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Voir dire in a bicycle case

The quest for understanding and common ground is not easy; jurors may harbor strong feelings about bicycles sharing the road with cars.

By Artemis H. Malekpour

If you’ve got bicycle cases in your “wheelhouse,” you know they’re tough. And they’re tough for reasons similar to what makes motorcycle cases tough: bikers of any sort scare the beak out of the driving public. Depending on where your case is being tried, a majority, maybe even the entirety, of your potential jury pool will be made up of drivers. So it becomes a big issue in your case.

We can hypothesize a variety of other reasons why jurors don’t like bikes or cyclists: jealousy, resentment, frustration, laziness, contempt for all things fit—perhaps even the entirety, of your potential jury pool will be made up of drivers. So it becomes a big issue in your case. With these reasons, we can create, simply by getting on a bike. And it hangs overhead as the jury is asked to decide who’s to blame when someone on a bicycle is harmed. As we tend to approach bicycle cases with an “us against them” mentality, there’s a perception of division and competing interests right off the bat.

No way to begin a jury selection

So the work you need to do in voir dire becomes pretty critical. You must learn all you can about those potential jurors and what they’re bringing into the courtroom to effectively exercise your strikes. You must also establish a tone of unity and community, so that the jury you end up with recognizes the common ground on which you stand.

The danger of what the defendant did could have harmed anyone. This time, it just happened to be someone on a bicycle. That’s how we want jurors to see your case: ultimately, it’s not about a bike, but an opportunity to protect the community, your client included, from the negligence of another.

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Stephen Ellison
First things first... we've got to weed out those prospective jurors who will never get there. That's where voir dire comes in.

**Where do we begin?**

Getting to know you, Getting to know all about you. Getting to like you, Getting to hope you'll like me.

No matter how much time you have in a jury selection, to the extent possible, you want to engage your panel in a conversation that runs all the way through voir dire. To develop that congenial atmosphere, where jurors feel comfortable opening up, you've got to throw them some softballs initially. Best way to do that is to get them to tell you about themselves. And for you to be interested.

That last sentence is key, so it's worth repeating. Be interested in what jurors have to say. Paying attention is important to learning who these individuals are when deciding if you can keep out those prospective jurors who will never get there. That's where voir dire comes in.

Where do we begin?

Getting to hope you'll like me.

Getting to know you,

Getting to know all about you.

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Some people think that when bicyclists are around, a driver has to be more careful and alert. Others think no, that’s the bicyclist’s problem to pay more attention. Which are you a little closer to?

Some people believe we’d all be better off if bicyclists did not share the road, that there is no safe way to put bicycles and cars on the road together, so bicycles should just stay on sidewalks and bike paths. How do you feel?

If there is no safe way to share the road, what should be done?

What are your thoughts?

You want to be open to and accepting of any answer a juror gives you. Does some of it make you cringe when you’re thinking about your cause or your own proclivity toward bicycles? Don’t let your knowledge or opinions color your thinking of any answer a juror gives you. Do es that make you more or less likely to hear it. And you want to know more. And who else feels that way.

If you spend any time talking with people in general (which – as a trial lawyer – I highly recommend you do), you learn that sometimes there’s reluctance in revealing how one personally feels about something. Whether it’s a concern for political correctness, need for acceptance or a desire to avoid embarrassment, there are certain topics or situations where we’re far more willing to give our true thoughts only when it’s disguised as someone else’s opinion.

For instance: “I personally feel that candidate is an idiot... but I know others who believe he’s the real deal for telling it like it is.”

So, when you’re asking for jurors’ own thoughts about something, and you suspect you might not be getting a straight answer:

How do you think other people feel about that?

Why do you think people don’t like bicyclists on the road?

Do people you know consider having bicycles sharing the road a good thing for the community or bad?

We want to recognize and acknowledge the risk and annoyances some, maybe even all, of your jurors feel towards bicycles on the roadway during voir dire. Then, once you get into your undermining section of opening, show where you can – how your client was aware of and protected himself and others on the road from each irritation or concern your jurors identified:

• Wore gear that was easy to see.
• Used the bike lane where possible.
• Traveled the required distance from the road’s edge where there was no bike lane.
• Followed the traffic signals.
• Obeyed the same rules of the road as cars are required to do.

You want to show during trial how your client was different from how your jurors negatively perceive bicyclists. How your client was being safe. And how the defendant’s behavior could have endangered anyone. So you ask:

What are some safety things bicyclists should do and generally don’t?

What are some safety things cars should do when there are bicycles around?

Is a driver’s responsibility to be on the lookout different when there’s a bicycle around as opposed to other vehicles or people around?

Does a driver’s responsibility to pay attention change when it’s a bicycle versus car or pedestrian sharing the road?

Again, we’re on the same side of safety here. Which jurors are resistant to that?

A word of caution before we move on: don’t think that just because you have a cyclist on your panel, that person will be good for you. Often someone who rides a bicycle, particularly when it’s beyond simple recreational use, can be your toughest critic. Not only will that juror be considered an “expert” in the deliberation room, but often cyclists get perturbed at what they see others on bicycles doing that they feel gives the sport or activity a bad rep. And then there’s, of course, the defensive attribution that looms in any case:

“I would have been able to protect myself from that. This would never have happened to me, because I would have been safe.”

No one wants to imagine they could be harmed in the way your client was (or claims to have been). So “I would have done something different” becomes the mantra for that juror who wants to be critical of your client. It’s self-preservation on the juror’s part. That’s why it’s important to show all the ways this plaintiff was safe, and how what happened here could have happened to anyone, at any time. And to strike those who will likely – and strongly – remain in judgment.

What else do we have to talk about?

As in any case you want to explore jurors’ thoughts on lawsuits and tort reform. When there’s no affirmative defense, teach the jurors preponderance, then find out what trouble they will have, even if just a little, applying that burden.

These categories of conversation, if thoroughly developed, are where many of your cause challenges lie. And you want to wrap up with the jurors’ rights questions, as my consulting partner and mentor instructs:

But just before you get there, you need to deal with your client’s damages and how your jurors feel about the topic. It’s important in any case, but especially where there are “invisible” injuries, or insinuations of faking an injury.

When your plaintiff has brain damage as a result of a bike crash, the biggest hurdle is that all looks okay when it’s not okay. A broken arm we can see. Same for a gash on the leg and resulting scar. But when the injury is inside one’s head, it’s more challenging to show. And people’s expectations of what you should see with brain trauma can differ from reality. So you want to talk about that. Especially when there are allegations that your client is lying.

Who here knows anyone who, or who here themselves, has had anything pretty significantly wrong with them (for instance, early stages of brain trauma) that you could not see just by looking at them (for instance, early stages of brain trauma)?

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cancer or back problems? Was that person lying about what they had?
Who here knows of someone who claimed to have an injury that they did not actually have, or were not as bad as they made the injuries out to be?
Who knows someone who others thought was faking an injury, and turns out that person was telling the truth, there was actually something really wrong? Tell us about that.
Your client may have injuries that are delayed in appearance, or will get worse over time.
Who here knows someone who was injured in some way, but the injury did not show up or get bad until sometime later?
Some folks think that if you’re in a wreck, any injury that you get from that wreck shows up right away. Others think that it could take a while before the injury appears. Which are you a little closer to?
Some folks believe that brain injuries heal or get better over time. Others believe that a brain injury and its effects get worse as you age. Which are you a little closer to?
And with any brain injury case, you want to strongly consider whether your client should sit in the courtroom during trial or even testify. If you decide against it, or will limit how much the jury sees of the plaintiff, discuss it with the panel.
Maybe it’s a treating doctor who has said it’s not good for your client to be there, or you’re making the call to keep your client away.
Some people might have a problem with that, others would be okay with it. Which are you a little closer to?
Go through each injury, and find out what jurors know or have experienced. When it comes to compensation, walk through each element and listen to how answers or even a juror’s inflection changes when considering what trouble (she may have allowing money in the verdict for, say, medical bills compared with the more squishy stuff, like pain and suffering, or loss of enjoyment of life. Establish a baseline response with the easy items first, then work your way up to those harms or losses that are more problematic for jurors.
By the end of voir dire, you want those jurors selected to be comfortable with you and this bicycle case, which really is not about a bicycle at all. It’s about keeping the streets of our community safe from those who choose to violate the rules of the road.

Artemis Malekpour is a partner in the litigation consulting firm of Malekpour & Ball. With a background in psychology and psychiatric research, she specializes in focus groups, case strategy, damages and jury selection. She did her undergraduate work at the University of North Carolina at Chapel Hill, then earned a Master’s in Healthcare Administration from UNC’s School of Public Health and law degree with honors from Duke University. Along with her partner, David Ball, she has consulted on a wide variety of cases across the country, demonstrating a knack for identifying potential landmines, incorporating her knowledge from years of watching jury deliberations and talking with jurors.

Endnotes
4 Ibid, see Chapter 3.
5 Ibid, see Chapter 3 and Appendix A.

