Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

July 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

Plaintiff



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EDITOR Maryanne B. Cooper, Esq.
CONTRIBUTING EDITORS Donna Bader, Esq. Jeffrey Ehrlich, Esq. William L. Veen, Esq.
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Humanizing the "cyclist"

Many potential jurors are not in our tribe and they bring anti-cyclist prejudices to the jury box

By Nathaniel Leeds

When taking on a case involving someone injured while riding a bicycle, it is important to recognize an undeniable, regrettable fact: many people do not like "cyclists."

Only about 10 percent of people in a recent survey reported riding a bicycle more than once a week; over 50 percent reported never riding a bike. When you start looking at the number of senior citizens who serve on juries the numbers are probably even worse; many people injured riding bicycles are unlikely to get a jury of their peers – and claims adjusters know it.

Although I applaud the efforts of our bar and community organizations to change perceptions, I think it is useful to examine the uphill battle many of our clients face.


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There are no "cyclists," just people who ride bikes

As in any case, it is useful to think of which client's and witness's daily life activities jurors may believe are representative of that person's identity, which are of no significance – and which will consume our client's identity to the point that the jury will struggle to look past their prejudices. Appreciating the significance and implications of prejudices is a part of every plaintiff attorney's practice, and must be considered from client intake through theme development and trial.

For example, it is widely acknowledged that evidence of an arrest or conviction reflects on that person's testimony and character. So we have rules about how this evidence can be used. On the other end of the spectrum are the uninteresting details that we would not think to highlight in a trial, because nobody would care. I buy all my shirts at Brooks Brothers. But nobody would ever call me a "Brooks Brotharian" – I am not even sure if being called a "Brooks Brotharian" would be a compliment or criticism.

Advertisers love to play with the dynamic between the "telling" detail and the mundane. My personal favorite is Volkswagen's "Drivers Wanted" campaign which effectively suggested that owners of their cars are desirable, assertive, serious and in control as they move through life. "Traffic Sitters Wanted" probably did not do as well in focus groups.

For many jurors, the fact that a plaintiff rides a bike makes them a "cyclist" and many of the connotations associated with cyclists are not good.

Traffic tribalism and empathy

People often divide humanity into two groups "Self" and the "Other." "Self" in this formulation are "our people," or those who we are a part of; the "Other" is the great "them," the barbarians over the hill, or terrorists, or anyone else.

The people who are part of the "Self" are part of *our* society, so we naturally recognize our obligation to them and expect that they will reciprocate. The same is not true of the "Other." When someone is part of the "Other" we do not expect them to play by *our* rules, and because *they* do not follow *our* rules, we do not believe that *we* need follow those norms when interacting with these "Other" people.

For a stark example: George W. Bush brilliantly exploited the concept of "terrorist" as shorthand for a policy narrative. We cannot negotiate with "terrorists" because they will not follow our social norms, and we do not need to follow any rules when dealing with "terrorists"– like due process, or limits on state violence – because "terrorists" are not part of *us*.

This dialectic is important for any attorney. If your client is seen as the "Other," jurors will assume that they were not following "Our" rules and the same jurors will not empathize with your client's injuries; they will not think "that could happen to me."

Even if you can get a begrudging verdict in your favor, it may not reflect the damage your client sustained.

Cyclists will always be "rule-breakers"

We need to recognize that for most people who drive cars, and walk, the cyclist is the "Other." This is because many people who ride bicycles disregard the rules that apply to either pedestrians or motorists.

A defense-hired bicycle expert explained to me how he had been hit when riding his bicycle against traffic. He then went on to explain that my client was at fault in a road-edge-defect case because my client had not ridden in

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the middle of the lane "like a car." When I asked him if he thought following the "rule" might have gotten my client hit, and possibly killed, he gave me a rules-are-rules and cycling-is-risky response.

The expert's view created an impossible double standard: if you cannot behave like a 150hp car, you are not following the rules. If you are not following the rules, you are liable for your injuries.

However unfair these expectations are, this belief that cyclists consistently do not follow the rules (however impossible it is for them to do so) is why police officers often assume liability for the cyclist, defense attorneys insist on pursuing ridiculous defenses, and jurors under-compensate cyclists.

What does it mean to be a cyclist?

As an avid cyclist, I am often tempted to talk about my clients as cyclists. I do this naturally because when I refer to someone as a cyclist I think of that person as part of my tribe and entreat those around me to offer them the same respect and empathy that I would.

But, I am not your juror, opposing counsel, or claims adjuster.

For people who see the cyclist as "Other" the cyclist has a number of associations beyond being a scofflaw that are not helpful to our cases:

- Often middle, or upper-middle class ("They don't need the money." "They have good insurance.")
- Youthful ("They'll work through their injuries and recover.")
- Accident-prone/Reckless (Cyclists fall off their bikes all of the time; why does the defendant need to pay for injuries that the cyclist was going to get anyway?")
- Individualistic ("They weren't contributing that much to the family, otherwise they would have been driving the kids around instead of off riding their bike.")

How to humanize the bicycle-riding client

In every case I handle, my goal is to explain that our clients are *people* ("Self"), not *plaintiffs* ("Other"). Often that means counteracting the idea that the injured person is a cyclist, even if that is how they see themselves. It is important to look for those characteristics of our clients which make them part of the juror's "Self."

Here are some ideas:

Downplay cycling experience: Although being an experienced cyclist can be helpful in some cases, it can be more useful to emphasize that they are not.

A person who has just taken up bicycle-riding is just like the jurors – but with a different hobby. And, as an added benefit, typically, people will get into cycling for reasons that jurors can relate to: to solve a commuting problem; health; to spend time with their children; social activism (AIDS rides); tourism.

Emphasize the defendant's conduct, not the cyclist's: Recently, a driver who had had an epileptic attack due to medical non-compliance hit me from behind, landing me in the hospital for three nights. If I were handling my case, I would focus on how frightening it is that an uncontrolled epileptic was on the roadway – I just happened to be the object he hit, it could have been school children.

Also, see if you can develop facts to show that the driver did not think the cyclist was just another human. Often without much prodding in deposition, a defendant will tell you exactly what they think of bikes in *their* roadway. Listen to 911 tapes. Flesh out how quickly the defendant will "blame the victim" of their own negligence – just because they were on a bicycle.

Emphasize social, professional impact of the injury: Although cycling may be an important feature of some people's lives, jurors might not understand it and it runs the risk of backfiring by painting your client as a cyclist. Also, even after a cyclist's injury, their cycling may be more vigorous than any physical activity that the jurors do.

Using me as an example, after being badly injured I have cut my weekly mileage from 150+ to 60, and cut out most high-intensity intervals – hardly statistics that will garner much understanding or sympathy. However, the fact that I no longer socialize with the people on my former cycling team might have more resonance.

Cast the roadway environment as a "recreational" environment: People hate cyclists who interfere with *their* commute – those are the rule-breakers – but understand family outings and children riding in the park. If your client was riding in an area outside the flow of *serious* traffic, you can cast them as someone out for a relaxing pedal – not a cyclist.

Even if they did not get struck on a bike-path in Golden Gate Park, look for context cues that make the environment appear recreational. Bicycle-route designations, school zones, and the bucolic nature of a particular road can all help.

No spandex or courier bags: When you are selecting pictures of your client, emphasize that they have a life off the bike – a life similar to the life of your future jurors. Try to avoid those photos and cameo stories that emphasize your client's life as a cyclist. Cyclists love how they look in the slimming kits, helmets, courier bags, and the other armor of their tribe. But be careful – tribal armor will do more to emphasize that your client is a member of the cyclist tribe – which is counter-productive if your goal is to make them seem like a human who was riding a bicycle.


Leeds

Nathaniel Leeds handles a broad range of civil cases on behalf of consumers and small businesses for Calloway and Wolf, *including personal injury, medical malpractice, and business litigation. He started out as a Deputy District Attorney in Merced County where he tried numerous jury trials including third-strike felonies, juvenile sexual assaults, and manslaughter. He brings this extensive trial experience to his civil practice. He is a University of Chicago graduate. He received his law degree from UC Hastings in San Francisco. His sincere hope is that this article will be obsolete as attitudes towards the bicycle-riding public changes, and he applauds the efforts of those in the bike-advocacy groups who are making it safer to ride in more places for more people.*

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Five tips on handling the adverse Traffic Collision Report in bicycle and pedestrian cases

The officer and the witness say in the TCR that your guy was at fault – but that doesn't make it so

By Greg Schaffer

The first hurdle in handling a bicycle case is overcoming what I call "bike bias." As a cyclist, I have seen firsthand drivers who fail to share the road with cyclists. I can't tell you how many times cars have aggressively sped around me, peeved that I'm seemingly slowing them down as I bike along Page Street on my way to work. Drivers do not like it when riders split lanes through traffic in the Financial District. Drivers think it is reckless when riders pass on the left of a long line of cars waiting for a traffic light. In urban areas, drivers perceive the cyclist to be "winning," while the driver is stuck in the car behind traffic. The attitude of these drivers may not be reasonable, but to combat the bias you must understand it exists and attempt to change the narrative early.

The unfortunate bias against cyclists translates into bad witness statements, sloppy collision analysis by investigating officers and incorrect findings of fault, all of which make their way into the Traffic Collision Report (TCR). If your practice involves bicycle cases, you have seen your fair share of unfavorable TCRs. Similarly, deference is often given to a driver in many pedestrian collision reports. At the outset, you know you will be dealing with an investigating officer or witness who will favor the defendant driver. With an adverse police report or witness statement, the chances of pre-litigation settlement drop significantly. You can set yourself up for success, however, if you properly investigate the collision and gather evidence as soon as the case comes to you.

The second hurdle in handling a bike or pedestrian case is to understand the unique vehicle dynamics of a two-wheeled vehicle or pedestrian collision. Bikes are not cars, so the standard accident reconstruction we are used to does not translate in a bike case. You must arm yourself with knowledge about relative bike speeds, hazard perception, gearing, and the forces at work when a cyclist or pedestrian is hit by a vehicle. With this knowledge, you can obtain beneficial evidence from the scene and statements from witnesses when investigating your case.

1. Use common sense

We have all seen cyclists behaving badly – not fully stopping for stop signs, running red lights and not yielding the right-of-way. I have even paid my own ticket for rolling through a four-way stop on my bike.

While cyclists (and pedestrians) may violate the vehicle code, they usually do not purposefully place themself in danger. If you watch cyclists on Market Street in San Francisco during the morning commute, you will notice they are attentive to what is going on around them. They are not on their phones, fiddling with a radio, or drinking coffee like many drivers. Cyclists actively scan the road, looking for dangers like train tracks, opening car doors, or a merging vehicle. Active scanning is even more present to a cyclist or pedestrian who is bending the rules.

If you watch cyclists rolling through a four-way stop, you see them looking at the cars in the intersection to make sure they are staying put. Similarly, if you watch a pedestrian jaywalking in the Financial District, you'll see them looking toward oncoming traffic. Cyclists and pedestrians know that challenging a car is a sure loss for them. Keep this in mind when you put yourself in the shoes of your client.

This approach was useful in a wrongful death case I handled in which a propane truck hit the decedent pedestrian near Rainbow Grocery at 13th and Folsom in San Francisco. The investigating officer determined that the northbound pedestrian was jaywalking across 13th Street because his body was found 20 feet outside of the crosswalk. The propane truck had turned right from northbound Folsom onto 13th, a busy roadway with three eastbound lanes.

We retained an accident reconstruction expert to evaluate the evidence and opine that the impact threw the pedestrian's body out of the crosswalk. But, the overwhelming commonsense argument in my view was that no reasonable person would jaywalk across six lanes of traffic (there are also three westbound lanes on 13th) when there's a perfectly good crosswalk 30 feet away, and if he had jaywalked he was not looking at the ground. If jaywalking, he would have looked westbound to make sure the coast was clear, and he would not have missed a propane truck coming at him. A common sense evaluation was that my pedestrian was crossing northbound, in the crosswalk, looking north. When the propane truck came up from behind him, he did not see the truck because he had a walk sign and was not expecting danger.

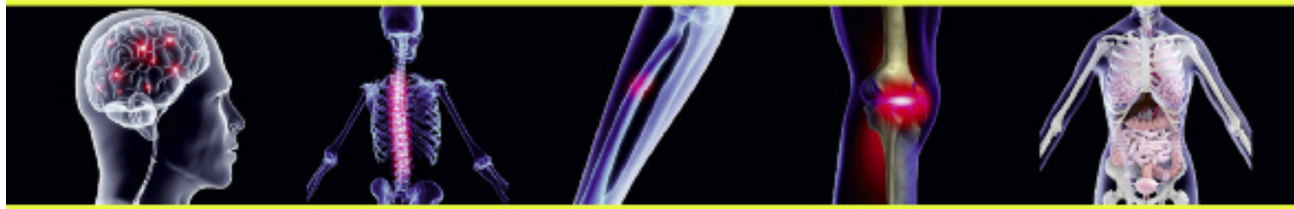
The moral: if you have a TCR with a police officer or witness who says your cyclist or pedestrian was riding or walking

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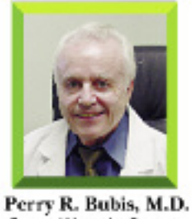
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in a dangerous manner, do not take it at face value. Be critical, do the digging, change the story.

2. Use Google maps to investigate your case

If you are not already using Google maps to initially evaluate your cases, you should start. I use Google maps for *every* collision case. It is not a substitution for going to the scene to observe, but it is an extremely invaluable tool. When I take a client intake over the phone, I have Google maps open so I can visualize the scene. I take screen shots to put in my demand letters. I check parking signs to see if cars were likely parked in the area at the time of collision. I use aerial photos to determine car lengths. I have used the distance function to show an adjuster that a defendant did not have her turn signal on for long enough.

In several dangerous condition cases, Google maps have been pivotal. One case involved a large pothole caused by a sloppy asphalt patch after a utility dig on Broadway Street in San Francisco. My cyclist hit the pothole, was ejected from his bike and injured both wrists. By the time the client came in, the pothole was fixed and the City claimed they did not have prior notice of it. The City had recently paved the road, and in discovery responses pointed to a "guarantee inspection" two months prior to the accident date where the City had signed off on the paving project. Using the street view function, I checked the past Google photos of the roadway, and the photos clearly showed the pothole in a Google image taken one month before the "guarantee inspection." Google map images show the date and year the photos are taken, which I highlighted in the demand package to the City. I did not end up taking the inspector's deposition, but it would have been fun to ask him how he missed a massive pothole in the newly paved road during his "guarantee inspection."

In another case, my client's bicycle tire went into a dangerous sewer grate and I used the prior street view photos to show that someone had crudely spray painted an arrow by the sewer grate, presumably to warn cyclists of the danger. Google maps showed that the arrow had been present for at least six months prior to the accident. It was hard for the City

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to dispute notice and that the grate was dangerous when their employee had painted a warning arrow on the ground.

