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The bogeyman of comparative fault in vehicle vs. pedestrian and vehicle vs. bicycle cases

WEIGHING DAMAGES AGAINST COMPARATIVE FAULT

In personal-injury cases involving automobiles, whether it is between two automobiles, an automobile and a pedestrian, or an automobile and a bicycle, comparative fault will often rear its ugly head. When you get a call about a child hit by a car with a severe traumatic-brain injury, your instinct as a plaintiff's attorney is, "How can I help this family?" Then you learn that the child was playing soccer in his front yard, lost track of the ball, and then darted out into the street, directly into oncoming traffic. What do you do? Do you take the case? Do you refer it out?

This question is often the most difficult to answer. Most plaintiffs' attorneys are driven by the desire to help people. This is often why we became trial lawyers. But we also need to make a living. Hence, the first factor to consider in deciding whether to accept a case should be the ultimate monetary worth of the case and how it can contribute to your practice. This is difficult in cases involving big injuries and comparative fault.

In assessing the potential value of the case, the two major factors to consider are liability and damages. The probability of establishing liability and the extent of a claimant's damages both contribute to the claim's value. And, the apparent value of the claim is usually the deciding factor in determining whether it should be pursued. While liability has typically been the first factor considered in assessing a personal-injury case, we trial lawyers tend to fall in love with a case based on the damages. If we like the damages, we will look more closely at the case. Personally, we find that the better approach is to look at the liability first.

Liability in automobile cases

In personal-injury litigation, automobile accidents will occupy a great percentage of your time. These cases almost always involve clear liability and are also usually the easiest to settle with insurance carriers. However, cases involving automobiles and pedestrians/bicycles, such as when a child runs out into the middle of the street, are more difficult because liability is often contested through trial. Juries are often unfriendly when deciding pedestrian and bicycle cases, and the defendant typically always focuses on the comparative fault of the plaintiff. This makes sense. The jurors look at the dart-out and think, "Boy, that could easily happen to me."

In one of my first jury trials, I tried a red-light dispute case. I should have never taken this case. My client was a young woman. I believed her. The police report was in her favor. But the only witness was my client's friend and a passenger. By the time of trial, she was in the wind.

The jury returned a verdict for the plaintiff of \$100,000. But it assigned 85 percent fault to my client. That is not a typo – 85 percent! Therefore, the jury verdict was reduced by that amount. In California, a plaintiff's contributory negligence is compared with the negligence of defendants and other persons, and the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 828.) Most cases with high comparative fault usually end with a defense verdict. This trial illustrates a case we should

have never taken to trial. On the other hand, if this case was one with more significant damages, a reduction that large would not have been so bad. This goes back to my initial comment that, with big damages, I will try to work through cases of comparative fault.

I had another case, early in my career that luckily did not need to be tried but presented real challenges. Our client was a pedestrian just outside an unmarked crosswalk. A crosswalk is not just the points between corners of an intersection that are painted; but also, points between any intersection painted or not. The driver must yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. (Veh. Code, § 21950(a).) Even for a pedestrian, though not within a crosswalk, and not more than one or two feet outside the limits of an unmarked crosswalk when he or she is struck, the same rules are applicable as if the accident had occurred within the unmarked crosswalk. (*Karr v. Sherer* (1995) 132 Cal.App.2d 835, 837.)

It takes some persuading to convince a carrier that they should pay your client real money when they are technically outside of an unmarked crosswalk (jay-walking). In this case, our damages were big. Our client fractured her hip in multiple places, broke her wrist and suffered a traumatic brain injury. This was why we were able to settle. Damages!

More recently we took a case with an older man on a bike, allegedly going the wrong way through an intersection. He was struck in that intersection. Jose is 65

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and had an opioid addiction. He is also an ex-gang member and felon. Jose is now an incomplete quadriplegic. His life changed forever when the defendant struck him in that intersection. Clearly the damages are huge. There are liability, damage and money problems everywhere.