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The auto-overtaking-bicyclist case and the Three Feet for Safety Act

Is it negligence per se or do the circumstances matter when the overtaking auto causes an accident with a cyclist?

By Nestor Schnasse

As a former pro road racer, cycling-related injury cases are of intense interest to me. While road racing events can be risky business, training on public roads is far more dangerous. One driver rear-ended me while I was stopped, foot-down at an intersection and then drove over my bike, flinging the scene. I was t-boned by an elderly driver one rainy day and learned how effective helmets can be. I was once clipped by a hit-and-run driver’s mirror, pushed into a parked vehicle and left with a broken jaw. Now, as a lawyer, it is immensely satisfying to fight for members of the Bay Area’s cycling family faced with similar injustices.

Despite significant improvements in infrastructure throughout the Bay Area, such as the bright green bike lanes springing up around San Francisco and elsewhere, cyclists are increasingly in need of lawyers’ collective skill-set and services, racers and enthusiasts alike.

For those who don’t follow bike racing, the sport has grown steadily over time. In the U.S., the number of racing licenses issued increased from 42,924 in 2002 to 75,303 in 2013. Data since 2013 is not yet available, but it does not appear there has been any significant drop-off in response to recent doping scandals or an emerging one involving tiny hidden motors.

Marin, San Francisco, San Jose, Oakland, Berkeley, Santa Rosa, Davis, and Sacramento have long been home to many accomplished competitive cyclists, attracted by mild weather, varied terrain, proximity to high altitude training, and high-caliber training groups. Northern California’s spring road racing calendar in particular is fantastic, drawing racers to the area from around the country and abroad.

Competitive cyclists are, in some ways, at greater risk than most. A rigorous training program can cover 300 to 600 miles per week over a combination of urban and rural roads, with a fairly constant stream of vehicles overtaking and passing. In addition, road cyclists often train in tightly formed groups, increasing the chance of disaster when a vehicle makes contact.

More broadly, cycling in the Bay Area is booming thanks to unusually dry weather, a constant flow of tourists on rental bikes, innovations like San Francisco’s bike sharing program, and increasing popularity of bike commuting. At the same time, we have the rapid proliferation of smart phones and associated distracted driving, which presents a particularly significant risk to cyclists.

There is a relatively new hammer in the plaintiff lawyer’s toolbox: California’s “Three Feet for Safety Act.” With this act in mind, here are some thoughts from a cyclist’s perspective on investigating auto-overtaking bicycle collisions, and some issues to look for when the collision involves a group of cyclists.

California’s “Three Feet for Safety Act”

In late 2014, California Vehicle Code (CVC) section 21760 went into effect with relatively little fanfare, requiring See Overtaking Auto, Page 16

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<td>Teacher sexually assaulting student athlete</td>
<td>Teacher putting student on lap in classroom</td>
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VICTORIES FOR ADULTS SINCE 2012

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motorists to maintain a distance of three feet when overtaking and passing a cyclist. If “unable to comply,” a motorist must slow and wait for an opportunity to pass safely. A driver must also take into account environmental factors in assessing the situation including the surface and width of the highway. If there is even the slightest contact with a passing vehicle when a bicyclist is injured, this statute may have some real teeth and provide the basis for a negligence per se instruction.

CV C section 21760 provides:

(a) This section shall be known and may be cited as the Three Feet for Safety Act.
(b) The driver of a motor vehicle overtaking and passing a bicycle that is proceeding in the same direction on a highway shall pass in compliance with the requirements of this article applicable to overtaking and passing a vehicle, and shall do so at a safe distance that does not interfere with the safe operation of the overtaken bicycle, having due regard for the size and speed of the motor vehicle and the bicycle, traffic conditions, weather, visibility, and the surface and width of the highway.
(c) A driver of a motor vehicle shall not overtake or pass a bicycle proceeding in the same direction on a highway at a distance of less than three feet between any part of the motor vehicle and any part of the bicycle or its operator.
(d) If the driver of a motor vehicle is unable to comply with subdivision (c), due to traffic or roadway conditions, the driver shall slow to a speed that is reasonable and prudent, and may pass only when doing so would not endanger the safety of the operator of the bicycle, taking into account the size and speed of the motor vehicle and bicycle, traffic conditions, weather, visibility, and surface and width of the highway.
(e)(1) A violation of subdivision (b), (c), or (d) is an infraction punishable by a fine of thirty-five dollars ($35). (2) If a collision occurs between a motor vehicle and a bicycle causing bodily injury to the operator of the bicycle, and the driver of the motor vehicle is found to be in violation of subdivision (b), (c), or (d), a two-hundred-twenty-dollar ($220).

See Overtaking Auto, Page 18
fine shall be imposed on that driver. (f) This section shall become operative on September 16, 2014.

**Negligence per se**

Where a statute establishes a driver’s duty, which CVC section 21760 clearly does, proof of a driver’s violation of the statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the violation. (Spristerbach v. Holland (2013) 215 Cal.App.4th 255, 263.)

The negligence per se doctrine creates a presumption of negligence if four elements are established: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (Evid. Code, § 669.) The first two elements are questions of fact, while the latter two are questions of law. (Spristerbach v. Holland (2013) 215 Cal.App.4th 255, 263.)

Under CVC section 21760, the latter two elements should be a straightforward matter. The nature of the occurrence to be prevented is extremely well defined, as is the class of persons to be protected. The cyclist’s challenge, then, is to prove the violation, and causation.

Invariably, in auto-overtaking-bicycle collisions, narratives about how the collision unfolded will differ. No one is riding around with a yardstick and a camera at the ready. Where a single rider is involved, the driver will claim to have been in a better position to see the relative positions of vehicle and bicycle before overtaking. Where a group of cyclists is involved, the opposite may be true. Even where contact is obvious, the driver may claim that the cyclist made a sudden swerving movement without cause and crashed into the vehicle. If at all possible, preserving physical evidence of even the slightest impact is essential. Evidence of contact may be faint and ephemeral, so aggressively investigating the incident early will be key.

See **Overtaking Auto**, Page 20

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Preserving evidence of impact

Preserving evidence of the condition of the vehicle can be a challenge. Obviously, a driver will not voluntarily make the vehicle available for inspection once it has left the scene. If the vehicle is parked regularly in a public place, photos should be taken as soon as possible, particularly of the right side and mirror. A simple tape measure can serve to document the height of any areas of the car that could potentially have made contact with the rider, to match against abrasions or bruises. If the vehicle happens to be covered with dings and scrapes, photos could also be useful to show that the driver has a poor sense of its size. Covered with dings and scrapes, photos could also be useful to show that the vehicle can be a challenge.

If all possible, a visit to the scene with your client may provide important insights into where to look for additional support for your case. Dangerous condition cases are beyond the scope of what I want to cover here, but may become apparent. A visit to the scene will often refresh your client’s memory, or help things fall into place. I often find it helpful to then ride the one-fourth mile leading up to the point of impact a few times at a similar time of day and under similar conditions, if possible, to get a good sense of the area, and then drive it too. If it appears the bicycle moved left before impact, riding the route may reveal whether doing so was reasonably necessary. Consider CVC section 21202(a), which requires cyclists to 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; preparing for a left turn at an intersection or into a private road or driveway; approaching a place where a right turn is authorized; or when reasonably necessary to avoid conditions that make it unsafe to continue along the right-hand curb or edge.

Any hazards discovered in the area should be documented before they are repaired, and the area measured with a speedometer or the rider with a heart rate monitor. Increasingly common among competitive cyclists are power meters, which measure a rider’s output at the crank throughout a ride. Many of these devices record data up to the moment of impact that should be uploaded immediately and preserved. Any of these types of data may be useful to show or estimate how fast the cyclist was moving at impact.

The bicycle’s speed is very important in the overtaking scenario because speed affects the way a bicycle handles. If you don’t have a gyroscope handy, try to wobble a spinning wheel while holding both ends of its axle, first at a very, very slow rate of rotation, then very fast. At two miles per hour, a bicycle making a sharp turn into a passing vehicle is conversely very slow, slippery and dangerous. Mountain roads are prone to falling rock. Often such hazards are only apparent after a thorough inspection. On the other hand, some roads are perfectly fine. Either way, some roads are perfectly fine. Either way, it’s best to know early.

It is also crucial to make sure the physical damage is consistent with your client’s description. A sudden and complete loss of control over the bicycle’s front wheel will generally result in a fall. For example, if the claim is that an impact from the left suddenly turned the bicycle wearing a helmet? Using headphones or earbuds? Carrying something in one or both hands? Riding no-handed? Changing or adjusting clothing?

If the vehicle cannot be located immediately, a letter to the driver to make the vehicle available for inspection at your office, and notice of the driver’s deposition to occur on the same date.

Collecting and securing data

Bikes and riders today are wired, able to collect a surprising amount of data that may help prove a violation. Some bike-commuters wear GoPro cameras that can record each trip. While any data that is available, it should be secured and stored as soon as possible.