For many roads, these historical photos go back 10 years. You can use them to demonstrate how long the dangerous condition has been present and cross-reference those dates with maintenance or inspection records obtained in discovery.

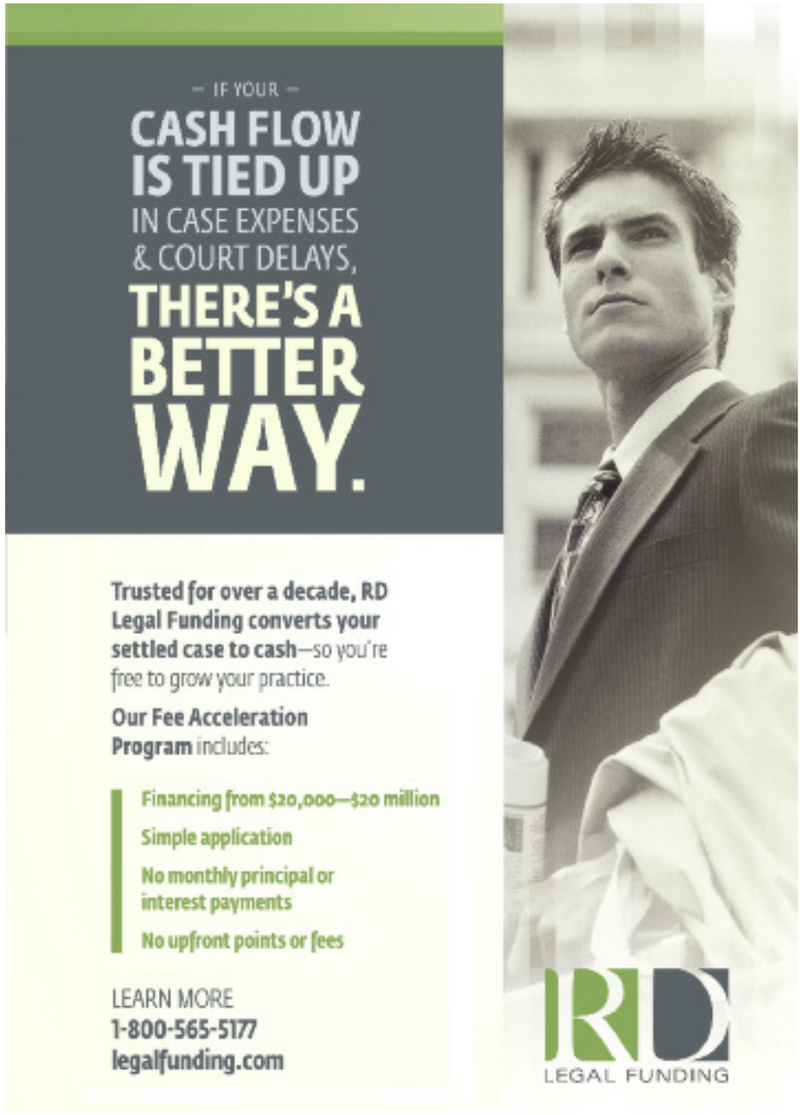
3. Quickly go to the scene and observe

You must spend time at the scene watching cyclists (or pedestrians) interact with traffic, the roadway, and traffic signals. Watch how cyclists, pedestrians and vehicles interact with one another. Does the scene fit with what your client is telling you, or is it closer to what the investigating officer determined or what the witness stated?

In one case, my client was riding south in a dedicated bike lane along the Embarcadero during rush hour. The bike lane is adjacent to the curb, and he was passing the slow rush hour traffic on his left. Near the large crosswalks by Justin Herman Plaza, a front passenger door opened and took him out. While he was going to the emergency room in an ambulance, the driver of the vehicle and the exiting passenger told the investigating officer they had pulled over to the curb to let the passenger out when the cyclist tried to "squeeze" by the car to pass on the right. The investigating officer adopted this statement in his conclusion, and determined the cyclist was at fault. As a rider, this seemed like an odd cycling decision. I went to the scene with my client during rush hour, and spent 45 minutes observing and discussing what happened.

While there, I noticed a smooth and relatively quick pace in the unobstructed bicycle lane. Vehicle traffic was heavy. Many cars stopped to let out passengers who were going to the ferry building. Because traffic was slow, the cars were stopping in their lane and the passengers exited quickly, opening their door into the bike lane, so the car could proceed on its way down the Embarcadero without pulling out of traffic. Is it more plausible that my client, a regular commuter cyclist, saw a car pull over to the curb in front of him and tried to squeeze by it on the right, or that the driver and passenger were lying about pulling over? Of course the driver was lying, but I may not

See ***TCR,*** *Page 16*





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TCR, continued from Page 14

have known that if I had not taken the time to go observe the scene.

4. Talk to witnesses before the insurance company does

If you have a witness in a TCR saying your cyclist did something wrong, call them. Ask them what they observed, and how they observed it. The conversation should be cordial: "I represent a cyclist who was injured in a collision you witnessed and I'd appreciate your help so I can understand what happened." But treat these conversations like a nice deposition. It can also be helpful to meet with a witness at the collision scene so you can get their precise vantage point.

In the case with the cyclist on the Embarcadero, the TCR contained a statement from a witness who reportedly saw the car pull to the curb with its flashers on, saw the bicyclist going 25 mph, and saw the cyclist trying to "squeeze" between the car and curb. I called him, and the first thing he told me was that my guy was "flying," going so fast that he was worried he might have killed himself. In discussing his observations, it became apparent that the speed he attributed to my cyclist was a product of the suddenness of his recollection of the impact. After speaking with him, he agreed that my cyclist was going the same pace as the rest of the cyclists and was probably not going faster than the 25 mph speed limit. If the insurance company had talked to this witness first, I would have heard about how my client was "flying" down the Embarcadero for the duration of the case.

While you have a witness's cooperation, get something tangible. In that same case, the witness told me he catches the ferry home every day, so I asked him if he'd be willing to meet me at the subject crosswalk so I could understand the event better. We watched as several taxis let passengers out near the crosswalk, without pulling over to the curb. The witness agreed to allow me to take pictures of him standing in the roadway where the potential defendant's car had been. He wasn't standing next to the curb. I included those pictures in the demand letter, and the case settled pre-litigation despite a bad police report that contained an unfavorable statement from that witness.

In another case, I had a Good Samaritan who had chased down a car that left the scene after the driver hit my cyclist. There was no TCR so there were no written statements of the event. I talked to the witness twice on the phone early on and she was extremely helpful and cooperative. Thinking that she wasn't the type to disappear, I sent out my pre-litigation demand with her phone number for the adjuster. The insurance adjuster could not get a hold of her, and she stopped returning my calls. When the insurance company did not put pre-litigation money on the case, I filed the lawsuit wishing I had taken the time to get a declaration from her. Lesson learned: when you have someone willing to help, take them up on it and get something in writing. They may get busy with other things and change their mind about wanting to participate in your case.

5. He who waits, loses

We are all busy. Much of our attention is focused on cases in litigation or those with approaching deadlines. Rather than jumping on a new case quickly, you may find yourself scrambling around six months before a lawsuit must be filed to work on settlement.

If you wait, you lose important information and positioning. Most significantly, you lose witnesses' interest. Even witnesses who believe your client is at fault are commonly sympathetic to your client's injuries and want to help. Talking to witnesses early establishes the relationship, and makes you credible. A year and a half later, they wonder why they are being bothered so late in the game and they may question your motivations.

In the face of a bad traffic collision report, gathering evidence and witness testimony early will vastly improve your chances of settling your case early. The ripple effect of this practice is that you will have fewer cases in litigation, fewer cases approaching statutory deadlines, and fewer fires to put out.


Schaffer

Greg Schaffer is an associate at Rahman Law PC. *His practice focuses on personal injury cases involving motorcycle and bicycle accidents, medical malpractice, wrongful death, catastrophic injuries, defective products, premises liability and elder/dependent adult abuse. He lives in San Francisco and is an avid bicyclist, motorcycle rider, climber and runner.*



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Getting the squeeze on Market Street

Beating comparative fault in a vehicle vs. bicycle trial

Le Moullac v. Daylight Foods

By Micha Star Liberty, William L. Veen, and Jeremy Cloyd

Twenty-four-year-old Amelie Le Moullac was bicycling to work a couple years ago on San Francisco city streets when a delivery truck driver turned right across her bike lane, propelled her from her bike, and then ran over her twice. Her parents' wrongful death claims went to trial a year-and-a-half later in the case of *Le Moullac v. Daylight Foods*.

The delivery company denied any responsibility throughout and asked the jury to deliver a defense verdict. The defense theorized that Amelie was unsafely passing a right-turning delivery truck on the right, either because she was distracted by headphone music or because she was in a hurry to get to work. This article looks at three strategies that were effective in dealing with the comparative fault arguments before, during, and after the presentation of evidence.

Voir dire exposed juror biases

We were concerned that jurors would apportion some degree of fault simply because Amelie was a bicyclist. After all, Amelie's case made news when surveillance video surfaced showing that the San Francisco Police Department had wrongly faulted Amelie for the collision. Some felt this discovery revealed a glimpse of a systemic bias – or rush to judgment – against bicyclists. Even after the video was discovered, the district attorney's office – the same office that prosecuted a bicyclist for negligently killing a pedestrian the year prior – declined to prosecute the driver that killed Amelie as a result of a traffic violation.

Our jury pool demonstrated bias covering all points of the love/hate spectrum for and against bicyclists. The prospective jurors that came in from their commute with helmets under arm or Velcro® straps on their legs were easy targets for the defense. But those carrying biases against bicyclists did not wear them so plainly.

To get jurors to start discussing their views on bicyclists, we welcomed the concept that not all bicyclists are all good or all bad. "Has anyone had a negative interaction with a bicyclist? Tell me about that." "Has anyone seen a bicyclist roll through a stop sign?" In addition to exposing negative views about bicyclists, these questions played the foil to our clients' daughter – one of the "good ones" who was following traffic laws when she was run over.

We also wanted to expose beliefs that Amelie might share some responsibility simply because she chose to ride a bike in the City. "Does anyone feel that a bicyclist assumes some degree of risk by choosing to ride on San Francisco city streets? What about a bicyclist who stays in the bicycle lane? Can that person assume they will be safe and others will not enter their lane?"

See ***Comparative Fault****, Page 20*

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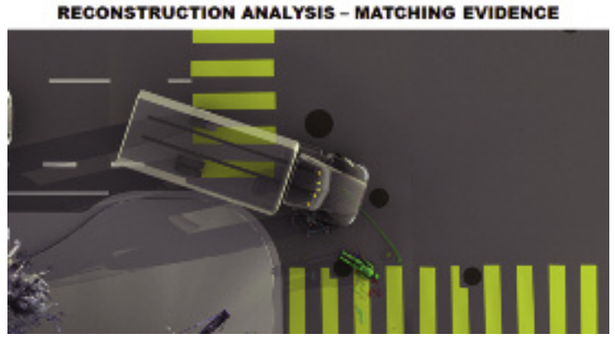
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Comparative Fault, continued from Page 18

We were surprised to learn that not all jurors felt that Amelie's use of the bike lane was necessarily a good fact for us. Some jurors felt that the bike lane should be a zone of safety for bicyclists. Others felt that a bike lane is a shared area where bicyclists need to be alert and ready to yield to motorists. This turned out to be a central tenet of the defense case. We therefore knew that we needed to hammer throughout trial the concept that a bike lane should be a safe area for bicyclists.

Accident reconstruction showed the bicyclist was where she was supposed to be

The defense tried to depict Amelie as reckless – one of the "bad ones" the jurors had discussed during voir dire. They argued that she had plenty of time to see the truck turning ahead of her. They argued she should have merged to the left around the truck rather than continue traveling in the bicycle lane at twice the truck's speed. They were allowed to show the jury training videos with examples of bad bicycling behavior. Plaintiffs' accident reconstruction was thus essential to show that Amelie was in fact one of the "good ones" and was following all traffic laws at the time she was run over.



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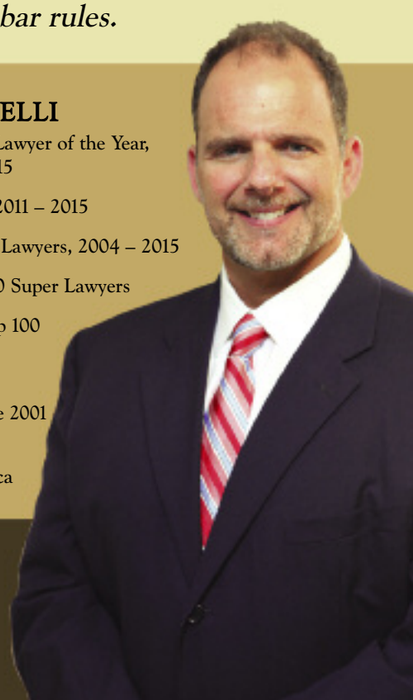
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Comparative Fault, continued from Page 20

The reconstruction of bicycle collisions, generally, poses different challenges than motor vehicle versus motor vehicle collisions. The bicycle and rider are not attached and may come to rest at different locations. Bicycles are more easily moved following a collision than cars and thus evidence of its resting place may be lost. There is also often less evidence of the point of impact such as skid marks or damage to the motor vehicle. And bicyclists of course are more susceptible to death or serious brain injuries that would prevent them from providing evidence about how the collision occurred.

These difficulties require a prompt review and preservation of the scene of a bicycle collision. In this case, a member of the San Francisco Bicycle Coalition found video surveillance of the collision from an auto body shop's security system. The police department had overlooked the video and it was saved just before the security system's DVR would have erased it forever. To its credit, however, the police department took abundant high resolution photographs of the scene and evidence from all angles. The importance of these photographs was highlighted when the intersection underwent a lane reconfiguration shortly after the collision.

Preservation of Amelie's clothing, helmet, bicycle and backpack also helped reconstruct the collision. Our biomechanist evaluated the nature of the damage to these items to help remove uncertainties about how the bike, asphalt, Amelie, and the truck all interacted with each other through the entire chain of events. For example, a tread pattern on Amelie's helmet matched up to the unique markings of the truck's rear tire. And a scuff mark on her shoe suggested an initial point of contact with the truck's right front tire.

One of the things we wanted to know was where the truck driver started his turn. Did he merge into the bike lane before turning or did he suddenly turn across it in violation of the Vehicle Code? In order to figure out the truck's path we needed to know enough of the points along that arc. Whereas a straight path of travel may only include two points, the path of a turning movement, i.e., an arc, contains at least three. Fortunately,

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Traci Kaas, CSSC
Managing Partner
Settlement Planner
Certified Financial Transitionist™
traci@alliance-west.com



Tanis Kelly, Esq.
Settlement Planner
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Comparative Fault, continued from Page 22

enough evidence had been preserved to draw the path of the truck's turn, and the reconstruction showed the truck's path during the turn.

