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Duty and standard of care are *not* the same thing

Don't allow defendants to paint your client comparatively at fault

By Louis S. Franecke

Too often in trial we forget that any comparative fault of our clients is a burden of proof on the defense. The client is entitled to be defended from fault from the beginning by motions in limine, not just during the trial. The client may not have had a duty to do anything, and thus may not be at fault at all. The challenge to duty is a matter of law, not of fact for the jury. By allowing the jury to consider issues damaging to your client, the judge is sanctioning the defense claim that your client did something wrong.

The following article examines the duty of a plaintiff riding a bicycle and the use of a helmet. The principles stated here, however, are applicable to any fact situation.

Assume an over-18-year-old bicyclist is intending to take a leisurely ride, after brunch, on a beach path. While pedaling in the parking lot to the beach, the bicyclist is struck by an out-of-control arm of a barrier gate used to control vehicle traffic. The bicyclist falls backwards and suffers a permanent brain injury. The bicyclist was wearing appropriate clothing, a hat, sunglasses, but not a helmet. The defense demands that the standard-of-care issue of wearing a helmet should be considered by the jury.

Plaintiff's duty versus defendant's duty

There appears to be little case law dealing with a plaintiff's duty. The existence of a duty is a matter of law and is not the same thing as standard of care which is a jury question. (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124.)

However, the defendant's duty is different than the plaintiff's duty. (See, Civ. Code, § 1714(a).) For instance, the defendant's duty is to use reasonable care under the circumstances to prevent all foreseeable injury to the plaintiff. The injuries need only be foreseeable and not specific. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) "[B]ut a court's task – in determining 'duty' (for a defendant) – is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced …"

On the other hand, plaintiffs only owe a duty to themselves (and thus comparatively to defendants) to use ordinary care not to expose themselves to danger that may arise from a defendant's negligence. (See 57B Am.Jur.2d (2004 edition), Negligence, ¶¶ 808, 812 *et seq.*; 33 ALR 4th 790).[1]

Notice, plaintiff's duty is to avoid danger, not to avoid specific injury.

The recent California Supreme Court case of *Cabral v. Ralphs Grocery Company* (2011) 51 Cal.4th 764, 771 repeated in *defining duty for the defendant*, as defined in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112, that duty determinations are dependent upon several factors:

> …the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Cabral, supra, 51 Cal.4th at pp. 772-773, also stated "... the court deciding duty assesses the foreseeability of injury from the category of negligent conduct at issue (for the defendant)." Thus, foreseeability with respect to the defendant's duty (as a matter of law) is determined by focusing on the general character of the event and inquiring whether such event is likely enough in the setting of modern life that the reasonably thoughtful person would take account of that in guiding practical conduct.[2]

Thus, the task for a court is to distinguish between the ordinary duty by defendant to all persons including plaintiff under the circumstances, versus the duty of the plaintiff to exercise ordinary care, and *not injury-specific care*, under the circumstances.

Plaintiff's duty does not arise out of the injury

Clearly, the circumstances are significant when assessing what duty the plaintiff has. However, *the ultimate injury*

received is not where plaintiff's duty is derived. Plaintiff has a general duty only and not a matter of injury specifics. 20/20 hindsight is not the criteria since the use of protective devices is only one of many equipment precautions which could have been taken, but are not ordinary care.

The question is: Did plaintiff have a duty to take a specific equipment precaution under the circumstances?

Illustrative is the language in various automobile cases dealing with passengers. It may be analogized that the bicyclist was like a passenger in a car driven by the defendants with their dangerous barrier gates operating as the bicyclist approached. As stated in *Drust v. Drust* (1980) 113 Cal.App.3d 1, 7, "in the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, a passenger in an automobile has no duty to observe traffic conditions on the highway, and his mere failure to do so, without more, will not support a finding of contributory negligence." (*Robinson v. Cable* (1961) 55 Cal.2d 425, 427.) In other words, an automobile passenger's duty to look does not arise until some factor of danger comes to his attention, charging him as a person of ordinary prudence to take steps for his own safety. (*Van Pelt v. Carte* (1962) 209 Cal.App.2d 764, 770.)

