

As a result of comments from the October 28th open forum hosted by the Huntsville Bicycle Advisory and Safety Committee, this paper will provide a general over view of legal principles and portions of Alabama code that may apply. This should not be considered a legal opinion, since I am not a lawyer, but topics for further clarification from a criminal law attorney or a representative of the district attorney's office.

Most of this relies on Bob Mionske's book, *Bicycling & the Law, Your Rights As A Cyclist*.

The general provision in Alabama law that determines criminal actions is Section 13A-1-4, When act or omission constitutes crime.

No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance.

In the case of the driver who kills a cyclist while using a cell phone, this section makes it clear unless using a cell phone while driving is made illegal by the legislature, criminal charges cannot apply.

In examining criminal laws that affect bicycle crashes, it is necessary to break the laws down into three areas, intentional acts, gross negligence, and simple or ordinary negligence.

Intentional acts – While the topic of distracted driving initiated this review, many complaints from cyclists surround harassment by motorists. Harassment is an intentional act, which current laws already address. Bob Mionske writes:

Unlike drivers who are merely unaware of the danger they're putting you in, or those who are merely careless or negligent drivers, the harasser is aware of what she is doing – she is intently attempting to intimidate you, frighten you, or harm you. (pg 234)

The news article examples of the emergency room physician in Los Angeles and the post from Omaha are examples of intentional acts to do the cyclists harm. The LA doctor was charged with assault with a deadly weapon, for instance. Since causing harm to another is already covered by the existing laws, additional laws are unnecessary. Prosecution of intentional acts revolves around application of those existing laws.

www.latimes.com/news/local/la-me-cyclist3-2009nov03,0,761131.story

bikeomaha.blogspot.com/2009/11/victory-for-omaha-cyclists.html



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Capt Baker addressed what could be considered harassment at the October 28th meeting.

Negligence – Negligence occurs when harm is done to another unintentionally. Bob Mionske defines negligence as:

An act or failure to act by a person who has a duty of care and breaches that duty. (pg 353)

A *negligent act* comprises three elements: Whenever these three elements are combined – an act or failure to act, a duty of care, and breach of that duty – a negligent act has been committed (pg 119)

Gross Negligence – In some instances, a negligent act is considered so outrageously beyond acceptable that it is classified as gross negligence. Mionske defines gross negligence as:

An act that was so careless or in such reckless disregard for the rights or safety of others that the tortfeasor knew or should have known that injury was a likely consequence, but nevertheless acted in disregard of (with conscious indifference to) that likely consequence, even though the injury was unintended. (pg 352)

Mionske goes on to add:

Gross negligence is more extreme than ordinary negligence but falls short of an intentional act. (pg 119)

Sometimes, a statute will make gross negligence an element of a crime; when gross negligence is an element of a crime, it is called *criminal negligence*. (pg 119)

DUI is an example of gross negligence. When a motorist who is DUI kills a cyclist, existing DUI laws, Section 32-5A-191, cover this. Motorists have been convicted for killing cyclists while DUI. No new laws would be necessary.

Other than DUI, the other provision in Alabama law that would likely apply to this is reckless driving. Reckless driving is defined in section 32-5A-190 as:

Reckless driving.

(a) Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and



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circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

(c) Neither reckless driving nor any other moving violation under this chapter is a lesser included offense under a charge of driving while under the influence of alcohol or drugs.

Note that the wording is “willful or wanton” disregard for a persons’ safety, which is consistent with Mionske’s definition above.

Alabama vehicular homicide law applies if the cause of the fatality violates traffic laws:

Section 32-5A-192, Homicide by vehicle or vessel.

(a) Whoever shall unlawfully and unintentionally cause the death of another person while engaged in the violation of any state law or municipal ordinance applying to the operation or use of a vehicle, or vessel, as defined in Section 33-5-3, or to the regulation of traffic or boating, shall be guilty of homicide when the violation is the proximate cause of the death.

Since using a cell phone is not illegal under existing traffic laws, this provision cannot apply.