The most visually stunning aspect of the reconstruction, though, was putting all of the evidence collected into a 3-D reconstruction of the intersection in order to show the relative times, speeds and distances. The reconstruction showed that whereas Amelie would have been visible in the truck's mirrors at the time the driver began his turning movement, Amelie would not have detected the truck's change in course until just nine-tenths of a second before impact. Thus, even if the jury bought into the theory that bike lanes are intended to be shared zones rather than zones of safety, our accident reconstruction showed that Amelie was never given an opportunity to share.

Specific jury instructions on the law

The defense argued that Amelie was required by law to slow for the truck, leave the bike lane and merge to the left around the turning delivery truck. The defense attorneys told the jurors that this was the case throughout trial and even hired a bicycle expert who stated that Amelie was required to follow this law. We undermined this defense strategy with specially drafted jury instructions setting forth the specific rights and responsibilities of bicyclists found in California Vehicle Code sections 21200-21212.

Defendant requested a negligence per se instruction based upon California Vehicle Code section 21202 to support its theory. That statute provides that "Any person operating a bicycle upon a roadway at a speed less than the normal speed of traffic moving in the same direction at that time shall ride as close as practicable to the right-hand curb or edge of the roadway except…When overtaking and passing another bicycle or vehicle proceeding in the same direction…" and "when approaching a place where a right turn is authorized." The defense argued that this language indicated a mandatory requirement for Amelie to leave the bike lane to avoid turning vehicles.

We found a slightly different statute that applied for circumstances involving bike lanes. California Vehicle Code section 21208 provides pertinently that "Whenever a bicycle lane has been established on a roadway … any person operating a bicycle upon the roadway at a speed less than the normal speed of traffic moving in the same direction at that time shall ride within the bicycle lane, except that the person *may* move out of the lane…" in the same circumstances set forth in section 21202. We felt that the permissive "may" language not found in the more general statute was very important and emphasized that Amelie had a right to remain in her bike lane – to treat it as her safety zone.

When statutes conflict

California Code of Civil Procedure section 1859 provides that where a more specific statute is inconsistent with a more general statute, the more specific statute controls:

> In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

This is also the common law. (See e.g., *Woods v. Young* (1991) 53 Cal.3d 315, 324.) We therefore argued that the defense's proffered instruction incorrectly stated the law because a more specific statute controlled. The Court agreed and refused to instruct on the more general statute the defense had promised to the jury. During deliberations we were pleased to receive a jury question asking about its absence.

Conclusion

Amelie's parents felt that police investigators, a district attorney's office, and an insurance company had all failed them. A civil jury trial was their last hope. They were very grateful to have a careful jury evaluate the evidence and find their daughter shared no responsibility for her death. We hope that our own experiences in reaching this result for her parents can also help other victims of bicycle accidents find justice.


Liberty

Micha Star Liberty is a civil rights attorney specializing in litigating serious injury, civil rights, sexual abuse, and employment matters in both individual and class actions. She is a certified mediator with over 40 hours of training who performs mediation for the Contra Costa Superior Court. She is also a frequent lecturer and widely published author. Ms. Liberty is a graduate of the University of California at Los Angeles and the University of California, Hastings College of the Law. She was recently elected to serve an unprecedented third one-year term on the California State Bar Board of Governors, and was also elected to be a Vice President of the State Bar of California. She actively serves on the boards of the Consumer Attorneys of California, the Alameda-Contra Costa County Trial Lawyers Association (President 2010, Former Secretary and Treasurer, Former Editor of The Verdict magazine).


Veen

William Veen founded The Veen Firm, P.C. *as a sole practitioner in 1975, gradually developing it into a firm of talented attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003. http://www.veenfirm.com*

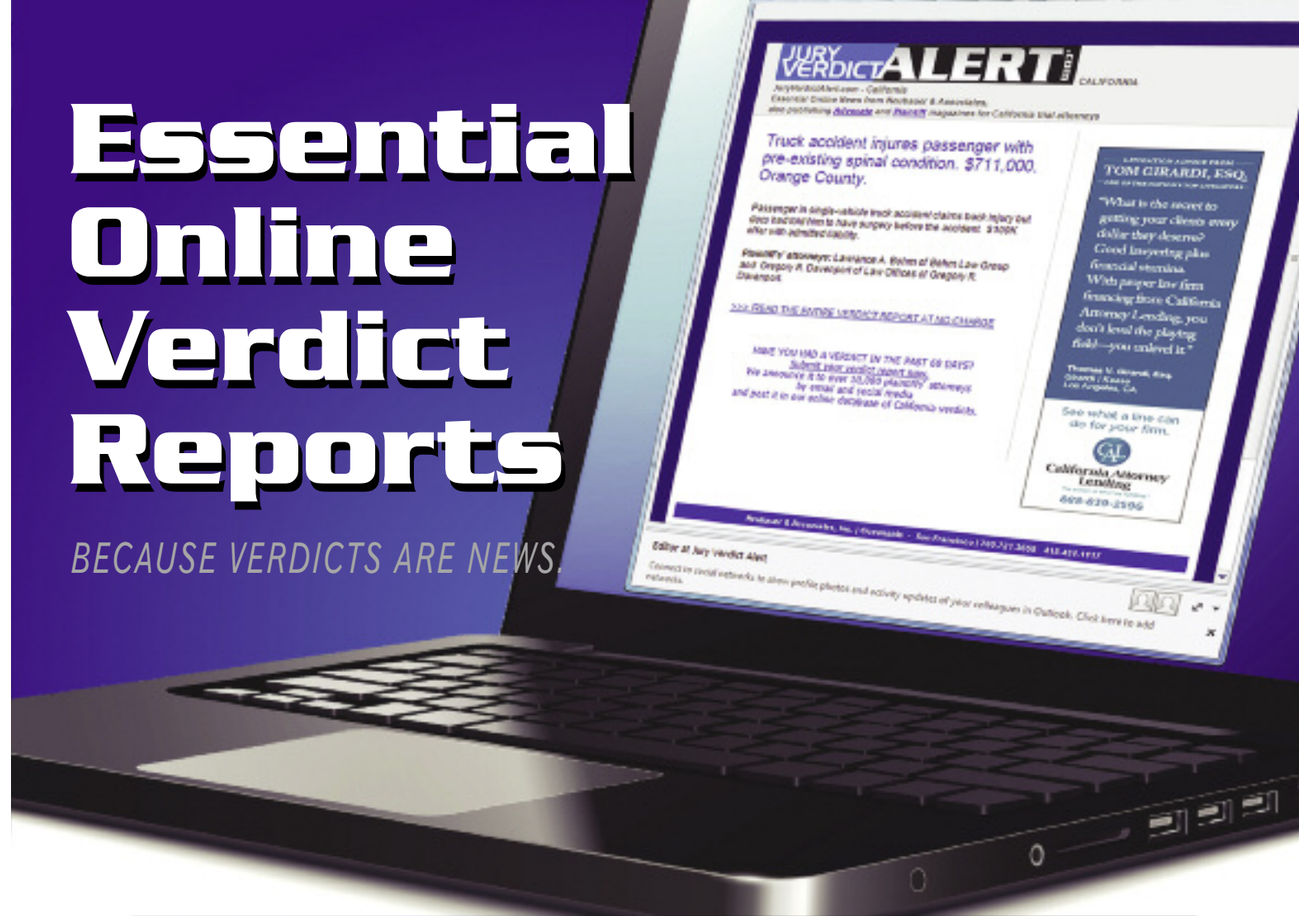

Cloyd

Jeremy Cloyd is a member of the Label Trial Team at The Veen Firm, P.C. *He litigates complex catastrophic injury cases involving negligence, wrongful death, products liability and industrial accidents.*

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A walker's paradise–lost!

At least three pedestrians are hit by cars each day in San Francisco

By Natalie Burdick

With more than three dozen parks packed into fewer than 49 square miles, it takes almost no time to walk to green, open space in San Francisco. While not quite as well known as its East Coast counterpart, Golden Gate Park is actually 20 percent larger than New York's famed Central Park. Moreover, as a peninsula famous the world over for its hilly terrain – by some counts there are as many as 57 hills – the city (and most often its public parks including Buena Vista, Lafayette Square, MacLaren, and Alamo) is graced with breathtaking views of the Pacific Ocean to the west, the Golden Gate and Marin Headlands to the north, the San Francisco Bay and Contra Costa Hills to the east – and not to mention the city's own ever-changing, fog-wrapped shores and skyline.

The hills are alive

In between the 48 (named) hills dotting the city's scant seven by seven miles, its rich patchwork of intimately-scaled and distinct neighborhoods, the unique Victorian and Edwardian architectural heritage, and San Francisco's turbulent economic, geologic and social history, ensure there's no end to a walker's delight. Search Google for "walk san francisco" and page after endless page of walks are returned – pick from your choice of historic, cultural or nature-focused outings. There are also walks about chocolate, beer, public and street art, and a seemingly endless list of niche interests from hidden stairways to ghost haunts – there's even an annual, all-day urban trek that stretches 12 to 14 miles across at least ten of the city's hills each September called Peak2Peak.

With its mild climate, compact geographic area, and second highest-ranked transit access in the U.S., San Francisco was the obvious choice to be the first American city to host Walk to Work Day, and to reclaim its streets from car traffic by opening them up to tens of thousands



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Street memorial to Emily Dunn, a pedestrian killed in the Castro District in 2011.

of pedestrians with Sunday Streets, a monthly weekend event that highlights different neighborhoods from March to October. San Francisco also innovated the "parklet," which literally transforms a parking space into a small public park. There are now over forty of these parklets throughout San Francisco (the most of any city), offering spaces where people can stop to sit or rest. They are designed by a local community partner and provide greenery, art or some other visual amenity to enhance the experience of traveling by foot.

Indeed, the shining city on the hill seems to be a walker's paradise. Which is why many are surprised to learn: each day, at least three people are hit by cars, while they walk in San Francisco. Annually, 20 people are killed and at least 100 suffer serious, life-changing injuries. For every victim of gun violence, there are five people who are hit by cars in the city. In fact, one out of every four trauma cases at San Francisco General Hospital involves a pedestrain hit by a vehicle.

San Francisco is literally California's most dangerous city for pedestrians, making up fifty percent of all traffic deaths in San Francisco – four times the national average of around twelve percent.

Last year, 31 people lost their lives in traffic crashes. Twenty-one of those people were walking when they were struck and killed. People like little two-year-old Mi'yana Gregory; a 78-year-old grandmother of eight; music teacher, Pei Fong Yim Lee; and 27-year-old Zach Watson, who was walking his bicycle on a sidewalk when he was hit.

What accounts for such disproportionate number of injuries and deaths in a city that welcomes one of the highest walking rates in the country? And more importantly, is there anything that can be done to make the city's streets safer for people to walk here?

How to make streets safer for walkers

The good news for San Francisco is only six percent of its streets account for more than sixty percent of the total crashes involving those who walk. As part of a Pedestrian Strategy released by the Mayor's Office in 2013, these high-injury corridors and intersections were identified using years of collected data from the San Francisco Police Department and the Department of Public Health. The City has detailed information on both the most common locations for injuries and deaths, and the top five illegal driving behaviors that lead to these collisions.

Understanding that speeding, not yielding to pedestrians in a crosswalk, running a red light, making an improper turn, and not stopping at stop signs are the leading causes behind crashes, and knowing where these collisions are concentrated, offers the City a unique opportunity to focus engineering, enforcement, and even education efforts to successfully addressing its traffic violence.

A quick look at the list of the most dangerous corridors (See Figure A or map at http://sfgov.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=335c508503374f5d94c95cb2a1f3f4f4) shows most crashes involving pedestrians happen

*See **Walker's Paradise**, Page 28*

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Walker's Paradise, continued from Page 26

on wide arterials and/or fast, one-way streets, including Geary Boulevard, Sunset Boulevard, Mission Street, 19th Avenue, Polk Street, and along Market, cross-streets like 6th and 8th. Roads where drivers feel like they're on a freeway, despite the fact they are in dense, urban neighborhoods, are disproportionately concentrated in communities of concern including SoMa, Chinatown and the Tenderloin.

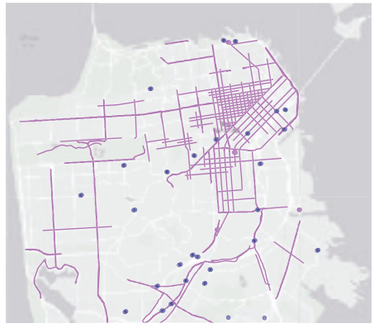


Figure A: Map of the most dangerous pedestrian corridors in the City of San Francisco

Vision Zero

In 2014, a coalition of community groups, led by the pedestrian advocacy nonprofit Walk San Francisco in partnership with the San Francisco Bicycle Coalition, launched *Vision Zero* – a goal to eliminate ALL traffic-related deaths in ten years. The high-injury corridor maps have isolated not just where crashes involving those walking are clustered, but also collisions which involve bicyclists and motorists. Layering all three high-injury maps together, it turns out over 70 percent of all the serious and fatal traffic injuries occur on only 12 percent of city streets. Targeting this subset of streets with the right mix of interventions, San Francisco could effectively reach a zero traffic fatalities goal for preventable collisions.

The effort would require the City to commit to funding and implementing proven engineering, enforcement, and targeted education solutions within a ten-year period to bring the number of motorist, bicyclist, and pedestrian deaths to zero. While certainly an aggressive goal, the results are achievable and well worth pursuing to eliminate preventable losses of life.

Sweden, where Vision Zero originated in 1997, has already demonstrated success in bringing down their road fatalities, even as overall car ownership and driving has doubled since 1970. Fatalities involving pedestrians in Sweden have

See ***Walker's Paradise****, Page 30*

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Walker's Paradise, continued from Page 28

fallen by almost 50 percent in the last five years. Most strikingly, road deaths of children under the age of seven have plummeted: in 2012 only one child was killed, compared with 58 in 1970. In the U.S., cities like New York, Chicago, and Seattle have begun adopting Vision Zero as well.

In San Francisco, driving at unsafe speeds is responsible for five times as many collisions as driving or bicycling under the influence of alcohol or drugs. Yet, despite the lethal impacts from speeding, driving faster than is safe for a given road is a cultural norm.

A triple threat

While most people understand intuitively that speeding can be more dangerous, very few know that speeding is a triple threat. Traveling at a higher speed increases the severity of any crash: 9 out of 10 people hit by a car going 20 miles per hour will survive; if the car is traveling at 40 miles per hour, just 2 of 10 can hope to survive. The faster the car is moving, the longer the driver's reaction time *and* the car's braking distance (at 20 mph the braking distance is less than a hundred feet, at 40 mph it is nearly three hundred feet), making it harder to stop in time or even swerve to avoid crashes. Lastly, at speeds greater than 20 mph, drivers lose their peripheral vision, preventing them from spotting people who may be stepping off a curb and into the crosswalk, as they innately look farther down the roadway ahead.