In *Van Pelt, supra*, 209 Cal.App.2d 771, the court stated that since the duty to look does not arise until some factor of danger comes to his attention, discharging him as a person of ordinary prudence to take observation for his own safety, and since no such factor appears in that case, the court was unable to apply duty to plaintiff.

In a bicycle case, defendants will argue, however, that plaintiff should have anticipated an injury-specific danger the moment the bicyclist left his house, i.e., that he may fall off for some reason, hit his head and suffer brain injury without a helmet. This argument is false because the same is true for numerous other injuries which could be suffered including broken bones, shoulders, injuries to the lower head, arms, etc. The circumstances of the foreseeable risks of said danger only require that he take ordinary precautions and had no further duty under the circumstances involved.[3] (See, *Fortier v. Los Rios Community College District*, *infra*.)

Of course, circumstances affect the analysis. The California Legislature does not require the use of a helmet, or any other safety precautions, when riding a bicycle. However, circumstances might arise where a duty to anticipate collisions in a "race" with other bicyclists, or "high-speed travel on open highways" might say that ordinary care dictates utilizing equipment precautions, but not under the circumstances of the facts assumed in this article.

The court's task in terms of facts and circumstances, is really looking at a set of circumstances in 20/20 hindsight. The danger of 20/20 hindsight is the ease of saying the plaintiff had a legal duty to wear a bicycle helmet and leave it to the jury. However, the court must be persuaded that the real question is: does plaintiff have a duty to take all precautions to prevent all possible foreseeable injuries to himself while riding a bicycle in a leisurely and benign manner, not that a specific injury occurred? If the court finds a duty existed to wear a helmet, then a duty existed to take all other equipment precautions to prevent all other injuries. However, no case law imposes such a duty.

The availability of the helmet is no different than the availability of shoulder pads, shin guards, leather braces, gloves, and clothing which could have prevented all kinds of injuries that remotely might have been suffered. In other words, the starting point is not the injury for the duty analysis; the starting point of duty is what general duty did plaintiff have. *It should be contended* that ordinary duty is not injury-specific regarding wearing a helmet regardless of the severity of potential injury. The duty was to pedal cautiously, look out for where he was going, avoid collisions with other people and bicyclists in the leisurely ride he was taking. Not to wear armor.

Determining if a "helmet" defense is permitted

It is a question of law if any evidence is admissible. (Evid. Code, § 310(a).) The determination of whether a "duty of care" has been owed in a particular situation is a question of law for the trial judge. (*Wilson v. All Services Insurance Corp.* (1979) 91 Cal.App.3d 793; *Frantz v. San Luis Medical Clinic* (1978) 81 Cal.App.3d 34; *Whinery v. Southern Pac. Co.* (1970) 6 Cal.App.3d 126.)

A court must (1) determine "as a matter of law" that plaintiff had a duty to or was required to wear a helmet as a part of that duty, before (2) allowing a jury to evaluate the issue of the standard of care under the circumstances. (Evid.Code, § 310(a); *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 546.)

If the court admits into evidence a helmet issue, the jury will be irretrievably sanctioned that wearing a helmet, as opposed to numerous other precautions, including padding, armor, etc., is considered a duty and failure to wear one can be negligent or below the reasonable standard of care of reasonable persons under the circumstances. Yet, no Court of Appeal case so holds.

The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary ..." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.)

In *Lasater v. Oakland Scavenger Co.* (1945) 71 Cal.App.2d 217, 221, a pedestrian was hit at night in a crosswalk while wearing dark clothes. Defendant contended the plaintiff should have used "a greater degree of care" for his safety, i.e., white clothing. The Court rejected that notion. (See discussion in *Rangel v. Badolato* (1955) 133 Cal.App.2d 254, 257-259, that "ordinary care" is "ordinary care," not more care or greater care.)

In other words, no duty was owed to start taking precautions which, as a matter of law, were outside of ordinary. (See, *Fortier v. Los Rios Community College District* (1996) 45 Cal.App.4th 430, 435 (noncontact football practice drills) where defendant argued that "common sense" dictates use of helmets, but the court disagreed stating use of helmets would not protect from other types of injuries.) Thus, a specific injury doesn't justify helmet use after the fact when many other injuries can also be suffered. See *Ferguson v. Ulmer* (2003) WL 22512042 (Cal.App. 2003), unpublished opinion involving competitive rodeo riders wearing Western hats rather than helmets.

