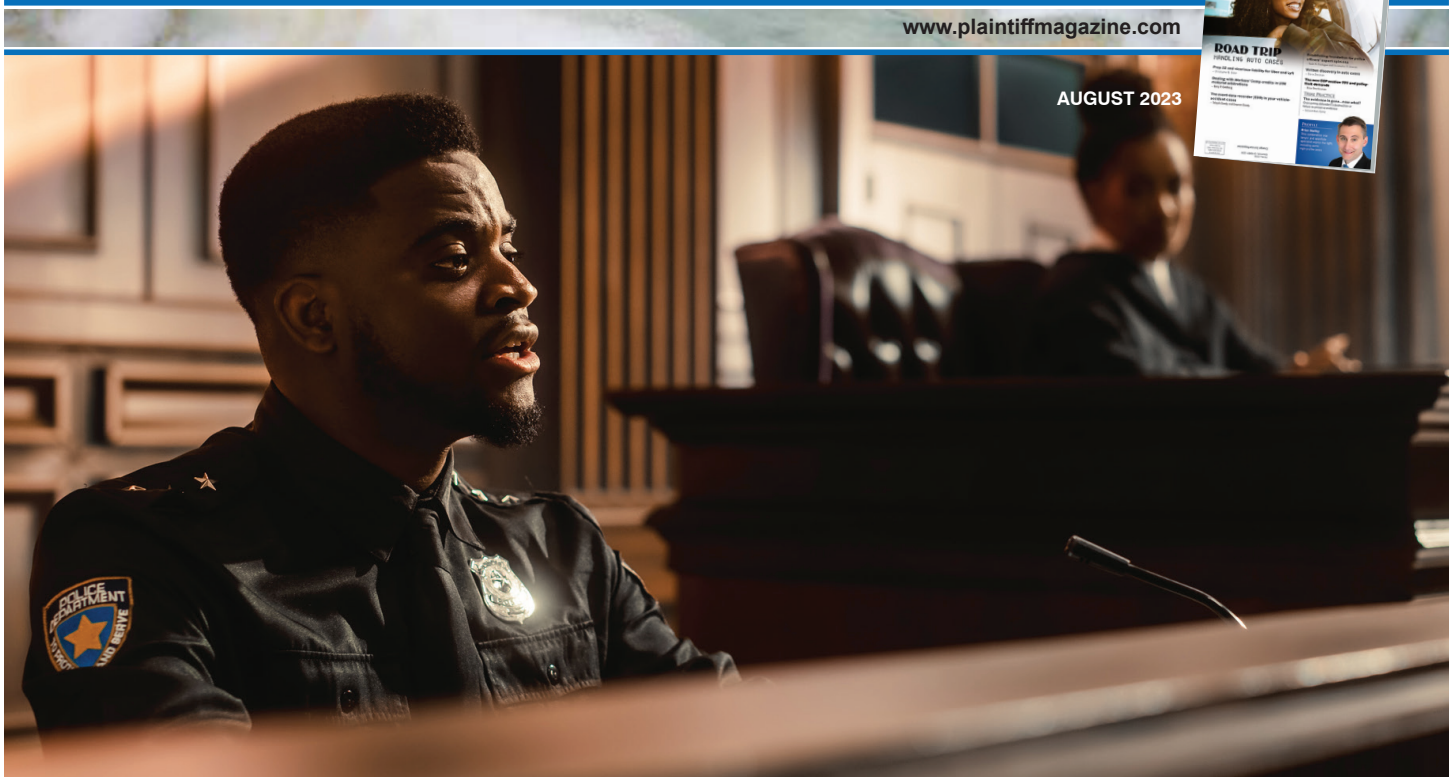


What seems to be the problem, officer?

Establishing the foundation for police officers' expert opinions in motor-vehicle cases

By Kevin S. Conlogue & Christopher P. Orlando

Officers responding to car accidents are usually the first to investigate those accidents; taking photos, measurements, and gathering other evidence. This evidence can make or break your case on liability, and often goes towards causation and damages. You need to know how to use these officers' findings to plaintiff's advantage.

Note, it is well established that the traffic collision report itself is inadmissible at trial. (Veh. Code, § 20013 ["No such accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident . . . ."); *Kramer v. Barnes* (1963) 212 Cal.App.2d 440; *Summers v. Burdick* (1961) 191 Cal.App.2d 464; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 237.) Exclusion of the traffic collision report protects against the danger of a jury giving weight to the conclusion in an accident report because of its "'official' character or allowing the 'official' report alone [to] determine the verdict." (*Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.)

