1] At the higher end of the spectrum, countries like the Netherlands, Denmark and Germany register a higher proportion of bike share with 26 per cent, 18 per cent and 10 per cent respectively.[2]

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[1] R Buehler and J Pucher "International Overview - Cycling Trends in Western Europe, North America and Australia" in J Pucher and R Buehler *City Cycling* (MIT Press, November 2012) at 9.

[2] At 9.

In terms of the objectives of cycling, cycling in most parts of Northern Europe is chosen for utilitarian purposes rather than recreation. Travel to work or school accounts for 32 per cent of all cycle trips in the Netherlands and 38 per cent in Germany and trips for shopping, account about 22 per cent of all cycle trips in the Netherlands and 20 per cent in Germany.[3] In England and Wales, about 741,000 people in the age bracket between 16 and 74 years cycled to work in 2011, an increase of 90,000 active people cycling to work in 2001.[4]

5.3 Understanding the increased use of cycling in the Netherlands- policies of the Government

Even before the Second World War, bicycles were popular in the streets of the Netherlands. Bicycles were affordable to the average Dutch person and were seen as using less space in the streets. In the 1960s, the Netherlands started to witness a boom in the rate of cars on the streets.[5] The car is still a dominant transport mode in the Netherlands. Bicycle mobility share is 8 per cent and is the second largest mobility share after the car.[6] Yet, cycling use in the Netherlands is still the highest among countries in the world.

One important factor that has been analysed as contributing significantly to the popularity of cycling in the Netherlands is the relative safety of cycling. Cycling is considered three times safer in the Netherlands as in the UK and more than five times safer than the USA.[7] Over the period 2002 to 2005, the number of cyclist fatalities per 100 million km was estimated at 1.1 in the Netherlands, 1.7 in Germany, whilst being 3.6 in the UK and 5.8 in the USA.[8] This can be an important factor accounting for the wider uptake of cycling in the Netherlands as the Dutch perceive cycling as a safe activity in their country. The relative safety of cycling in

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[3] Pucher & R Buehler "Cycling for Everyone: Lessons from Europe" (2008) Transportation Research Board at 6. (pre published version).

[4] At 6.

[5] SWOV *SWOV Fact Sheet, Mobility on Dutch Roads* (SWOV Institute for Road Safety Research, July 2013) at 2 <https://www.swov.nl>.

[6] At 3.

[7] Pucher and Buehler "Cycling for everyone" above n 3, at 9.

[8] Pucher and Buehler "Cycling for everyone", above n 3, at 9.

the Netherlands explains the wider uptake of cycling there, especially among women, children, and the elderly, who are considered as the most vulnerable road users.

Policies that have contributed to cycling safety and the success of cycling in the Netherlands are discussed below.

5.3.1 Planning and funding cycling policies

In many of the cycle friendly countries like the Netherlands, Denmark and Germany, there is limited involvement of state and central Government, but more of local Government when it comes to cycling planning and policies.[9] Though general planning constructing and funding of bicycle facilities come from central Government, specific 'cycling training, safety and promotional programs' are done at a local level.[10] From 1990 to 2006, the Dutch Central Government had invested annually an average of €60 million to cycling projects. This figure includes an investment of €25 million for the purposes of bike parking at train stations.[11] The Dutch Government makes a further provision of €1.8 billion annually to the provinces to develop their transport projects including bicycle facilities. At a local Government level, in Amsterdam, for the period 2007-2010, about €40 million of city funds was dedicated solely for bicycling projects and it was estimated that this would rise to € 70 million over the next four years.[12]

5.3.2 Bike paths and lanes

The Netherlands, Germany and Denmark are famous for their well organised, smooth and wide network of cycle paths and lanes conspicuous in many corners of each of the countries. They are regulated by a different set of rules and have their own traffic systems, like signals and roundabouts. In 2007, Amsterdam (with about

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[9] J Pucher and R Buehler "At the frontiers of cycling: Policy innovations in the Netherlands, Denmark and Germany" (2007) World Transport Policy and Practice at 3(pre published version).

[10] At 4.

[11] Pucher and Buehler "Cycling for everyone" above n 3, at12-13.

[12] Pucher and Buehler "At the frontiers of cycling", above n 9, at 11.

735, 000 inhabitants) has had 450 km of bike paths and lanes built since 1980's[13] and Groningen, another Dutch city (with about 181, 000 inhabitants) has approximately 420 km[14]. Most of the cities in the cycle friendly countries have a continuing network of separate cycling facilities.[15] Pettinga, in a study in the Netherlands, identifies five core requirements for a good bicycle infrastructure, they are, the route has to be coherent (whole), direct (with minimum detours), safe, comfortable and attractive.[16]

5.3.3 Traffic calming

In residential neighbourhoods, where it is impractical to provide for separate bike paths and lanes, the major cities in Netherlands, Germany and Denmark have implemented traffic calming techniques reducing the speed limit to 30 km per hour.[17] Other infrastructural measures that make cycling more flexible in major cities of the Netherlands include: "road narrowing, raised intersections and crosswalks, traffic circles, extra curves and zigzag routes, speed humps, and artificial dead ends created by mid-block street closures"[18]

Amsterdam, like other cities in Denmark and Germany has successfully restricted car access to the city centre, as part of their traffic calming measures.[19] Car parking has been made "sparse and costly"[20] with a view to discouraging car travel in the city. Car free zones have been designed with the needs of the pedestrian in mind and also include bike lanes and bike parking with a view to encouraging cycling.[21]

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[13] Pucher and Buehler "At the frontiers of cycling", above n 9, at 14.

[14] Pucher and Buehler "Cycling for everyone" above n 3, at 14.

[15] Pucher and Buehler "Cycling for everyone" above n 3, at 14.

[16] A Pettinga and others *Cycling-Inclusive Policy Development - A Handbook* (Federal Ministry for Economic Cooperation and Development, the Netherlands, 2009) at 59-62 <www.fietsberaad.nl>.

[17] Pucher and Buehler "Cycling for everyone" above n 3, at 15-16.

[18] Pucher and Buehler "Cycling for everyone" above n 3, at 16.

[19] Pucher and Buehler "At the frontiers of cycling", above n 9, at 15.

[20] Pucher and Buehler "At the frontiers of cycling", above n 9, at 15.

[21] Pucher and Buehler "Cycling for everyone" above n 3, at 16.

Dutch cities have also developed special 'bicycle street' for traffic calming purposes. Cyclists are given priority on those streets. If motorists chose to use them, they have to drive at a speed of 30 km per hour and are not allowed to make cyclists speed up.[22]

All these traffic calming measures have been implemented in order to make cycling safe, convenient and enjoyable.

5.3.4 Cycling safety at intersections

It is, of course, not always possible for a cyclist to complete their journey on a straight bicycle path or lane. At some point, there will be intersections. Dutch authorities, consider that intersections are where the danger lies and have made a big effort to improve the design of intersections to allow safe crossing by the cyclist. Some of these major modifications to intersections include:[23]

- Special bike lanes leading up to the intersection, with advance stop lines for cyclists, far ahead of waiting cars;
- Advance green traffic signals for cyclists, and extra green signal phases for cyclists at intersections with heavy cycling volumes;
- Turn restrictions for cars, while all turns allowed for cyclists;
- Highly visible, distinctively coloured bike lane crossings at intersections
- Special cyclist-activated traffic lights;
- Timing traffic lights to provide a "green wave" for cyclists instead of for cars, generally assuming 14-22km/hr bike speed;
- Moving bike pathways a bit further away from their parallel streets when they approach intersections to help avoid collisions with right-turning cars.

Although it is impossible to address all the potential risks that motorists pose to cyclists, planners have aimed to minimise as many as possible.[24]

5.3.5 Bike parking

Most Dutch cities have a system of extensive bike parking. The major bike parking facilities are found near train stations apart from a number of bike racks located

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[22] Pucher and Buehler "Cycling for everyone" above n 3, at 16.

[23] Pucher and Buehler "Cycling for everyone" above n 3, at 17-18.

[24] Pucher and Buehler "Cycling for everyone" above n 3, at 18.

throughout the major cities.[25] In 2006, during work day peak hours, Amsterdam Central station registered about 10, 000 parked bikes. Amsterdam has about 15 secure bike parking facilities in the city centre whilst Groningen has about 36 bike parking facilities. Many Dutch cities including Amsterdam have noticed an increase in bicycle theft over the last decade and the Dutch authorities have been responsive in addressing this problem. In 2006, in Amsterdam, about 50, 000 bikes were stolen.[26] The city has developed measures that include "official bike registration, collaboration with bike stores, strict police checks … encouraging the engraving of unique codes into the bike frame".[27] The code is registered with the police which allows a stolen bike to be returned to its owner, if recovered, and the police can easily identify stolen bikes during checks and a webpage to promote this program has been set up.[28] An investment of € 5 million was made to this programme of bike registration and checks by the police in 2002 and a further investment of €4 million has been made over four years since then.[29]

5.3.6 Bicycle use and coordination with public transport

Many Dutch cities, as well as those in Denmark and Germany have made cycling an integral part of their public transport system. Extensive bike parking facilities are provided outside train stations. This allows people to ride to the train station, park their bicycle and take a train to their destination. Bicycles are also allowed on the train during off peak times.[30] In addition, bike parking facilities are also provided bus terminals and some major bus route interchanges.[31] One of the programs adopted in Amsterdam is 'Park and Bike'. The program enables the motorist to park their car at paid car parks provided near the city and take their bike to the city centre.[32] Other cities like Bogota in Columbia have free bicycle parking

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[25] Pucher and Buehler "Cycling for everyone" above n 3, at18.

[26] Pucher and Buehler "At the frontiers of cycling", above n 9, at 12.

[27] Pucher and Buehler "At the frontiers of cycling", above n 9, at 12.

[28] Pucher and Buehler "At the frontiers of cycling", above n 9, at 13.

[29] Pucher and Buehler "At the frontiers of cycling", above n 9, at 12-13.

[30] Pucher and Buehler "Cycling for everyone" above n 3, at 19-20

[31] Pucher and Buehler "Cycling for everyone" above n 3, at 20

[32] Pucher and Buehler "At the frontiers of cycling", above n 9, at 16

stations at several terminal stations whilst other cities in North America allow for bicycles to be boarded on train or on bus.[33]

5.3.7 Bicycle promotion at school

School children in the Netherlands, Denmark and Germany are given "extensive training in safe and effective cycling techniques"[34] and this forms part of their school curriculum. The training, is done both in classroom setting and on the road and is intended to familiarise the children with bicycle riding and to teach them basic traffic rules and behaviour. The children's riding performances are assessed by police officers and they receive certificates and awards when they pass the test.[35] Since most children cycle to school, providing them with the necessary riding skills is key to ensure their safety on the roads. Another form of training is targeted to the motorist to make sure they learn to consider the cyclist on the road.

5.3.8 Programs aimed at promoting cycling

The Netherlands, unlike Germany and Denmark do not have any major special cycling promotional events. Some of the programs as prevalent in the major cities of Germany and Denmark were identified by Pucher and Buehler as including the following:[36]

- Well signed and maintained bike routes both in the city and the surrounding countryside;
- Comprehensive bike maps for every part of the city and the surrounding region;
- Bicycling websites with extensive information for cyclists;
- Improved lighting and security of bike parking facilities;
- Focus on health benefits of cycling;
- Annual awards to firms that do the most to increase bicycling among their employees;
- Regular surveys of cyclists to assess their satisfaction with cycling facilities and programs.

But in the Netherlands, the programs are more safety focused.[37]

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[33] Pettinga, above n 16 , at 128

[34] Pucher and Buehler "Cycling for everyone" above n 3, at 20

[35] Pucher and Buehler "Cycling for everyone" above n 3, at 20

[36] Pucher and Buehler "Cycling for everyone" above n 3, at 21-22

[37] Pucher and Buehler "Cycling for everyone" above n 3, at 22.

Other policies include the closing of roads to motor vehicles at certain times to allow people to cycle, walk or jog as in Bogota with about 120 km roads closed on Sundays.[38] In most of the Dutch and German cities, it is the separated bikepaths, bike parking facilities, traffic training to both cyclists and motorists, which make car use less attractive and cycling safer and more convenient.

5.3.9 Discouraging car use and land use policies

In the Netherlands, like other European countries, the Government have a number of schemes that make ownership and use of cars expensive. Some of these policies include heavy taxes on new cars, high registration charges, driver training fees and high parking fees.[39] Also, the Netherlands has adopted a system of "mixed use zoning and transit oriented developments", this has the effect of bringing residential areas closer to schools, commercial areas and other busy places.[40] Such policies help make car use expensive and less convenient to the Dutch. New Zealand has a system of allowing an aging car fleet on its roads. Reviewing of polices in New Zealand in view of restricting access to cars by their age, could help encourage more New Zealanders to consider cycling.

Ton Welleman, Project Manager at the Ministry of Transport, in the Netherlands, although he has conceded that the success of cycling in the Netherlands can be attributed to the dedication by the Dutch authorities to the cycle infrastructure, disagrees that it is the only contributing factor. To him, it is the "simultaneous execution of a policy"[41] that discourages car use that is equally important:[42]

> Expansion of the infrastructure for bicycle traffic is undoubtedly a contributing factor to the revival of bicycle use since the 1970's… the construction of a network of bicycle routes is insufficient in itself for bringing about a sustainable increase in bicycle use. The simultaneous execution of a policy discouraging car use is necessary.

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[38] Pettinga, above n 16, at 17.