The bicycle may be equipped with a speedometer or the rider with a heart rate monitor. Increasingly common among competitive cyclists are power meters, which measure a rider’s output at the crank throughout a ride. Many of these devices record data up to the moment of impact that should be uploaded immediately and preserved. Any of these types of data may be useful to show or estimate how fast the cyclist was moving at impact.

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Bicycles are gaining popularity as a simple solution to complex problems. On roadways, bicycles offer greater throughput and impose lower wear and tear and maintenance costs than cars. Bike trips can effectively offset many car trips, most of which take place in less than three miles. Bicycles relieve traffic congestion. They use no energy and emit nothing. Bicycle ownership, maintenance and operation is relatively affordable. Bicycles are the most practical solution to the first-mile/last-mile transit problem for those who cannot afford to own, operate and insure a car. They enable low-income commuters to eschew the cost of car ownership, increase their financial margins, and free up capital to send their children to college, pay rent, eat, and obtain medical care. It is no wonder millennials are shunning cars. Federal, State and Municipal governments are encouraging this shift through a combination of legislation, policy and planning. Countless programs at all levels aim to reduce vehicle miles traveled. In 2008, the State legislature passed SB 375, which supports the climate action goals to reduce GHG emissions through coordinated transportation and land use planning with the goal of making communities more sustainable. One way to do this is by encouraging drivers to become cyclists. Many potential cyclists would in fact ride if they felt safe. Protected bike lanes reduce cyclist fatalities by 90 percent. In 2015, the Los Angeles City Council passed Mobility Plan 2035, which proposes to install 900 miles of protected bike lanes throughout Los Angeles.

Three Feet for Safety Act

Implementing this infrastructure poses innumerable challenges and revisions. Cyclists may not benefit for many years. In the meantime, the cheap and easy fix is legislation, which protects cyclists where infrastructure is lacking. For example, Vehicle Code section 21760, the Three Feet for Safety Act, became effective September 26, 2014. Section (c) of the Act prohibits a driver from overtaking or passing a bicycle moving in the same direction at less than three feet. Drivers who injure cyclists as a result of passing closer than three feet do so at their own risk. It is time to harmonize the UM Statute with the Three Feet for Safety Act. Bicyclists injured by cars need the security of UM coverage, but they don’t need the physical-contact test.
Most of my clients are injured bicyclists. I recognize how many negligent drivers are out there and evangelize about uninsured motorist coverage ("UM"). UM protects claimants injured by the negligence of others with no insurance, too little insurance, or who hit and run. Los Angeles County alone averages 20,000 hit-and-runs per year. UM can be a lifesaver, spare an injured person or family from bankruptcy, and keep them from becoming homeless and/or destitute or more. Owning a car is not necessary. Several insurance companies offer non-operators’ UM policies.4

The Insurance Code discrepancy

Two years ago, a call from a potential client alerted me to a discrepancy in the Insurance Code that fails to protect cyclists with UM. The client had been bicycling on a major thoroughfare with three lanes in each direction. A bus had stopped to pick up passengers in the number three lane (the lane closest to the curb). The bus stop was at the limit line in the intersection. The traffic light was red. A car stopped behind the bus. The bicyclist stopped behind the stopped car.

The client pulled into the number two lane behind the last car stopped. He intended to pass the bus and vehicles stopped behind it in the number one lane once the traffic light turned green. The light turned green. Suddenly the client heard a car accelerate toward him from behind. The driver behind him did not notice him and was bearing down on him. The driver’s car came within inches of the client. The client took his last clear chance and veered back into the lane to his right. He got injured when he crashed into the stopped car to his right.

The driver of the car that caused the crash recognized he was at fault. He pulled over, took out his driver’s license and insurance card, and waited. The client alerted me to a discrepancy in the client’s UM policy. The original uninsured motorist (UM) provision requiring physical contact was added to UM. The UM statement in order to eliminate such fictitious claims. (Id. at p. 1396 quoting Inter-Insurance Exchange v. Lupesc (1963) 238 Cal.App.2d 441, 443-444.)

As written, the physical contact test requires cyclists to choose between two unpalatable outcomes. To ensure coverage, a cyclist can brace himself and let an oncoming vehicle hit him. The UM statute requires cyclists to choose between two unpalatable outcomes. To ensure coverage, a cyclist can brace himself and let an oncoming vehicle hit him.
as written incentivizes this outcome. Yet a plaintiff cannot be compensated for damages which he could have avoided by reasonable effort. (Gowan v. Smith (1968) 261 Cal.App.2d 392, 396.)

A more realistic outcome is that the cyclist avoids the oncoming vehicle. Maybe this prevents injury. Or, like my client’s case above, he ends up injured anyway. If this happens, and the offending driver fails to stop, the cyclist cannot invoke his own UM coverage. Thus the physical contact test creates perverse incentives and directly conflicts with the Vehicle Code. It should therefore be eliminated.

Let’s fix it

Removing the physical contact test from the Insurance Code is a quick and cheap, stop-gap measure to help cyclists hedge against the risk they take, pending implementation of the State’s more costly, long-term goal of building infrastructure that promotes multi-modal transport. The potential cost to injured cyclists who are denied coverage significantly outweighs the potential burden on insurers who may have to pay on fraudulent claims and on their shareholders. Insurers are generally corporations and can more easily absorb such losses, while individuals and families who need to access the coverage cannot.

Ensuring that cyclists can financially protect themselves regardless of drivers’ irresponsibility promotes the necessary policy of reducing the problems that cars cause.

Opponents to eliminating the physical contact test may argue that “phantom car” claims could potentially obligate insurance companies to pay unsubstantiated claims. To assuage these concerns, eyewitness testimony can be required to corroborate the near miss instead of the physical contact test.

Irrespective of that potential, claimants should be presumed truthful. Insurers owe their insured an implied covenant of good faith and fair dealing. (Century Surety Co. v. Peluso (2006) 139 Cal.App.4th 922, 949.) For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it must give at least as much consideration to the latter’s interests as it does to its own. (Egan v. Mutual of Omaha Insurance Co. (1979) 24 Cal.3d 809, 818-819.) Insurers owe their insured fiduciary-like duties that stem from the insured’s special dependence on the insurer’s good faith and performance and the unequal bargaining power between them. These “special and heightened duties” arise “because of the unique nature of the insurance contract, not because the insurer is a fiduciary.” (In re Prudential Prop. & Cas. Ins. Co. (2001) 26 Cal.App.4th 1142, 1153.) These special duties “foster the unique purposes of an insurance contract, namely, bringing an insured peace of mind and security from loss.” (Devine v. Blue Shield of Calif. (2010) 189 Cal.App.4th 1117, 1131.) Cyclists are no less deserving of peace of mind and security from loss than drivers. Indeed, their vulnerability on the roads and exposure to greater risk should afford them the benefit of the doubt and greater deference.

The physical contact test also violates the Legislature’s intent to protect UM claimants:

Insurance Code section 11580.2 is remedial in nature. “By requiring all policies to contain uninsured motorist coverage (or an express waiver) the Legislature attempted to broaden the protection of innocent drivers against negligent and financially irresponsible motorists. (Plumma v. Axis, 206 Cal.App.3d at p. 1190.) It is time to broaden that protection even further. Between 2010 and 2012, California led the country in cyclist deaths.” Taxpayers currently foot the bills for insured people with no health and/or disability insurance. It is better to incorporate that cost into the cost of auto insurance, especially when cyclists are already acting responsibly. Innocent cyclists deserve no less protection against negligent and financially irresponsible motorists than innocent drivers.

Instead, insurers should bear the burden to prove UM claims false. They already bear that burden in defending allegations of bad faith. (See Spray, Gould & Bowers v. Associated Ins’rs Co. (1999) 71 Cal.App.4th 1260, 1270, fn. 10 (dealing with violation of Department of Insurance Regulations promulgated to enforce Unfair Practices Act). Applying the same burden to UM claims extends that logic as well as the policy considerations imposing on them a duty of good faith and fair dealing.

It is high time to remove the physical contact test from the UM statute.
The test is unfair and violates public policy. It defeats the intent behind SB 375 and other measures intended to mitigate climate change. It imposes an undue burden on vulnerable users. Like the bicycle itself, eliminating the test is a cheap solution to a costly problem. To do otherwise constitutes a windfall to insurers.