Personal knowledge and opinions however, can still be provided by the officer at trial. In certain circumstances, the officer's recollection can be refreshed by the report, and in even more strict circumstances, the report can be read into evidence. (*Sherrell*, *supra*, 116 Cal.App.3d Supp. at p. 32-33 [providing compliance with Evidence Code § 1237 must be met to read the report into evidence].) In any event, an officer's opinion that one party was "'most responsible' for the accident is a legal conclusion and not a proper subject for expert opinion." (*Carlton v. Department of Motor Vehicles* (1988) 203 Cal.App.3d 1428, 1432.)

In this article you will learn how to qualify an officer as an expert, and how to introduce at trial opinions regarding point of impact, speed of the vehicles before impact, what constitutes reasonable speed under the circumstances, sobriety/intoxication of the parties, and any other factors contributing to the accident.

Does the officer know what he/she/they are talking about?

The first step with an officer is qualifying or disqualifying the officer as an expert for whatever the topic is at issue, which should be done during deposition before trial. Parties seeking to introduce an officer's opinion testimony must qualify the officer as an expert. (*Hodges v. Severns* (1962) 201 Cal.App.2d 99, 109.) There are two steps for qualifying/disqualifying an officer: (1) training and experience, and (2) investigation of plaintiff's specific case. Below are specific questions on how to do so; these questions are by no means exhaustive, but should lay enough foundation for testimony to establish liability.

Training and experience

Q: Good morning, Officer, how long have you been with [CHP, Department, etc.]?
A: For XX years.

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Q: During that time, did you attend any courses in accident investigation?
A: Yes.
Q: What courses and when?
A: Well, in XXXX, I took [name of course(s)].
Q: Please describe the subjects covered in that course.
A: The subjects covered XXX.
[If the officer does not list the subject at issue in Plaintiff's case, you must specifically ask about that subject.]
Q: Did you cover how to determine [points of impact, speeds, etc.]?
A: Yes.
Q: Have you also received in-the-field training on how to investigate accidents while working for the [CHP]?
A: Yes.
Q: What training and when?
A: I remember XXXX.
Q: Have you investigated accidents where you determined [points of impact, speed, etc.]?
A: Yes.
Q: What is your best estimate of the number of accidents where you determined [points of impact, speed, etc.]?
A: Hundreds.
Investigation here
Q: Here, did you rely upon your training and experience to investigate Plaintiff's accident?
A: Yes.
Q: What did you do?
A: XXXXX.
[Then ask specific questions depending on the facts of your case.]
Q: Did you take field notes?
Q: Did you take photographs/videos?
Q: Did you create the diagram in the TCR?
Q: Who did you interview regarding the accident?
Q: Did you make an audio recording of those interviews?
Q: Did you take measurements on scene?
Q: How did you take measurements on scene? Visual? Rolatape?
Q: Did you see [evidence at issue] or did someone tell you about that evidence?
Q: Did you see any injuries on scene?

Points of impact

For liability, point(s) of impact will usually make or break Plaintiff's case. Only officers who possess "expert qualifications can express an opinion as to point of impact." (*Waller v. Southern Cal. Gas Co.* (1959) 170 Cal.App.2d 747, 752.)

An officer may provide an opinion as to the point of impact based on the officer's examination of the physical evidence. (*Robinson v. Cable* (1961) 55 Cal.2d 425, 428; *Francis v. Sauve* (1963) 222 Cal.App.2d 102, 114.) Further, an officer's opinion can be based on a driver's statement rather than physical evidence. (*Arellano v. Moreno* (1973) 33 Cal.App.3d 877, 886 [providing that "the possibly partial hearsay basis of the officer's opinion went to its weight and not to its admissibility."].) Additionally, a diagram made by the officer at the scene may be admitted into evidence for the purpose of illustrating the officer's testimony to the jury. (*Robinson*, *supra*, 55 Cal.2d at p. 429.) Simply, an officer can opine as to the points of impact, provided the foundational requirements above are met. Specific questions to ask can be:
Q: With this accident with tire marks you saw in the road, have you formed an opinion as to which vehicle made those tire marks?
Q: What is your opinion?
Q: What is the basis for that opinion?
Q: What is the significance that Defendant's vehicle made those tire marks?
Q: With those tire marks being Defendant's, were you able to determine the point of impact between XXX and XXX?
Q: And, what is the basis for your opinion regarding that point of impact?

In a case on point, *Wells Truckways v. Cebrian* (1954) 122 Cal.App.2d 666, a plaintiff sought to prove that defendants' truck swerved over a center line on a two-lane highway, causing an accident. The plaintiff used the testimony of a CHP officer to testify regarding what he saw at the scene of the accident and what his opinion was as to the position of the trucks on the highway. There, the plaintiff established the CHP officer's expert qualifications with testimony that the officer had had many years of experience in investigating accidents on the highway, including with a railroad company, as an investigating officer in the U.S. Army, and that he had investigated "considerably more than" 100 accidents in 14 years of such work. (*Id.* at p. 676.)