[39] Pucher and Buehler "Cycling for everyone" above n 3, at 22.

[40] Pucher and Buehler "Cycling for everyone" above n 3, at 23.

[41] Ton Welleman *The Dutch Bicycle Master Plan - Description and evaluation in a historical context* (Ministry of Transport, Public Works and Water Management, Netherlands, 1999) at 44.

[42] At 44.

The commitment of the Government to setting up a well organised network of bicycle paths or lanes does not, in itself, explain the success of cycling in the Netherlands. Much of this success is also attributed to the policies that the Government have adopted in discouraging car use in the major cities of the Netherlands.

This brief overview of the cycling policies and strategic planning indicates the significant contribution they have had in the promotion of cycling safety in the Netherlands, and contributing to the upsurge of cycling there. It is now pertinent at this stage to consider the contribution of the legislative framework and the courts in further increasing cycling safety.

5.4 The legal perspectives of bad driving in the Netherlands and comparisons with New Zealand and England and Wales

The legislative provisions that regulate driving offences in the Netherlands are identified, followed by an analysis of their interpretation. A comparison of the legislation of England and Wales and New Zealand for these offences will also be made.

5.4.1 An overview of the Netherlands' law regulating bad driving

The discussion that will follow under sub-headings 5.4.1 and 5.4.2 on the law of the Netherlands (legislation and case law analysis) in relation to serious traffic offences will be discussed based on an essay written by Professor Alwin Van Dijk, an Associate Professor of Criminal Law at the University of Groningen, the Netherlands and Professor Hein Wolswijk, a Professor of criminal law at the University of Groningen, and an Honorary Judge at the Arnhem-Leeuwarden Court of Appeal.[43]

[43] Alwin Van Dijk and Hein Wolswijk "Serious Traffic Offences: The Dutch Perspective" in Alwin Van Dijk and Hein Wolswijk *Criminal Liability for Serious Traffic Offences Essays on Causing Death, Injury and Danger in Traffic* (1st ed, Eleven International Publishing, Netherlands, 2015) at 9.

In the Netherlands, road traffic offences fall into two main categories: (1) offences which do not involve any harm to people, like breaking speed limits or causing danger on the road and (2) where someone is injured or killed by someone acting negligently. This latter offence is covered by Article 6 of the Road Traffic Act 1994 (RTA), which is read as follows:[44]

> Anyone who participates in traffic is forbidden to behave in such a way that a traffic accident which is due to his negligence takes place which causes another person to be killed or which causes serious bodily injury to another person or such physical injury that it results in temporary illness or impediment of the performance of daily routines.

The penalties for this offence are provided for under Article 175 of the RTA 1994. The maximum penalty is fixed by three considerations. Firstly, the consequences of the accident and if death results from the accident, the maximum term of imprisonment is three years, reduced to eighteen months if there is bodily injury. Secondly, the degree of negligence has an important bearing on the penalty to be imposed. In the presence of recklessness, which is treated as an aggravating factor, the maximum penalty will double, if death results, it is a maximum term of six years and a maximum of three years if there is bodily injury. Thirdly, if the driving is aggravated by other factors as specified in the Article, like driving under the influence of alcohol or drugs or exceeding the speed limit, the maximum sentence is increased by one half, whether the driver is convicted for negligent driving or reckless driving.

Many of the traffic offences, like speed limits and right of way violations, are regulated by traffic rules and traffic signs, covered by the Road Traffic and Traffic Signals Regulations. Offences provided for under these rules are characterised as endangerment offences and constitute a misdemeanour with a maximum custodial sentence of two months.

Traffic behaviour is also regulated by Article 5 of the RTA which is read as follows:[45]

> Anyone is forbidden to behave in such a way that danger on the road is caused or can be caused or that the traffic on the road is hindered or can be hindered.

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[44] Road Traffic Act 1994 (the Netherlands), art 6.

[45] Road Traffic Act 1994 (the Netherlands), art 5.

This covers offences less serious than those of Article 6. They are misdemeanours and attract a maximum term of imprisonment of two months.

This overview of the legislative provisions regulating negligent driving and other driving related offences leads us to question as whether the law is stricter in the Netherlands than in New Zealand. New Zealand's and England's legislation provides for both careless and dangerous driving, while the Netherlands only recognises negligent driving. As stated in Article 175 of the Netherlands RTA 1994, the maximum penalty for negligent driving causing bodily injury is eighteen months but the maximum penalty doubles where death is caused. This offence can be compared with that of careless driving causing death/injury. New Zealand's law provides for a maximum term of imprisonment of three months or a maximum fine of $4,500, coupled with a minimum disqualification period of six months, under s 38 Land Transport Act 1998 (LTA). Negligent driving, in the Netherlands coupled with recklessness attracts a higher penalty, with a maximum of three years for bodily injury and six years where death is caused. The equivalent for this offence could be termed as dangerous and reckless driving causing death or injury under New Zealand law. The penalties for this offence is provided for under s 36 of the LTA 1998, with a maximum imprisonment term of five years or a maximum fine of $20,000, together with a minimum disqualification period of one year.

Whilst the law in the Netherlands makes the distinction between the punishment of the offender in cases where victim suffers bodily injury and cases where death occurs, no such distinction exists in New Zealand law. In the case of careless driving, however, the Dutch legislation is stricter, with only a maximum term of three months imprisonment in New Zealand law, whether injury or death results, though combined with a disqualification period. A prima facie reading of the penalties for dangerous driving in New Zealand and of the penalties for the equivalent 'negligent driving with recklessness' in the Netherlands shows that our law is stricter than that in the Dutch jurisdiction. However, a mere comparison of the legislative provisions cannot conclusively confirm that it is New Zealand that has a stricter penalty system for serious traffic offences. An analysis of the interpretation of the provisions by the Dutch courts is required to give us a more accurate picture on the relative strictness or leniency of New Zealand law.

5.4.2 Interpretation of negligence for the purpose of traffic offences

Van Dijk and Wolswijk define negligence as "a blameworthy, gross (or substantial) deviation from the required standard of care that has caused a certain unwanted result."[46] To them, the concept of negligence involves both an objective and subjective element; objective as it involves 'a gross deviation of a duty of care', and subjective because the deviation needs to be 'blameworthy'.

As regards the adequacy of guidelines to the sentencing judge in establishing negligence in a collision case, Van Dijk and Wolswijk argue there are no guidelines coming from the Supreme Court in the Netherlands. In this context, it is therefore important to understand the interpretation of negligence which is adopted by the courts in the Netherlands.

Advocate General Vellinga pointed out that the demarcation line between the different types of negligence seems to have been neatly drawn and these categories include:[47]

1. Where the driver "consciously" takes a risk
2. Where the driver fails to take a precaution which results in a breach of the duty of care
3. Where the driver is impaired, either by alcohol or overtiredness
4. Cases that fall within what is termed "momentary inattention".

While the Dutch courts find that this classification is quite clear cut, it is hard to see an accurate working of the different categories in practice. Under the second category of cases, it is obvious that a driver who gives way, has not breached the duty of care he owes to other road users, given that he has acted cautiously. But the courts have not adopted this type of reasoning in all cases. In a Supreme Court case, in spite of the caution that a van driver took, by giving way, his conviction was

[46] Van Dijk and Wolswijk, above n 43, at 19.

[47] Van Dijk and Wolswijk, above n 43, at 23- 24.

upheld. The case involved a collision between a van and a young cyclist. The young boy was cycling with his mother. The van driver had stopped to give way to both of them who were crossing. Unfortunately, the young boy fell off his bike whilst crossing, which the van driver did not see. The mother signalled to the defendant to stop but he took the signal to mean that he could go. He did so and ran over the boy. The Supreme Court, in upholding the conviction of the driver, emphasised that the driver ought to have been cautious and checked, himself, whether it was safe to go, given the limited view he had in the circumstances and given more importantly, the care he owes to 'very vulnerable road users'.

Whilst this case seems to indicate the harsher approach that the court is likely to adopt in cases where the 'very vulnerable road user' is involved, the other line of cases where 'momentary inattention' is involved, the courts seem to have adopted a more lenient approach. In the Geervliet Ruling in 2008, the conviction of the defendant driver was quashed by the Supreme Court. In this case, the defendant driver came to a near stop at the end of a road with give way markings, checked for any oncoming traffic and continued on his way when he did not see any. It was after driving some 20 metres down the road, that he realised that there was 'something' slowing him down. He had failed to see a motorcyclist in spite of having checked for oncoming traffic before moving out. Contrary to the findings of the Court of Appeal, the Supreme Court found "the mere fact that the defendant, when he was checking for oncoming traffic, did not see the motorcyclist, to whom he had to give way, although the motorcyclist must have been visible to him",[48] does not suffice to establish negligence.

This ruling gave rise to some critical comments. To Advocate General Vellinga, this reasoning seems to suggest that in cases, where the driver has taken the necessary precautions, saying he stopped and yet through a moment of inattention an accident is caused, this will be enough to establish driver negligence. However, if this failed perception, that is, 'looked but did not see' includes culpable behaviour like not being cautious, not stopping or driver's overtiredness, it is these kind of instances where negligence is more likely to be established. But it is not always clear when a driver's lack of perception can be linked to their culpable behaviour.

[48] Van Dijk and Wolswijk, above n 43, at 24-25.

An interesting case illustrates this inconsistency. In Arnhem, the defendant driver had killed a cyclist in a collision when he left a roundabout and claimed not to have seen the cyclist. Contrary to what was held in the Geervliet case, here the Court of Appeal found that the defendant's failing to see the oncoming cyclist is culpable behaviour and he had therefore breached the duty of care. The Court of Appeal held:[49]

> A driver has a special duty of care to anticipate traffic conflicts, and to ascertain the presence of other traffic users he may encounter and must yield right of way.

Article 5 of the RTA covers the general reprehensible behaviour that endangers traffic. For somebody to be convicted under this provision of the law, the collision needs not to have had any consequences whether in the form of death, injury or even an accident, nor that the defendant driver had the *mens rea*, be it intent or negligence. This explains why the prison term under this Article is relatively low, a maximum term of two months. The implication of this Article means that if somebody driving dangerously but it does not result in death or injury or even a collision, that person will only be charged with a traffic misdemeanour under this Article and be sentenced to a maximum term of imprisonment of only two months. On the other hand, Article 6 is only triggered if the threshold for gross negligence is met, if not the driver will not be convicted for negligent driving even if the consequences of the collision are disastrous. Causing a serious accident, therefore by *culpa levis* (a lesser form of negligence like momentary inattention) would only attract a minor penalty under art 5 RTA. There have been recommendations to bring a higher penalty for a serious accident by *culpa levis*.

Another gap in Dutch traffic law lies in the fact that the law does not cater for criminalisation of all kinds of dangerous driving. For example, if less serious consequences result, like only material damages or no serious injury, the offence would fall under Article 5.

[49]Van Dijk and Wolswijk, above n 43, at 26.

5.4.2.1 Comparative analysis of Netherlands' serious driving offences with England and Wales

Marius Duker, a Judge at the Amsterdam Court of Appeal, referred to some concrete examples of cases to compare the sentencing practice in the Netherlands with England and Wales. [50]Among the English cases, was a 2007 case, [51]where the court recognised that the accident was caused not just by the momentary error of judgment by the defendant driver who was overtaking but also the faulty brakes of the oncoming vehicle. The defendant served an imprisonment term of 18 months following a conviction for causing death by dangerous driving) (CDDD), though he had no previous convictions, nor was there any finding as to a deliberate dangerous manoeuvre whilst driving. In another case cited by Duker, the offender failed to avoid a collision with a stationary vehicle because he was manipulating his car radio. The impact of the collision was not so great, yet the victim died as he was not wearing a seat belt. Here, the driver was very remorseful, had been injured himself, had no previous conviction and yet he faced a sentence of two years' imprisonment for a charge of CDDD.

The discussion, and cases cited that will follow in this part of the study are drawn from Marius Duker's essay.[52] His Honour considers that cases with more or less similar circumstances in the Netherlands would either fall under the misdemeanour of endangering traffic under Article 5 or the offence of 'negligently causing death or serious injury by driving' (NCDD) under Article 6 RTA.[53] His Honour cites in support, two interesting cases involving collisions with cyclists. In the first case, a cyclist died after a collision with a van whose driver had overtaken on the left side of traffic held up in a queue. The District Court Judge made no finding for the offence of NCDD but rather convicted the defendant driver for the misdemeanour of endangering traffic and he faced a sentence of 80 hours community service and

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[50] Marius Duker "The Relation between culpability and harm in Sentencing Traffic Offences in the Netherlands and England and Wales" in Alwin Van Dijk and Hein Wolswijk *Criminal Liability for Serious Traffic Offences Essays on Causing Death, Injury and Danger in Traffic* (1st ed, Eleven International Publishing, Netherlands, 2015) 131 at 146-147.

[51] Duker, above n 50, at 147.

[52] Duker, above n 50.

[53] Duker, above n 50, at 147.

12 months suspended disqualification. In another case heard before the Supreme Court, a car driver who was speeding did not reduce the speed at a bicycle junction, causing him to hit one of the cyclists and killing him. The Supreme Court gave the driver a "suspended prison sentence of two months, 180 hours' community service and a lengthy (the exact length is unclear) disqualification."[54]

Compared to England and Wales, the sentence imposed on the careless driver in the Netherlands is far lenient. To further support this finding, a study by Van Tulder reveals that for 2001 – 2002, in 4 per cent of cases where there have been convictions for NCDD, an unconditional prison sentence was imposed. Lensing studied 252 judgments by the Dutch Court in 2003 for the offence of NCDD and he made findings to the effect that in only 12 per cent of those 252 cases, a term of imprisonment was imposed and that too only in cases where there was reckless driving or repeated offences.