With speed being the key factor in safety, particularly for the most vulnerable road users – seniors and children – there are proven interventions that would make San Francisco more walkable. Given that seniors are five times more at risk of injury or death than the general adult population, and that here in San Francisco, although seniors make up only 17 percent of the total population, they account for 50 percent of pedestrian fatalities, targeting speed reduction solutions around senior centers would go a long way to reducing the city's traffic deaths. These solutions include lowering speed limits in combination with increased enforcement using automated safety enforcement cameras, changing signal timing for longer crossing intervals, and, one of the most effective strategies, implementing road diets (the process of removing traffic lanes and reusing that space for other modes of transportation, like bike lanes, transit only lanes, or wider painted sidewalks).

In addition to the increased enforcement for the most lethal, illegal driving behaviors like speeding, not stopping at lights and stop signs, unsafe turns, and not yielding to people in crosswalks, the most important and lasting changes involve street designs that prioritize safety over vehicle volumes and speed.

In a dense, urban environment like San Francisco there are proven solutions that will dramatically increase safety. They're often low-cost and easy to implement. Here are some of the most effective treatments:

- Countdown signals for pedestrians
- "Daylighting" near crosswalks that push parking back from the intersection to open up lines of sight between both people and cars
- Sidewalk extensions at intersections called "bulb-outs" to shorten the crossing distance and make the intersections more human-scaled
- Well-marked crosswalks
- Lower speed limits (Walk San Francisco led and won an effort to make San Francisco the first major city in the state to adopt slower 15 MPH speed limits around schools in 2012.)
- Turn restrictions where unsafe turns are known to be the cause of crashes
- The use of pedestrian scrambles (where all vehicle traffic stops to allow people to safely cross intersections in all directions)

Sharing the road

Safety solutions can also serve to make our streets more livable. Crossing islands (also know as medians and refuges), parklets, and sidewalks can include stormwater gardens, trees and other greenery, which all work together to slow drivers down and reinforce the idea that roads are public spaces to be shared by motorists, bicyclists, and pedestrians – not the exclusive domain of the car. These safety amenities also enhance the walkability, sustainability, and vitality of San Francisco's public spaces, making it more inviting and enjoyable for everyone.

It's worth noting that San Francisco's streets and public rights-of-way make up 25 percent of the city's land area; more space than all of its many public parks combined. Reclaiming these streets to create safe, shared spaces will not only protect lives, it will enhance the overall health of the community members, increase the economic vitality of neighborhoods, and support a more sustainable environment.

As the City works towards implementing Vision Zero, visitors and residents alike will be able to continue to delight not only in San Francisco's unique bounty of scenic views, its treasure trove of hidden gems discoverable only from a walker's perspective, and all the tremendous health, environmental, and social benefits of travel by foot – but they will finally be able to do so without the unnecessary risk of having to navigate fast, dangerous and unwelcoming streets.

Meeting the Vision Zero goal requires another cultural shift; a change from the commonplace acceptance (and in fact, resignation) that accidents simply happen.

It requires city planners, traffic engineers, law enforcement (including the police and the District Attorney), the public, and the elected officials, to understand that most traffic collisions are not random acts of God or uncontrollable accidents. Instead, it requires refocusing efforts to analyze how crashes happen and evaluate how they can be prevented. But rather than the traditional finger-wagging approach towards changing personal behavior, thinking needs to shift to emphasize the need for designing a smarter road and traffic system, one which effectively takes into account the inevitability of human error.

After all, if we can create a road system where people can be safe, why shouldn't we? Why shouldn't we work to end the tragic and devastating loss of life, and the untold emotional toll to family, friends, and communities? Why shouldn't we end the tens of millions in annual financial costs in health care and lost wages? Why shouldn't we, if we can?

The same questions were asked in 1970, when automobile manufacturers fought the requirement to install automatic restraint systems in all their vehicles. As recently as 1981, only 11 percent of U.S. drivers wore seatbelts, reflecting the acceptance at the time of preventable deaths resulting from car crashes. But, starting in 1989, the cultural pendulum began to shift and seatbelt use became mandated. In 2013, seatbelt use reached a high of 87 percent – a cultural (and legal) shift, which has saved an estimated 147,246 lives (Donna Glassbrenner, *Estimating the Lives Saved by Safety Belts and Air Bags* (Washington DC: National Center for Statistics and Analysis National Highway Traffic Safety Administration, Paper No. 500).

It's time for the next major cultural shift on the roads that take us to and from our jobs, shops, schools, and homes – one where no preventable loss of life is acceptable, one where mistakes don't end inevitably in tragedies.

By meeting the city's Vision Zero goal of eliminating all traffic deaths by 2024, San Francisco could become a veritable walker's paradise – and so much more.


Burdick

Natalie Burdick directs Walk San Francisco*'s membership, volunteer, community events, and outreach programs. Walk SF (walksf.org) has been San Francisco's only pedestrian advocacy organization since 1998. She partners with community members, nonprofit groups, and agency and elected staff, to build awareness and support for pedestrian safety, including advancing Walk SF's Vision Zero effort, a campaign to end all traffic-related deaths in ten years.*

She joined Walk SF in 2012 after five years in marketing and development at Santa Monica's Heal the Bay. She earned a Bachelor of Arts in Economics from the University of California Los Angeles and has experience in executive marketing, product marketing, and project management roles in customer relationship management.



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Fully investigating the car vs. pedestrian incident

When the primary defendant is underinsured, a thorough investigation of the accident scene can yield surprising evidence of negligence by other parties

By Casey A. Kaufman

In many seemingly clear liability incidents, pedestrian- or bike-versus-car, we are faced with hurdles. A common hurdle is a badly injured person and very little available insurance. That's why it is important to completely investigate the incident. Complete investigations include a visit to the location – preferably by you, although sometimes through a private investigator. This can yield crucial evidence like surveillance video that would otherwise be overwritten or disappear. This article demonstrates how we were able to locate another responsible party despite all the witnesses indicating the defendant driver had run a red light and struck our client in a crosswalk.

During discovery, it became clear that a contractor had improperly narrowed the lane of travel to less than 10 feet, in violation of San Francisco construction regulations. The concrete truck that was on-site and legally parked within the coned area also caused/contributed to this incident because it blocked the line of sight for drivers to see one of the two traffic lights as they approached the intersection. The California Court of Appeal has held that it is reasonably foreseeable for a legally parked commercial vehicle to block the views of passing cars and cause a collision (*Lawson v. Safeway* (2010) 191 Cal.App.4th 400).

Using these theories of liability we were able to establish liability well beyond the driver, which was necessary, given that the driver had minimal insurance.



GOOGLE EARTH

Facts

At the intersection of Turk and Laguna in San Francisco, our client was struck while northbound within the crosswalk on the western side of the street. Turk is a two-lane, one-way westbound street and Laguna is a two-lane, two-way north/south street. Driver is traveling westbound on Turk and strikes the pedestrian after she has gone more than halfway across the street. All eyewitnesses say that the driver ran the red light and that the pedestrian entered the crosswalk on her green.

Normally, that would be the end of the analysis, but the severity of the pedestrian's injuries required a full investigation into any other potentially liable entities. At the time of the incident there was a sidewalk repair project on Turk, east of its intersection with Laguna.

Concrete truck is liable for impeding sightlines even if parked legally

Notice that the concrete truck was parked toward the front of the construction site, but fully within the construction site. In this intersection, there are two traffic lights: one on each side of the intersection, on the opposite side of the street at about 10 feet off of the ground. There is no center traffic light positioned directly in front of westbound traffic on Turk.

After a visit to the scene of the incident, it became clear that the left traffic light was completely obscured from westbound traffic until about 165 feet, or

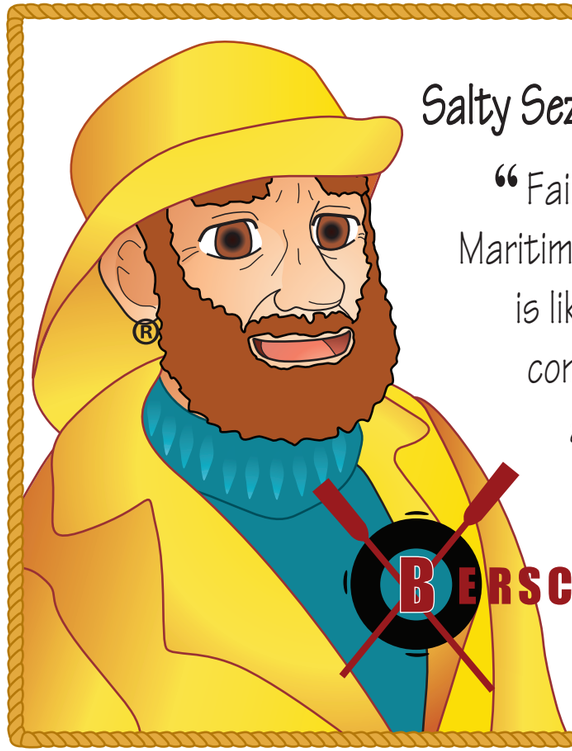


This frame-grab was taken from a security camera on a nearby building just seconds before impact.

3.75 seconds before the driver entered the intersection (at 25 mph). Under normal conditions, the right traffic light was open and visible for over 500 feet before the intersection.

On the following page are Google Streetview pictures showing the left light sightline impediments as the driver approached the intersection.

On the day of our incident, though, the right traffic light was completely blocked from all westbound traffic on Turk for at least 1,000 feet before the intersection by the position and height (11 feet tall) of the concrete truck. This blockage left the already obscured left traffic light as the only usable light for traffic. The driver testified at deposition that he did not live in San Francisco and never saw any traffic lights prior to hitting the pedestrian.


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165 Feet; 3.75 seconds before intersection – left traffic light blocked by tree.



130 feet; 3 seconds before intersection – first glimpse of left traffic light.



95 feet; 2 seconds before intersection – traffic light about to be obscured by Laguna traffic light and pole.

California case law provides that "it is readily foreseeable that parking a large commercial truck near an intersection may obstruct the views of passing motorists and cause them to collide." (*Lawson v. Safeway* (2010) 191 Cal.App.4th 400.) The *Lawson* Court engaged in a detailed analysis before extending liability to legally parked vehicles:

> First, this case involves an extremely large commercial truck. Such trucks create a greater than normal risk because by sheer size they obstruct more of the view than smaller vehicles. Second, expert testimony was presented that the drivers of such trucks receive professional training that includes, or should include, the need to take other drivers' sight lines into account when parking. … Third, …[t]he risk of serious injury is greater than normal at the intersection because of the speed of the traffic and the nature of the traffic… Fourth, Wilburn had other places to park without creating a hazard. … 'If the actor reasonably can accomplish the same result by other conduct which involves less opportunity for harm to others, the risk incurred in the manner of doing business which resulted in injury is clearly unreasonable.'

(Internal citations omitted)

With this legal backdrop, the analysis is clear. Despite being legally parked, there was a valid argument as to the liability of the concrete subcontractor by virtue of where the concrete truck was parked. Given the truck height, the position of the right traffic light, and the already present sightline issues with the left traffic light, it was reasonably foreseeable that the concrete truck was blocking the driver's sightline and could contribute to a collision.

Construction site violations

Plaintiff was able to determine that the cone placement in the road left between 8 and 9 feet available to traffic in the number 2 lane. While this was more than enough "room" for the driver's car, it was narrower than the minimum lane width at or near construction sites in San Francisco.

All street construction projects in San Francisco are governed by The Regulations for Working in San Francisco Streets (also known as the Blue Book [https://www.sfmta.com/sites/default/files/pdfs/BlueBook8thEd_Accessible.pdf]). It states, "This manual establishes rules and guidance so that work can be done both safely and with the least possible interference with pedestrians, bicycle, transit and vehicular traffic."

Blue Book § 3.2B requires lanes to be no less than 10 feet, including any cones placed at a construction site. At deposition, the Contractor PMQ testified that they never measured the width of the lanes affected by their cones, there was no policy regarding these minimum widths, and that the number 2 lane was less than 10 feet wide. The contractor essentially admitted that it violated City regulation, paving the way for a negligence per se argument, leaving only causation to prove.

Causation

In order to show causation, plaintiff argued that the narrowed lane and position of the concrete truck combined to create a complete bar to seeing the right traffic light. The narrow lane required him to pay more attention to avoiding the cones and also created a concern that he would strike workers or heavy equipment immediately within the cones. These close proximity hazards reasonably drew the driver's attention towards the right as he traveled next to the construction zone. Once the driver's attention was focused on his right, the location of the concrete truck blocked his sightline of the right traffic light. This argument tied the contractor and concrete subcontractor's conduct together and made it reasonable for the driver to miss the traffic light altogether.

Conclusion

Our duty to our clients requires full investigation into all of the possible parties that may be liable to them. In many situations, further investigation may not yield additional liable parties, but the only way to find out is to fully understand the mechanism of the incident from each party's perspective.



Kaufman

Casey A. Kaufman is an attorney with the Brandi Firm, *San Francisco. He is a member of the California, Arizona, Nevada, Washington State and Washington, D.C., bars, where he represents clients in personal injury, product liability, and wrongful death actions. He is Martindale-Hubbell AV Preeminent rated and was named as a Super Lawyer Rising Star for Northern California, 2009-2013.*

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The defense "expert" with a badge may have a lot to say, but much of it should be inadmissible

How to neutralize the hostile investigating officer

By Sara Peters and Valerie Rose



DEBORAH CHERAMIE - ISTOCK

You are representing a cyclist in an auto-versus-bicycle trial. You watch as defense counsel calls the investigating officer. The officer strides confidently to the stand. All eyes are on the crisp uniform, gun and badge. You know the officer is hostile. Her one-sided traffic collision report summarily found your client at fault.

But you are not overly worried. After all, the judge granted your motions in limine. Neither the traffic collision report nor any legal opinions regarding "negligence" are coming into evidence.

However, over your objections, the examination – and your case – begins to go off the rails. The Q&A runs something like this:

Q. Are you familiar with this intersection?
A. Oh, yes, very.
Q. Would a driver approaching the intersection be able to see a cyclist in the bike lane?
A. No.
Q. If a vehicle started to merge into the bike lane, as if to make a right turn, what is the obligation of the bicyclist?
A. Oh, the bicyclist should be looking from way back to see what the vehicle is doing. If you have an experienced bike rider, which the plaintiff here likely is since he had a very nice bike, he's looking to see whether the vehicle is merging to make a right-hand turn. Once the car starts to merge over, that tells the cyclist to merge left and go around.
Q. In terms of your expertise enforcing the Vehicle Code, once the vehicle had merged 50 percent into the bike lane, is there any requirement that the driver making the turn look back to make sure nobody is trying to pass them on the right?
A. No. At that point, they've fulfilled Vehicle Code 21717, which requires them to merge safely. They've already merged.