The court noted that the officer arrived at the accident scene within 30 minutes after it happened and was testifying from facts which he obtained from his personal observations, such as damage to the trailer, angle of broken metal pieces, gouge marks, and the location of dirt, debris, and oil spots. (*Id.* at pp. 676-677.) The court found that the circumstantial evidence of the location of impact opined to by the CHP officer "was not necessarily self-explanatory to the layman's eye" and that the CHP officer's testimony "could aid the jury in drawing correct inferences from the raw and unsorted facts." (*Id.* at pp. 677-678.) As such, the court concluded that there was no error in admitting the CHP officer's opinion as to the point of impact.

Speed

Officers frequently provide opinions as to speed. Several cases have noted that an officer "whose duties include the investigation of automobile accidents may qualify as an expert entitled to give an opinion respecting the speed of automobiles involved in an accident, based on his observations obtained in the course of his investigation thereof." (*Davis v. Ward* (1963) 219 Cal.App.2d 144, 148; *Enos v. Montoya* (1958) 158 Cal.App.2d 394, 399 [noting that because jury's knowledge of the subject roadway must be limited to that shown by the evidence, it cannot be said that a prudent speed on the subject curve "was a matter exclusively within the jury's fact finding power which should not be 'invaded' by opinion evidence"].) Whether an officer has sufficient qualifications to give an opinion regarding the speed of the

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vehicles involved in the accident is "a matter committed to the sound discretion of the trial court." (*Davis,* 219 Cal.App.2d at p. 148.)

For a traffic officer to testify as to an estimate of the approximate speed of the involved vehicles, the following factors are analyzed: (1) "a known relationship between speed and the objective results" of the automobile accident; (2) the traffic officer's knowledge and experience, and (3) the facts observed by the traffic officer after the collision. (*Crooks v. Pirrone* (1964) 228 Cal.App.2d 549, 552.) If each of these factors is proven "to the satisfaction of the trial judge such a person could in a proper case give his opinion as to speed." (*Ibid.*)

Notably in *Crooks*, a CHP officer's opinion regarding the speed of a party's vehicle before the collision was excluded because: (i) the officer admitted that he had not taken the CHP course for ascertaining speed from the physical results of a condition; (ii) the officer did not conduct the experiments he performed prior to this case; (iii) the officer's conclusion relative to speed in other cases was not verified; (iv) the officer did not know sufficient facts concerning the type and weight of the vehicles involved; and, (v) the officer lacked sufficient knowledge of "principles of mechanics or physics to permit him, as an expert, to arrive at any reasonably accurate opinion as to the speed of the respective vehicles." (*Id.* at p. 553.)

Sample questions to ask an officer regarding speed might be:
Q: Based upon your investigation and experience, were you able to form any opinions as to the speed of plaintiff's/defendant's vehicle?
Q: What are your opinions?
Q: What are the bases for your opinions?

Additionally, properly qualified officers may also give testimony as to what would have been a "reasonable and prudent speed" at the location and circumstances at issue during the accident. (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 230; *Enos, supra,* 158 Cal.App.2d at p. 399.) In *Hart*, a CHP officer testified what would be a reasonable speed in and around the area of the accident. (*Hart, supra,* 4 Cal.App.3d at pp. 228-229.) First, the CHP officer was qualified to provide such an opinion because the officer "had been in the Highway Patrol for 13 years, had extensive training and schooling in accident investigations (including proper speeds under various conditions), and had investigated more than one accident weekly." (*Ibid.*) Then, the officer testified that if the road was wet due to snow and ice, a "reasonable speed" in and about the area of the accident would be 10-15 miles per hour and that "a person driving under these conditions, in and about the area of the accident, at a speed of 30-35 miles per hour [i.e., the defendant's estimated speed], could anticipate he might slip, slide, and have an injury accident." (*Id.* at p. 229.) This testimony was allowed because an officer who has spent years investigating accidents and who was required to make official reports with both the facts and potential causes of the accidents "is an expert," and the officer's opinions go to weight and not admissibility. (*Id.* at pp. 229-230, *citing Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 Cal.2d 52, 57.)