See also *Clemente v. State of California* (1985) 40 Cal.3d 202, 211 where the state Supreme Court refused contributory negligence jury instruction, as a matter of law, based on the absence of a helmet being worn by a pedestrian (who had prior brain surgery) when being hit by a car in a crosswalk.

Clemente is important because while there was a risk of injury, *the plaintiff did not have a duty to wear a helmet when engaging in non-hazardous activity*.

Indeed, recreational bicycle riding is akin to recreational dancing or being a boating passenger. The courts hold that these activities are not primary assumption of the risk and certainly, while there is a risk of falling, protective devices such as pads, body armor, helmets would not rise to the level of duty and requirement such that comparative fault would apply while dancing or boat riding. (See, *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792 (boating passenger); *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322 (recreational dancing).)

Defendant will only argue injury-specific protections, not required by law

Evidence Code sections 400, 402, 403, 405 require that a "preliminary fact" be determined to determine admissible evidence. However, "duty" is a matter of law applied to circumstances by the court out of the presence of the jury. A court may be forced by the defendant to consider one item, i.e., a "helmet," as a duty for the plaintiff. The only reason a helmet has been argued is that plaintiff suffered a brain injury, i.e., injury specific precaution.

However, plaintiff should contend that ordinary "duty" is not injury-specific as a matter of law, but ordinary duty only. The specific injury is irrelevant.

If plaintiff had scraped an elbow, the defendant will argue that plaintiff should have been wearing protective elbow pads. If plaintiff had injured a shoulder, defendant will argue that plaintiff should have been wearing shoulder pads. The list would go on and on for all the potential foreseeable possibilities that a bicyclist might injure himself while on a recreational, leisurely bike ride. That is not how comparative fault is analyzed.

If the California legislature believed it was important for adults over the age of 18 to wear a bicycle helmet, the law would have been passed. It did not. (See Veh. Code, § 21212.)

Ordinary care under the circumstances is all that is required. *Ramirez, supra.*

No expert may testify what the law is and hence the standard of care or if a duty is owed; it is for the trial judge as a matter of law. (Evid. Code, § 310(a); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1185-87; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 842; *Elder v. Pacific Tel. & Tel.* (1977) 66 Cal.App.3d 650, 664.)

Defendants argue by taking an injury suffered and working 20/20 hindsight backwards to a specific possible precaution. That is not ordinary care. Plaintiff actually had a very low probability of many different injuries, i.e., broken legs, ankles, ribs, arms, neck, eyes, face, etc. The bicyclist was exercising ordinary care under the circumstances by being dressed, wearing shoes, a hat, sunglasses, riding slowly, and looking out for his safety.

A leisurely bike ride is very different than a competitive Tour de France bike ride with close, high-speed bike riders colliding all over the place. Plaintiff was on a leisurely bike ride only. The circumstances are important as clearly stated over and over by the cases cited by plaintiff. Whether a duty of care exists in a given circumstance, "is a question of law to be determined on a case-by-case basis." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.)

When faced with the reality that a helmet is not a legally required duty under the circumstances of this case, defendant may retreat to an irrelevant bicycle operator's manual for the proposition that the manual says wear a helmet. That does not establish legal duty of ordinary care for the plaintiff under the circumstances of this case. The manual is suggesting beyond-ordinary care precautions.

Defendants will further argue that plaintiff should take precautions commensurate with the risk posed by the act of riding a bicycle on the public streets. Yet, he was not riding the bicycle on the public streets. Plaintiff was riding the bicycle in a parking lot and on a beach service road. The risk of traffic collision is miniscule.

Defendants may further argue that it is a foreseeable risk of injury when riding a bicycle of falling off and hitting your head. This ignores the truths that there are many risks potentially of riding a bicycle and falling off, such as a broken arm, broken leg, broken shoulder, scrapes and bruises, etc. If defendants are to be believed, then plaintiff's duty is to be construed to be wearing a full suit of armor to protect from all foreseeable possibilities. However, that is not ordinary care. Ordinary care is ordinary care and does not legally require a duty of wearing a helmet.