What explains this tendency for a harsher sentence in England and Wales is the difference in the statutory provision itself. In England and Wales, the maximum penalties as provided for under the Road Traffic Act 1988 are much higher. The offence of CDDD, causing death by dangerous driving has a maximum term of 14 years of imprisonment (if there is no death, it is two years). There is no separate provision for reckless driving as this offence is covered under the CDDD. Causing serious injury by dangerous driving carries a maximum imprisonment term of five years. Whilst the Netherlands recognises only negligent driving to be an offence, New Zealand, England and Wales recognise both careless and dangerous driving. The offence of careless driving carries a maximum penalty of £5,000 whilst if death results from the offence, the maximum penalty will be five years' imprisonment and a minimum disqualification period of 12 months. If the offence of Causing Death by Careless Driving (CDCD) in England was because the driver was under the influence of drink or drugs, then the maximum term will be considerably more, 14 years imprisonment and a minimum disqualification period of two years.

Another factor which may explain the more strict penalties imposed in England compared to the Netherlands is the difference in the sentencing guidelines. In

[54] Duker, above n 50 at 147.

England, whether it is for careless or dangerous driving, the convicted driver will be disqualified for a minimum term of 12 months, and it is a minimum of two years if he has been disqualified for more than 56 days in the last three years. The starting point for sentencing in cases of the least serious forms of dangerous driving is three years and this involves cases where only minor damage results from the accident and that the behaviour of the offending driver has created significant danger by speeding or making a dangerous manoeuvre. Such cases can be said to be analogous to the traffic error that should satisfy the minimum threshold required for the offence of NCDD in the Netherlands and the starting point adopted by the Dutch courts is two months' imprisonment and one year's disqualification. Dangerous driving that involves excessive speed and considerable risks resulting from the driving falls in the midway category and the prison term here is a starting point of five years' imprisonment in England, whilst an equivalent offence brought before the Dutch courts will have a starting point of six months' imprisonment and two years' disqualification. The highest category which involves "prolonged bad driving involving deliberate disregard for safety of others or incidents involving excessive speed […] by a disqualified driver"[55] will be heard before the Crown Court and carries a starting point of eight years. A line of comparison can be drawn between this highest form of dangerous driving and reckless driving in the Netherlands, which has, as a sanction, an imprisonment term of eight months and 3 years' disqualification. In all the three categories of dangerous driving, the conduct of the driver and the consequences of the accident are the determining factors.

The offence of CDCD can also be classified into three main categories in terms of culpability of the offender. The first one covers cases of momentary inattention, for which a community service will be imposed accompanied by a minimum disqualification period of 12 months. An equivalent punishment that would be meted out to an offender in the Netherlands would be a fine between €700 and €1,400 and a disqualification ranging from one to three months. The second category of CDCD would include other cases of careless driving with a starting point of nine months of imprisonment to the convicted driver. And the third one would be cases that can be said to be nearing the threshold for dangerous driving

[55] Duker, above n 50 at 141.

and a starting point of 15 months of imprisonment would be considered here. It is clear that the categories of CDCD, as identified in the UK can be compared to offences under the Dutch NCDD (under Article 6 RTA). Therefore, the starting point for the Dutch NCDD and English CDCD could be said to be close to each other. But in reality they are distinct offences.

5.4.3 New Zealand versus The Netherlands: comparison of the more serious traffic offences as interpreted by the courts

In New Zealand even though much criticism has been raised against the court's practice of avoiding custodial sentences. In many cases, especially where a cyclist is involved, it cannot be said that custodial sentence is the practice in the Netherlands courts. Marius Duker has offered important insights into the approach adopted by Dutch courts. His Honour conceded that the approach that the Dutch courts adopted when compared to England and Wales for similar serious traffic offences, is more lenient. Moreover, Professors Van Dijk and Wolswijk, in the above discussion criticise the law and say there are a number of circumstances where an offender can be sentenced under, instead of Article 6, under Article 5 where is only charged with a traffic misdemeanour which carries a maximum term of imprisonment of only two months. And the analysis of the case law above seems to confirm this. Honourable Marius Duker points out that even when sentencing for a charge under Article 6, the court's approach seems to be a lenient one in spite of the legislative provision being relatively higher under this Article.

5.4.4 Further findings as to the approach by the courts in England and Wales when dealing with cyclists

As stated above, Marius Duker notes that the sentencing pattern and the legislative regime on driving offences are far stricter in England than in the Netherlands. On the other hand, the issue as to whether the judicial system in England and Wales responds adequately to the offences of careless or dangerous driving, especially when cyclists are involved has become a controversial one. The National Cycling Charity, points out "the way the justice system handles bad driving should reinforce

the message that it is unacceptable to endanger and intimidate other road users"[56] and adds that "lenient sentences for crimes that maim and kill not only cause distress to victims and their families, but also suggest that the justice system views the dangers on our roads as inevitable".[57] It calls for reforms so that the law and its enforcement authorities can more adequately protect all road users.

The report cites a number of cases in support of its contention that sentences imposed in cases of collisions involving vulnerable road users are unduly lenient. The Sentencing Guidelines of England and Wales does provide for the vulnerability of the victim to be a factor to be considered "when determining the seriousness of an offence".[58] But the cycling charity does not agree that this is reflected in the sentences imposed, where vulnerable victims die. The following are some of the case studies chosen by the cycling charity in their analysis. Martin Boulton, who was sentenced to six months suspended imprisonment, 200 hours of unpaid work, two consecutive terms of driving ban of 15 months and a fine of $350, pled guilty to a charge of CDCD and causing death by driving whilst uninsured and killing a cyclist. Another convicted driver, Paul Brown was acquitted of a charge of CDDD, pled guilty to a charge of careless driving after killing a cyclist. He was sentenced to 240 hours of unpaid work and a driving ban of one year. Brian Creasey, another driver walked away with a stricter sentence for a charge of CDCD when he hit a cyclist, killing him. He faced a custodial sentence of 20 weeks, a driving ban of three years and had to take a re-test for his driver's licence.

The above cases indicate that the sentence imposed is nowhere near the maximum statutory penalty as provided for under the Road Traffic Act 1988. The report refers to a case which was an exceptional one where the accused had four previous convictions for dangerous driving and 11 for driving whilst disqualified and in this case, killed two persons riding a tandem bicycle and subsequently faced two counts

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[56] Martin Porter QC *The Courts and Sentencing, Road Justice* (National Cycling Charity, UK, Undated <http://www.roadjustice.org.uk> .

[57] Porter, above n 56 at 5.

[58] Porter, above n 56 at 5.

of CDCD and was sentenced a custodial term of ten and a half years.[59] This case led to a parliamentary debate on dangerous driving in January 2014.[60]

The report also expressed its disapproval of the short length of driving bans imposed on the dangerous driver and also the reduction in the number of driving bans imposed by the courts. The report qualifies this as a "lack of prioritisation in sentencing practice".[61] The convicted driver is also allowed to plead the 'exceptional hardship' argument in courts, and if they can prove that their position will be unduly jeopardised if they face a driving ban, the court will refrain from imposing such a ban on them.[62]

The study above is therefore indicative of no particular harsh system of penalties in the Netherlands whether or not a vulnerable road user is involved. It is therefore a dedicated policy framework which has brought an upsurge in cycling levels there. It is therefore the policies in the Netherlands which could serve as good lessons to New Zealand and this would be made more possible by the collaboration project which is now under way between Netherlands and New Zealand as illustrated below.

5.5 Collaboration project SWOV Netherlands and New Zealand

As stated, it is the dedicated policies and strategies adopted in the Netherlands that lie behind the success of cycling. A promising future for cycling in New Zealand is felt in the new collaboration project between Dutch National Institute for Road Safety Research (SWOV) and New Zealand. The three specific topics that the collaboration project will concentrate on are: "safety and e-bikes, sensing technologies and methods to more accurately map cycle crash risk and pedestrian and bicycle infrastructure and safety."[63] The first meeting will be held in the summer

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[59] Porter, above n 56 at 6.

[60] Porter, above n 56 at 7.

[61] Porter, above n 56 at 8.

[62] Porter, above n 56 at 9.

[63] SWOV *Safe city cycling in New Zealand collaboration project SWOV and New Zealand* (2015) <www.swov.nl>.

of 2015 and 2016. Much is hoped to be achieved from the collaboration with the Netherlands which has many lessons to share with New Zealand in terms of promoting cycling safety strategies.

5.6 Approach adopted by GIZ, an international organisation

Apart from the policies adopted in the Netherlands, another worthy consideration to the New Zealand Government is the approach to land transport planning adopted by GIZ. GIZ, a German-based international organisation provides transport policy advisory services to the Federal Ministry for economic Cooperation and Development. GIZ finds that traditional approach adopted by the Government has now become an outmoded one.[64] The approach, known as supply side oriented approach, involves the Government responding to increased transport demand by creating more road space. GIZ launched the Sustainable Urban Transport Project (SUTP), a flagship activity adopting an Avoid, Shift, Improve (ASI) approach.[65] The approach implies 'Avoid the need to travel, Shift to more environmentally friendly modes of transport and Improve the efficiency of transport.'[66] Avoiding the need to travel can be attained through the adoption of an integrated land use planning policy to reduce travel distances of people of a locality to their destinations. GIZ adds that the ASI approach is the right framework towards developing a good climate change strategy. It helps develop "transport strategies that support climate change mitigation and helps define the path towards making transport systems more resilient."[67]

5.7 Conclusions

The Netherlands, a country which registers the highest cycling rate, does not have harsh legal penalties for a driver who is found guilty of a serious traffic offence.

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[64] GIZ "Sustainable Urban Transport: Avoid-Shift-Improve (A-S-I)" <www.transport2020.org>.

[65] Sustainable Urban Transport Project *Transport Policy Advisory Services* <www.sutp.org>.

[66] GIZ "Sustainable Urban Transport: Avoid-Shift-Improve (A-S-I)", above n 64, at 1.

[67] GIZ "Sustainable Urban Transport: Avoid-Shift-Improve (A-S-I)", above n 64, at 2.

Even when cases are determined before the court, judges do not impose a particularly harsh sentence on the convicted driver involved in a collision with a cyclist, when compared to the practice in England and New Zealand. England and Wales, on the other hand, have a stricter system of penalties and sentences for the careless or dangerous driver. In fact, the success story of cycling in those countries, especially that of the Netherlands whose policies have been analysed, has been associated with its highly developed, cycle dedicated infrastructure perceived as safe by many Dutch cyclists. The Netherlands also owes the success of its cycling story to major policies of the Government aimed at reducing car use. There is much for the New Zealand Government to draw on from these foreign policies that have contributed significantly to the upsurge of cycling in the Netherlands. It is of prime importance that the New Zealand Government, both at local and central level, integrate the Avoid, Shift, Improve approach, as adopted by GIZ, the German-based international organisation, in all land transport related plans and strategies. The collaboration project between SWOV Netherlands and New Zealand is a pioneer project which seems to be very promising to the promoting of cycling safety in New Zealand.

Chapter Six: Assessment of other legislation in promoting safety of the cyclist and reform options

6.1 Introduction

As indicated in Chapter 2, existing literature on factors that inhibit cycling in New Zealand show that a significant barrier to the wider uptake of cycling is perceived and actual safety. Chapter 4 has given an overview of the road safety rules that relate to serious driving offences like careless and dangerous driving and the decisions that judges and prosecution make using those rules. Apart from the legislation on careless and dangerous driving, there is other legislation that addresses, directly or indirectly, the safety of the cyclist. This chapter seeks to address shortcomings in the law, other than the provisions on careless or dangerous driving. It does so by analysing two key reports, that of Coroner Gordon Matenga and the Safety Panel Report, which provide important insights into the shortcomings of some of the legislative provisions that could be reformed. An overview of the existing legislative provisions is also provided, followed by an analysis of the potential for reform with brief comparisons with other countries.

6.2 Coroner's Report on cycling safety

Between late 2010 to early 2011, there were a number of tragic cyclist deaths on New Zealand's roads. Coroner Gordon Matenga conducted a number of inquests into cyclist deaths during that period. During that time, growing awareness of the need for cyclist safety has risen to such an extent that something needed to be done. Following the series of inquests and the resulting recommendations he made, Coroner Matenga wrote a Coronial Review of cycling deaths in New Zealand.[1] The Review is important as it identifies the common factors of deaths of the cyclists in the study. It is, however, the Cycling Safety Panel, set up upon the recommendation of the Coroner that identified the shortcomings in New Zealand legislation.

[1] Coroner Gordon Matenga *Cycling safety in New Zealand: A Coronial Review* (11 November 2013) <www.justice.govt.nz>.