Endnotes:
4 Like VC 21750, Section (b) of the Act requires that a driver overtaking and passing a bicycle moving in the same direction “do so at a safe distance that does not interfere with the safe operation of the overtaken bicycle.” The passing driver must account for the size and speed of the motor vehicle; size and speed of the bicycle; traffic conditions; weather; visibility; surface of the highway; width of the highway. Section (d) provides that, if traffic or roadway conditions preclude a driver from safely passing a cyclist at three feet, the driver must “slow to a speed that is reasonable and prudent, and may pass only when doing so does not endanger the safety of the cyclist,” taking into account the variables to be considered in section (b) (emphasis added).
5 Progressive offers a non-operators’ UM policy with $100,000 limits. State Farm offers one with $250,000.
6 Josh Cohen, an associate at the Law Offices of Paul F. Cohen, practices personal injury law, specializing in bicycle cases. Cohen has practiced since 2008, when he graduated from Vermont Law School. He clerked at the EPA, Dewey & LeBoeuf, the California DOJ, and the LA City Attorney’s Office. He belongs to the LA County Bicycle Coalition, Move LA and is a board member of the California Bicycle Coalition and Bicycle Culture Institute. Before practicing law, he played drums with countless artists, including the Brocksters, Macy Gray, the Wu Tang Clan and the Black-Eyed Peas and later taught with the LAUSD.
Helmets and head-impact protection
A primer on the most relevant issues for head-injury and helmet investigations

By Craig A. Good

Mechanical devices have been used since the time of antiquity to protect the head from direct impact. Most early helmets were crude shells with little or no padding that were effective against projectiles and piercing objects. A gladiator’s battle helmet is a good example. Early in the 1900’s, when automobiles, motorcycles and aviation were in their infancy, padded leather helmets became fashionable, although their protective ability was limited. In the 1950s and 1960s, biomechanical scientists started to understand the impact loads that could cause skull fractures and brain injuries. With this understanding, instrumentation and tests were devised to quantify head-impact exposure and helmet performance. This testing spurred the development of the modern helmet. A modern helmet has energy-absorbing and impact-distributing properties to mitigate lacerations, contusions, skull fractures and brain injuries.

Modern helmet design

The modern helmet is constructed of a hard outer shell to resist penetration and an inner liner to absorb energy and spread impact forces over a larger area. The combined effect of the functional layers reduces the injurious forces applied to the head by lengthening the total time of impact. A strap or restraint system keeps the helmet on the head where it is needed. Most helmets also have a comfort liner immediately adjacent to the head.

For helmets that are designed to protect the user from severe impacts, such as motorcycle, bicycle and equestrian helmets, the most common material used to construct the liner is expanded polystyrene (EPS). Energy-absorbing liners for these helmets are good for one serious impact only. Once struck, the energy-absorbing material will have been crushed, cracked and deformed, the material will no longer adequately absorb energy. Some sport helmets, such as those for hockey and football, are designed for multiple impacts (albeit they are designed to manage lower energy impacts). The energy-absorbing material of these helmets recovers from impact and does not need to be replaced.

Performance standards

Technical performance standards have been established through the consensus of biomechanical and helmet experts. Specific standards have been developed for each type of helmet. Motorcycle helmets, for example, must adhere to different performance criteria than bicycle helmets or hockey helmets. The most common motorcycle helmet certification standards are the United States Department of Transportation (DOT) and the Snell Memorial Foundation standards. For bicycle helmets, the most common standards are administered by the U.S. Consumer Product Safety Commission (CPSC) and the Snell Memorial Foundation.

Novelty motorcycle helmets come up frequently in forensic helmet investigations. A novelty helmet looks very slim fitting because it does not have an energy-absorbing liner. Do not mistake comfort foam for an energy-absorbing liner. Novelty helmets will not meet an impact
Helmets and Head-Impact Protection, continued from Previous Page

protection standard and are illegal in jurisdictions where helmets are required by law. These helmets are typically used for their visual appeal rather than their functional impact protection.

Users may purchase a sticker closely resembling a certification label and place it on the helmet to mislead law enforcement that their helmet meets the required standards. In May 2013, changes were made to the Federal Motor Vehicle Safety Standard, FMVSS 218, requiring improvements to the Department of Transportation certification label that the DOT feels will deter attaching misleading helmet labels.

Injury mitigation

The development of the modern helmet is a biomechanical engineering success story. Modern helmets with energy-absorbing liners are very effective at reducing the incidence of head injuries. Dubious claims that helmets increase other injuries are not supported in the literature.

Different helmet makes, models and styles provide different head coverage and, as a result, the injury mitigation varies depending on the point of impact and the coverage area of the helmet. A full-face helmet can also protect the user from facial impacts. Helmets are least effective when the impact is to the edge of the helmet.

Mild traumatic brain injury (MTBI) or concussion is a topic that receives considerable attention in both litigation and in the press. Helmets reduce the transmission of forces applied to the head that cause MTBI; however, even a properly fitted and properly worn helmet can allow the transmittal of forces that will result in MTBI symptoms in a portion of the population. Helmets are most effective at preventing serious brain injuries and skull fractures. The most recent research indicates they may reduce, but are not capable of preventing MTBI.

Even a certified helmet can only perform well when worn properly. When a helmet fits poorly or is not fastened securely with the chin strap, it can shift during usage resulting in reduced visibility or sub-optimum protection. Worse, the helmet can be ejected from the head during impact, resulting in a serious injury.

Forensic investigation

A helmet inspection by an expert can identify whether a helmet has been subjected to an impact and can determine the direction and magnitude of the impact. A visual helmet inspection may be sufficient to identify and document the physical evidence. In some cases, the energy-absorbing liner will need to be removed from the helmet for examination; this is a more involved procedure. Tests can be conducted to evaluate the effect of appropriate helmet fit, chin strap usage and helmet retention. An associated biomechanical investigation can identify the range of injuries expected given the physical damage to the helmet. An expert inspection can also identify marks that are fraudulently placed on a helmet to appear like impact evidence.

Comparative negligence

The scientific evaluation of injury outcome considering contributory negligence is often evaluated in a forensic helmet investigation. In many cases, an investigation reveals that the use of a helmet would have reduced the magnitude of the head injury. When a helmet is not worn, impact loads to the head are much higher and, as a result, injuries are much more severe than they would have been had a helmet been worn; however, a high severity impact can overwhelm the protective capabilities of a helmet and still result in an injury.

MTBI also reports that bicycle helmets reduce head-injury risk by an estimated 50 percent. Despite these convincing figures, many people prefer not to wear helmets, and helmet laws vary greatly from state to state.

No states require adult bicycle helmet usage, but some have helmet laws applying to minors. Most states have no bicycle helmet law at all, although there are many city bylaws that require helmets for some or all bicyclists.

Motorcycle helmets were mandatory for all riders in almost every state in the early 1950s, but then the federal government eased pressure on helmet use legislation and laws in many states were weakened or repealed. Today, only 19 states and the District of Columbia have helmet laws covering all riders, and three states have no motorcycle helmet requirements. The IIHS reports that, historically, motorcycle helmet laws have dramatically increased helmet usage, and helmet usage has significantly reduced rider deaths and injuries.

Craig A. Good is the president and senior consultant of Collision Analysis, an automotive forensic consulting firm with offices in Morrisville, NC, and Calgary, AB, Canada. He received a Ph.D. in Mechanical Engineering, specializing in Injury Biomechanics. He has been the recipient of several prestigious research awards and scholarships throughout his academic career. He is also the holder of a U.S. and a European seat-belt patent.

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Stop networking and start community building

Building a supporting network for your personal brand is critical to marketing your legal services

By Traci Stuart

The term “networking” has expanded to encompass all activities not directly related to work but that may, tangentially or eventually, lead to work. Any time spent away from the office can be designated as “networking.” With this oversaturation and the lack of immediate gratification, many have grown tired of the standard networking activities. To be more successful with your extracurricular activities, it is beneficial to go beyond showing up to events and demonstrating your ability to balance a wine glass and shake hands. Why not use these opportunities to make genuine connections and contribute to your community?

There’s a solid business reason that applications to top universities across the nation require students to evidence their contributions to their communities to be considered for admission. Beyond bettering the community itself, these activities are the earliest and most basic form of networking—a skill key to developing business relationships.

During their impressionable years, young adults who participate in community building activities are developing key skills that will help them later in life. In these volunteer settings, students have the opportunity to learn about the plights of others, see the inner workings of an organization, and form opinions of you when you interact. Becoming active in your community will make you more attractive to potential clients volunteer. These groups are often key to relish typical business networking opportunities. It feels too much like sales—whether he has a “good networker.”

Further, it is a rare lawyer who claims to relish typical business networking opportunities. It feels too much like sales—whether he has a “good networker.”

The attorney who diligently went to meetings and spent $100s on business cards and buying lunch for others is not directly related to work but that office can be designated as “networking.” With this oversaturation and the lack of immediate gratification, many have grown tired of the standard networking activities. This could be a solid investment. Volunteering gives you access to local membership rolls, which includes franchise owners, real estate developers and regional business executives, among others. Building those relationships while doing something positive for the community in which you live will help build your personal brand and keep you top of mind when those professionals are looking to engage counsel.

• **Personal communities**—Joining a local bar association or trial lawyer association is a great relationship builder—particularly if the groups are where your referral sources (e.g., other lawyers) or potential clients volunteer. These groups also regularly revolve around shared work problems and solutions around which you can bond.

• **Alumni communities**—Whether it’s your undergraduate alma mater or a former employer, alumni groups are active and present. Involvement in local groups like Rotary or Kiwanis brings you into contact with a range of community members—and, depending on the focus of your practice, this could be a solid investment. Volunteering gives you access to local membership rolls, which includes franchise owners, real estate developers and regional business executives, among others. Building those relationships while doing something positive for the community in which you live will help build your personal brand and keep you top of mind when those professionals are looking to engage counsel.