Sadly, the above example is taken, almost verbatim, from a real trial transcript. It is one of many such examples. In such cases, the police officer – who is neither judge, nor jury, nor engineer – becomes a sort of super expert. In one breath she may interpret the law, form unsupported accident reconstruction opinions, serve as a mouthpiece for inadmissible hearsay, deliver a closing argument and supplant the jury's role.

We trial lawyers must proactively undermine and exclude such testimony. The potential unfair prejudice to our clients is too great to ignore.

Deposing the investigating officers

It may be necessary to depose each investigating officer, including the lead investigator, the report author, and any officers who took measurements or other witnesses that gave statements. In addition to exploring percipient knowledge (including measurements, physical evidence, and statements taken at the scene), the deposition should explore potential expert testimony.

Consider covering the following areas:

- Confirm the officer does not intend to express any opinions other than those contained in the police report. This would include opinions regarding fault (aka "primary factor"), causation, vehicle code violations, accident reconstruction (i.e., times, speeds, distances, and/or point of impact), and human factors (i.e., visibility or perception/reaction time);
- For each opinion or conclusion expressed in the police report, identify all the bases, including (a) facts and witness statements relied upon, (b) law applied, (c) training and expertise, and (d) methodology;
- With respect to facts and witness statements relied upon: Confirm a lack of personal knowledge where applicable, verify which portions of the report contain verbatim witness statements versus summaries, and identify where the officer is assessing witness credibility or making assumptions;
- With respect to the law applied: identify code sections the officer failed to consider, and identify where the officer is relying on subjective interpretation of the vehicle code, as well as what standards are being applied (i.e., is any objective standard used to determine whether a speed is "safe" or is that just a gut feeling or retrospective analysis?);
- With respect to training and expertise: explore in detail the officer's training (or, more likely, lack thereof) in accident reconstruction, physics, engineering, biomechanical engineering, human factors, and accident investigation;
- With respect to methodology: explore any scientific standards, equations or literature relied upon, and ask whether the officer can identify the error rate or cite to studies supporting the reliability of that methodology.

Armed with this deposition testimony, you are better poised to exclude improper opinions.

Precluding officer from testifying as an expert

When evaluating admissibility of an officer's opinion, the first question to ask is whether the officer will be testifying as an expert.

If defense counsel failed to disclose the officer as a non-retained expert, the officer is limited to opining as a lay witness. (Cal. Code Civ. Proc., § 2034.300 (a).)

Obviously, even if the officer is disclosed as an expert, this does not make him one. He must qualify as an expert in the relevant field. (Cal. Evid.Code, § 720.) In almost every case, the investigating officer's expert qualifications are dubious. Armed with deposition testimony regarding the extent of the officer's training and expertise, you can make a credible argument he is unqualified to testify as an expert in any relevant field.

Once it is established that the officer may only testify as a lay witness, the officer may only offer opinions based on

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facts she personally observed. (Cal. Evid. Code, § 800; see also *Stickel v. San Diego Elec. Ry. Co*. (1948) 32 Cal.2d 157, 165 (opinion regarding cause of accident inadmissible where officer did not observe accident); (*Hodges v. Severns* (1962) 201 Cal.App.2d 99, 108 (it was error for the trial court to admit the investigating officer's point of impact opinion where the officer was not presented as an expert and the opinion was in part based on hearsay witness statements).)

Opinions from officer qualified as expert

If the defendant disclosed an officer as an expert witness, it is within the trial court's discretion to admit his expert opinion. (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 723.) Testimony that is otherwise admissible is not objectionable simply because it "embraces the ultimate issue to be decided by the trier of fact." (Cal. Evid. Code, § 805.)

That said, even for an officer disclosed and qualified as an expert, there are limits. The testimony must be helpful to the jury, non-legal in nature, based on reliable material, and based on a reliable methodology.

As an expert witness, an investigating officer may give opinion testimony "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact...." (Cal. Evid. Code, § 801.) Thus the opinion must go beyond common sense. It must do more than simply apply law (for example, the vehicle code) to circumstances already understood by the jury.

Although testimony is permitted regarding "ultimate" issues, the expert must not testify regarding a legal issue. Expert testimony "on issues of law is not admissible since it is the judge's responsibility to instruct the jurors on the law." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1159.) An expert who "expounds on the law usurps the role of the trial court." (*Ibid.*) The vehicle code is no exception.

Even if the testimony is on a proper subject, it must be reliable. Keep in mind that "because I say so" testimony is not admissible. Testimony – whether expert or percipient – must have evidentiary value.

The applicable standard requires that an officer's expert opinion must not be speculative and must be based on matter of a type on which an expert in that field may reasonably rely, as well as on reasons supported by the material on which he relies. (See *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-72.) This means that the officer's methodology must be sound, and his conclusions must be supported by the record. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563-64.) Evidence that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. (*Id*. at 564.)

Even where the officer is qualified as an expert, courts have held opinions based on hearsay are inadmissible. (*Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 58.) For example, "[w]here the opinion is based on what witnesses told the officer, at least where objection is made, it is error to admit it." (*Ribble v. Cook* (1952) 111 Cal.App.2d 903, 906 (citing *Stuart v. Dotts* (1949) 89 Cal.App.2d 683).) This is because, for an expert opinion to be admissible, the factual foundation cannot be "nebulous," based on conjecture, or based upon a credibility determination. (See *Waller v. Southern Cal. Gas Co.* (1959) 170 Cal.App.2d 747, 755.)

Most conclusions formed by law enforcement officers do not meet these standards. When we push on accident reconstruction and fault opinions during depositions of law enforcement officers, we usually find these opinions collapse. They are made up of building blocks that include hearsay, speculation, arbitrary judgments, and subjective interpretations of the law (i.e., the vehicle code). It is rare to find objective standards or rigorous methodology.

In the absence of a reliable methodology, the court should exclude expert opinions.

The Police Report

Cal. Veh. Code, § 20013 expressly prohibits the admission of traffic collision reports at trial. (See *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, 270 (collecting cases).) The policy behind section 20013 is to protect against the danger that a jury may consider an accident report an "official" document and consequently give it undue weight. (*Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.)

The contents of the report are a different matter. (See *id.* (Section 20013 does not exclude the "*contents* of an accident report, but rather excludes the *report itself*.") (emphasis in original). For example, witness statements contained in the report may be admitted under an established exception to the hearsay rule or used for impeachment purposes. Regardless of admissibility, a testifying police officer may reference the report to refresh his or her recollection. And the accident diagram may be shown to the jury in order to illustrate the officer's testimony.

Officer opinions regarding fault or causation

The concern that a jury might give undue weight to "official" conclusions found in a police report is equally applicable to "official" conclusions voiced by a uniformed officer.

This is why a court should strictly apply the rules of admissibility to opinion testimony from officers. Error in this regard is likely to be prejudicial.

Nevertheless, courts are divided as to whether these opinions are admissible. For example, in *Williams v. Gurwitz* (1950) 99 Cal.App.2d 801, 803 the court held that "neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated the right of way or to state such conclusion if he had arrived at one," but in *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229, the court held "[i]t is generally established that traffic officers whose duties include investigations of automobile accidents are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations" (internal citations omitted).

When an officer opines regarding the "cause" of a collision, this is usually code for assigning fault. Insist, in deposition, that the officer define exactly what she means when she says "X caused the collision."

For example:

- When the officer says the collision was caused by the bicyclist riding on the sidewalk against traffic, does she mean the bicyclist bears primary fault for the collision? Or does she just mean the bicyclist's conduct was one of many circumstances that combined in order for the collision to happen?
- If the officer is referring to fault, what standard or methodology was used to assign fault?
- In assigning fault, is the officer looking for whether a vehicle code violation occurred? Is there also an evaluation as to whether the parties were negligent?
- In assigning fault, what facts did the officer take into account or assume?

An opinion regarding "primary factor," "cause," or fault, when reduced to its essence, usually runs afoul of the prohibition against legal opinions, the prohibition against opinions regarding matters in the jury's common experience, or both. "An opinion that [a driver] was 'most responsible' for the accident is a legal conclusion and not a proper subject for expert opinion." (*Carlton v. DMV* (1988) 203 Cal.App.3d 1428, 1432.)

Under California Evidence Code section 352, such opinions also carry a high risk of unfair prejudice and confusing the jury, with minimal probative value. A jury may take the officer's opinion regarding "fault" or "causation" as equivalent to a comparative fault determination in a civil trial. But the reality is that officers are applying their own idiosyncratic standard that elevates the Vehicle Code and excludes concepts like "due care" and "reasonableness." In a recent deposition, a CHP lieutenant confirmed that negligence was irrelevant to his assignment of fault. Only the vehicle code mattered:

Q. ...[Y]ou can cause an accident by factors that don't amount to violations of the Vehicle Code, precise code sections. Right?
A. I would beg to differ.
. . . .
Q. ... Your job in determining fault was to determine whether or not a specific Vehicle Code violation occurred?
A. Correct.

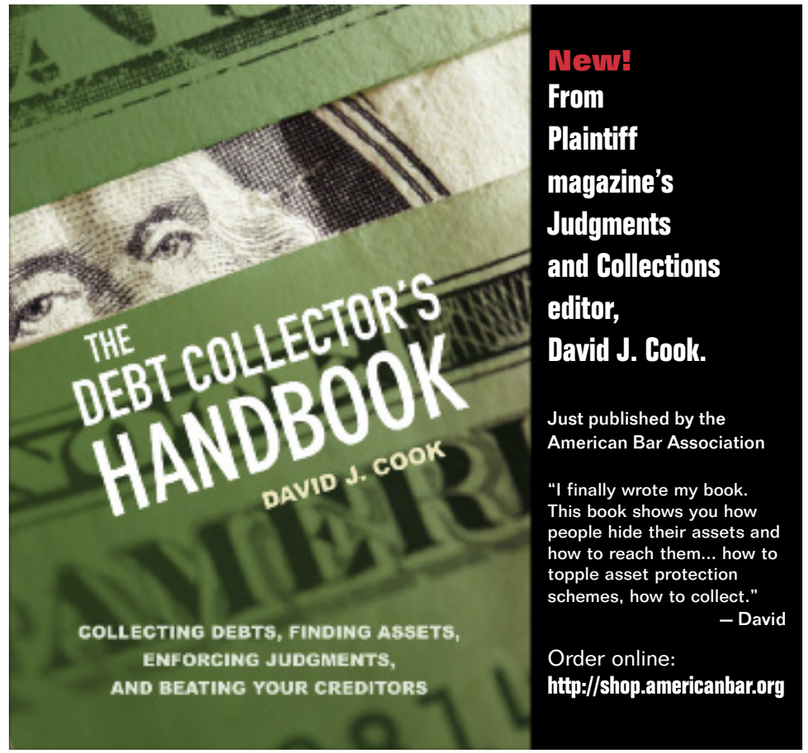
She assigned fault to the (decedent) bicyclist for riding on the "wrong" side of the road, but admitted she had no framework for evaluating comparative fault from an inattentive driver who did not violate a specific vehicle code provision.

By clarifying during the officer's deposition what standard is being applied, we can lay the foundation for the court's exclusion of all fault and causation opinions from hostile officers.

Opinions about the point of impact or "safe speed"

Courts will usually admit expert testimony from an officer regarding the point of impact or safe speed under the circumstances. But admissibility depends on the basis for the opinion.

In *Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d at 721, the court properly admitted point of impact opinion testimony from a traffic officer who had investigated accidents for seven years and who based his opinion exclusively on his personal observations. Other cases



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are distinguishable where the officer is relying on hearsay, or where the point of impact determination involves complex engineering computations outside the officer's expertise. (See *Hodges v. Severns* (1962) 201 Cal.App.2d at 108 (opinion regarding point of impact "is not admissible unless based on facts observed by the officer at the scene of the accident").

Similarly, in *Enos v. Montoya* (1958) 158 Cal.App.2d 394, 399, the First District held the trial court properly admitted testimony regarding reasonable speed around the curve where the accident occurred when the investigating officer had driven the curve "on a number of occasions under comparable conditions." The outcome should be different where an officer is speculating regarding conditions and visibility at the time of an accident, or simply offering a "because I say so" opinion based on facts known and understandable to the jury.

Questioning the officer's Vehicle Code assumptions

In our experience, many officers evaluating vehicle-versus-bicycle collisions or vehicle-versus-pedestrian collisions overlook Vehicle Code provisions that benefit the cyclist or pedestrian.

For example, some officers profess ignorance of the existence of unmarked crosswalks. An unmarked crosswalk exists between sidewalks at every intersection. (Cal. Veh. Code, § 275.) A pedestrian crossing at a corner without a marked crosswalk is thus not jaywalking. In fact, the pedestrian has the right of way and vehicles must yield.

Other officers assume that a bicyclist on a sidewalk is violating the law. But this is not the case. The California Vehicle Code explicitly states that there is no prohibition against riding on a sidewalk in the absence of a local municipal ban. (Cal. Veh. Code, §§ 21650(g) and § 21206.) Some municipalities have blanket prohibitions, some have no prohibition, and others prohibit bikes on sidewalks in downtown areas only.

Additionally, if a bicyclist was riding on a sidewalk, the law does not require that the bicyclist ride in the same direction as traffic. Cal. Vehicle Code section 21650.1 requires a bicycle operated "on a roadway, or the shoulder of a highway," to be operated in the same direction as vehicles are required to be driven. But the legal definition of "roadway" does not include sidewalks. (Cal. Veh. Code, § 530.)

Another common misconception is that bicyclists should stay off the road whenever a shoulder or bike lane is available. The law says a bicyclist riding at the speed of traffic is entitled to share the road anytime. And even a bicyclist riding slower than traffic is entitled to ride on the right-hand edge of the road, and to take over the center of the lane when the lane is too narrow for passing, or when safety otherwise requires. (Cal. Veh. Code § 21202.)

The list goes on. We cannot rely on the vehicle code provisions commonly cited in traffic collision reports. We must know the code, especially the portions benefiting pedestrians and cyclists.

The hostile officer damages enhancement

Often, in cases where we represent pedestrians or bicyclists, we observe a law enforcement bias against our clients (especially against the cyclists).

You've seen it before, too. A defendant driver, fueled by righteous indignation that a bicyclist is merging into the lane of travel, accelerates into an unsafe pass and runs him down. The bicyclist shatters half the bones in his body. As the cyclist is loaded onto a stretcher, the officer takes down a self-serving statement from the defendant. When the cyclist gets home from the hospital insult piles on injury. He finds a ticket waiting for him, citing him for an unsafe merge.

Our first impulse may be to exclude evidence of the citation. But this also eliminates evidence of one aspect of damages: the added anxiety and frustration caused by an erroneous finding of fault against the innocent victim of a collision.

Whenever your client is found at fault in a collision, the hostile investigating officer is a dangerous witness for the defense. However, careful planning for the officer's deposition can lay the groundwork to exclude or neutralize much of her potentially damaging testimony at trial. What the witnesses told the officer, how the officer believes the accident occurred, and who the officer found to be at fault are all fair game for exclusion.