Another example, in *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, an officer was able to opine that there was no evidence of "excessive speed" of a plaintiff. The foundation for the officer's opinion was: (a) his qualifications were provided; (b) there was no physical evidence to give any indication of excessive speed; (c) there were no skid marks or markings on the pavement; and (d) the amount of physical damage the officer observed did not indicate plaintiff was driving faster than 35 miles per hour. (*Id.* at p. 460.) The posted speed limit where the accident occurred was 25 miles per hour, not 35 miles per hour, so defendant objected, claiming the officer's opinion wrongfully convinced the jury that plaintiff was free from wrongdoing. (*Id.* at pp. 460-461.) But, the Court admitted the opinion, finding that the defendant's objections were not tenable because the jury was instructed on the issue of contributory negligence with the speed limit being 25 miles per hour. (*Id.* at p. 461.)

These cases show that an officer with the proper qualifications can testify as to reasonable speeds of the vehicles involved to an accident.

Sobriety

The effects of intoxicants, and even alcohol, are "sufficiently beyond [the] common experience of most jurors [such] that expert testimony is required." (*Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 161; *Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 374; *and see* Evid. Code, § 801, subd. (a).) But remember, testimony of a party's drug use may be inadmissible if the use did not contribute to the accident or damages. (*Hernandez, supra,* 226 Cal.App.4th at pp. 1615-1617 [expert testimony deemed irrelevant and improper where there was no evidence the deceased's alleged marijuana use contributed to the initial collision or the deceased's death the following day].)

The bar permitting an officer to testify as to opinions regarding sobriety is quite low. For example, in *Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 284, a retired police officer was able to testify that a bus driver who struck and killed a 13-year-old bicyclist was not impaired at the time of the accident. The reason being that even though the retired officer had no certifications in California, he "had 25 years of experience and extensive training" as a former Florida police officer, had received certifications in standard field sobriety tests and the drug recognition program, worked for several years on a driving-under-the-influence (DUI) task force, and had taught the standard field sobriety test, breath test, and drug recognition expert program. (*Ibid.*)

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Hence, an officer can likely testify regarding a party's sobriety and/or intoxication, provided a sufficient showing of foundation is made and causation is at issue.

Other factors contributing to the accident

Officers whose duties include investigations of traffic accidents "are qualified experts and may properly testify concerning their opinions as to the various factors involved in such accidents, based upon their own observations." (*Neumann, supra,* 59 Cal.App.3d at p. 460*; Hart v. Wielt* (1970) 4 Cal.App.3d 224, 229; *Risley v. Lenwell* (1954) 129 Cal.App.2d 608, 631; *Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 723-727.)
A "traffic officer who has spent years investigating accidents in which he has been required to render official reports not only as to the facts of the accidents but also as to his opinion of their causes, including his opinion, where necessary, as to the point of impact, is an expert." (*Hart, supra,* 4 Cal.App.3d at p. 229; *Kastner v. Los Angeles Met. Transit Authority* (1965) 63 Cal.2d 52, 57.) Aside from point of impact, discussed above, officers may provide opinions on other factors involved in car accidents, such as path of travel and use of headlights.

An officer can opine as to the travel of a vehicle. In *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266, a former officer testified as to the path and trajectory of a plaintiff's motorcycle after impact. The former officer "(1) had been a California Highway Patrol officer for 28 years, of which the last 18 were devoted exclusively to accident analysis; (2) he had either personally investigated or supervised the investigation of 5,000-6,000 traffic accidents – many involving motorcycles; (3) he had authored several books which are used in teaching accident analysis and reconstruction at the California Highway Patrol Academy; and (4) he had taught courses concerning this subject." (*Id.* at p. 274.) The officer testified that plaintiff was not turning to the right before the accident, based upon the following: "(1) the distance traveled by the motorcycle after the collision; (2) the point of rest of plaintiff's body; (3) the type of damage to the left front fender of the pickup truck; (4) an examination of the same make and model of motorcycle; and (5) an inspection of the accident scene." (*Ibid.*) These factors "constituted sufficient grounds upon which to predicate an opinion as to the path of the motorcycle after impact." (*Id.* at p. 275.)

With proper foundation, an officer can even testify if headlights were on or off. In *Riddick v. Jim Hay Co.* (1975) 45 Cal.App.3d 464, opinion testimony from CHP officers regarding plaintiff's vehicle's headlights was proper based on the officers' observations at the scene, specifically, one CHP officer testified that the plaintiff's vehicle's headlights were "on" at the moment of impact "because of the manner in which the tungsten filaments in the lamp had deflected after the shattering of the bulb." (*Id.* at p. 468.) This testimony was permitted even though another traffic officer testified that the headlight switch was in an "off" position when that officer began his investigation shortly after the accident. (*Id.* at p. 471.)

In sum, officers may be called to give expert testimony regarding a variety of factors affecting causation and liability.

Conclusion

Before going to trial, depose the traffic-collision-report officer. You will possibly be able to lay the foundation to introduce at trial favorable opinions or exclude unfavorable opinions of the officer. Either way, you will be a better trial lawyer by doing so.


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