Simple or Ordinary Negligence

Many collisions would fall under the simple or ordinary negligence area. Mionske defines ordinary negligence as:

With ordinary negligence, the negligent conduct breaches a duty of care that the defendant owes to every other person to behaves a reasonable person would under similar circumstances to protect others from unreasonable risk of harm. (pg 119)

One attorney I contacted indicated that a central principle of criminal law is that of intent. With simple negligence, there is no intent to harm the cyclist. The driver that killed Sarah Chapman did not intend to kill her; the driver intended to answer the phone. Nor did the motorist who almost killed me in 2003 give any indication that she intended to kill me. She stated she just wanted to swat the bee off her arm. It would be up to the legislature to legally define that using a cell phone while driving as so reckless or careless that the driver should know that injury to the cyclist was likely to occur. An example of a similar issue is prohibiting drivers from watching their DVD players while driving.

The above have focused on whether motorists can be criminally charged. It is also important to examine whether motorists will be charged when a cyclist is killed.

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Burden of Proof – The burden of proof is very different between criminal law and civil law. Mionske explains:

In a criminal trial, the prosecutor must prove the case “beyond a reasonable doubt.” This is an objective “reasonable person” standard; there may always be some minuscule nagging doubt, like a voice suggesting “what if,” in a juror’s mind, but if a reasonable person would have enough doubt to believe that the defendant may not be guilty, then the prosecution has not met its burden of proof and the defendant must be found “not guilty.” (pg 242)

This burden of proof is much stricter than civil law:

In a civil trial, you need only to prove your case by a “preponderance of the evidence.” This is a simple probability standard: If it seems more likely than not that the defendant committed the offense, then you have met your burden of proof. (pg 242)

A common example of the differences in burden of proof is how OJ Simpson was found not guilty in the murder of two people but was found liable in civil court for their deaths.

If intent plays a considerable role in criminal charges, proving intent “beyond a reasonable doubt” makes criminal prosecution that much more difficult. Had the LA doctor not provided statements that he intended to “teach the cyclists a lesson” it might have been considerably difficult to prosecute him.

Another provision that is a consideration in criminal prosecutions of motorists is the “Reasonable Person Standard.” The prosecution must prove guilt beyond a “reasonable” doubt. Mionske defines the reasonable person standard for civil law as:

Standard of behavior for determining negligence; relies on what a person of ordinary prudence would do (or not do) in a particular set of factual circumstances. (pg 355)

Considering most of the general public has little understanding of bicycle law or safety, what would a “reasonable person” standard be for a cyclist hit by a motorist? For intentional acts or gross negligence such as DUI, that reasonable person standard is much easier to define and meet the burden of proof. Mionske spends considerable length in his book on societal bias against cyclists (pgs 196 to 216), including the judicial system. One cyclist in Huntsville sued after being hit by a motorist at night in the rain. The jury determined that the cyclist was at fault since he was using an amber reflector (which are actually bigger, brighter and more visible but are not allowed by law) instead of the required red reflector. The jury was polled after the decision and

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stated that the cyclist should not have been in the road to begin with. Given this was a civil trial with a lower burden of proof, this societal bias against cyclists under the criminal burden of proof must also be considered.

As cyclists we must decide if we would rather have prosecutors spend limited time, manpower and resources prosecuting simple negligence like the driver that kill Sarah Chapman or prosecuting intentional acts and gross negligence? We routinely hear about state budget pressures reducing court staffs, judges overwhelmed with cases, etc. Can we expect prosecutors to try cases that legally are very difficult to prove at the expense of other crimes?

Mionske provides a partial solution to this problem in section 5-14, Citizen Initiated Prosecutions. He elaborates:

Under Oregon's statute, which was enacted in 1999, the cyclist, a pedestrian, or anybody else who has witnessed a traffic violation may prosecute his or her own case if the authorities decline to prosecute. (pg 246)

Mionske goes on to include this only applies to traffic violations and not for nontraffic criminal offenses. Since using a cell phone while driving is not illegal, this still would not apply to the Chapman crash. Oregon also has a much more powerful and influential cycling community to get this type of law passed.

Three-Foot Law

Considerable discussion is occurring about passing a three-foot passing law similar to those in other states. There are a number of problems with a three-foot passing law.