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Profile: Matthew Davis

Avid cyclist and bicycling advocate steered his way from the City Attorney’s Office to a partnership at the Walkup firm

By Stephen Ellison

Integrity, passion and a seamless ability to stare down the most daunting legal challenges have guided Matthew Davis through his nearly three-decade law career, and they are the very qualities that landed him – and kept him – at one of the most prestigious plaintiffs’ law firms in California.

Over the first half of his career, Davis worked at a business law firm and then in the San Francisco City Attorney’s Office. It was with the latter that Davis carved a niche in representing city employees in a wide range of civil matters, and those experiences eventually steered him to join Walkup Melodia Kelly & Schoenberger, where he’s spent the past 15 years.

“I was very fortunate to have landed at this firm,” said Davis, who served San Francisco as the city attorney for about nine years before joining Walkup. “When I worked for the city, the Walkup firm had a reputation. It was like, ‘Oh no, Walkup is on the other side.’ That usually meant two things: It was a good case, you meant two things: It was a good case, you were going to try it and be prepared; and you’d have the difficult choice of either paying a good settlement or going to trial.”

“Getting inside the courtroom and trying cases, indeed, revitalized Davis. He took the ball and ran, learning quickly and developing his own successful style. While he stood fast on the two most important keys to being a successful trial lawyer – preparation and credibility – he also emphasized being truthful and genuine.

“I’m at my best when I’m being honest and I’m at my best when I’m being honest and I’m approaching things with credibility and integrity. ’You hear it over and over again, but it’s a profession, and if you have a reputation for being less than honest, that’s bad.’

PROFILE: MATTHEW DAVIS

Biking through Europe for five months after college, Davis’s firm distributed $15,000 to buy safety lights on bikes to walk, Day 2 in the San Francisco and I’m a big advocate for a safer biking infrastructure, including a protected bike lane down the entire length of Market Street.”

Two recent cycling cases involved settlements for riders in the city injured in collisions with Muni vehicles. The first was a bus that made a left turn into the path of an oncoming cyclist, which resulted in the man breaking his arm. The matter settled for $95,000. The second involved a Muni train employee who opened the door of a pickup truck and caused a bicyclist to crash, injuring his shoulder. That case settled for $650,000.

Another recent cycling case involved a rider in the Donner Lake region of the Sierra Nevada who was struck by a car while turning a corner. The crash fractured the cyclist’s pelvis and caused a partial amputation of his left thumb. Davis obtained a $625,000 settlement in that case.

Davis also has worked a number of pedestrian injury and death cases, including one where he and partner Rich Schoenberger obtained a more than $4 million settlement for a recent business school graduate who suffered a traumatic brain injury after being struck by a car while walking in a crosswalk. Though the driver had limited insurance coverage ($50,000), Davis and Schoenberger discovered she was an employee of a large Silicon Valley company, and they were able to prove she was still on the clock, driving from one campus to another when the accident occurred. The company contributed $4 million to the settlement.

“The cases that really stand out for me are ones that looked like difficult cases because maybe it didn’t look like there would be enough coverage, or liability seemed questionable at first.” Davis said. “Of course, it’s always very satisfying when you find someone who really needed help because you knew they’d been hurt or someone they loved had been killed, and you’re able to get them a good result. There’s a whole bunch of cases that fall into that category.”

“East Coast transplant

A native of Boston, Davis stayed close to home for undergraduate studies, which taught him about honesty and integrity. Upon graduating from Hastings College of the Law, a good enough reason to call the Bay Area home.

“T he clients are just some of the most terrific people I’ve ever represented, and the lawyers on the other side of the litigation are very good, too,” Davis said. “I don’t know what the future holds for this case, but this is one of those where you’re in it for a couple of years, it’s going to consume your life and it’s really important for a lot of reasons to do a good job. And it’s rewarding, even though something horrible has happened.”

Davis said his team is handling 12 of 16 cases in the incident that killed six students and injured several more. Some trial dates are expected in August, and then more will come in 2017, he said.

“For follow your bliss; do the work you find most interesting and rewarding,” he said, also stressing what his City Attorney’s Office mentors, Renne and Pat Mahoney, taught him about honesty and integrity. “You hear it over and over again, but it’s a profession, and if you have a reputation for being less than honest, that’s bad.”

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

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Keeping it real

When he’s not in the office or in court, Davis enjoys spending time with his wife and two sons. Along with his affinity for cycling, he is quite the swimmer, taking to the San Francisco Bay on a regular basis. He’s been doing a morning swim down to Aquatic Park for the past 20 years with a “hard-core group” that, oddly enough, includes a lot of lawyers, he said.

“I was brought down there by a guy who works at the City Attorney’s Office – a good friend,” Davis said. “Once you start doing it, it’s not that big of a deal. I wake you up in the morning and keeps you focused. It’s a nice way to start the day.”

Davis also enjoys cooking and said it’s not uncommon at his house to have a bunch of people over for Sunday dinner for a big meal that he prepares. With advice for those who are seeking similar success in law, Davis kept it short and simple – but meaningful.

“Follow your bliss, do the work you find most interesting and rewarding,” he said, also stressing what his City Attorney’s Office mentors, Renne and Pat Mahoney, taught him about honesty and integrity. “You hear it over and over again, but it’s a profession, and if you have a reputation for being less than honest, that’s bad.”

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Anatomy of a scaffolding case

Liability often focuses on witnesses to prove why the scaffolding failed

By Jeremy Cloyd
The Veen Firm, P.C.

Every year people die or sustain life-changing injuries due to falls from scaffolding. These injuries generally occur on multi-employer worksites where scaffolding is set up so that workers from many different trades can perform their jobs. The United States Department of Labor estimates that 65 percent of the construction industry works on scaffolding. Thus a large percentage of the workers on scaffolding likely rely on the scaffold erector to do their job correctly. Counsel representing the injured worker should expect disputes as to whether this reliance is reasonable.

The injured worker’s unfamiliarity with scaffolding requirements is not the only reason why it is often difficult to establish responsibility for a scaffolding failure. By nature, scaffolding is temporary. The scaffold erector is usually a “foreman” who is typically the most experienced and knowledgeable about the scope of the work. Note that the erection or dismantling of scaffolding must be performed under the direction and supervision of a “qualified” person. (8 C.C.R. § 1637(b).) The scaffolding crew will thus consist of witnesses who should be knowledgeable of both the requirements for scaffold- ing and how it was actually erected prior to your client’s injury.

Standards for safe erection of scaffolding

The primary source for determining how scaffolding should have been installed in an injury case will likely be Title 8 of the California Code of Regulations, otherwise known as Cal-Osha. Cal-Osha is intended to protect all workers. (Lab. Code, § 6300 (“... purpose of assuring safe and healthful working conditions for all California workers...”)). Cal-Osha regulations may be admissible to establish duty or standard of care (Kaiser v. Usages (2004) 34 Cal.4th 915, 928 (“...are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions...”). Regulations may also be relevant to standard of care where employer adopts the regulations as company policy. (Dillenbeck v. City of Los Angeles (1968) 69 Cal.2d 472 (“such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise”).

The scaffolding contract and the scaffolding contractor’s own training materials, safety manual, and Injury and Illness Prevention Program (8 C.C.R. 2203) will likely require employ- ees to be knowledgeable about and follow the safety require- ments of Cal-Osha. The contractor’s witnesses should admit that these regulations were a job requirement and inform the standard of care applicable to their work.

The California Department of Industrial Relations maintains a searchable index of all Cal-Osha regulations including those applicable to scaffolding at www.dir.ca.gov/samples/search/query.htm. In addition to considering the regulations specific to scaffolding (8 C.C.R. 1635-1667) the attorney may want to also browse the regulations pertaining to Access, Work Space, and Work Areas (8 C.C.R. 2270-2328); Safe Practices and Personal Protection (8 C.C.R. 3300-3416); and the Erection of Structures Including Falsework, Shoring and Framing System (8 C.C.R. 1709-1722).

Other sources the attorney may want to consider for deter- mining the way scaffolding should have been erected include the contractor’s safety manuals; training materials; the scaffold- ing contract; the design drawings; the scaffolding manufactur- er’s product guide; and the federal Osha regulations at 29 CFR 1910.28 although Cal-Osha is generally as strict as the feder- al regulations. You may also want to consider consulting with a

After entering the contract, the scaffold contractor’s "project manager" will be responsible for planning, coordinating, and overseeing the erection, inspection, and dismantling of the scaffold- ing according to the construction schedule. The company may also employ a safety director responsible for managing and overseeing safety aspects. These witnesses are likely to have infor- mation relating to the timing requirements of the work as well as any changes or problems encountered in finishing the work according to schedule in a safe manner.