Before looking at the recommendations of the Coroner, let us briefly consider some of the submissions the Coroner received. It is those submissions that culminated in the findings he made in his Review. One of the submissions was that of Dr Glen Francis Koorey, Senior Lecturer in Transportation at the University of Canterbury.[2] Dr Koorey made his submission based on his research of a sample of 84 fatalities involving cyclists on New Zealand roads between January 2006 and December 2012.[3] He noted that even non-fatal crashes and 'near misses' would serve as useful clues to reducing cycling deaths.[4] Some of the recommendations he advocated are listed below:

- He calls for the Police or the Ministry of Transport (MoT) to record all cycle crashes in the Crash Analysis System;[5]
- In terms of road user fault, he recommended that there should be more national campaigns to encourage good behaviour amongst motorists; to consider the introduction of 'strict liability' laws for the burden to be on the motorist to prove that he was not at fault; and to promote cycle training to national standards for all school children by Year 6;[6]
- Given the greater likelihood of a fatality when a cyclist is hit by a heavy vehicle, he recommended that some heavy vehicle safety equipment be made mandatory like "under-run protection for all trucks"[7] and "blind spot mirrors in heavy vehicles"[8]
- He also recommended that there should be more investment in better treatment of cycling at intersections[9] and for more cycle facilities to encourage potential cyclists[10];

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[2] Dr Glen Francis Koorey *New Zealand Chief Coroner's Inquiry into Cycling Deaths- Evidence* (June 2013) <www.can.org.nz>.

[3] At [3].

[4] Koorey, above n 2, at [5].

[5] Koorey, above n 2, at [a].

[6] Koorey, above n 2, at [d], [f] and [g].

[7] Koorey, above n 2, at [j].

[8] Koorey, above n 2, at [l].

[9] Koorey, above n 2, at [q].

[10] Koorey, above n 2, at [v].

- Dr Koorey considered that helmets do not help in most cases where a serious crash impact is involved, and suggested that there should be more road user education on the strengths and limitations of helmet when cycling[11] and he encourages police to report cases of helmet wearing in reported crashes[12];

The Cycling Advocates Network, besides wanting cycle training for all school children to be government funded as a public education programme, also advocated for more investment in cycling infrastructure which, they say, "has failed to keep up with public demand".[13] They also add:[14]

> Less than 1 % of our land transport spending is going on cycling (and walking) at a time when ordinary people and local government both want to invest more in these areas to address a multitude of issues (…). Therefore we need quality cycling infrastructure.

By quality cycling infrastructure, they meant connected cycleways, sealing of the shoulder on rural roads and cycle friendly streets with low traffic speeds and volumes.

Dr Alexandra Macmillan, Senior Lecturer of Environmental Health at the University of Auckland, recommended in her submission that targets and budgets for national and regional walking and cycling should be kept separate as this, she says, would make the authorities responsible for cycling safety more accountable.[15] To her, developing the most appropriate infrastructure is key and the best infrastructure, she considers, should include re-allocating road space; allowing physical segregation on arterial roads by elevation or curb separation; creating 'home zone' local streets where speeds of vehicles would be lowered down to less than 30 km per hour.[16]

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[11] Koorey, above n 2, at [w].

[12] Koorey, above n 2, at [x].

[13] Patrick Morgan *Submission from Cycling Advocates Network* at 2 (Cycling Advocates Network, June 2012).

[14] At 1.

[15] Dr Alexandra Kathryn Macmillan *Joint Inquiry into cycling deaths on New Zealand Roads* (University of Auckland, New Zealand, July 2012).

[16] At 9.

Coroner Matenga explained that the purpose of conducting the review of the thirteen fatal cases was to identify any common factors which would potentially decrease the chance of more cyclist deaths in the future.[17] Of the 13 cases analysed, some observations made by Coroner Matenga include:[18]

- Of the 10 collisions with motor vehicles, 7 were due to motorist error and only 3 to cyclist error;
- In 12 of the 13 cases, the cyclist was wearing a helmet and in 10 out of 13 cases, the cyclist was wearing hi-vis clothing;
- Out of the 5 cases that the motorist driver has failed to see the cyclist, 3 cyclists were wearing hi-vis clothing.

These findings make the Coroner observe that in spite of the cyclist wearing protective helmet or hi-vis clothing, the motorist still fails to see them and colliding with a motor vehicle remains the main cause of cyclist fatality.[19]

Coroner Matenga also noted a number of recommendations made by other Coroners as a result of their inquests, based on 94 fatalities occurring between 2007 and 2013, and recorded in the Case Management System (CMS) of the Coroner's Office.[20] These recommendations included a call for changes in the law to make the wearing of hi-vis clothing mandatory, and the use of cycle lanes by cyclists; reviewing the standard for helmets and considering colouring of helmets, promoting cyclist education programs especially among primary school children.[21] He noted with concern that neither the NZTA nor the Ministry of Education considered any of these recommendations.[22] He also underlined the ambiguities in the law that were identified in the inquest he conducted in the *Lawless* case, where the motorist failed to see Mr Lawless when he took a right turn.[23] Coroner Matenga had noted that not

[17] Matenga, above n 1, at [3].

[18] Matenga, above n 1, at [6].

[19] Matenga, above n 1, at [7].

[20] Matenga, above n 1, at [8].

[21] Matenga, above n 1, at [10].

[22] Matenga, above n 1, at [11].

[23] *Lawless* [2013] NZCorC 158 (11 November 2013).

only was the cyclist not wearing hi-vis clothing but the street was "dimly lit".[24] The ambiguity in the law he summed up as follows: [25]

> ambiguity in the law relating to the use of lights when cycling at night. Is it permissible for example, for the required front white light to be affixed to the cyclist's helmet or must the light be fixed to the front of the cycle? At what distance should the light be visible? Should the light be a steady beam or is a flashing light allowable? Which is more effective? Do the standards as presently set need revisiting?

Regarding the failure by authorities to implement the Coroner's recommendations, it is noteworthy to consider some of the provisions of the Coroners Act 2006. Section 9 of the Coroners Act 2006 provides "recommendations or comments about the avoidance of circumstances similar to those in which the death occurred or the way in which any people should act in circumstances of that kind".[26] For the credibility of the Coroner's recommendations not to be undermined, it is important that they should not be based on 'personal perspectives', but should be "concise, precise, targeted and evidence-based".[27] The recommendation by the Coroner to the effect that a cyclist should wear hi-vis clothing has often been cited by many organisations as being a "non-evidence based and non-justifiable recommendation".[28] It is of equal importance that the recommendations be consistent with each other because inconsistent recommendations are said to be undermining credibility and "devalue the criminal process".[29] It is a shortcoming of New Zealand system, however, that the Government has no obligation to consider or implement the Coroner's recommendations. A legislative amendment to the effect that the Government should respond to the Coroner's recommendations could be a way of ensuring that the Coroner's recommendations are duly acted upon.

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[24] At [3].

[25] Matenga, above n 1, at [17].

[26] Coroners Act 2006, s 9.

[27] Jennifer Moore and Mark Henaghan *New Zealand's Recommendations 2007-2012* (University of Otago, October 2014) at 275 <www.lawfoundation.org.nz>.

[28] At 276.

[29] Moore, above n 27, at 272.

Following on from the coronial review, Coroner Matenga suggested that the NZTA solicit the assistance of an expert panel and provide recommendations to the central and local Government with a view to avoiding more cycling deaths.[30]

6.3 Shortcomings in the law through the reform options advocated by the Cycling Safety Panel

The New Zealand Transport Agency (NZTA) is a Crown entity set up under the Land Transport Management Act 2003 (LTMA). The NZTA exercises its powers under s 95(1)(b) LTMA. Acting on recommendations from the Coroner to conduct investigations on ways cycling on the road could be made safer, the NZTA established 'The Cycling Safety Panel' (the Panel) in December 2014 to formulate "innovative, comprehensive and practical" recommendations to the central and local Government for safe cycling on the road.[31]

The Panel adopted the Safe System approach set out in the MoT's S*afer Journeys* strategy as an aid to develop their recommendations. The Panel made a number of proposals based on the safe system approach. This includes the creation of safer roads and roadsides, safer speeds, safer road use and safer vehicles. For the purpose of analysis in this chapter, more emphasis will be made as to the recommendations made by the Cycling Safety Panel as to legislative shortcomings.

As pointed out in Chapter 2 in crashes between cyclists and the motor vehicles, cyclists sustain more serious injuries than vehicle drivers. Some of the major causes of motor vehicle and cycle crashes are identified by the Panel as follows:[32]

- Not seeing (or looking for) other road users;
- Confusion and impatience at intersections;
- Misjudging other road users' speed or intentions;
- Poor infrastructure design or maintenance;
- Design guidance that balances travel time and safety;
- Motorists infringing upon cycle lanes;
- Roadworks pushing cyclists into busy traffic.

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[30] Matenga, above n 1, at [22].

[31] Cycling Safety Panel *Safer journeys for people who cycle – Cycling safety panel final report and recommendations* (December 2014) <www.saferjourneys.govt.nz>.

[32] At 29.

Before we consider the proposals made by the Panel as regards the cycling infrastructure, let us see how the cycling infrastructure is governed by the existing law. To understand the shortcomings in the legislation and the recommendations by the Coroner and the Panel, it is important to address how the road rules apply to cyclists in New Zealand.

6.3.1 Rules on use of cycle lanes/ cycle paths/ shared paths/ when sharing road space in New Zealand

The Land Transport Act 1998 (LTA) enabled the passage of a number of subsidiary pieces of legislation from which the official road code and the code for cyclists are derived. It is necessary to start the analysis by referring to provisions of the Land Transport (Road User) Rule 2004 (RUR).

Although the LTA was principally drafted with the intention of the motorist and pedestrian in mind, the RUR does contain express provisions for cyclists. The definition of a cycle is given in the interpretation section of the RUR as: [33]

> (a) a vehicle that has at least 2 wheels and that is designed primarily to be propelled by the muscular energy of the rider; and
> (b) includes a power-assisted cycle.

6.3.1.1 Cycle Lane

Rule 1.6 of the RUR defines a cycle lane as a "longitudinal strip within a roadway" meant for the passage of bicycles whilst a cycle path is separated from the roadway, and can be used by cyclists and pedestrians and can include cycle tracks.[34] Cycle lane therefore refers to a lane which is marked on a roadway with a cycle symbol, meant to be used only by the cyclists, whilst cycle path is an off roadway path for the cyclists.[35]

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[33] Land Transport (Road User) Rule 2004, r 1.6.

[34] Land Transport (Road User) Rule 2004, r 1.6.

[35] S Turner and others *Cycle Safety: Reducing the Crash Risk – New Zealand Transport Agency Research Report 389* (NZTA, October 2009) at 43.

Rules 2.1 to 2.4 of the RUR refer to lanes and include guidance on their use by drivers. A cycle lane, as defined under the RUR, is classified as a special vehicle lane under the Land Transport Rule: Traffic Control Devices 2004 (TCD). Section 2 of the TCD Rule reads as follows: [36]

> Special vehicle lane means a lane defined by signs or markings and restricted to a specified class or classes of vehicle; and includes a bus lane, a transit lane, a cycle lane, and a light-rail vehicle lane.

The significance of this provision lies in increased safety for the cyclists by restricting the use of the lane only to them. Rule 2.3(4) allows the driver of the motor vehicle to drive wholly or partly in a cycle lane in a restricted number of exceptions, like when they are making a turn, or leaving a road and they should do this manoeuvre with the minimum required time and for not more than a maximum length of 50 metres and by giving way to those entitled to the use of the lane. [37]

The cycle lane is the most common type of cycle infrastructure in the major cities of New Zealand. It is questionable whether the use of this lane by a cyclist really ensures their safety. The cyclist's safety on this lane is not only reduced by traffic passing them but also by the opening of doors of parked cars and delivery vehicles.

6.3.1.2 Shared Path

Rule 11.1A(1)(a) of RUR 2004 describes a shared path as a path that may be a cycle path, footpath, or some other kind of path and may be used by the pedestrian, cyclists, riders of mobility devices, and riders of wheeled recreational devices at the same time. The user of the shared path has a duty to use such a path in a careful and considerate manner[38], ride at a reasonable speed[39] and give priority to other users wherever indicated by the relevant signs[40]. However, for the purpose of this study,

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[36] Land Transport Rule: Traffic Control Devices 2004, pt 2.

[37] Land Transport (Road User) Rule 2004, r 2.3(4).

[38] Land Transport (Road User) Rule 2004, r 11.1A(2).

[39] Land Transport (Road User) Rule 2004, r 11.1A(3).

[40] Land Transport (Road User) Rule 2004, r 11.1A(4).

the inherent danger of the shared path will not be debated further given that cycling on the roadway has more disastrous consequences in the case of a collision.

6.3.1.3 Turning instructions

It is a trite observation that it is at intersections that there is a greater likelihood of accident, as discussed in Chapter 2. To further increase the safety of the cyclist, rule 2.5 contains directions to the driver and the cyclist and rule 2.5A gives additional ways in which the cyclist can make a safe turn at intersections. According to rule 2.5, a driver making a left turn onto another roadway or into a vehicle entrance, should move as far as possible to the left of the roadway until he reaches the point he plans to turn,[41] and keep as close as practicable, to the left of the roadway throughout the turn.[42] The Rule further provides that if the driver is making a right turn, he should move as far as practicable to the right of the roadway, without encroaching any unavailable lane or roadway not marked with lanes,[43] and turn as directly as possible to a similar position on the roadway he or she enters. The cyclist who is riding on a cycle lane located on the extreme left of the road may find it dangerous to make a right turn. Rule 2.5A has been specifically designed to cater for this situation and allows the cyclist to make a hook turn, which means, they move into the intersection, keeping to the far left of the intersection, turn their cycle in a way that it faces the roadway they are entering and move at a green signal or when safe to move after giving way to approaching drivers.[44] The hook turn is a dangerous manoeuvre. It is difficult to see how this turn, provided for in the law, allows for safety of the cyclist.

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[41] Land Transport (Road User) Rule 2004, r 2.5(1)(a).

[42] Land Transport (Road User) Rule 2004, r 2.5(1)(b).