Finally, evaluate whether the evidence is ultimately more helpful or hurtful depending on the facts of your case. Sometimes, letting your client testify about the emotional impact of being wrongfully found "at fault" is the most compelling testimony of all.



Peters

Sara Peters is an associate attorney prosecuting complex and catastrophic personal injury cases at Walkup, Melodia, Kelly & Schoenberger. *She coaches mock trial at Stanford Law School, where she received her J.D. in 2008, and is a contributing editor for The Rutter Group 2015 Claims & Defenses practice guide. She serves as Co-Director of Attorneys Bettering the Community, a local nonprofit, and as CLE Vice Chair of the BASF Barristers Litigation Section. Ms. Peters has been peer-nominated as a Northern California Super Lawyers Rising Star from 2013-2015.*



Rose

Valerie Rose practices all types of personal injury litigation as an associate at Walkup, Melodia, Kelly & Schoenberger. *Ms. Rose is a 2010 graduate of the University of California, Berkeley School of Law and has been peer-nominated as a Northern California Super Lawyers Rising Star from 2013-2015.*

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LOKAN SARDARI/CREATIVE COMMONS LICENSE

Shaping liability in the driverless car era

Some say liability concerns could be a roadblock for driverless cars, stifling innovation

By Chris Dolan

In 2009 the California Department of Transportation commissioned a study by the Rand Corporation (you know, that conservative think tank) entitled Liability and Regulation of Autonomous Vehicle Technologies. The authors felt that "overall, we do not anticipate that liability for individual drivers will be a problematic obstacle to the use of autonomous vehicle technologies. On the contrary, the decrease in the expected probability of a crash and associated lower insurance costs that autonomous vehicle technologies will bring about will encourage adoption of these technologies by drivers and automobile-insurance companies."

And, leaving no opportunity unexploited, they made a pitch for no-fault insurance which inures a benefit to the insurance company at the consumer's expense. Despite the obvious enhanced safety benefits to consumers, the study said "we anticipate that current liability laws may lead to inefficient delays in manufacturers introducing autonomous vehicle technologies. The gradual shift in responsibility for automobile operation from the driver to the vehicle will lead to a similar shift in liability for crashes from the driver to the manufacturer."

In essence, the authors are saying that the manufacturers will shy away from technology that could save lives because of the fear of lawsuits for when their technology fails. Indeed, they write, "It will probably be in automakers' interest to continue to focus attention on the need for a responsible driver to monitor



Interior of a car modified to be driverless

the autonomous vehicle technologies, even after the technologies mature sufficiently to allow truly autonomous operation. To the extent possible, automakers will want to preserve the social norm that crashes are primarily the moral and legal responsibility of the driver, both to minimize their own liability and to ensure safety."

The authors also suggest that preemption, requiring manufacturers to incorporate the most promising forms of this technology by regulatory fiat, while simultaneously exempting them from state tort liability, presents a practical approach to encouraging manufacturers to develop the technologies under the theory that in the aggregate more good than harm will occur.

The Rand study centers too much on protecting the interests of the manufacturers and not enough on protecting the public. It completely fails to address harms to third parties such as pedestrians. Presumably, the preemption theorists feel their lives will be the price to be paid for progress. What is apparent is that those of us to whom the process of sorting out responsibility and accountability is entrusted need to become a part of the policy discussion and regulatory framework so that the interests of the yet-to-be-injured are factored as much, if not greater than, those who stand to profit off of this technology.

The future is here

In May of 2014 Google unveiled the first of 100 completely driverless vehicles. Most striking is not the radar on top, it is the absence of *any* controls inside the vehicle. That's right, no steering wheel, brake, turn signal, accelerator, or mirrors. To see the car in action, go to YouTube and enter "a first drive." You will see a slick promo done by Google which talks about empowerment, security, freedom and the cool factor. You will be equally intrigued and disturbed at the same time. (www.youtube.com/watch?v=CqSDWoAhvLU)

Chris Urmson, director of Google's self-driving car project, told The Guardian that "the aim was to run extended tests in California where Google is based." Urmson



reportedly stated the development was "an important step toward improving road safety and transforming mobility for millions of people." Google states that the results of their testing suggested it was safer to remove all driver controls because the potential of a human suddenly taking over was too unpredictable and potentially dangerous. Urmson reportedly told the New York Times that "[w]e saw stuff that made us a little nervous."

Google is not the only company pushing forward with automated technology, indeed, in a CNNMoney interview, Tesla Founder Elon Musk said that the 2015 Tesla would allow for what he termed "autopilot" for up to 90 percent of miles driven and definitely for highway travel. During the October 2014 meeting of the Intelligent Transport Society, General Motors CEO Mary Barra, speaking about consumer expectations, stated; "[t]hey want unfettered personal mobility. More specifically, they expect us to help mitigate... if not eliminate... the congestion... pollution... and traffic accidents that are the downsides of automobiles. To me, these aren't noble causes. They are imperatives. If we expect our industry to thrive well into the future, we have to provide solutions. To do that, we have to be passionate and fearless advocates for safety technologies like vehicle-to-vehicle communication... vehicle-to-infrastructure communication... and ultimately, fully autonomous driving. No other suite of technologies offers so much potential for good... and it's time to turn potential into reality. That's why I'm announcing today that GM will put its first V2V-enabled car on the road in about two years." Audi and Volvo are in hot pursuit.

In 2013 The Earth Institute at Columbia University released a study called "Transforming Personal Mobility" which modeled various existing transportation systems in comparison to driverless vehicles, shared vehicle system, and specific-purpose vehicles in an effort to see if economies and efficiencies would result. The results are staggering. For example, the study revealed that with just 9,000 autonomous vehicles managed through the "Mobility Internet," all of New York's taxis could be replaced, reducing pick-up wait times to about 36 seconds and costs by as much as 80 percent for fleet owners. Savings that could then theoretically pass down to passengers. One author suggested that at a cost of $25,000 per driverless car, all 171,000 taxis in the US could be replaced for about $4.3 billion.

So who is perhaps most excited about the driverless car? Uber. Currently the mammoth common carrier application (with a market value of over $41 billion) pays around 75 percent of gross profit per ride to the drivers who provide the vehicles and labor. Indeed, in 2014, while speaking at The Code Conference in Palos Verdes, Uber CEO Travis Kalanick said that Uber will eventually move away from hiring human drivers to using a fleet of autonomous vehicles. He stated, "Look, this is the way the world is going… If Uber doesn't go there, it's not going to exist either way." [We think he meant to say "… it's going to exist either way." — editor]

Kalanick went on to state, "The reason Uber could be expensive is because you're not just paying for the car – you're paying for the other dude in the car. When there's no other dude in the car, the cost of taking an Uber anywhere becomes cheaper than owning a vehicle. So the magic there is, you basically bring the cost below the cost of ownership for everybody, and then car ownership goes away." Given that Morgan Stanley research released in September of 2014 revealed a utilization rate by car owners of about four percent of available hours, Kalanick is banking on both car ownership and driving to become obsolete. Indeed, on February 2nd of this year, Uber announced a strategic partnership with Carnegie Mellon University (CMU) in creating the Advanced Technologies Center in Pittsburgh whereby Uber will endow faculty chairs and graduate fellowships. CMU already hosts the General Motors-Carnegie Mellon Autonomous Driving Collaborative Research Lab. Research at CMU has been heavily funded by the National Science Foundation (NSF), the Defense Advanced Research Projects Agency (DARPA), the U.S. Department of Transportation's University Transportation Centers program as well as General Motors and private foundations. It was the Carnegie Mellon's modified Cadillac SRX autonomous vehicle which transported Bill Shuster, chairman of the House Transportation and Infrastructure Committee, 33 miles to Pittsburgh International Airport. CMU is now providing members of Congress the opportunity to ride the vehicle around Washington.

Not surprisingly, GM CEO Barra's statement about the 2017 Cadillac V2V release came just weeks after Chairman Shuster was safely delivered to Pittsburg. Given GM and CMU's inside track with Washington, it makes sense that Uber (supposedly) shunned its investor Google when it turned to form a strategic partnership with CMU (and by association, GM) in an effort to develop the driverless car. A more jaded skeptic (one of the more polite things that I have been called) might see this as Uber and Google, partners from the start, collaborating to infiltrate the competition and, between them, control the marketplace.

The magnitude of change

According to Price Waterhouse Cooper's Autofacts team's February 2013 predictions contained in the report entitled, "Look Mom No Hands," autonomous vehicle technology has the potential to reduce the vehicle fleet from 245 million to just 2.4 million vehicles, reduce the number of traffic accidents from 10.8 million to 1.1 million and reduce commute time and energy as a function of quantity of fuel consumed from 1.9 billion gallons to 190 million gallons.

According to one tech blogger, Zach Kanter, who cites the Price Waterhouse Study as a basis for his predictions, "[a]ncillary industries such as the $198 billion automobile insurance market, $98 billion automotive finance market, $100 billion parking industry, and the $300 billion automotive aftermarket will collapse as demand for their services evaporates. We will see the obsolescence of rental car companies, public transportation systems, and, good riddance, parking and speeding tickets. But we will see the transformation of far more than just consumer transportation: self-driving semis, buses, earth movers, and delivery trucks will obviate the need for professional drivers and the support industries that surround them."

"The Bureau of Labor Statistics lists that 884,000 people are employed in motor vehicles and parts manufacturing, and an additional 3.02 million in the dealer and maintenance network. Truck, bus, delivery, and taxi drivers account for nearly six million professional driving jobs. Virtually all of these 10 million jobs will be eliminated within 10-15 years, and this list is by no means exhaustive."

Kanter cites to a Morgan Stanley report entitled "Nikola's Revenge: TSLA's New Path of Disruption" predicting that autonomous vehicles, among other significant impacts, will lead to a 90 percent reduction in crashes which would save nearly 30,000 lives and prevent 2.12 million injuries annually. In short, the driverless vehicle is predicted to definitely, and permanently change all aspects of transportation as we know it. Throughout all of this disruption we need to remain ever vigilant so that we do not see consumer safety and corporate accountability trampled under the hoofs of the techno titans as they shout their battle cry (whine): "don't stifle my innovation."



Dolan

Chris Dolan is the owner of the Dolan Law Firm with offices in San Francisco, Oakland and Sacramento. He has been widely recognized for his excellence in trial advocacy, receiving the Consumer Attorneys of California Trial Lawyer of the Year Award, the Edward Pollock Award for service to the Plaintiff's Bar, the SFTLA Trial Lawyer of the Year Award, The Chief Justice's Award for Contribution to the Courts, and the SFTLA Civil Justice Award. Chris is rated AV Preeminent by Martindale Hubble, has been designated as one of the Top 100 Lawyers in California by the Daily Journal, is named as one of the Best Lawyers in America, and has been a Top 100 Super Lawyer for over a decade. He currently serves as president-elect of the San Francisco Trial Lawyers Association.



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Profile: Mark Fong

Accomplished trial attorney, avid cyclist, relishes a diverse trial practice and says that to a client "you're their knight…"

By Stephen Ellison

For Mark Fong, advocacy is more than just a job requirement. It's an important part of his daily life, whether he's at work in his San Francisco office, riding his bicycle for commute or pleasure, representing his Asian-American heritage or just being a good citizen and family man.

Because others are depending on his intelligence and shrewdness, as well as his ability to do the right thing, Fong takes those roles seriously, always conscious that his actions could result in positive change for specific people's lives and possibly society in general.

"When you've got someone who is catastrophically hurt, they're relying on you to basically put their lives back together again," said Fong, a partner with Minami Tamaki LLP. "You're their knight, you're the one who can put them back together again … they're resting every confidence on you, and you have a chance to really help them."

Indeed, when he was starting out more than three decades ago, Fong quickly recognized that his foray into law – and into plaintiffs' trial practice – would give him a chance to make a difference. It also would give him an opportunity to represent his heritage at a time when few Asian-Americans were in the profession.

"Those certainly were huge factors – the lack of people who looked like me in the courtroom and the ability to … say 'yeah, I'm doing right, one case at a time, one client at a time,'" Fong said about deciding to pursue law. "And every so often, you get a case that will speak to a greater good, where changes can be made that have a much broader impact, not just on your clients."



Fong

Fong's cases pretty much run the plaintiffs' law gamut, from premises liability and governmental torts to personal injury and medical malpractice. But his passion seems a bit more heightened when a case involves a motor vehicle, watercraft, bicycle or pedestrian. While he hesitantly called himself a specialist in accident cases, Fong was quick to point out that, as a trial lawyer, he shouldn't be seen as a niche attorney.

"I hearken from a time when a trial lawyer would say they can pick up any kind of a plaintiffs' case," Fong said, recalling what his mentors taught him early on. "They would say they could litigate that (case) and try it because they always believe the skill is in the trial work and working with the jury and knowing your way around the courtroom. The substantive area is something you can learn up on, and you find experts."

"Those were my mentors' contentions. I'm not that bold; I know my limits."

"But, yes, I would say anything that rolls and ways that people can get hurt from vehicles … those types of cases I've had a lot of experience trying."

Motions on motion

Fong's case diversity in the area goes beyond typical car, bike and pedestrian incidents. They could involve tractor trailers, aircraft, heavy construction equipment, elevators, cranes, watercraft and even underwater transport, including scuba diving gear. He has obtained several multimillion-dollar verdicts and settlements over the years and has been recognized accordingly as a fellow of the prestigious American Board of Trial Advocates as well as a member of the National Trial Lawyers, comprising the top 100 trial attorneys from each state.

Because he is an avid cyclist himself – often riding to and from his San Francisco office – Fong is active in the city's cycling and transportation community – outside the realm of his law work. He is a member of two nonprofits – the San Francisco Bike Coalition and Walk SF and co-chair of a third called Chinatown TRIP, which is active in transportation and pedestrian safety and accessibility. Fong said cycling and pedestrian safety have become critical issues for his hometown.

"I've always lived in San Francisco – still do. It's always been very dense, no one drives, everyone takes the bus or walks or uses other public transit," Fong said. "So having streets that are safe to walk on and buses that are safe and operate on time serves the community, and it's a pretty big deal. Vision Zero is an ambitious and very commendable plan by the mayor – the goal is zero traffic deaths in San Francisco by 2024 – one that everyone who is interested in bike and pedestrian safety should get behind. It's an embarrassment and a sore spot for City Hall the number of pedestrian and bike deaths we've had to endure, and the Bike Coalition and Walk SF are not letting it subside. This issue is not going away."

Fong pointed out that more and more people each year are trying to find alternative ways to work, so that means the bus, walking and bicycling. While there may be many more cyclists on the streets, the number of vehicles is not necessarily subsiding – in a city that's essentially locked in on all four sides. "So you have more total vehicles competing for the same space," he said, "which is why you're seeing an increase in cycling accidents and deaths. It's a huge part of what Vision Zero, the San Francisco Bike Coalition and Walk SF are trying to get their heads wrapped around – how to make the three work more harmoniously together."