The scaffold contractor will send "scaffold erectors" to com- plete the physical labor of installing, modifying, inspecting, and/or dismantling the scaffolding pursuant to the terms of the contract and construction schedule. The scaffolding crew often includes a "foreman" who is typically the most experienced and dismantling of scaffolding. A scaffolding contractor is a specialty licensed contractor that erects metal or wood scaffolding includ- ing temporary sidewalk sheltered construction work barricades. A scaffolding contractor typically contracts with a general contractor or landowner for the rental, erection, and dism- antling of the scaffolding after providing an estimate of what those services will cost. To put this bid together, the scaffold contractor may employ an estimator responsible for evaluating the needs of the project – usually by visiting the installation site. The scaffold contractor may also employ a draftsman responsible for creating drawings or plans showing the number and type of scaffolding pieces required and how they are to be assembled. The drafts- man and estimator should have knowledge of how the scaffold- ing was designed and why it was designed in that particular way.

Construction projects larger than a small home renovation usually involve a contractor that specializes in the erection and
Building settlements in construction-defect cases

PASSING THE BUCK IS THE USUAL DEFENSE STRATEGY

BY ANNE M. LAWLOR GOYETTE

Construction-defect cases typically involve large numbers of parties, attorneys, insurance companies and experts. Each player has its own goals. The property owner wants maximum funds to repair defects and cover losses. The builder disputes both plaintiff’s repair scope and associated costs and seeks to pass plaintiff’s claims onto subcontractors. The subcontractors concentrate on minimizing alleged damages and shifting responsibility. The design professionals distinguish between construction errors and design issues. Attorneys challenge pleadings, decipher contracts, pursue claims and assert defenses. Insurers highlight policy language to define covered losses and involve other carriers to share the risk. Experts bring technical insight to all aspects of the discussion.

Special master/mediator

A special master/mediator can steer these players towards resolving the issues and designating areas of agreement and disagreement. The special master/mediator can steer these players towards settlement and allow the parties to use this information in settlement discussions. Will the parties settle around a “problem” player? Who will attend the settlement conference with authority to finalize any settlement agreement? When will the parties settle the estate demands? In addition to a settlement plan, the participants privately should define the outcome that they hope to achieve and plan how they will move from offer to offer to demand or demand before the mediation.

Moving players towards settlement in a construction-defect case is not easy. The process involves multiple players with variable and changing goals. Factual disputes, conflicting legal theories, late claims, missing parties and recalcitrant carriers create additional challenges. Nonetheless, a special master/mediator can steer these players towards resolution by implementing strategies that prepare parties for meaningful settlement negotiations.

"Scaffolds and scaffolding components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity." (29 C.F.R. § 1926.451(f)(3).) Look to the contract documents and testimony of the scaffolding experts for evidence as to whether the scaffolding contractor had an obligation for ongoing inspections was ever delegated to or undertaken by the scaffolding contractor or other parties.

Attorneys representing an injured party against a scaffolding contractor should develop a theme from the outset of the discovery process that the scaffolding company is a specialty contractor with greater expertise and knowledge about scaffolding than anyone else on the jobsite. A painter, for example, may notice obvious defects in the scaffolding like obstructions or missing planks but cannot be expected to know a technicality like the requirement that sloped platforms must be "positively secured" under C.C.R. § 1637(b).

When that painter's employer hired the scaffolding contractor, he or she was procuring the contractor's special knowledge and training and it can be argued that it was therefore reasonable to rely on the scaffolding contractor.

Document checklist

The following is a list of documents to request in cases brought by injured workers against scaffolding contractors. In addition to requesting these documents from the defendant, also consider third-party subpoenas to other contractors working at the project for some or all of these documents as appropriate.

• All contracts, including change orders, for the scaffolding work such as time and materials forms, invoices, estimates, and similar documents.
• All documents showing the work performed on particular dates such as daily logs, progress reports, time sheets, and similar documents.
• All reports or investigatory materials from Cal-OSHA.

Conclusion

Scaffolding cases can be difficult because of confusion over the cause of a failure and the identification of the responsible party. Pursuing a case against a scaffolding contractor requires a good understanding of how the scaffolding was erected versus how it should have been erected. A strong, focused inquiry into the issues and documents outlined above will help resolve these issues and allow you to reach a fair resolution for your client.
Speed kills
The road to stopping pedestrian fatalities begins with the speed limit

By Shauna A. Rahman

We are all multi-modal commuters. Since 100 percent of commutes include walking, we’re all pedestrians, right? Oddly enough, many people don’t self-identify as “walkers” or “pedestrians.”

Bicyclist, yes. Driver, sure. Motorcyclist, hell yeah. Pedestrian? I guess so. This lack of awareness that when we leave the house we have an instantaneous, shared common experience has made it difficult to get State and Local agencies to shift focus from the car-driving public or public transit to the safety of pedestrians.

In California, with the proliferation of non-profit pedestrian advocacy groups and the public outsourcing for projects like Vision Zero, pedestrian safety is now front and center of a new debate about making roads safe, efficient and accessible for all modes of transport.

And before you read any further: No, this is not going to be a step-by-step guide on how to crash on your next “ped” case. The point of this article is to build awareness around the issue of pedestrian safety with the hope of getting our community of plaintiffs’ lawyers interested in the inclusion of pedestrian safety that is needed to help our future clients not become clients. The idea is that the true goal of a civilized society is to protect the weak, the unprotected, or the unrepresented, or the general population, from harm.

Blame the victim in pedestrian collisions

The fact is one case in particular has stuck with me over the years and caused me to re-examine pedestrian cases. It was a case in which I represented the family of a 13-year-old child hit in a crosswalk on his way to school. The boy, hit by a young driver coming off a late shift at a Krispy Kreme, displayed irreparable brain damage that left him in a persistent vegetative state. The first thing that struck me were the initial whispers in the media and from locals speculating that the child was wearing headphones, or may have been a foot or so outside the crosswalk, or perhaps darted out into the street. None of those things were true, of course, but it was interesting to witness the subtle bias we have in urban areas against pedestrians, despite the fact we are all pedestrians at some point or another. For a long time, we have had a very “blame-the-victim” mentality when it comes to pedestrian collisions.

Also, despite the clear responsibility of the driver for the collision, my clients insisted that their son wouldn’t have been hit if there had been a stop sign at the intersection, like the residents of the neighborhood had been demanding. This led me down a road of many, many public records act requests and fights with the City Attorney’s office. The evidence I uncovered was really astounding.

Basically, citizens groups had made repeated complaints to the City that the intersection needed a stop sign because children and the elderly crossed there and cars went too fast. When they were ignored, the residents employed the voice of their City Supervisor, who was also ignored by the City. The City did manage to have a summer intern go to the intersection to perform a stop sign study. But the intern’s work was rejected, determined that no stop sign was needed.

But here’s the really amazing part that was at the root of the problem with the City’s intractability when it came to roadway safety improvements throughout the City. The City had long ago adopted what they called their “Transit First” policy which in essence enabled the City to say no to any roadway change, e.g. stop signs, stop lights, yield signs, traffic calming measures, if the change impeded the flow of the City’s public transportation. Now, not one City Engineer or City employee would admit that the Transit First policy placed bus schedules over the safety of pedestrians but that is exactly what it did. Ultimately, the City installed a stop sign at the intersection. Sadly, it was too little, too late for my clients.

During the case, it seemed that the whole attitude of the City and the public was wrong somehow. It was as if in an urban area, anything that wasn’t a car or a bus was expected to fend for them selves in some sort of Darwinian experiment. But, what really was happening was public entities weren’t holding up their end of the bargain – they weren’t providing safe streets for pedestrians either with infrastructure or enforcement. That led me down a winding path to taking on public entity and dangerous condition cases and fighting with public entities to effectuate changes to their policies.

What public entities should have been doing all along

In 2000, in acknowledgement that pedestrian injuries and fatalities had become a public health crisis, the California Legislature enacted the Pedestrian Safety Act of 2000. The Legislature’s intention to guard pedestrian safety can be seen throughout California Vehicle Code sections 21949-

21970. In Vehicle Code section 21949 the Legislature “declares”:

[(1) is the policy of the State of California that all and every consistent pedestrian travel and access, whether by foot, wheelchair, walker, or stroller, be provided to the residents of the State...it is the intent of the Legislature that all levels of government in the state...particularly the Department of Transportation, work to provide convenient and safe passage for pedestrians on and across all streets and highways, increase levels of walking and pedestrian travel, and reduce pedestrian fatalities and injuries.]

(Cal. Veh. Code § 21949)

Similarly, Vehicle Code sections 21590-21594 provide all kinds of legal protections for pedestrians such as requiring drivers to yield to pedestrians in marked and unmarked crosswalks, placing restrictions on the removal of a marked crosswalk, giving pedestrians the right of way while on sidewalks, and providing that drivers have a higher duty of care than pedestrians. While these laws and the intent of the Legislature make it clear that pedestrians are vulnerable roadway users and as such need special protections, laws without clear enforcement and coordination with existing infrastructure have failed to reduce pedestrian deaths or fatalities.