[43] Land Transport (Road User) Rule 2004, r 2.5(2)(a).

[44] Land Transport (Road User) Rule 2004, r 2.5A(2).

6.3.1.4 Stopping and give way rule

When a driver approaches or enters an intersection on a roadway where the vehicles moving in the direction in which that driver is travelling are controlled by a stop sign at or near the intersection, he or she must:[45]

> (a) stop his or her vehicle before entering the path of any possible vehicle flow at such a position as to be able to ascertain whether the way is clear for the driver to proceed; and
>
> (b) give way to any vehicles approaching or crossing the intersection from a roadway not controlled by a stop sign.

The obligation on the driver to stop and give way implies that they should give way equally to cyclists as, under r 4.1(1), vehicle includes a bicycle.

The give way rule affecting vehicles under rule 4.2 is crucial, given that it addresses the operation of the rule at intersection, T intersection and equally to vehicles changing lanes or turning. If the driver is changing lane or turning or about to do either, they must give priority to vehicles not doing such manoeuvres.[46] A vehicle making a right turn, must give priority to vehicles coming from opposite direction or those making an authorised left turn.[47] Similarly, a driver entering a roundabout must give way to traffic on the roundabout and to traffic approaching from the driver's which includes a cyclist approaching from the driver's right.[48] The driver entering a driveway, must give way to the road user on a footpath, cycle or shared path,[49] and when exiting a driveway, the driver must, in addition to the road user on the footpath, cycle path or shared path, give way to all vehicles on the roadway, whether moving on the roadway or making a right turn into the driveway.[50]

In spite of the existing rules especially the stop and give way rules, accidents at intersections remain very high, as stated in Chapter 2. Many roads in New Zealand

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[45] Land Transport (Road User) Rule 2004, r 4.1 (1).

[46] Land Transport (Road User) Rule 2004, r 4.2 (2).

[47] Land Transport (Road User) Rule 2004, r 4.2 (2A).

[48] Land Transport (Road User) Rule 2004, r 4.6(1).

[49] Land Transport (Road User) Rule 2004, r 4.4(1).

[50] Land Transport (Road User) Rule 2004, r 4.4(2).

have cycle lanes but regretfully, a cyclist cannot achieve their journey just by using cycle lanes. There will be a point where they will have to share the road, either at an intersection or at a roundabout, where the risk of a crash is very high. In order to address this concern, the Panel recommends:

- cycle specific intersection treatments and a trial of European roundabout design;[51]
- bringing signalisation at roundabouts would improve safety of cyclists but a more plausible option could be to have "signals or grade separation" for cyclists;[52]
- the provision of "consistent, continuous, convenient and complete urban cycle networks, in keeping with best practice- a whole of journey approach".[53]

The need for the cyclist to have a complete trip on a cycle lane was also reflected in the 'complete streets approach', as advocated by the Ontario Coronial Review. It states that any development or re-development of communities in Ontario should include:[54]

> - Creation of cycling networks (incorporating strategies such as connected cycling lanes, separated bike lanes, bike paths and other models appropriate to the community.)
> - Designation of community safety zones in residential areas, with reduced posted maximum speeds and increased fines for speeding.

The Panel also draws on the need for cycle lanes to be of adequate width, as identified by the Austroads project cited by the Panel. [55] The Panel considered that on busy streets with high speed traffic, the safer option would be to cycle on separated cycleways rather than on road cycle lanes. Sealed road shoulders are also

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[51] Cycling Safety Panel, above n 31, at 32.

[52] Cycling Safety Panel, above n 31, at 31.

[53] Cycling Safety Panel, above n 31, at 32.

[54] Deputy Chief Coroner, Office of the Chief Coroner for Ontario Cycling Death Review a review of all accidental cycling deaths in Ontario from January 1st, 2006 to December 31st, 2010 Road Safety is everybody's responsibility (Office of the Chief Coroner, Ontario, 2012) at 29.

[55] Cycling Safety Panel, above n 31, at 31.

an effective way of increasing safety to the cyclist. The Panel also added that to encourage the use of separated paths by cyclists, where they are available, the authorities should make sure they are of an adequate width, have a good surface and are free from debris. This would deter a cyclist from sharing the road with other traffic.[56] As a precautionary measure, the Panel also recommended that parking facilities for cars be removed on arterial roads wherever they pose a risk to a cyclist. In its response paper published in August 2015, the NZTA stated that they are presently exploring the intersection trials which forms part of its 'infrastructure delivery programme' over the next three years.[57] As to the removal of car park on arterial roads, the NZTA is, at present, doing a cost benefit analysis of integrating a system of inner city parking.[58]

6.3.1.5 Passing distance

Many cyclists have died or sustained serious injuries as a result of crashes with a motor vehicle which has passed them unsafely. Cyclists are particularly vulnerable because firstly, they are riding at a comparatively low speed when compared to the vehicle overtaking them. Secondly, cyclists are highly dependent on a proper balance for their ride, which becomes more difficult to maintain if "their space is impinged upon".[59] The immediate question we are led to is whether the driver, if at all at fault, has been adequately sentenced. The answer is the motorist, in many cases, has walked away without any charge being imposed on them. It cannot be the case that the prosecution, in failing to lay a charge be blamed totally for this. The law itself is flawed in this area. Contrary to many jurisdictions, New Zealand law is silent as to what constitute a safe distance to be observed when passing a cyclist.

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[56] Cycling Safety Panel, above n 31, at 30.

[57] NZTA *Making cycling safer and more attractive The New Zealand Transport Agency's cycling safety action plan* (August 2015) at 8 <www.nzta.govt.nz>.

[58] At 8.

[59] Cycling Safety Panel, above n 31, at 33.

Rule 2.6 of the RUR 2004 provides that, a driver must not pass or attempt to pass another vehicle [a vehicle in the definition section includes a bicycle] moving in the same direction, unless:[60]

(a) The movement can be made with safety; and

(b) The movement is made with due consideration for other users of the road

The law does not specify the mandatory distance that the motorist should allow when passing a cyclist. It is only a recommendation by the NZTA that the passing distance to be observed by motorist should be 1.5 metres, which is stated in the Road Code as- "[i]deally, allow at least 1.5 metres between you and the cyclist."[61] If it is not in the law, it is hard to understand how compliance to this requirement can be enforced upon the motorist.

A cross-jurisdictional comparison as to the law on safe passing is required here. Many countries have provisions in their law as to the specific distance to maintain when passing a cyclist. In Queensland, Australia, motorists, under the amended Transport Operations (Road Use Management-Road Rules) Regulation 2009, are now required to observe "a lateral distance from the bicycle" of at least 1 metre in a 60 km/hr zone and 1.5 metres in a zone where the speed limit is over 60 km/hr.[62] Many states in America have incorporated this mandatory passing distance in their laws, most having the set the passing distance requirement at 0.9 metres and Pennsylvania at 1.2 metres. [63] In Ontario, a proposal to amend their law to provide for a safe passing distance was tabled following a Coronial Cycling Death Review in 2010.[64]

Atom Emet, in his submission to the Coroner, cites the case of Jane Mary Bishop who died in Christchurch in September 2014 because of no observance of passing

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[60] Land Transport (Road User) Rule 2004, r 2.6.

[61] New Zealand Transport Agency *The Official New Zealand road code about other road users sharing the road with cyclists* < www.nzta.govt.nz>.

[62] Transport Operations (Road Use Management-Road Rules) Regulation 2009 (Queensland, Australia), s144A.

[63] Cycling Safety Panel, above n 31, at 33.

[64] Cycling Safety Panel, above n 31, at 33.

distance by the truck driver.[65] And to make matters worse, charges were not laid against the truck driver. Had the truck driver kept the passing distance from the cyclist, he would not have run her over, when she fell off her cycle after a motorist opened his door in front of her. Atom expressed his dismay when he said, "As is clearly evident from the outcome of that fatal crash, the truck driver was not providing a safe space between the truck and the bicyclist, and should have been charged accordingly."[66]

The Coroner Ian Smith, investigating the death of Stephen Fitzgerald, concurred with the idea of introducing the one metre distance and recommended that the legislation include the provision of the one metre gap from a cyclist.[67] The Panel recommends, as a trial minimum passing distance when overtaking a cyclist, one metre in areas with speed limits up to 60 km per hour and 1.5 metres where the speeds are above 60 km per hour.

The NZTA in its response to the recommendation says that it will further extend the *See the person, share the road* campaign and act upon the results.[68] The encouraging side of this requirement is that the Government is presently considering incorporating the 1.5 metres passing distance into law.[69] Associate Transport Minister, Craig Foss said that this investigation will continue until mid-late 2016 and adds "I firmly believe cycling should be a safe choice for personal travel on New Zealand roads, and I look forward to seeing significant improvements in cycling safety."[70]

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[65] Atom Emet *Submission to the Office of the Chief Coroner regarding the Inquiry into Bicycling Deaths in New Zealand* (June 2013).

[66] At [11.1.2.2].

[67] *Fitzgerald* [2013] NZCorC 6 (31 January 2013) at Recommendation I (b).

[68] NZTA *Making cycling safer and more attractive*, above n 57, at 11.

[69] Stuff "Govt considers 1.5m safety buffer for cyclists" (2 September 2015) <www.stuff.co.nz>.

[70] Craig Foss "Government committed to cycle safety" *(*2 September 2015) *The National* <www.national.org.nz>.

6.3.2 Road rules that could be a risk to cyclist

The Panel considers that many of the regulations governing traffic have been set bearing in mind the motorists and pedestrian. It recommends changes specifically to rr 2.6 and 2.9 RUR, considering that such amendments would help improve the safety of the cyclist:[71]

> - Road User Rule 2.6 to provide that a motor vehicle may encroach on a flush median to overtake a cyclist if it is otherwise safe to do so; and
> - Road User Rule 2.9 to provide expressly that a motor vehicle may cross a no-passing line to pass a cyclist if it is otherwise safe to do so.

These recommended changes would definitely increase the safety of the cyclist. The minimum passing distance of 1 metre or 1.5 metres, if implemented would work better for both the motorist and the cyclist by allowing for motorists to encroach on a flush median or a no passing line if obviously, it is safe for them to adopt this manoeuvre.

As a response to this proposal, the NZTA announced recently that over the coming three years, it will, in collaboration with the MoT, ensure that the proposed amendments progress through the annual Land Transport Rules Programme.[72] Associate Transport Minister, Craig Foss, says that he has asked for the MoT and the NZTA to continue with the investigation as to the proposed legislative changes on side under-run protection for trucks and passing distance and the investigation will last until mid-2016.[73]

6.3.3 Harm caused by collisions with trucks and reform

Another strong concern expressed by the Panel was the need to ensure that cyclists are safe around heavy vehicles. It is true that motor cars are mostly involved in crashes with the bicycle. It is, however undisputed, that the harm caused to the cyclist in the event of a crash with a truck is far more alarming. The rate of crashes

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[71] Cycling Safety Panel, above n 31, at 44.

[72] NZTA *Making cycling safer and more attractive*, above n 57, at 12.

[73] Foss, above n 70.

with trucks cannot be under estimated either. The Panel states that for the period 2003 to 2012, 33 per cent of urban cyclist fatalities involved crashes with trucks. [74] In the Vehicle Standards Map, as part of the Safer Journeys Action Plan 2013-2015, the MoT explained the significance of the under run protection device in trucks as follows:[75]

> Under-run protection devices are fitted to the side, front or rear of a heavy vehicle to prevent motorists and cyclists running under a truck in a crash. This prevents these road users for becoming jammed between the road surface and the heavy vehicle or overrun by the heavy vehicle's wheels.

The significance of this measure was also reflected in the Ontario Coronial Review, which recommended that side guards be made mandatory for heavy trucks in Canada. It also called upon consideration of other safety mechanisms like blind spot mirrors and blind spot warning signs so as to increase visibility of the cyclist to the truck driver.[76]

The New Zealand Safety Panel considered that the issue of under run protection devices in trucks be further explored together with other vehicle technologies like additional mirrors, and collision detection systems and a cost benefit analysis be made.[77] The Ministry of Transport will make an assessment of the effectiveness of this protection device against that of other existing and future vehicle technologies that would help promote the safety of all road users.[78]

6.3.4 Equipment and Clothing for the cyclist

The need to be properly equipped is a prerequisite for the cycle rider who is more exposed to danger when using the road. Equipment and clothing have played an important role in preventing road accidents. Rule 11 RUR 2004 has been specifically designed to address the safety of the cyclist, as well as that of other road users.

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[74] Cycling Safety Panel, above n 31, at 45.

[75] Ministry of Transport *Safer Journeys Vehicle Standards Map* (2014) at 45 <www.saferjourneys.govt.nz>.

[76] Deputy Chief Coroner *Cycling Death Review*, above n 54, at 25.

[77] Cycling Safety Panel, above n 31, at 45.

[78] NZTA *Making cycling safer and more attractive*, above n 57, at 13.