Truman and *Lara*

In *Truman v. Vargas* (1969) 275 Cal.App.2d 976, an old Court of Appeals case and not a Supreme Court case, seatbelts were in the car and were not being used. The use of a motor vehicle is at higher speeds with a high risk of death or serious injury when being thrown about in a collision. The foreseeable injuries of not

using a seatbelt when available is far more singular.[4] However, the *Truman* case does not address the real issue. That is, whether it is negligence to use or not to use the seatbelt in the first place. The court was only addressing proximate cause and whether the seatbelt would have minimized whatever injuries may have been suffered. A retrial was ordered. The only issue was a seatbelt, not a laundry list of possible protective devices depending on what injury was suffered. The final outcome was not reported.

It is inescapable that a helmet will not protect you on a bicycle from a broken arm or leg, severe lacerations to the body, puncture wounds to the body, etc. A seatbelt in a car, however, can prevent many injuries all over the body and also because there is a steel frame around you. A helmet is not the same thing as a seatbelt.

Ironically, if plaintiff received a brain injury while riding in a car (higher speed, catastrophic impacts), why not argue plaintiff should wear a helmet in a car also? How much prevention is required in injury-specific defenses?

In *Lara v. Nevitt* (2004) 123 Cal.App.4th 454, again a Court of Appeal case, the Legislature had passed a mandatory seatbelt requirement use act in 1985. The duty to use seatbelts was thus a matter of law. The plaintiff was asleep in the sleeper cab which had belts that were not being used. What is significant is that the truck was in high-speed maneuvering. The risk of serious bodily harm was obvious. That is not the case of a very low risk, leisurely bike ride.

The nature of the activity must be looked at before a given doctrine will be applied as a legal question and must also turn on the nature of the activity in question and on the parties' general relationship to the activity and to each other. (*Knight v. Jewett* (1992) 3 Cal.4th 296.)

Here, plaintiff sought a leisurely bicycle ride and was not hurtling down the highway unrestrained in a sleeping bunk in the back of a truck where restraining safety belts were located. The comparison is like apples to oranges.

Exclude this line of defense under Evidence Code section 352

If the court allows the arguments that injury-specific precautions are to be used to prevent the injury suffered, it will create a whole new class of defense. It can be called the "Crystal Ball" defense. You have a duty to look into the crystal ball and protect yourself from specific types of injury out of many possibilities, from what you know will happen in the future as seen in the crystal ball. (Evid. Code § 352.)

In other words, defendants are arguing you have a duty to protect yourself from an injury that happens; any other potential injury doesn't matter even if you took some other precautions (shin guards for instance). However, that is not ordinary care. Duty does not require extraordinary insight to what will happen, only to take ordinary care. A helmet is not ordinary care in the circumstances of this case. It is extraordinary and not a duty required of plaintiff.

Preventing misleading or confusing the jury is a basic premise of Evidence Code section 352. If a court allows, as a matter of law, the introduction of injury-specific precautions, the court is misleading the jury from ordinary care, to extraordinary care. Availability of a helmet as a precaution is not the criteria of duty. Yet, allowing an argument about helmets, as a matter of law, says to the jury that duty existed in the circumstances of the case. A plaintiff is thus at fault unless proven innocent. Not a good thing.

Conclusion

Don't just ignore fighting the introduction of comparative fault evidence. There may not be a duty on the part of the plaintiff and the evidence should be excluded as irrelevant as a matter of law.

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Endnotes

[1] For instance, one who assumes the risk of certain obvious dangers does not assume the risk of all dangers. (See *Perry v. First Corporation* (1959) 167 Cal.App.2d 359; see also *Gornstein v. Priver* (1923) 64 Cal.App.49, where a person riding in a car did not assume the risk of unusual dangers created by defendant's negligence outside of what was to be anticipated.)

[2] The jury on the other hand determines defendant's standard of care (as a matter of fact determination) by looking deeper into a more fact-specific inquiry of foreseeability. See, *Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1273.

[3] The risk of falling while walking down stairs poses a greater risk of head injury (height, fall, etc.) than a leisurely bike ride – yet no helmet is required when descending stairs.

[4] A helmet only protects the head, not the rest of the body like a seatbelt.