First, let's look at crash statistics. Since motor vehicles account for less than 20% of bicycle crashes and only about 5% of those involve getting hit from behind, a three-foot passing law would affect less than 1% of bicycle crashes. The popularity of this law is probably an artifact of the "cyclist inferiority phobia." John Forester coined the term in his book *Effective Cycling*:

That view is that cyclists' greatest danger is motor vehicle traffic from behind, that the roads intended for motor traffic, that most accidents to cyclists are collisions from behind caused simply riding on the road or by too little room on the road. (pg 510)

This phobia is why in my courses I ask the students what percentages of crashes involve motor vehicles and of crashes with motor vehicles what percentage get hit from behind. I will usually have at least one student that will feel that 80-90% of crashes involve motor vehicles and 80-90% are getting hit from behind. A prime example of the cyclist inferiority phobia is this website that

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implies that if you buy their “3 ft” jersey your life will be saved: www.3feetplease.com. The website is keying of the fear rather than the actual risks. How many crashes would the three-foot law applied to in Huntsville? It would not have helped Sarah Chapman since it was a distracted driver. Nor would have applied to the Fletcher or Luhana crashes. It would not have applied to my crash either.

Existing laws, Section 32-5A-82, Overtaking vehicle on left, already applies to safe passing. This section requires:

The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions and special rules hereinafter stated:

(1) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

By passing a three-foot passing law, instead of a subjective determination of safe passing under the current law, police officers must apply an objective three feet to issue a citation. Unless the officer takes a tape measure and physically measures the distance, enforcement is extremely difficult. I doubt this would stand up in court. The only way three-foot laws can be enforced is after a collision occurs, which is too late. This law does little to no good in reducing collisions from negligent drivers. The cyclist is already injured or dead. It only provides a legal means that in many cases already exists to go after the motorist for damages. While it may allow for the vehicular homicide law to come into play, if criminal prosecutions rely heavily on proving intent, I doubt that this law will be used to prosecute the motorist. If the motorist intended to harm the cyclist, existing laws would apply.

Cyclists can avoid the need for a three-foot law if they use the full lane. By using the full lane, cyclists force motorists to pass in the next lane with adequate clearance. If motorists intend to buzz the cyclist, that becomes an intentional act. This becomes very evident on my recumbent tricycle. Rarely does a motorist pass closely because they cannot try to “squeeze by” since even if I’m as far right as possible, the trike is wide enough to always use the full lane. A “Cyclists Use the Full Lane” sign would be a possibility in this instance.

A three-foot law will not affect the top two motorist caused collisions, the left cross and right hook.

A three-foot law will not reduce the collision risk from drunk or distracted drivers.

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A three-foot law does not make the cyclist more visible.

Given the limited applicability of a three-foot law and the enormous effort to pass a law like this in the legislature, would the limited resources of the cycling community be better spent on educating cyclists and motorists how to drive around each other? From an educator's point of view, it is far more desirable to prevent the crash from occurring than addressing the aftermath of a fatality. While some states report improved education of police and increased publicity as a result of passing the law, can these be achieved without the effort required to get the law passed through the legislature? For the HBASC, it would be easier, faster, and more beneficial to train police in enforcing existing safe passing laws than embark on a statewide campaign to pass a three-foot law. Long term, a three-foot law can be considered after other efforts to address cyclists risks are established.

If criminal prosecution is a priority, our efforts should be focused on prosecution of intentional acts and gross negligence with severe penalties for both. Forester describes several instances where guilty motorists received probation or little jail time after intentional acts, a DUI and hit and run, that he attributes to the "cyclist inferiority phobia" and the societal bias against cyclists in the judicial system. (pgs 550-556)

Councilman Kling's offer to pass a resolution may be better served emphasizing the need for better drivers ed requirements than a three-foot passing law. Maj Roscoe Howell, who was head of the Drivers License division at the Dept of Public Safety, responded in 2005 to my changes in the drivers ed manual that only a "minimum and basic" understanding of safety is required in order to get a drivers license. Consider that a drivers license & pilots license are both privileges. Now look at two Northwest pilots who got distracted while on their way to Minnesota. The aircraft did not crash. No passengers were hurt. Yet the FAA revoked both pilot's licenses for gross misconduct. Now apply that same principle to most drivers and I expect you would get much better drivers. Maybe our efforts should be in making it more rigorous to get a drivers license, more enforcement of the rules, and make it easier to take it away.

Things to ask for clarification from the district attorney

- What is the role of intent in criminal prosecutions?
- What laws apply to motorists that intentionally harass cyclists? What can cyclists do to insure these get prosecuted (such as helmet cams of motorists) and the sentences are adequate?
- What laws are necessary to make it easier to prosecute negligent drivers?

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