6.3.4.1 Use of helmet

Rule 11.8 RUR 2004 requires a cyclist to wear a safety helmet of an approved standard at all times while cycling. However, on the issue whether helmet wearing being compulsory promotes cyclist safety is controversial. Pucher and Buehler have come to conflicting findings on this issue.[79] While they found that in the Netherlands, Dutch planners find helmets to have a deterrent on cycling due to their lack of comfort and inconvenience, they found that Danish and Germans have a more favourable attitude to helmet wearing. In New Zealand, Thull and Lausterer's research in 2003 revealed that since helmets were made compulsory in New Zealand in 1994, there has been a decrease in cycling to school.[80]

In countries where helmet use is made compulsory by statute, this may be seen to impinge on the cyclist's rights. When assessing the level of damages to the injured cyclist, they may be held to have been contributorily negligent for failing to wear a helmet, thus reducing drastically the damages that could be awarded to them. Bob Mionske, states that to avoid blame being shifted to the cyclist, many countries have incorporated in their helmet legislation a "no-blame provision". This, he says will not allow the failure to wear a helmet to be used against the cyclist, either to prove their contributory negligence or to reduce their damages awards. [81] The author, replies negatively as to the question whether in a country with no helmet law, the cyclist can be blamed for not having worn one. Bob Mionske refers to the case of *Cordy v Sherman Williams Company*[82] where the District Court Judge for the District of New Jersey said that in the absence of any state law requiring adult helmet use, a reasonable person would not believe that their failure to wear a helmet

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[79] J Pucher, & R Buehler "Making Cycling Irresistible: Lessons from the Netherlands, Denmark and Germany" (2008) 28 (4) Transport Reviews 495 at 28.

[80] JP Thull and H Lausterer "Mobility Management for High School Students in Christchurch, New Zealand" (paper presented to the 26th Australasian Transport Research Forum, Wellington, New Zealand, 2003).

[81] JD Bob Mionske *Bicycling and the Law*, *Your rights as a cyclist* (1st ed, Velo Press, Colorado, 2007) at 88.

[82] At 90.

could be unreasonable and the District Court Judge warned that such behaviour would prejudice the legal rights of the cyclist.[83]

It is also questionable whether helmet wearing is indeed effective in protecting the cyclist in all falls. Bob Mionske highlights that only cases of low speed that it does help and not vice versa:[84]

> This is because helmets are usually only designed to prevent injury during low speed impacts; 11 to 14 miles per hour, the type of low-speed impact a cyclist would expect to encounter while falling from his or her bike due to some defect in the road surface, or due to cyclist error.

Atom Emet, in his submission to the Coroner, notes that more than 80 per cent of cycle fatalities are those collisions where motor vehicles were involved.[85] He further adds that bicycle helmets cannot be said to withstand the impact of a motor vehicle collision and to him "there is a very narrow range of 'real world' scenarios where bicycle helmets would have any beneficial effect... and the helmet law did not prevent head injuries."[86] He notes, however that New Zealand registered a drastic fall in cycling rates, "as much as 30%" ever since helmet law was introduced.[87]

On the other hand, the Ontario Coronial Review underlined the importance of helmet to avoid death among cyclists. Though it recognised that the issue of helmet use is the subject of much controversy, it recommended that the Highway Traffic Act in Ontario be amended to make helmet use mandatory.[88]

6.3.4.2 High visibility clothing

Rule 11.12 (2) provides that a person must not ride a cycle on a road during dark hours unless the pedal of their bike has reflectors or they wear reflective material.

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[83] Mionske above n 81, at 90.

[84] Mionske, above n 81, at 91.

[85] Emet, above n 65, at [11.2.1].

[86] Emet, above n 65, at [11.2.1].

[87] Emet, above n 65, at [11.2.1].

[88] Deputy Chief Coroner *Cycling Death Review*, above n 54, at 22.

The rule therefore does not make high visibility clothing compulsory. High-visibility clothing is more commonly known as high vis.

Just like helmet law, any recommendation to the effect that the wearing of high-vis should be compulsory, has been subject to criticism. In January 2013, Coroner Ian Smith investigated the tragic death of Superintendent Stephen Fitzgerald who died when he was cycling home in June 2008. Coroner Smith recommended the compulsory wearing of high visibility clothing – "That just in the same manner that it is compulsory for a cyclist to wear a safety helmet when cycling on public roads, all cyclists (with the exception of those partaking in a controlled event, such as a road race) should wear high-vis clothing."[89] The Coroner also added that the issue of high vis is "a no-brainer... while the wearing of such clothing will not stop a specific incident happening it simply must be common sense in the interests of safety to wear such clothing."[90]

This recommendation by the Coroner has, however, been criticised. Elena Mok recalls that apart from the public, many officials and cycling group had opposed this recommendation.[91] The media had, however, reported that the victim was wearing reflective stripes and also the lights on their bike were working at the time the accident occurred.[92] Elena also adds that "the MoT consequently declined to adopt the recommendation on the basis that legal regulation in this area was undesirable and would deter many New Zealanders from cycling."[93] Furthermore, when Coroner Gordon Matenga published his Coronial Review in 2013, he made no request to reform the law as to the wearing of high vis clothing.[94]

Even though the Panel encourages the wearing of high visibility clothing by cyclists, it does not favour the view that this should be made compulsory.[95]

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[89] *Fitzgerald* [2013] NZCorC 6 (31 January 2013) at Recommendation I(a).

[90] At Comments II.

[91] Elena Mok "Harnessing the Full Potential of Coroner's Recommendations*"* (2014) 45 Victoria University of Wellington Law Review at 331.

[92] At 331.

[93] Mok, above n 91, at 331.

[94] Matenga, above n 1.

[95] Cycling Safety Panel, above n 31, at 43.

6.3.4.3 Lighting Equipment

As noted in the studies by Jensen and others and Turner and others,[96] many bicycle-motor collisions occurred because the motorist failed to see the cyclist. Rule 11.12(1) of the RUR 2004 requires a cyclist to ride on a road during the hours of darkness if they have the following equipment on their cycle, a headlamp, a reflector and a rearward-facing position lamp. The Land Transport Rule: Vehicle Lighting 2004 (VL) is a supplement to the RUR and it sets out the safety standards and requirements for lighting equipment fitted to vehicles including the bicycle.[97]
It is noted that the interpretation section of the VL provides for the meaning of driver as "the rider of an all-terrain vehicle, a motorcycle, a moped, a cycle, a mobility device, or a wheeled recreational device."[98]
In terms of the lighting requirements, this is addressed under Sub-clause 2.1(1) of the VL which requires the lighting equipment fitted to a vehicle or a bicycle to be:

> (a) capable of providing sufficient illumination, light output or light reflection to:
> (i) fulfil its intended purpose; and
> (ii) enable the vehicle to which it is fitted to be operated safely on a road; and
> (b) correctly aligned; and
> (c) fitted in a position and perform in a way that is appropriate for the equipment and the vehicle.

And the interpretation section adds that hours of darkness means 30 minutes after sunset on a particular day and 30 minutes before sunrise on the next day or any other time, in the absence of sufficient daylight, that a person or vehicle is to be visible at a distance of 100 metres.[99]

The requirements for retro reflectors fitted to a cycle are explained under Rule 9.3 of the VL that the cycle may basically be fitted with "one or two forward-facing retro reflectors and one or more side-facing retro reflectors."[100] Atom Emet, in his

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[96] Jensen and others *Collection of Cycle Concepts* (Road Directorate Copenhagen, Denmark, 2000); Turner and others (2006) *Predicting accident rates for cyclists and pedestrians – Land Transport New Zealand Research Report 289* (NZTA, 2006).

[97] Land Transport Rule: Vehicle Lighting 2004, r 1.2.

[98] Land Transport Rule: Vehicle Lighting 2004, pt 2.

[99] Land Transport Rule: Vehicle Lighting 2004, pt 2, Definitions.

[100] Land Transport Rule: Vehicle Lighting 2004, r 9.3 (8).

submission to the Coroner, is critical of these lighting requirements having been updated only in 2004, when the VL became law. Since then, there have been rapid changes in technological devices to the effect that modern lights can be seen from a distance of 500 m.[101]

The Panel seems to agree with Emet when it says that the legal requirement that bicycle lights should be visible from 100 metres is very weak when considering the latest technological changes in the quality and brightness of bicycle lights. It recommends that the present legislation on the standards of lighting requirements, as stated above, should be amended as follows:[102]

> when operated between sunset and sunrise or in low light conditions, [bicycles] must be fitted with lights that are visible from a distance of 200 metres (this may be steady or flashing).

Other recommendations that the Panel have made, with a view to improving cyclist safety, include:

- Promote a scheme of safe speeds by ensuring that the interests of the cyclists is considered whilst implementing the Safer Speeds Programme, reduce speeds through traffic calming in key areas like schools and shops and reduce speeds on roads where cyclists and traffic cannot be separated;[103]
- Establishing adult cycle training opportunities;[104]
- Creating the right climate to cycle to school through a number of safe system measures;[105]
- Employee heavy vehicle driver should receive 'cycle safety-specific driver training';[106]
- Planning, implementation and evaluation of investment in cycling should be conducted by dedicated team at the NZTA and MoT and active transport

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[101] Emet, above n 65, at [11.2.4].

[102] Cycling Safety Panel, above 31, at 48.

[103] Cycling Safety Panel, above n 31, at 13.

[104] Cycling Safety Panel, above n 31, at 43.

[105] Cycling Safety Panel, above n 31, at 39.

[106] Cycling Safety Panel, above n 31, at 38.

modes should be given topmost priority in and transport planning and investment decisions.[107]

This leads us to the question as to whether the recommendations by the Panel will adequately ensure the cyclist safety. Those recommendations are, to a large extent, in line with the policies adopted in the Netherlands, as seen in Chapter 5, in the form of traffic calming measures and increased education programmes. A parallel can be equally drawn with the recommendations made by the Ontario Coronial Review. It stressed the need for a comprehensive education programme to ensure safer road sharing between cyclists and motorists, through a number of targeted mechanisms which include road safety education in the school curriculum, and higher public awareness campaign on cycling safety. It also recommended a comprehensive review of the Highway Traffic Act and municipal by-laws to ensure "they are consistent and understandable with respect to cycling and cyclists and therefore easier to promote and enforce."[108]

Another recommendation of the Coronial Review of Ontario which was not considered by the Panel in New Zealand was that bicycle safety information like road rules could be made available to the purchaser at the time of sale, thereby ensuring that the cyclist has access to the road safety rules.

Another strength of the Ontario Coronial Review is that it addresses each specific recommendation to the relevant Ministry, which is not entirely the case with the way the Panel's recommendations have been addressed.

Arguably, the setting up of the Panel and its subsequent recommendations aroused much awareness about cycling safety and provided avenues for reform to be adopted by the Government. However, a Panel, set up only on a one-off basis, is not considered to be very useful, as it is unlikely that it would achieve any significant safety outcomes. It is a worthwhile step that a cycling authority be set up for the purpose of advising the Government on the adoption of policy measures that are cycling related or those land transport policies that are likely

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[107] Cycling Safety Panel, above n 31, at 26.

[108] Deputy Chief Coroner *Cycling Death Review*, above n 54, at 25.

to have a detrimental effect on cycling. The proposed authority, with cycling related experts, either as full time or part time researchers, could assist in providing ideas that would promote legislative amendments or guidelines to consider when prosecuting or sentencing in cases where the victim is a cyclist. The contribution of the NZTA is a valuable one. However, an authority associated with the NZTA in the form of a Technical Advisory Group and known as the New Zealand Cycling Agency, with experienced cycling advocates, would be in a better position to make constant appraisals of Government policies or legislative amendments that are likely to benefit or deter cycling in New Zealand.

6.4 Assessment of other legislative provisions aimed at promoting cycling safety

6.4.1 Prohibition by cyclist to use the footpath

Rule 11.11 of the RUR prevents the cyclist from using a footpath, unless he is delivering letters to letterboxes. Again, it is controversial whether this rule favours the safety of a cyclist or compromises it. Preventing a cyclist riding on the footpath can be viewed as a safe measure. Firstly, there may not be sufficient space on the footpath to accommodate pedestrians, elderly people with mobility devices, skating lovers and cyclists. Hence, this creates a greater likelihood of collisions and severe harm. In case of a collision with a pedestrian, Bob Mionske notes that the cyclist will be at a legal disadvantage, given that it is the cyclist who owes the pedestrian a higher duty of care than what is owed to the motorist.[109] Atom Emet is against the prohibition of riding on a footpath. He underlines that, in many places in New Zealand like Wellington, it is almost inevitable for the cyclist to ride on a footpath, given a "combination of steep hills, fast traffic, narrow lanes and lack of alternate routes."[110] It can be argued that it is quite discriminatory for a cyclist to be denied the right to use the footpath, especially the less confident cyclist, when the footpath is accessible by riders of mobility devices or wheeled recreational devices. [111]

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[109] Mionske, above n 81, at 162.

[110] Emet, above n 65 at [11.2.7.2].

[111] Land Transport (Road User) Rule 2004, r 11.1.

6.4.1.1 Brief comparative analysis with other countries on the use of footpath

In the UK, cycling on the footpath is an offence under s 72 of the 1835 Highways Act, as amended by s 85 (1) of the Local Government Act 1888. A person shall be guilty of an offence if he:[112]

> shall willfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers or shall wilfully lead or drive any carriage of any description upon any such footpath or causeway.

The definition of "carriage" has been amended by s 85 of the Local Government Act 1888 to include "bicycles, tricycles, velocipedes and other similar machines."[113] The person who breaches this provision will receive a fine of £30 under s 51 and schedule 3 of the Road Traffic Offenders Act 1988. In Germany, where there are signs of sidewalk or footpath, cyclists are allowed to use the sidewalk or footpath if there is a supplementary sign indicating same. Where cyclists are allowed to use the sidewalk or footpath, they will need to ride at a speed that corresponds with the walking speed of the pedestrian.[114] And where there is sign of combined sidewalk/footpath and bikeway, the cyclist is obliged to use the combined path and not the roadway.[115] In most states in the United States of America, riding on sidewalks is legally allowed, except in places where it is expressly prohibited.[116]

Bob Mionske doubts that riding on the footpath is really a safe practice. When cycling on a footpath, the cyclist is exposed to a risk of crash with vehicles entering or exiting driveways.[117] Motorists do not expect a fast moving vehicle on a footpath.