A sense of duty

In law, Fong's path to success was almost as unwieldy as a San Francisco street. But he paid his dues, learned as he went and polished his skills to a fine shine. And through it all, he never lost sight of his duty or purpose.

"Someone once said, 'You try a case for show, but you settle for the dough.' The idea is you try the cases to show the other side … that you're not afraid, and you *will* try the right case," Fong explained. "If (the opposition) is not willing to be fair to your client, then it's on. I've tried enough cases that I think I have the reputation that I won't back down if they won't be fair."

By the same token, Fong said he's not willing to add undue risk to his clients – many of whom are already catastrophically injured – just to stroke his ego. "I'm not going to say, 'I think I can do better' at trial," he continued. "I'm not going to say, 'Let's roll the dice – let's roll your dice.' I think the medical expression is 'The enemy of good is better,' meaning if you've got the operation to a point where you have a good result, that's where you stop – let's close up the patient. But if you're in your hubris, trying to make it better, now you're playing with the patient's health. … In our case, we're playing with the client's livelihood."

Born and raised in San Francisco, Fong was a trail blazer of sorts in his family when it came to the law profession. He had an uncle who was a probation officer and later went into law, but he really had no influences – at home or at school – pointing him down that path. His career choice, he said, basically came down to his intellectual strengths: reading, writing, critical thinking and public speaking.

Fong graduated with high honors from UC Berkeley with a political science degree and went on to UC Hastings College of the Law in San Francisco, where at first much of the procedural and theoretical practices were foreign to him. He persevered, however, and eventually served as an extern to Justice Winslow Christian of the Court of Appeal, First Appellate District (San Francisco).

Upon graduation from Hastings, Fong was eager to start trying cases and joined forces with Robert Harlem, practicing in that capacity for the next 25 years. He moved to Minami Tamaki in 2006. "When I was coming up, there weren't a lot of minority or especially Asian-American trial lawyers, and that was something that I really enjoyed from the beginning," Fong said. "Trial lawyers will tell you many reasons why it floats their boat, but for me, it's a combination of it's a chess match, it's theater, it's like football. It's a game of inches sometimes with discovery, and then sometimes there can be a long bomb with a dispositive motion. But mostly it's a game of inches – it's human life. So I decided early on I don't want to just be working on some corporation's lease."

Through the early years, Fong studied other successful plaintiffs' trial lawyers at work: how they carried themselves in court, what worked for them and what didn't. Then he recognized the importance of applying those methods to his own way of doing things. It is a developmental process he feels all young lawyers should follow. "What we do, it's been done, studied, dissected by other lawyers – they write books and give seminars," Fong said. "It's incumbent on any young trial lawyer to learn as much as they can, just be a sponge and learn from those who have been successful, and then make it your own because juries can tell when you're faking it.

"I think (jurors) appreciate it when you're yourself," he continued. "If you're not a gifted orator, if you're more of a quiet, confident type, they'll appreciate that. You've got a lot of time in court, and they will know by the end of the trial that your demeanor is true. On the flip side, they can also tell when you're not yourself."

Keep on pedaling

When he's not in the office or court, Fong most likely is spending time with his family, riding his bike or participating in a community service capacity. He insists he is not a hard-core cyclist, but he's experienced and knowledgeable enough to speak authoritatively about it. He also is extra cautious and mindful of following the rules of the road. "I know how hard it is sometimes – you're clipped into your pedals, you've got momentum and you're at a stop sign and you see no cars coming – so it would be easy to keep pedaling," Fong said. "You really have to be cognizant of the fact that if it's a car versus you, you're going to lose.

"When I ride, I look kind of stupid – lights on in the daytime, highlighter-yellow helmet, bright yellow jacket – because I've seen all the crazy stuff that can happen," he continued. "If someone's going to say they didn't see me, they're going to have a tough time proving it."

When it comes to proving his cases at trial, Fong believes whole-heartedly in a show-and-tell approach. For young trial attorneys today, he said, there's no better way.

"Trial work is all about creating a word picture, but if we can create a picture picture, better still," he explained. "People have different learning styles. A study once said if you tell with words, people retain it for 10-20 minutes; if you show them something in a picture, they retain it for 30-40 minutes. When you tell them and show them, their retention increases many-fold, and your chances of winning your case are that much better."

Stephen Ellison is a freelance writer based in San Jose. Contact him at ssjellison@aol.com.

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Marijuana use and the civil jury trial

The rules you must know before evidence of marijuana use is put before the jury

By Alan Van Gelder

In 2010, Randy Hernandez was struck and killed by a vehicle driven by a Los Angeles County Sheriff's Deputy as he stood on a freeway next to his disabled car. Randy had a legal prescription for marijuana. The night before his death he allegedly used some of his prescription marijuana. Trace amounts of marijuana were still in Randy's system at the time of a post-mortem blood test. In the ensuing wrongful death action, the plaintiffs would contend there was no connection between Randy's marijuana use and the events that caused his death.

At trial in 2012, the County desperately tried to get evidence of marijuana before the jury. The County had multiple experts, all of whom admitted they could not connect the marijuana to Randy's death. Still, the County claimed it was a matter of disputed fact that had to be resolved by the jury. Ultimately, after a hotly contested motion-in-limine hearing, the marijuana evidence was admitted. Although the plaintiffs were able to get a verdict against the County, the jury's verdict was compromised by the marijuana evidence, with the jury apportioning 14% of the fault to Randy. The plaintiffs appealed.

In 2014 the Court of Appeal ordered a new trial in the published decision of *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599. The Court agreed with the Plaintiff that the jury's verdict had been prejudicially tainted by the introduction of evidence related to marijuana.

We have added this article to the bicycle and pedestrian issue because the issue of marijuana use and comparative negligence could play a role in an otherwise admitted-liability case of a vehicle striking a cyclist or pedestrian. – **Editor**

The lesson to take away from the *Hernandez* decision is that parties need to be careful when attempting to present evidence of marijuana use to the jury. Marijuana evidence is extremely complicated and controversial. If the marijuana issue is improperly admitted into evidence, a party risks having a verdict overturned. The *Hernandez v. County of Los Angeles* decision provides some helpful guidance about the use and misuse of marijuana evidence at trial. This article will walk you through the *Hernandez* decision and provide some basic rules regarding marijuana evidence.

Rule #1: Marijuana is different than alcohol

Testing positive for marijuana is not the same as being under the influence**.** In the State of California if your test results show you have a blood alcohol level of .08 you are legally intoxicated, but marijuana is different. Marijuana is processed by the body differently than alcohol. Each person processes and reacts to marijuana differently depending on a variety of factors. Significantly, evidence of marijuana use lingers in the body long after the active effects of the marijuana have worn off.

Evidence of past marijuana use does not establish when the marijuana was actually used or whether the person was suffering from the effects of the marijuana at the time of the incident. Even when the marijuana is no longer actively affecting the user, it can still appear in the blood work. Consider the following discussion from the *Hernandez* case at 1606-08:

> [Plaintiff's Medical toxicology expert] testified that "The level of the active ingredient of marijuana found in Randy's heart during the autopsy was extremely low." It was barely within the ability of the test to measure. In addition, the amount of the inactive metabolite measured in the autopsy was higher than it would have been at the time of the accident, because concentrations that have built up in the tissues over time are released as the tissues break down postmortem.
>
> [In the expert's] opinion, the level of active marijuana ingredient detected in Randy's blood was consistent with his having ingested marijuana between 10:00 p.m. and 12:30 a.m. the night before the accident. The main effects from marijuana occur in the first one to two hours. Most of the effects would have worn off within three to four hours.
>
> [Plaintiff's expert] stated the opinions of the [County's expert] were flawed, because she relied on a model that does not account for postmortem redistribution. The fact that marijuana is detectable does not mean Randy was impaired or under the influence of marijuana. [Plaintiff's expert] admitted the study he relied on used less potent marijuana samples than marijuana on the current market and the concentration affects the results.
>
> [The County's expert] testified that in her opinion, Randy was under the influence of marijuana at the time of his death. Marijuana is not stable and dissipates after death, but the autopsy performed a few days after Randy's death showed he still had the active ingredient in the blood in his heart. Based on the presence of the active ingredient, she concluded the amount must have been higher prior to the accident and Randy had used it recently enough to be impaired at the time of his death. She also testified that the level was well within the measurable amount for the test.
>
> [The County's expert] concluded Randy used medical marijuana approximately five to six hours before his death. The model she relied upon suggested a wide range of times in which Randy could have taken the marijuana based on the ratio of the active ingredient and the metabolite in Randy's blood, but she agreed with [Plaintiff's expert's] concern that the model was based on living participants. Therefore, [the County's expert] accepted the conclusion that Randy used medical marijuana the night before the accident, because it was within the range provided by the model and consistent with his mother's testimony.
>
> [The County's expert] could not quantify the level of impairment that Randy was experiencing at the time of the accident. The level measured in his blood could not be related to an alcohol level. [The County's expert] did not do any accident reconstruction, so she could not form an opinion that the marijuana Randy used caused the accident. Although [the County's expert] could say where Randy was in the ranges and effects, [she] could not say that Randy would not have died if he was not impaired. She disagreed with [Plaintiff's expert] that Randy's level of the active ingredient was so low that it would not have an effect on his driving. She could not say that the marijuana Randy used the night before caused his death the next morning or that being under the influence caused his death.

As the above discussion illustrates, the science related to marijuana can get complicated especially when trying to use a blood test to work backwards in an effort to prove the effect the marijuana was having, if any, at the time of the incident. This discussion leads us to the next important rule.

Rule #2: You need an expert, or several

You need an expert and, depending on the case, you may need multiple experts. There are many traps and pitfalls that need to be navigated when dealing with marijuana. As set out above there are questions as to how testing is done, questions related to the test results, the meaning of the test results, and how those test results can be applied to your case. The issue gets even more complicated when a party tries to use the blood work to reconstruct how marijuana was affecting a person at the time of the incident.

You are a lawyer, not a toxicologist. Only an expert trained in the field is going to be able to explain to you and the jury why the opposing expert is playing fast and loose with the facts and the science. As the Court in *Hernandez* wrote at supra 1614:

> Where the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.

(*Garbell v. Conejo Hardwoods, Inc*. (2011) 193 Cal.App.4th 1563, 1569.)

> The probable effect of intoxicants other than alcohol is a topic 'sufficiently beyond [the] common experience' of most jurors that expert testimony is required. [Citations.]

(*Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359.)

Also, while it is important to have an expert who can handle the science of marijuana and testing for marijuana, sometimes the case will require more than one expert. It is not enough for the party to establish that there was marijuana in the system or that the party was potentially under the influence of marijuana. As set out in CACI Instruction 404, "A person is not necessarily negligent just because he or she used alcohol [or drugs]. However, people who drink alcohol [or take drugs] must act just as carefully as those who do not."

It is not enough to show marijuana use. In order to get the marijuana evidence in front of the jury, the particular facts of your case might require testimony about how the marijuana played a role in causing the incident. This may involve additional experts in accident reconstruction and/or human factors, or others. These experts might be necessary to help put the marijuana use in the context of the behavior of the person at the time of the incident and link the marijuana to the incident. This leads us to our next and important rule of this article.

Rule #3: Substantial factor

Without expert testimony that marijuana was a substantial factor in causing the incident, marijuana evidence should be inadmissible. In *Hernandez*, the County's attempt to put evidence of Randy's alleged marijuana use before the jury was riddled with problems related to testing and analysis of the actual test results. In the end, the County was unable to connect Randy's alleged marijuana use to his death. None of the three County experts (pharmacologist/forensic toxicologist, accident reconstruction, and human factors) could provide an opinion that marijuana was a substantial factor in causing Randy's death.

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Comparative fault is an affirmative defense which places the burden of proof on the County. As the *Hernandez* Court wrote at page 1614:

> The comparative fault doctrine "is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine 'is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss."' [Citation.]

(*Rosh v. Cave Imaging Systems, Inc*. (1994) 26 Cal.App.4th 1225, 1233, quoting *Knight v. Jewett* (1992) 3 Cal.4th 296, 314.)

Generally, the defendant has the burden of establishing that a percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action. The County tried to compensate for this problem by arguing that although the marijuana claim was weak, and there was no expert testimony on causation, jurors were sufficiently familiar with marijuana that they could decide the issue themselves. The Court cited parts of the Defense closing argument at page 1609:

> The County's attorney added, "There was evidence of marijuana. You folks are going to do with it what you will. None of our experts could say it caused the problem. Did it contribute to it? I don't know. Think about this. The blood was drawn 50 hours after the incident. And 50 hours is a long time. That's more than two days. Two days [later] and then tested, and those levels are still in the blood. I think that counts for something. …
>
> There is competent evidence that he was under the influence. You folks are going to do with it what you will.

The Court of Appeal rejected the attempt by the Defendant holding:

> In this case, the County failed to present evidence that Randy's marijuana use was a substantial factor in causing his injuries. [The County expert] could not quantify the level of impairment that Randy was experiencing at the time of the accident, did not form an opinion that the marijuana Randy used caused the accident, and could not say that the marijuana Randy used or being under the influence of marijuana caused his death. *If none of the County's experts could say Randy's marijuana use was a substantial factor in causing his death, the jury could not speculate there was a causal connection between Randy's use of marijuana and his death. Therefore, the evidence of marijuana use was irrelevant and should have been excluded.* (Cf. *Smith v. Workers' Comp. Appeals Bd*. (1981) 123 Cal.App.3d 763, 771-775 [employer that denied workers' compensation benefits based on employee's intoxication must prove intoxication was a proximate cause or a substantial factor in causing accident, as was shown by expert testimony that judgment and reaction time would be impaired seriously at a blood-alcohol level of 0.25 percent and could have contributed to the accident].)

(*Hernandez*, at 1614.)

The County's closing argument made it apparent that Randy's marijuana use was not relevant. The County's attorney admitted there was no evidence Randy's marijuana use contributed to his death, but he invited the jury to speculate about the effects of marijuana anyway.

Because the experts could not identify any manner in which marijuana use contributed to the accident that injured Randy or his decision to exit the Land Rover, the evidence was not relevant to the issues and had no probative value. *Even if the presence of marijuana in Randy's blood had some minimal probative value, the danger of undue prejudice was substantial. The conflicting evidence about marijuana use confused the issues for the jury and encouraged them to speculate whether marijuana use was a factor in the accident in some way, when there was no evidence to support causation.* The County's attorney even used the marijuana evidence to suggest that Randy might not have had a legitimate medical need for marijuana or that marijuana was not a legitimate treatment option. This was impermissible character evidence that had nothing to do with negligent actions on the morning that Randy was killed, because Randy's character was not at issue.

(*Id*. at 1615.)