Public entities failed: The result has been death

The statistics in urban areas like San Francisco are brutal: Sixty percent of all traffic-related deaths involve pedestrians (75 percent of all traffic deaths in San Francisco). Fortunately for our pedestrian community, there are other pedestrian-friendly cities in the state. In San Francisco, the State makes it illegal to exceed 20 miles per hour anywhere within the city. In Los Angeles, the State has declared the intersection to be a 20-mph zone (“Designated 20 Zone”). Los Angeles has also adopted “Vision Zero” safety goals. In a recent study by the California Department of Transportation, a driver traveling at 20-miles per hour is 25 times more likely to hit a pedestrian than a car traveling at 50 miles per hour.

The result has been death. Nationwide, speeding was a contributing factor in 30 percent of traffic collision deaths in 2013, according to the National Highway Traffic Safety Administration. Such deaths are down in the Bay Area, but still rank high in the state. And the speed limit is often increased by public works departments and city engineers. According to a study done by the Bay Area Rapid Transit (BART), pedestrian fatalities have decreased in the Bay Area by 34 percent since 2000. Still, there is room for improvement.

Public works departm ents and city engineers. The statistics are clear: lower speed limits and enforcing speed limits decrease pedestrian deaths and injuries.

So how do we change?

Advocate for change.

In 1997, Sweden created a government project called Vision Zero, which was a policy initiative to achieve the goal of no roadway fatalities or injuries. Sweden adopted a road safety project like San Francisco used it briefly and found it not feasible. Today, Sweden has adopted Vision Zero, and since then 14 cities have adopted it. It is the mantra for the end of traffic fatalities – “no fatalities and zero injuries.”

You, of course, can do what we do and take on tough cases against public entities for infrastructure defects. You can also lend a hand to the non-profits leading the charge. Get involved, volunteer your time, and donate.

Shauna A. Rahman is an experienced civil trial attorney in the firm of Rahman Law PC. She handles personal injury and wrongful death cases. A significant portion of Ms. Rahman’s practice includes actions against public entities in cases that involve dangerous conditions of public property or negligence of public entity employees, such as bus drivers, public works departments and city engineers. She is also a member of the Board of Directors of the San Francisco Trial Lawyers Association. Visit her Web site: www.rahmanlaw.com

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Pursuing insurance agents and brokers for professional negligence

These can be difficult cases, but there are scenarios in which they are viable

BY MICHAEL L. COHEN
AND HEATHER M. MCKEON

Insurance agents and insurance brokers can be held accountable for performing their professional duties negligently, but only in limited circumstances. To prove professional negligence against an insurance agent or broker, the client must prove the basic elements of negligence: duty, breach, causation, and damages. The challenge in these cases is proving the existence of a duty because in most jurisdictions insurance agents and brokers have only limited duties to their clients.

The professional conduct of insurance agents and brokers is governed by the laws of each state, and we have not exhaustively researched each state’s laws for each of the concepts that we discuss. The key issues that an attorney should consider when evaluating or prosecuting a negligence case against an insurance agent or an insurance broker are the possible claim for professional negligence against an insurance broker.

There are four basic situations in which a client will approach an attorney with a possible claim for professional negligence against an insurance broker.

Scenario 1: The client asked the broker to buy specific insurance, such as earthquake insurance for a jewelry store. But the broker procured an insurance policy that did not cover earthquakes. The client has suffered a loss that she thought was covered but that turns out not to be.

Scenario 2: The client asked the broker to effect re-write the insurance contract to include the requested coverage. In contrast to an insurance agent, an insurance broker typically works with several carriers and typically is considered to act for the insurer. Except in rare circumstances, a broker’s actions will not bind the carrier and will not be imputed to the carrier.

Although insurance agents occasionally can be held accountable for negligence in the performance of their duties and professional actions, since their professional actions can be imputed to the carrier, it is more common for brokers to be named as defendants in cases of alleged professional negligence. The key issue is proving the existence of a duty because in most jurisdictions insurance agents and brokers have only limited duties to their clients.

In each of these scenarios, the client has suffered a loss that she thought was covered but that turns out not to be. Three of these four scenarios present potentially worthwhile broker-negligence cases. The first two scenarios are straightforward examples of broker negligence. If one of these cases comes in your door, consider yourself lucky: the broker’s E&O coverage usually will settle these cases quickly (depending, as always, on the facts of a particular case). The fourth scenario presents a case that is probably not worth pursuing in most jurisdictions — not all, but most — courts will hold the policyholder responsible for choosing the amount of coverage.

Most broker-negligence litigation arises from the third scenario. These cases turn on whether the attorney can develop the evidence necessary to establish that the broker had a duty to procure insurance that the insured had not specifically requested.

Insurance brokers have only limited duties to their clients. An insurance broker has a duty to exercise reasonable care in procuring the insured’s requested coverage. (See, e.g., Jones v. Hayes (1987) 189 Cal.App.3d 950, 954.) In Jones, the California court held that, “[p]rimarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.” (Ibid.) Most jurisdictions interpret this duty narrowly, which makes it a challenge to hold brokers accountable for professional negligence. In most jurisdictions an insurance broker’s duties do not include an obligation “to volunteer to an insured that the latter should procure additional or different insurance coverage.” (Fitzpatrick v. Hayes (1997) 57 Cal.App.4th 916, 927.)

A few jurisdictions impose greater duties on insurance brokers. In these jurisdictions brokers have an obligation to give the advice requesting additional coverages and limits without proving the existence of any special relationship between the broker and his client. For instance, the New Jersey Supreme Court in...
in some jurisdictions an insurance broker can be liable for breach of fiduciary duty

In most jurisdictions, including California, neither insurance agents nor insurance brokers owe their clients fiduciary duties unless they are holding the client’s money. (See Fitzpatrick v. Hayes (Ill. 2d. Dist. 1992) 589 N.E.2d 641.) In those jurisdictions, there are some jurisdictions that impose fiduciary obligations on brokers for procuring insurance and not simply for transmitting funds. In Missouri, for example, if an insurance broker failed to inform a client that the policy procured was not the one requested, then the broker may be held liable for breach of fiduciary duty. (Perrier v. MidwestInterstate Insurance Co., Inc. v. Hayward, Tilton and Rolapp Ins. Co., Inc. (2001) 169 N.J. 64, 78.)

There are some situations where the insurer must have been available in the marketplace, and at a price the insured would have paid, before a broker can be held accountable for failing to obtain coverage. For example, a bar can ask for insurance to cover bar fights, but coverage for such claims is increasingly rare and difficult to find, let alone at an affordable rate. Consequently, a bar that fails to attempt reasonable insureds for a broker that the broker should be treated as more than just an order-taker.

Go to broker school

For most broker negligence cases, neither case law, nor statutes, nor administrative regulations will give you sufficient information to establish the industry standard of care for insurance brokers. (See Go to broker school, we mean the books and documents – not in any of the e-mail messages, not in any of the communications with potential carriers with whom he had communications. That defeat is what he repeatedly told his clients. If “it’s not in the file, it didn’t happen.” At our deposition of this expert, I played this excerpt from the lecture. The expert’s face was red when he confirmed that this was his voice. The case settled the following week.

The Insurance Journal (www.insurancejournal.com) offers on-line courses for brokers, but the courses are available to anyone who pays. The books that would-be brokers study to pass their licensing exams are another good source you can use to establish the industry standard of care.

Conclusion

Insurance agents and brokers are for the most part insulated by the law from negligence claims. However, the more an agent or broker proves, the more likely he can be held liable for negligence. Therefore, as you are reviewing a potential case, it is important for you as an attorney to have sufficient information as possible to find out if the agent or broker made misrepresentations regarding a policy to you as an expert in a specific field, or mishandled funds.

Michael L. Cohen and Heather M. McKeeon are partners at McKeeon LLP. Cohen received his J.D. in 1992 from Harvard Law School, and was a member of the Harvard Law Review. McKeeon graduated in 1996 with honors from Georgetown Law Center. They devote a substantial part of their practice to representing policyholders in cases involving insurance coverage.
Appellate Review

Supreme Court eliminates automatic depublication of appellate opinion upon a grant of review

By JEFFREY I. EHRlich

Who needs to know about this rule change? All lawyers who litigate cases in California trial and appellate courts.

Why is it important? Published Court of Appeal opinions will no longer automatically be depublished and become non-citable when the Supreme Court grants a petition for review. Instead, unless the Supreme Court orders otherwise, they are citable for "persuasive value" until the Supreme Court rules.

Which cases are affected? Any appellate opinion upon a grant of review.

What are the key points?
1. Unless otherwise ordered under (2), the Supreme Court may order that an opinion certified for publication is no longer considered published.
2. Unless otherwise ordered under (2), the Supreme Court may order depublication of an opinion certified for publication upon a grant of review.
3. The Supreme Court may also order depublication of a decision by the court applying the second guidepost in limine.

Who should read this? Anyone involved in an appeal to the Supreme Court.

Choosing the right appellate lawyer can be the most important decision a trial lawyer makes.

