



Win your auto vs. bike case

Beating comparative fault and winning your auto vs. bike case without much physical evidence

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You can guarantee that the defense attorney will say that the bike rider is at fault for his own injuries, but is he really?

Even though it may seem unreasonable to place any percentage of fault on your client, you must nevertheless combat this insurance bias in order to change the narrative early on. In these cases, it is common that there is a lack of physical evidence for several reasons; the damages on the defendant's vehicle could be minor, the bike itself might be gone or soon repaired if you do not act quickly, and same for your client's clothes. In such a situation, time is the enemy.

The collision

In our case, it is rush hour on a Friday afternoon, the plaintiff is riding his bike on Market Street towards the Ferry Building in San Francisco, following the flow of traffic. The defendant is driving his vehicle behind the biker, rushing to get home, and attempts to pass on the biker's left side. When the defendant's vehicle is passing, the biker swerves left to avoid a crack in the road. The defendant's vehicle, which was too close to the biker in violation of the three-foot rule, strikes the biker and knocks him off the bike. The biker suffers serious injuries as a result. The only physical evidence is a small scratch on the right front bumper of the vehicle.

Defendant's violation of the three-foot safety distance rule

In this case, the Defendant did not act according to his primary responsibility to maintain a safe distance and keep three feet away from the bicyclist when passing.

California Vehicle Code (CVC) section 21760 (c) defines the three-foot safety distance rule: "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." The law specifies the minimum safe distance, but sometimes more than three feet is required to ensure a safe pass. It is the driver's obligation to ensure and maintain the amount of safe distance required under any particular scenario encountered by the driver.

This article will provide steps to follow when there is a lack of physical evidence and the defense is trying to lay fault upon the bicyclist.



Tools to use to defeat the defendant comparative fault argument

Preservation of evidence

The moment the client retains you, you should make immediate efforts to preserve all of the evidence that you can. That includes informing your client to store his bike safely and not to fix any damages to the bike, and to safeguard the clothing, shoes, helmet, and backpack that the client was wearing at the time of the incident. It is important not only that the client keep all the evidence in their possession, but it is crucial that they take photographs of all items and send them to you promptly. If the physical items are lost or have been repaired, the photographs will greatly assist your experts in conducting their collision reconstruction analysis. You should get photographs of the accident scene from all angles. The importance of these photographs is critical if the accident location undergoes subsequent construction and there is a modification or reconstruction of the street after the collision.

Next, take advantage of existing technology by finding the accident scene on Google Earth to give the expert a better grasp of the scene. Later on, these images can be used in your demand



letter to the insurance company. If there are any video cameras that might have captured the accident, then get to the scene, acquire those videos and provide a preservation of evidence letter to all involved.

Once these steps are completed, send a spoliation letter to the defendant and request to inspect the car. The evidence from the driver's vehicle will help the expert in determining exactly what part of the vehicle touched the biker/his bike, and also the vehicle's speed and distance at the time of the impact.

Your spoliation of evidence letter should cite the affirmative duty to preserve evidence. (*Johnson v. United Services Auto. Assn.* (1998) 67 Cal.App.4th 626; *Smith v. Superior Court* (1984) 151 Cal.App.3d 491.) You should request the defense to produce and preserve any cell phone records from the driver, crash data, including black box, any GPS device information, any and all photographs that the defendant might have collected, and all written, recorded, emailed or typed statements, photographs, reports, measurements, notes and videos from the investigation of the accident. Additionally, the letter must state that the failure to preserve and retain the evidence that you are requesting constitutes "spoliation" of evidence and may subject the defense to sanctions. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215.)

Site inspection

More often than not, attorneys will fail to go to the site and conduct the necessary inspection. The attorney might think, "I have photographs from my client, so I don't need to go the scene." However, we cannot stress enough how important it is for you, your client, and your expert(s) to go to the scene and conduct the site inspection.

While at the location, ask your client in detail about how the incident occurred, check if his statements are consistent with his prior statements about the accident

location and configuration. You should visit the local businesses around the scene and ask for any security video footage they might have from the date of the incident. By doing that, you might find not only footage of the accident but also witnesses who may have seen what occurred.

Witnesses

The unfortunate prejudice against bike riders is likely to result in a traffic collision report (TCR) that places your client at fault for the incident or at least assigns some portion of liability to the bike rider. After the site inspection, you should request the TCR and contact all potential witnesses as soon as possible. If the TCR in fact places your client at fault, you should send a letter to the police department explaining the facts, show the evidence gathered, and ask for the TCR to be corrected or amended.

As previously mentioned, by conducting a site inspection, you might find other witnesses not mentioned in the TCR. In cases where there is a lack of physical evidence, witnesses will be a crucial element of the litigation. Even though the TCR may provide a witness statement that is not favorable to your case, you should contact that witness immediately in order to get a more fleshed-out statement. First, ask them what they observed, how they observed it, and why they determined that your client was at fault for the incident. If the witness cooperates with you now, future cooperation (such as showing up for a deposition, trial, etc.) is more likely.

Experts

Once you have collected your evidence, you should get an expert in accident reconstruction with knowledge of bicyclist cases. You want an expert who will be able to describe to you: (1) how the accident occurred; (2) why the accident

occurred; and (3) how and what discovery to conduct in order to get the evidence that you need to win your case.

The expert will be able to show the time of the impact, the vehicle's speed, and its distance from the bike rider. If all the steps above were followed, you will get the evidence that the expert needs to develop a reconstruction of the accident that it is not only supported by the facts, but which also supports your theory of the case.

When it comes to experts, the earlier, the better. In litigating your client's case, being pennywise and dollar foolish is unlikely to be the best strategy. The last thing that you want to happen is to retain an expert after discovery is closed only for the expert to tell you about things you should have done during the discovery phase of the case. So, do not be cheap, hire the expert early, and use the expert's time wisely so that it is a "win-win" for your client – you will get your evidence early and you will not waste your client's money.

Depositions

If you have worked diligently, but there is still lack of evidence, such as no video of the accident, the bike was destroyed, and/or a vehicle inspection was not possible, then depositions become even more critical to the case. Keep in mind that you can start noticing witness depositions very early – just 20 days after the complaint was personally served on the defendant. (Code Civ. Proc., § 2025.210.)

Remember, prepare your client, prepare your client, and prepare your client. Make sure that your client has a solid memory of the facts so that your client can recollect the events accurately in deposition.

Rule of evidence in the deposition

Here, you want to use the three-foot rule to establish that the defendant was not three feet away when passing the



bicyclist; hence, they did not maintain a safe distance. Once the rule and the evidence are established, ask questions using the evidence and then tie the evidence to the rule to force the deponent to testify whether they did or did not violate the rule.

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