Rule #4: Improperly admitted evidence = reversal of verdict

Improperly admitted marijuana evidence can result in reversal of a verdict. While it is true that certain segments of society have become more accepting of marijuana (especially medical marijuana) over the years, marijuana is still a hotly contested issue. There are conflicts in the science, conflicts in the politics, and conflicts between generations and social classes on the issue. Combine those conflicts with a lack of understanding from many jurors as to the effects of marijuana and marijuana can potentially turn into a very prejudicial issue.

During the appeal, defendant argued that times have changed and that plaintiff was stirring up arguments about old fears and prejudices related to marijuana from the 1950's. The Court rejected the argument and found that the issues relating to marijuana are complicated and can very easily taint an entire trial and verdict.

It is not enough to point to a positive marijuana result in a blood test and leave it to the jury. Without the right science, the right experts, and a solid connection between marijuana and the cause of the incident, marijuana should not be admitted into evidence. The *Hernandez* case demonstrates that the Court of Appeal will not hesitate to overturn a verdict if claims of marijuana are improperly tossed into the jury box.


Van Gelder

Alan Van Gelder is a partner at the law firm of Greene Broillet & Wheeler LLP. *He is a graduate of Southwestern University School of Law and since 2002 has been specializing in cases involving catastrophic injuries, wrongful death, product liability, business litigation, and legal malpractice.*

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Appellate Reports and Cases in Brief

EEOC v. Abercrombie & Fitch Stores

An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions

By Jeffrey I. Ehrlich

EEOC v. Abercrombie & Fitch Stores, Inc.

(2015) __ U.S. __ (U.S. Supreme).

Who needs to know about this case? Lawyers handling Title VII claims based on religious discrimination.

Why it's important: Holds that Title VII has no knowledge requirement. Hence, an employer can be held liable for violating Title VII even if it does not know that the employee or applicant requires a religious accommodation, and even if the employee or applicant has not requested such an accommodation.

Synopsis: Samantha Elauf, a practicing Muslim, applied for a job in an Abercrombie store. She wears a headscarf consistent with her understanding of her religion's requirements. The store's assistant manager gave Elauf a rating that qualified her to be hired, but was concerned that her headscarf would violate the company's "Look Policy," which governs how employees dress, and bars "caps." The store's manager decided that the headscarf would violate the Look Policy and directed the assistant manager not to hire Elauf. The EEOC sued for a violation of Title VII. The EEOC prevailed in district court, obtaining a $20,000 award. The 8th Circuit reversed, finding that an employer could not be held liable for violating Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of the need for a religious accommodation. Reversed.

Abercrombie's primary argument was that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. The Court disagreed. It held



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that, "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."

Title VII, unlike some other anti-discrimination statutes, contains no knowledge requirement as a prerequisite to liability. "Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

"Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation of that religious practice, and the employer's desire to avoid the prospective accommodation is a motivating factor in his decision, the employer violates Title VII."

Short(er) takes:

FEHA actions; costs; prevailing party; asymmetrical court discretion to award costs and fees to defendants: *Williams v. Chino Valley Independent Fire Dist.* (2015) Cal.4th (Cal. Supreme)

Williams sued the District under FEHA and lost on summary judgment. The trial court granted the District its costs. Williams appealed, arguing that in a FEHA action, costs cannot be awarded against a losing plaintiff unless the court finds that the lawsuit was frivolous, unreasonable, or groundless. The Supreme Court agreed. Section 1032 of the Code of Civil Procedure says that, except as otherwise provided by statute, the prevailing party is entitled to an award of costs as a matter of right. Government Code section 12965, which is part of FEHA, states that in FEHA actions, the trial court has discretion to award fees and costs to the prevailing party. By making a cost award discretionary in FEHA cases, section 12965 modifies the mandate in section 1032 that requires a cost award to a prevailing party.

Although section 12965, on its face, does not distinguish between awards to plaintiffs or defendants in FEHA actions, the legislative history of the provision convinced the Court that the Legislature intended an asymmetrical standard like the one adopted by the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 416-418. Accordingly, in FEHA actions, the trial court's discretion in awarding fees and costs is subject to the same standard: a prevailing plaintiff should ordinarily receive an award of fees and costs, unless special circumstances would render such an award unjust; a prevailing defendant, by contrast, should not be awarded fees or costs unless the trial court determines that the action was objectively without foundation when brought, or the plaintiff continued to litigate it after it clearly became so.

Medical malpractice actions; advance or partial payment of damages; tolling statute of limitations; Ins. Code § 11583: *Blevin v. Coastal Surgical Institute* (2015) 232 Cal.App.4th 1321 (2d Dist., Div. 6).

Insurance Code section 11583 states that no advance payment of damages made by any person or by his insurer as an accommodation to an injured person or the heirs of a decedent shall be construed as an admission of liability. The statute further states that the party who makes such an advance payment "shall" at the time of beginning payment notify the recipient in writing of the applicable statute of limitations. The failure to provide such notice "shall operate to toll any such applicable statute of limitations" from the date of payment until notice is actually given. But notification is not required if the recipient is represented by an attorney.

Blevin had knee surgery at Coastal and contracted a bacterial infection from a sponge that had been used to clean surgical equipment. Coastal paid him $4,118 for the medical expenses he incurred in treating the infection. He was not represented by counsel and did not sign any release. More than 15 months after receipt of the payment, he sued Coastal for medical malpractice and obtained a judgment. On appeal, Coastal argued that Blevin's claim was time barred and that Ins. Code § 11583 did not apply to medical-malpractice actions. Affirmed. MICRA's one-year statute of limitations provision, Code Civ. Proc. § 340.5, prohibits any tolling of the statute of limitations beyond three years. This limitation would apply to tolling under Ins. Code § 11583 that extended more than three years. But since the tolling in this case was only several months, the tolling provision in § 11583 applied. And since the relevant facts surrounding the application of the provision were undisputed, the trial court could apply the section as a matter of law, without the need for a trial on the defendants' limitations defense.

Medical negligence; MICRA; premises liability; ordinary versus professional negligence; statute of limitations: *Pouzbaris v. Prime Healthcare Services-Anaheim, LLP* (2015) __ Cal.App.4th __ (4th Dist., Div. 3):

Pouzbaris was admitted as a patient to Prime's hospital, West Anaheim Medical Center, complaining of chest tightness and shortness of breath. She was placed in a room with a private bathroom. Two days after her admission, she used the bathroom to freshen up and change her clothes, and she slipped and fell while walking back to her bed. She claimed that the floor was wet and appeared to have been recently mopped. There were no warning cones present. Almost 2 years after the fall, she filed suit against Prime for premises liability. The trial court granted summary judgment, finding that the case was subject to MICRA and that the one-year statute of limitations for MICRA cases, Code Civ. Proc. § 340.5 governed. Reversed.

MICRA applies to cases involving "professional negligence." The inquiry under section 340.5 requires the court to determine whether the negligence alleged in the complaint occurs in the rendering of professional services and not the level of skill required for each individual task. For purposes of section 340.5, subdivision (2), "professional negligence" is defined as "a negligent act or omission to act by a health care provider in the rendering of professional services." Because mopping the floor and putting a warning sign up did not occur during the rendering of such services, plaintiff sufficiently alleged facts to support an ordinary negligence claim so as to bring her action within the two-year limitations period of section 335.1 of the Code of Civil Procedure.

Federal Tort Claims Act; claim-presentation deadlines; equitable tolling: (2015) __ U.S. __ (U.S. Supreme). The Federal Tort Claims Act (FTCA) requires that a tort claim be presented to the appropriate federal agency within two years after it accrues, and then brought to federal court within six months after the agency acts on the claim. (28 USC § 2401(b).)

In two cases that were consolidated, the plaintiffs missed one of the deadlines, but asserted equitable tolling based on the government's conduct. The government argued that equitable tolling was not available under the FTCA because the deadlines in § 2401(b) are jurisdictional. Held: the deadlines are not jurisdictional, and are subject to equitable tolling. "In enacting the FTCA, Congress . . . provided no clear statement indicating that § 2401(b) is the rare statute of limitations that can deprive a court of jurisdiction. Neither the text nor the context nor the legislative history indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar."

Mandatory duty; proximate cause; government claims: *State Dept. of State Hospitals v. Superior Court* (*Novoa*) (2015) __ Cal.4th __ (Cal. Supreme).

The Sexually Violent Predators Act ("SVPA") allows for civil commitment of prison inmate who has committed a prison term, but has been found to be a sexually violent predator ("SVP"). Under the statutory scheme, when the Department of Corrections determines that an individual in custody may be an SVP, it must refer the case for evaluation by the Department of Mental Health ("DMH"). The DMH must have an evaluation made by two psychiatrists or psychologists. If they agree the inmate is likely to be an SVP, the DMH must begin civil commitment proceedings. If the evaluators disagree, a second evaluation is made by two new evaluators. If they agree that the inmate is a potential SVP, then civil commitment proceedings are initiated. The commitment process requires a jury trial to determine under the beyond-a-reasonable-doubt standard that the inmate is an SVP.

Here, Gilton Pitre was convicted and imprisoned for the 1996 rape of his roommate. He came up for parole in 2007. He was referred to the DMH for evaluation as a potential SVP. Instead of having him evaluated by two evaluators, the DMH had a single evaluator review his records, and on that basis Pitre was determined to be suitable for release. Four days after his parole, Pitre raped and murdered Alyssa Gomez. Gomez's sister, Elaina Novoa, sued the DMH for wrongful death, claiming Gomez's death was caused by the DMH's failure to discharge its mandatory duties under the SVPA. The Superior Court overruled a demurrer; the Court of Appeal reversed, finding that the SVPA imposed mandatory duties on the DMH, but that its breach of those duties was not the proximate cause of Gomez's death. Affirmed.

The Court's opinion contains an extended discussion of sovereign immunity and duty, and concludes that the duties imposed by the SVPA on the DMH are mandatory, and that the DMH's failure to have Pitre evaluated by two evaluators was a breach of its mandatory duties. But the Court held that this breach was not the proximate cause of Gomez's death, as a matter of law. The Court explained, as it has in prior cases, that proximate cause includes two components: (a) cause in fact, i.e., but-for causation; and (b) considerations of public policy. The Court held that neither component was satisfied here. With respect to cause-in-fact, the outcome of the SVP evaluations was discretionary, and the one evaluator who did evaluate Pitre determined he was suitable for release. In order to establish her case, the plaintiff would have to show that if two evaluators had been used, the process would have ultimately satisfied all the steps leading up to a civil commitment after a jury trial. This was too speculative. In addition, as a matter of public policy, the breach of the duty should not be considered to be the proximate cause of Gomez's death because it "trenches closely upon the discretionary functions of the evaluation process established by the SVPA."

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine.*



Ehrlich

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Relax, I'm a professional

Understanding bicycling experts' biases in the context of urban riding's evolution


Cooper

By Miles B. Cooper

The plaintiff's lawyer sat in the conference room, hoping the expert would eventually answer her question. "I've been doing this for over forty years," explained the bicycle expert in a condescending way, barely omitting a "little lady" at the end. "And during that time we've trained vehicular cyclists to…" The expert droned on. Nope. He was not going to answer the question posed.

Do I need a bicycle expert?

An expert is not always necessary, but the more complicated the incident and the more significant the damages, the more important a bicycle expert becomes. Having a trained professional who can explain the expectations for cyclists and why your client was complying with them can be helpful.

So are all bicycle experts the same? No. There can be a huge variance based simply on the timing of their own experiences.

Vehicular bicycling

In the 1970's, an approach known as vehicular cycling gained prominence. Vehicular cycling is the theory that bicyclists should use roads as if cyclists are cars (with some modifications). Riders are taught to ride with confidence and "take the lane" when necessary. This provides cushion to avoid incidents; say for example: getting doored (brought to a sudden and painful stop when a parked car's door is opened without warning in the rider's path – a violation of California Veh. Code, § 22517.)

Vehicular bicycling experts

So, vehicular cycling is good, right? Yes and No. An orthodox vehicular cycling advocate would tell you that a bicyclist is perfectly safe on long, wide, suburban roads with three lanes going in the same direction, at 35 miles per hour, and that bicycle funding is better spent on cycling education instead of roadway modification.

Stereotypically, that expert would be a white male in his sixties. He would carry a low-digit League of American Bicyclists Cycling Instructor number, and wistfully remember it as the League of American Wheelmen. This is not derision – the efforts of these types, in part, laid the groundwork for mainstream adoption of cycling commuters. Many such experts have kept current. But chances are the one hired by the defense is stuck in a zealous vehicular cycling mode, because that approach may help minimize the value of the plaintiff's case.

"Eight to Eighty" bicycling experts

Times are changing. Crowded cities are adopting bicycling as a mainstream transit solution. With adoption came a shift to an Eight to Eighty model. This theory asserts that roads should be designed so cyclists from age eight to eighty feel safe. This necessarily means changes to vehicular cycling – bikes aren't simply slower, narrow cars. They are road users who deserve their own space. The Eight to Eighty advocate, stereotypically in her (or his) twenties to thirties, lives in a busy metropolitan area, has an urban planning background, and is involved in urban policy directly or through advocacy.

Cycling plans

When evaluating experts, one must also consider cycling plans. Many localities have developed plans recently. Some fall under regional active transportation plans. Active transportation refers to public transit, walking, and bicycling – transit methods that require more than sitting behind a car's steering wheel. Other cycling plans may encompass a county or region, rather than just a city.

Many of these plans were developed by consultants in concert with community involvement. The plans tend to be ambitious – so ambitious that the adopters have been unable to meet their own goals. That's grist for a dangerous conditions case.

Where do you find the plans? Start with Google. Many are posted online. You can then hone in with Sunshine Act requests or a visit to the traffic engineering department.

No clear-liability bike cases

Say your case is a clear-liability bike-versus-car incident with plenty of insurance. Why bother with experts or research? First – there are no clear-liability bike cases! Anti-cyclist biases run deep, even in bike havens like San Francisco. The general public doesn't remember the thousands of law-abiding cyclists. They remember the helmetless dude blowing through a stop sign, one hand gripping a third wave coffee, the other extending a middle finger salute. (That's not me. I drink Peets – meaning I, too, like the vehicular cyclist expert, am a relic).

Traffic research also helps identify dangerous conditions. Cycling counts – traffic studies counting the numbers of road riders – are great when taking defendant depositions. When there are 30 riders per hour, it helps defeat the "I didn't expect the cyclist" argument. They also help demonstrate that cycling on that road is common, expected, and mainstream.

Outro

Returning to our plaintiff's lawyer's deposition. "You are familiar with the city's bicycle master plan, right?" she asked. "You came across that in your very thorough research into this incident?" The bobbing Adam's apple answered her question. "I'll take that as a no. Well, I've brought some copies and want to direct you to page 32." The rest of the deposition did not go very well for the expert.

Miles B. Cooper is a partner at Emison Hullverson LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)*

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