- Certified Appellate Specialist*, Harvard Law School, cum laude
- Over 65 published appellate opinions — including cases in the U.S. Supreme Court and California Supreme Court
- Ehrlich is a co-author of Croskey, Heeseman, Ehrlich & Klee, California Practice Guide – Insurance Litigation (Rutter 2016), and featured speaker on Insurance and Appellate litigation
- Two-time CAALA Appellate Lawyer of the Year


Who needs to know about this case? Attorneys who try bad-faith cases.

Why is it important? Helds that Bradolf fees can be included in the post-verdict review of punitive-damage awards.

Synopsis: Nickerson’s policy with Stonebridge promised benefits of $350 for each day for which he was confined in a hospital for necessary care and treatment of a covered injury. After breaking his leg, Nickerson, who is paralyzed from the chest down, spent 109 days in a VA hospital recovering from the injury. Without consulting his physicians, Stonebridge denied coverage for all but 18 days of hospitalization. Nickerson prevailed on his bad-faith claim, receiving $31,560 in unpaid benefits, $35,000 in emotional-distress damages, and $19 million in punitive damages. After the trial, the court awarded him Bradolf fees of $12,500. The court refused to include the Bradolf fees in its due process review of the punitive damages award, and reduced the punitive award to $350,000 — ten times the emotional-distress award. The Court of Appeal affirmed.

The Supreme Court granted review on the issue of whether an award of Bradolf fees that was made by the trial court after the verdict could be included as part of the second MJW v. Gore “guidepost.” The Court held that, “In determining whether a punitive damages award is constitutionally excessive, Bradolf fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.”

The Court explained that due process review of punitive damages awards does not seek to regulate the jury’s decisionmaking process. Although the Gore guideposts overlap to some extent with questions jurors are generally asked to consider in fixing punitive damages, the question for courts applying the guideposts is not whether the jury’s verdict is unreasonable based on the facts. Rather, as in other contexts in which courts review civil and criminal sanctions for constitutional excessiveness, courts applying the Gore guideposts make an independent determination, without regard to whether the amount of the award exceeds the state’s power to punish.

In deciding whether the Gore guideposts are designed to govern post-verdict judicial review of the amount of a jury’s award, not the adequacy of the jury’s deliberative process, there is no reason why a court applying the second guidepost may not consider a post-verdict compensatory damages award in its constitutional calculus. To exclude Bradolf fees from consideration would mean overlooking a substantial and mutually acknowledged component of the insured’s harm. The effect would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair reviewing courts’ full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds.

Osborne v. Todd Farm Service (2016) 247 Cal.App.4th 84 (2d Dist., Div. 6)

Who needs to know about this case? Attorneys who try bad-faith cases.

Why is it important? A cautionary tale. Affirms trial court order discounting case as a sanction for plaintiff’s counsel’s repeated disregard of rulings on motions in limine.

Synopsis: Osborne was a stable-main- tenance worker at the Oso Farm School. She was injured while standing on the top of a stack of hay bales. As she tried to move a bale, it gave way and caused her to fall. Todd sold and delivered the hay bale to the school. Todd produced documents indicating that it purchased hay from three suppliers in the six months before the accident. Two suppliers were from Southern California, and the third, Berrington, was located in Nevada. Osborne’s complaint alleged that Berrington manufactured the bale that caused the accident, but Todd had no records to support this.

During discovery, Osborne failed to timely designate experts. The court thus struck Todd’s supplemental designation as improper. Before trial, the court granted two defense motions in limine. MIL 2 precluded Osborne from testifying that she could identify the geographic origin of the hay bales by looking at the color and texture of the hay, or from offering opinions on the way hay is cut, baled, stored, or moved. MIL 4 precluded Osborne from relating the origin of the hay bales based on hearsay statements by unidentified Todd employees. In ruling on the motion, the trial court admonished counsel not to refer to Berrington paperwork or the name “Berrington.”

At trial, Osborne’s counsel violated the MIL rulings in his opening statement, stating that he intended to prove that the hay bale came from Berrington, and that his client would testify that she could tell that it came from Berrington because of its color and content. The defense’s objection was sustained, and trial court told trial counsel that he had violated a prior court order.

During the direct exam of Osborne, plaintiff’s counsel repeatedly violated the rulings on the motions in limine. The next day, he re-aroused his objections to the MIL orders. The trial court declined to modify its rulings. When Osborne resumed testifying, her counsel asked her, “Where did that bale of hay come from?” She answered, “Berrington.”

The trial court immediately excused the jury, and the defense asked for the case to be dismissed with prejudice against all defendants. The trial court granted the defense’s motion for a sanction for plaintiff’s counsel’s “flagrant, flagrant, misconduct.” Affirmed.

The trial court did not abuse its discretion in granting the motions in limine. Osborne was not allowed to testify as an expert because her expert designation was struck, and no lay witness could offer an opinion about the origin of a bale of hay based on its color and other characteristics. It was also proper to exclude the hearsay statements about the origin of the hay because there was no showing that the delivery workers whose statements she sought to introduce were authorized to speak for Todd. And even if it was, the trial court did not abuse its discretion in granting the motions in limine. The terminating sanction was an appropriate response to appellants’ flagrant misconduct and consistent with the trial court’s inherent authority to compel obedience to its judgments, orders and process.

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The road more traveled
Shifting the driver-centric focus in disputed-liability bike and pedestrian cases

By MILES B. COOPER

The lawyer felt ill reading the letter. Not surprised, but saddled. Both with the case specifically and humanity in general. The case involved a driver who struck the lawyer’s client from behind. She in her car. He on his bicycle. At 65 miles per hour, in broad daylight. The cyclist died from the massive force involved. The driver admitted to the police that she had taken her eyes off the road for 8 to 10 seconds prior to the collision.

The letter was from the driver’s insurance company. It stated, “Our review of the incident indicates Mr. Smith was in our insured’s lane of travel instead of on the right side of the fog line. Furthermore, he was wearing dark clothing. As a result, Mr. Smith is legally responsible for causing this incident.” Read another way, the letter said, “Your guy was on a bike. Juries have a bias against folks on bikes. We’re going to play that card and see if we can get away with it.”

A brief history of street use

Let’s go back in time to the beginning of the century. Roads were considered public spaces. Not in the way they are now – places to move cars – but public space for all. Horses, pedestrians, streetcars, bikes – they shared the roadway and traveled at lower speeds than what we are used to with cars. Children – without any irony – were told to play in the street. They used the streets as play space.

Then something changed. Automobiles arrived. Cars went faster than other road users. As cars zipped down the streets, people were not expecting car speeds. Automobiles spread in popularity. They struck more and more road users. Those road users – overwhelmingly pedestrian and overwhelmingly children – died in large numbers. Drivers were blamed. Cities considering taking measures to reduce these injuries, including mechanistically limiting automobile speeds.

The automobile manufacturers and related businesses recognized this as a problem. Not the deaths themselves. The problem was driver blame and anti-car sentiment from the vast majority who, at that time, did not drive. That sentiment undercut the spread of the automobile. So, the automobile industry joined forces under a banner called Motordom. Motordom waged a public relations war. The message: roads were for cars. People, bicyclists, horses needed to stay out of the way.

The American Automobile Association coined the term “jay walking” and began a campaign against it in Los Angeles. Back then, “a jay” was a very derogatory term for a bewildered rustic unfamiliar with city life. Prior to this campaign, people were simply folks using the public road space – crossing it when they needed to do so. After this, anyone not crossing at a designated time and place became a jay walker, invading the car’s provenance.

Shifting the modal lens

People see road use through the eyes of their mode of travel, a modal lens. Most people drive. Therefore, most have a driver’s perspective. To them, cyclists are irritating hazards. Pedestrians appear out of nowhere, getting in the way. The road belongs to cars.

Most people do not think of a road as public space. That is starting to change. Parklets – outdoor people spaces taking over parking spaces – are one example. Ciclovia – roads closed to traffic on a given day (oftentimes Sunday) and instead used for walking, biking, and living – are another. Add in the urban reality that bicycling is frequently the fastest way to get from point A to B and one understands the recent dramatic increase in bicycle commuting.

But most people are very surprised when they learn that roads were taken over by cars in recent history. That learning is an opportunity in disputed-liability cases. Juries, as long as they are not being talked down to, like learning. One can use this history to overcome the overwhelmingly driver-oriented focus. How and where is it employed? One area is in the demand package or mediation brief. Take the defense position to task when they push the roads-are-for-cars agenda. The next is jury selection, if one is lucky enough to have the luxury of a little time. Ask if people think of roads as shared spaces. Do they know the history of road use?

Expert testimony is the next avenue. In cases employing accident reconstruction, human factors, or traffic engineering, the expert is a springboard to inform the jury on road history and shared space. Finally, closing argument. Use it to counter the “he’s on a bike on a road, therefore it must be his fault” argument.

Outro

Back to our lawyer, his cyclist, and the flat-world insurance company. They went to mediation. The lawyer made a brief presentation on road history and roads as shared spaces. This then led into comparative fault – and why there was no comparative fault here. The case settled shortly before trial, with the insurance company acknowledging – by the size of the resolution – that their driver caused the collision.

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 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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