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[112] Highways Act 1835 (UK), s 72.

[113] Local Government Act 1888 (UK), s 85.

[114] John Allen "John Allens' bicycle facilities, laws and programs pages" (updated January 2010) <www.bikexprt.com>.

[115] John Allen "John Allens' bicycle facilities, laws and programs pages" (updated January 2010) <www.bikexprt.com>.

[116] Mionske, above n 81, at 160.

[117] Mionske, above n 81, at 159.

He explains that we cannot blame motorists for that, "we are all creatures of habit and motorists are no exception."[118]

The American Association of State Highway & Transportation Officials opposes the use of footpaths for cycling purposes as they consider that it undermines safety. To the Association, "sidewalks are typically designed for pedestrian speeds and manoeuvrability, and are not safe for higher speed bicycle use".[119]

6.5 The concept of the 'Vulnerable Road User'

The World Health Organisation includes a cyclist as someone who falls under the category of the Vulnerable Road User (VRU)[120]. In New Zealand, the significance of VRU protection laws comes into play when there have been a number of deaths of cyclists or other VRUs, which has been the subject matter of wide publicity, especially in 2010 and 2011[121]. Apart from the provisions on careless driving and dangerous driving as discussed under Chapter 4, New Zealand has no VRU law as such.

6.5.1 Significance of the concept

Professor Weiss explains that the aim of VRU laws is to ensure there are adequate penalties, costs and other forms of burdens imposed on the driver when they injure or kill a vulnerable victim in a collision through carelessness. However, VRU laws do not seek to sanction a new set of behaviours.[122] Professor Weiss explains the rationale behind the bringing of VRU laws in the following words:[123]

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[118] Mionske, above n 81, at 159.

[119] American Association of State Highway and Transportation Officials *Guide for the Development of Bicycle Facilities* (American Association of State Highway & Transportation Officials, Washington DC, 1999).

[120] World Health Organisation "World Report on Road Traffic Injury Prevention" (2004) <www.who.int>.

[121] Harold Hank Weiss and Aimee L. Ward, "Is it time to advocate for a vulnerable road user protection law in New Zealand?" (2013) The New Zealand Medical Journal at 2 <www.injurycontrol.com>.

[122] Weiss and Aimee, above n 121, at 2.

[123] Weiss and Aimee, above n 121, at 3.

> The problem of driver carelessness escalates viscerally when the legal outcome is little or no sanction to the motorist, leading to an unbalanced scale of moral redress to the injured victim or their family…This contributes, some believe, to a "culture" of motor vehicle driver entitlement where arrogant dominance and intimidation becomes entrenched, rather than a culture of safety, common humanity, deference to the vulnerable, and respect.

He further adds that the presence of VRU laws will provide an incentive for safer driving practices whilst drivers will be wary of additional penalties which will in turn, help address one major deterrent factor to a wider uptake of cycling, the fear of encountering unsafe and discourteous motorists.[124]

6.5.2 Analysis of the working of the VRU law in other countries

States in the United States of America that have VRU laws include Oregon, Delaware, Hawaii, Vermont and Washington.

In Oregon, the legislative provision on careless driving, where a VRU is involved, is provided for in 2013 Oregon Revised Statutes (ORS) and reads as follows:[125]

> (3) In addition to any other penalty imposed for an offense committed under this section, if the court determines that the commission of the offense described in this section contributed to the serious physical injury or death of a vulnerable user of a public way, the court shall:
>
> (a) Impose a sentence that requires the person to:
>
> (A) Complete a traffic safety course; and
>
> (B) Perform between 100 and 200 hours of community service, notwithstanding ORS 137.129 (Length of community service sentence). The community service must include activities related to driver improvement and providing public education on traffic safety;
>
> (b) Order, but suspend on the condition that the person complete the requirements of paragraph (a) of this subsection:
>
> (A) A fine of up to [USD] 12,500, notwithstanding ORS 153.018 (Maximum fines); and
>
> (B) A suspension of driving privileges for one year as provided in ORS 809.280 (Department of procedures following court order of suspension or revocation); and

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[124] Weiss and Aimee, above n 121, at 3.

[125] Oregon Revised Statutes §811.135 (3) (2013) Vol.17 Chapter 811 Careless Driving Penalty <www.oregonlaws.org>.

(c) Set a hearing date up to one year from the date of sentencing.

The Oregon statute provides for higher penalties when the victim is a vulnerable rod user, as opposed to the maximum penalties which are provided for careless driving where no VRU is involved. By way of example, USD 2000 is the maximum fine for careless driving, if a Class A violation (where the driving leads to an accident) and USD 1000 if a Class B violation.[126] Therefore, Oregon law provides for a far harsher penalty if a VRU is involved in a collision following careless driving.

A recent government article reports that the year 2013 registered a drastic fall in the number of fatalities among vulnerable road users from the levels in 2012. Troy Costales, a Safety Division Administrator at the Oregon Department of Transportation notes that:[127]

> reducing fatalities was no accident-our positive gains are a result of our comprehensive traffic safety effort. Not only do we have good laws on the books, a majority of Oregonians follow those laws and exhibit good behaviour.

In Delaware, their VRU legislation has been in force since September 2010 and raised the penalty for careless driving which results in serious injury of a vulnerable road user.[128] When Governor Markell signed the 'vulnerable users' law in August 2010, he was delighted about the outcome that this law would potentially bring. Governor Jack Markell said:[129]

> The bill is first and foremost about safety. It's about protecting people using a public right of way. It puts all of us, as drivers, on notice that motor vehicles, must, at times, share the road. We are all focused on making Delaware an even better place to ride.

In Washington legislation which came into force in 2012, created a new traffic infraction which is more than being issued a simple ticket and less than being a

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[126] Oregon Revised Statutes §153.018 (2) (a) (2013) Vol.4 Maximum fines <www.oregonlaws.org>.

[127] Government of Oregon "Pendleton Round up 2013 was the safest year ever on Oregon's roads" <www.oregon.gov>.

[128] Weiss and Aimee, above n 121, at 5.

[129] DE Newark "Governor signs 'vulnerable users' law" (12 August 2010) State of Delaware <http://governor.delaware.gov>.

crime.[130] The rationale for this increased infraction is to send the necessary signal to the driver who injures or kills the VRU.[131]

In the Netherlands and Germany, the VRU law takes the form of strict liability rules applicable in their civil jurisdiction. According to this concept, any motorist who is using a vehicle is liable for financial damages caused by the vehicle, unless they can prove that the incident was caused by circumstances beyond their control. The onus of proof is on the motorist to prove that he was not negligent. Professor Weiss cites a government publication which explains the rationale behind the strict liability rule:[132]

> The Dutch philosophy is: Cyclists are not dangerous; cars and car drivers are: so car drivers should take the responsibility for avoiding collisions with cyclists. This implies that car drivers are almost always liable when a collision with a bicycle occurs and should adapt their speed when bicycles share the roads with cyclists.

6.5.3 Assessing the need for VRU law in New Zealand

In spite of findings in some countries, like Delaware as noted above, as to the reduced fatality rates among VRUs, Professor Weiss notes that there has been no concrete evaluation of the "effectiveness of such laws in reducing VRU injury risk"[133]. He is doubtful about the deterrent effect that a VRU law is likely to have. A driver, he says, is likely to have limited knowledge and focus less on a new law but is more guided by "moral, financial and legal incentives to avoid harming fellow road users."[134]

Professor Weiss is even more sceptical about how VRU laws will work for New Zealand. The Government has considered an increase in the penalties for careless driving, as noted in Chapter 1, a rise in the term of imprisonment to 3 years from the existing 3 months and a maximum fine of $10,000 from the existing $4,500,

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[130] Weiss and Aimee, above n 121, at 5.

[131] Weiss and Aimee, above n 121, at 5.

[132] Weiss and Aimee, above n 121, at 4.

[133] Weiss and Aimee, above n 121, at 6.

[134] Weiss and Aimee, above n 121, at 6.

and raising the disqualification period from 6 months to a year was contemplated.[135] However, when weighing up, the social cost savings against the higher costs of prison resources and court costs, the increased penalties were required to bring a deterrent effect estimated at 3.8 per cent, a level which the Government considered it was unlikely to reach.[136] It is noted that New Zealand's legislation already provides for different serious driving related offences and corresponding penalties like aggravated careless driving, driving under the influence of drink or drugs and dangerous driving. [137]

In terms of any possibility of having VRU laws reflected in the civil law, the Accident Compensation Corporation (ACC) scheme operates in New Zealand to grant personal injury compensation to the VRU without the need to prove whether they were at fault or not.[138] It is therefore hard to understand how a strict liability system like the one operating in the Netherlands would serve a 'remunerative purpose' in New Zealand.[139]

However, we cannot entirely share the view of Professor Weiss that a VRU law would not work for New Zealand. It could prove to be a futile venture in the area of civil law, given the operation of the ACC in New Zealand. But, the imposition of additional penalties to the motorist when colliding with a VRU could have a deterrent effect and could call for more care when driving around a VRU. An amendment to the careless and dangerous driving provisions to reflect higher penalties if a VRU is involved in a collision could definitely help increase the safety of the cyclist and promote cycling altogether.

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[135] Ministry of Transport *Advice on why drink driving causing death does not automatically result in a manslaughter charge* (2010) at 5 <www.parliament.nz>.

[136] Weiss and Aimee, above n 121, at 7.

[137] Land Transport Act 1998.

[138] Weiss and Aimee, above n 121, at 7.

[139] Weiss and Aimee, above n 121, at 7.

6.6 Conclusions

In view of the above legislative regime surrounding cycling, it can be deduced that there are legislative safeguards to promote the safety of the cyclist and other vulnerable road users in general. However, some shortcomings in the law, as identified are being acted on by the NZTA. There needs to be a strong mechanism that enables reform proposals to be followed up and to make sure that the Government takes prompt remedial steps with a view to further improving cyclist safety. Speedy actions are necessary so that New Zealand roads do not have more preventable cyclist deaths. As to the introduction of the VRU law in New Zealand, it is submitted that, in spite of findings by Professor Weiss to the contrary, a change in the criminal law to provide for increased penalties if a VRU is involved in a collision will serve to better improve safety of cyclists on the roads.

Chapter Seven: Conclusions and Recommendations

7.1 Conclusions

It is undisputed that the law regulating driving behaviour and its enforcement plays a significant role in enhancing road safety. In New Zealand, statute and the subsequent amendments can be said to have been responsive to the prevalence of road accidents. But as far as the involvement of cyclists in road accidents is concerned, there are still some shortcomings in the law. The law does not expressly provide for the mandatory distance that the motorist should observe when passing a cyclist. This absence makes enforcement of the law difficult against the motorist who fails to pass "with due consideration for other users of the road".[1] The interpretation of the law by the courts also makes a contribution to the promotion of road safety and therefore to the protection of the vulnerable road user like the cyclist or the pedestrian. An analysis of the cases studied has revealed a high degree of variation in sentencing for dangerous or careless driving or any other serious road traffic offences where the victim sustains injuries or dies. Variation in sentencing has been a strong cause of concern, especially to the Law Commission, which has criticised it for causing injustices. In cases of driving related offences, the injustice could be intertwined with the idea that variation in sentencing does not send the signal that road safety is being taken seriously. To make matters worse, the court imposing home detention on the drunk driver Philip Hamilton who was convicted after causing the death of a cyclist,[2] does not seem to correspond with the general practice of the courts in imposing custodial sentences in similar cases, as discussed in Chapter 4. The Sentencing Act 2002 was aimed at upholding consistency in sentencing. However, continued observation of inadequacies of the law by the Law Commission culminated in the enacting of the Sentencing Council Act 2007. However, the establishment of the Sentencing Council was not proceeded with following a change in Government.

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[1] Land Transport (Road User) Rule 2004, r 2.6.

[2] Martin Van Beynen, "Southbridge man sentenced for hit and run" (New Zealand, 8/02/2010) *The Press* <www.stuff.co.nz>.

This study also addressed the various developments that the prosecution system saw following mounting criticism of its exercise of discretion. The structures in place that currently regulate the prosecution system, in the words of Spencer, "appear to have achieved a fairly robust decision-making process".[3] Prosecution Guidelines which saw constant updates following recommendations by the Law Commission constitute a very useful mechanism to promote consistency and transparency in prosecution decisions. But criticism raised against the prosecutorial discretion in deciding to prosecute or not, especially in cases where the cyclist is involved in collisions with a motorist, continues to be heard. Perhaps it is appropriate to conclude on the words of Nigel Stone that "A criminal justice system which acknowledges its shortcomings is more robust and better able to retain the confidence of the public."[4] Even though, this thesis shows no evidence of the prosecution laying unduly high or low charges on the driver, a proper monitoring mechanism would help bring more confidence by the public in the prosecution system in New Zealand.

On the other hand, a study of the law regulating serious traffic offences in the Netherlands supports the idea that having the strictest system of penalties and bringing very serious charges against the offending driver does not make the roads safer. Professor Harold Hank Weiss and Aimee Ward, from the injury prevention research unit, at the University of Otago, support the argument against a hardening of the penalties when they said, "[h]oping that a law, by itself, will have any measureable effect on changing driver behaviours and 'Copenhagnize' our transportation system is naive".[5]

However, it can be argued that in the Netherlands, cycling is already successful in spite of severity or non-severity of its criminal law on offending drivers. Its highly dedicated infrastructure and cycle facilities have a long standing history. The

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[3] John Spencer *Review of Public Prosecution Services* (September 2011) < www.crownlaw.govt.nz> at [259].

[4] Nigel Stone "Improving New Zealand's Prosecution System: A practical reform proposal to avoid miscarriages of justice" (2012) 20 Waikato L.Rev. 67 at 82.

[5] Harold Weiss and Aimee Ward "Is it time to advocate for a vulnerable road user protection law in New Zealand?"(2013) 126 New Zealand Medical Journal 67.

Government of the Netherlands, local and central, have always committed themselves to the development of a comprehensive, coherent and continuous cycle network and adopted a number of related measures like traffic calming techniques in its major cities with a view to enhancing the safety of the cyclist. It is this dedication by the authorities that has helped pave the way towards the success of cycling there. Changes, as recommended by Professor Weiss, including safer intersections, separating cycles from motor vehicles and making cars to come to a complete stop at intersections rather than giving way, demand, however, investment and are time consuming. With a view to avoiding more cyclist victims on New Zealand roads, changes in the law as well are required. It is important to have a proper legislative regime and effective implementation of the law by the courts and prosecution to add up to road safety which will, in turn, produce a catalyst effect on a higher uptake of cycling. Therefore, this study advocates the following recommendations bearing in mind the heightened safety concerns of the cyclist.

7.2 Recommendations

In order to efficiently address the shortcomings of the policy framework on land transport and cycling and of the legal system in addressing safety concerns with regard to the cyclist, it is important to consider the following recommendations.

7.2.1 Policy decisions

(1) A dedicated infrastructure, like that of the Netherlands, would help encourage a wider uptake of cycling in New Zealand. This includes a well organised network of separate bike paths, contrary to on-road cycle lanes. Alternatively, if infrastructural constraints require the maintenance of cycle lanes, it is recommended that they should not be burdened with car parking facilities alongside and need to be accompanied by intersections specifically designed that allow for safe crossing by cyclists. In areas where it is impracticable to provide for bicycle paths or lanes, traffic calming techniques, through the reduction of speed in many residential areas could be an effective way of addressing cycling safety.

(2) The way Dutch cities have provided for extensive bike facilities at train stations and other frequent destinations in the city also serves as a good example. The promotion of cycling through schools would be a good starting point. Much progress would be made if a high number of children cycle to school.

(3) A re-organisation of the residential areas and bringing shops and key commercial spots closer to residential neighbourhoods can also help towards increasing cycling.

(4) Apart from land use policies, the Government of New Zealand could also consider revising its policies in view of restricting access to old cars in New Zealand. This would be in line with the car use reduction policies as integrated in the Netherlands system.

(5) Government, both at central and local level, should be able to adopt the Avoid, Shift, Improve (ASI) approach as initiated by the German based international organisation, as described in Chapter 5. The NZTA has a crucial role in ensuring that the right policies are taken at local levels. It is important that this role is further enhanced, that the NZTA is able to supervise and influence investment projects by local councils and encourage the projects to be more cycling geared.

(6) Much can potentially be drawn from the recent collaboration project between SWOV, the Netherlands and New Zealand, as described in Chapter 5. Strategies and plans as advised by SWOV should be rigorously pursued.

(7) The setting up of a cycling authority, as discussed under Chapter 6, would be wise option. The proposed authority could be associated with the NZTA and takes the form of a Technical Advisory Group. Its members would not only advise the Government on the adoption of policy measures that are cycling related, but will be in a better position to assess the positive or negative impact on the potential levels of

cycling, of a new policy adopted by the government or any legislative amendment that Parliament brings about. It can also aid the sentencing judge in terms of accurate guidelines in cases of collision where a vulnerable victim is involved. Its constant appraisal of the law and policy will definitely help promote cycling safety.

(8) In view of the problem of under reporting of cycle crashes in New Zealand, it is important for the Government to consider a monitoring system to make sure that all crashes where cyclists are involved, whether with motorists or otherwise, are recorded in the Crash Analysis System (CAS). This plays a significant role in providing an accurate picture of the level of safety that is required for the cyclist and to enable the authorities to act upon them.

(9) It is submitted that the cycle trails project, which has reported much success in New Zealand so far, and where many New Zealanders are aspiring to for recreational purposes, could be linked to a number of key destinations like shops and other major shopping complexes and so on. The trails could therefore be used not solely for recreational purposes but commuting to key destinations as well, thus bringing a higher upsurge in cycling commuting.

(10) But obviously policy decisions in terms of investment are long term ones, whilst recommendations as to law reform, that will follow, can be accommodated in a speedier manner.

7.2.2 Road safety rules that are driving related: changes to them, if any and changes in the practice of decision makers like judges and prosecution over those rules

7.2.2.1 Changes in the legislative provisions

The penalties provided in the legislative provisions, mainly the LTA 1998 are adequate in terms of punishment to the careless or dangerous driver. The law

already provides for harsher penalties in differing circumstances, by way of example, if the careless driving is impaired by alcohol or drugs. However, in spite of findings by Weiss and Ward[6] to the contrary, it is worthwhile to consider amendments to the Land Transport Act 1998. The legislative provisions on careless and dangerous driving, as discussed under Chapter 4, could be amended to provide for stricter penalties to the convicted driver in cases where a cyclist or a pedestrian, is a victim in a crash. The convicted driver should face, either a longer term of imprisonment or higher fines, coupled with longer term of disqualification where the victim is a VRU. The legislative provision as provided for in the Oregon statutes, as reproduced in Chapter 6, when a VRU is involved could serve as a useful guidance to the legislator. Apart from changes in the law, changes in the judicial system to better help the sentencing judge is also called for, as discussed below.

7.2.2.2 Changes in the sentencing pattern over the application of those rules

(1) It has been observed by the Law Commission and law academics that sentencing inconsistency can bring about injustice. As far as road traffic offences are concerned, the injustice that may be caused here, is an inadequate sanction being imposed on the offender, thus sending the signal that road safety is not given enough attention. This, in turn, is unfair to the victim and their family. Therefore, it is important that the issue of sentencing inconsistency is addressed and resolved to enable the public to have more confidence in the legal system.

(2) With a view to addressing these concerns, there have been many changes aimed at promoting consistency in sentencing. Yet, the Law Commission observed that, even after the enactment of the Sentencing Act 2002, sentencing practice was still failing when it came to promoting consistency.[7] Various recommendations by the Law Commission culminated in the enactment of the Sentencing Council Act 2007.

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[6] Weiss and Ward, above n 5.

[7] The Law Commission *The Law Commission Sentencing Guidelines and Parole Reform* (NZLC, R 94, 2006).

(3) In line with the strong recommendations by the Law Commission, it is submitted that a comprehensive set of sentencing guidelines, on road traffic offences and more specifically on dangerous driving causing death or injury and careless driving causing death or injury, is required. Such guidelines would:

a. be a clear guidance to the sentencing judge as to the kind of careless or dangerous driving that would warrant a custodial sentence and those that require a community sentence or any other non-custodial sentence;
b. bring a more consistent approach in sentencing in serious driving related offences. The guidelines would serve as a yardstick to determine the sentence that should be imposed in the circumstances. This would help to send the signal that road safety is an important consideration, which is being enforced in a more systematic and coherent manner.
c. help determine the outcome of a case where a vulnerable victim like a cyclist or a pedestrian is involved. The Guidelines should include a provision that the vulnerability of the victim, as a cyclist or pedestrian is one that will weigh in the balance when determining the culpability of the offender. Guidelines including this provision are already prevalent in England, as noted in Chapter 4.
d. help determine a definite set of circumstances where the imposition of driving disqualification is appropriate. It is important that this sanction is adequately emphasised as it is a strong deterrent to careless or dangerous driving.

7.2.2.3 Changes in the way prosecutors make charging decisions over those rules

With a view to encouraging more public confidence in the prosecution decision process and the criminal justice process at large, the following can be considered:

(1) As the Law Commission pointed out, as in Chapter 4, probably the taking away of the police discretionary powers to prosecute does not seem to be a sustainable option; there needs to be, therefore, a more

coherent system of supervision of the police prosecution and closer supervision by a Crown prosecutor; or alternatively enhancing the role of the Crown solicitor is another option that would help promote transparency in the system of prosecution. The law does provide for oversight by the Solicitor-General of the prosecution decision by the PPS[8] but there needs to be a stronger mechanism for the monitoring of the PPS by requiring them to report on prosecution decisions they made and if they declined prosecution, the reasons for so doing. Closer supervision is solicited, with a view to ensuring that the police is acting as per their mission statement, that is:[9]

> To serve the community by reducing the incidence and effects of crime, detecting and apprehending offenders, maintaining law and order and enhancing public safety.

(2) It is important, as discussed in Chapter 4, that the victim or the victim's family is kept aware of the proceedings and explained the prosecution decision and its outcome. To ensure compliance with the obligation of the prosecutor as imposed by Victims of Crime Guidance for Prosecutors 2014 and the Victims Rights Act 2002 to keep victims well informed, a monitoring system could be put in place to make sure this is being done.

(3) The victim should have the chance to review the decision of the prosecution, either in the face of a lower charge or no charge at all. This was recommended by the Law Commission in cases of victims of sexual offences.[10] The recommendation of the Law Commission can equally be applied in the case of traffic offences, affording the victim or the victim's family the opportunity to review the prosecution decision. The Law Commission also adds that this review is to be made by a senior

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[8] Criminal Procedure Act 2011, s 185.

[9] New Zealand Government *New Zealand Police Annual Report for the year ended 30 June 2006* (2006), <www.police.govt.nz>.

[10] Law Commission *Alternative Pre Trial and Trial Processes - Possible Reforms* (NZLC, 2012) at 13.

prosecutor if the decision was made by a police prosecutor and a Crown Solicitor from a different area if the decision was made by a Crown Solicitor.[11] This will help enhance public confidence in the system.

(4) Even though New Zealand has its own set of Prosecution Guidelines, their accuracy and reliability in aiding the prosecutor in making decisions on serious traffic offences are doubted. The "Guidance on Charging Offences arising from Driving Incidents" in England is a useful guideline to the prosecution in their charging decisions.[12] A similar comprehensive set of charging guidelines specific to driving offences, and especially in cases where a vulnerable victim is involved, can be incorporated in the New Zealand system to promote more consistent and coherent prosecution decisions.

7.2.3 Recommendations as to the legislative provisions on other rules related to the cyclists

Many of the recommendations made as to policy measures, as above, would help keep the cyclists, as far as practicable, away from the traffic. However, in view of infrastructural constraints and limited land use, it is conceded that those projects might be considered as long term ones. Therefore, in view of addressing the safety of the cyclist, whilst they are in continued conflict with the motorist, the following recommendations call for interventions:

(1) The minimum passing distance that should be allowed by motorist when passing a cyclist should be expressly included in the Road User Rules, though it is an issue which is already being considered by the Government.

(2) Legislative amendments, as advocated by the Panel in Chapter 6, for the purposes of allowing motor vehicles to encroach on a flush median or a

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[11] At 15.

[12] Crown Prosecution Service *Road Traffic Offences - Guidance on Charging Offences arising from Driving Incidents* (CPS, UK, 2007) <www.cps.gov.uk>.

no-passing line, when passing the cyclist is worthy of consideration. It will help provide more room to the cyclist and thus enhances their safety.

(3) Considering the high likelihood of collision with a truck being so deadly, the need to make compulsory under run protection in trucks and the fitting of additional mirrors becomes of heightened significance.

(4) Changes in the law are also warranted as to the cycle lights to be visible over 200 metres to make cyclists more visible at night.

(5) Riding on a footpath should not be made illegal as it can help save lives especially when it comes to the less confident cyclist on the road. It is noted that though riding on the footpath is risky when it comes to assessing the probability of a collision with a pedestrian, it is however submitted that collision with a moving vehicle on the road is more deadly.

(6) As noted in Chapter 6, the compulsory wearing of the helmet is not warranted as it does constitute a strong deterrent to cycling. Cyclists should be allowed to make decisions as to helmet wearing by themselves. The same argument applies to the wearing of high visibility clothing.

(7) The recommendation made by the Deputy Chief Coroner in Ontario, as stated in Chapter 6, in respect of the need for clear and consistent laws, can be applied in New Zealand context. Provisions of Road User Rules and other legislation governing safety of road users should be made "consistent and understandable". Also, given that the cyclist requires no licence to be cycling on the roads, it is important to make sure they are well aware of road code and safety rules. Safety information should be made available to cyclists upon the purchase of a bicycle, be it a second-hand or new purchase.

(8) It has been an observation that some of the Coroners' recommendations have not been acted upon. There is presently no legislative or other mechanism to ensure that they are implemented. Therefore, a legislative amendment to the Coroners Act 2006 could be made to the effect that Government should respond to the Coroner's recommendations. It could be a way of ensuring that the Coroner's recommendations are duly acted upon.

Hence it is submitted that addressing safety concerns of the cyclist, with a view to promoting cycling, is not the responsibility of only the Government or the legislator but it calls for interventions from different stakeholders. If all make a conscious effort towards making cycling safety a priority on their agenda, this will definitely have a bearing on the uptake of cycling. We may not reach the cycling rate as prevalent in the Netherlands but we must at least aim at creating a safe and conducive environment to enable people to cycle for more utilitarian purposes, that is, cycle to work and to school. This would, in itself, constitute a move towards a success story in New Zealand.

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