The young woman who struck our client was driving a brand-new Audi but had no insurance. We were asked to look at the case. When I was reviewing the medical records, I noticed that the ER doctor wrote that our client was “tripped” by a car. I am not sure how one is “tripped by a car,” but, this was then repeated throughout the medical record. What I ultimately noticed was that he was treated and released without a complete neurologic exam. Moreover, imaging was not done that should have been done. I contacted a couple of experts and my suspicions were confirmed. There is a fairly good medical malpractice case here. Now, this is not one without its own problems. But, had I not looked, I would have seen only a drug addict going the wrong way on a bike in a crosswalk, and a driver without insurance. Again, the damages drove my decision-making here; we were not afraid of the comparative fault issue.

Damages in bicycle/pedestrian cases

Insurance carriers and defense attorneys are often inclined to fight liability in automobile versus bicycle/pedestrian cases. As they continue to win, it is likely these cases that will be more and more difficult to settle. However, in our practice, we use this to our advantage. We understand the plaintiff typically has comparative fault, making liability difficult to establish. But this is by no means a bar to the lawsuit, and it is important to not assume that liability cannot be established or that the plaintiff is the at-fault party. At worst, these cases are about shared responsibility and are still worth pursuing. It is these tough liability cases where the defense attorneys take on a narrow-minded view that liability will not be established. Because I try these cases and go for it, the defense attorneys do not see the outlier result coming.

And that is why it is critical you look at the potential damages of a case at the outset. It only takes one outlier (with large damages potential) to make up for the losses from cases where you received little or no compensation. This is not to say that when damages are high you should take on the case no matter how questionable liability is. Damages should not be judged in isolation when determining whether to take on a case. Rather, the effective approach is to weigh the probability of establishing liability against the extent of damages incurred. And when the facts show clear comparative fault on your client, you should be inclined to take on the case only when the damages are severe.

Red flags in bicycle/pedestrian cases

With the following in mind, there are potential red flags in pedestrian litigation matters which we still consider before agreeing to represent a pedestrian or cyclist injured by a motor vehicle. If these issues are present, this does not necessarily mean that you should automatically reject the case. However, before accepting the case or giving due deference to the potential damages, these issues should be acknowledged and addressed.

Dart-out cases

One of the first issues in any case involving a motor vehicle and a pedestrian is the “dart-out” case. These cases arise when a child or adult darts into the roadway and is struck by a vehicle. In such cases, the defendant will have an extremely strong argument that it was your client’s negligence that caused his or her injury.

Generally speaking, the driver has a duty to anticipate at all times that he or she may meet pedestrians at any point in the street or highway, to maintain a proper lookout for them, and to keep his or her car under the control necessary to enable him or her to avoid a collision with persons. (*Lebkicher v. Crosby* (1954) 123 Cal.App.2d 631, 635.) But in cases of liability for injuries to a pedestrian who suddenly darts out or steps into the path of an automobile, the defendant will be

entitled to an emergency defense indicating that they only need to exercise such reasonable care as an individual who is in a similar situation would exercise. This is a very powerful defense to bring to a jury.

When deciding whether to take a dart-out case, you should evaluate the amount of time that a driver had to react to the pedestrian entering the roadway. In doing so, it is important to determine in addition to how fast the driver was going, the distance between where the driver was when he or she first noticed the pedestrian and the location of the accident. In these cases, eyewitness testimony and physical evidence such as skid marks and surveillance footage are essential. If the driver is traveling within the speed limit, and not intoxicated or otherwise impaired, the damages will need to be potentially large before we would consider pursuing such a case.

Child dart-out cases

Another important factor to consider is whether the injured party is a child. Children are among the most vulnerable pedestrians because they lack the same judgment that adults have. A child may run out into traffic while chasing a ball, unaware of the danger. Drivers must exercise a higher degree of care toward child pedestrians than adult pedestrians because of the unpredictability of the conduct of children. A driver should therefore anticipate the thoughtlessness and impulsiveness of children and act accordingly. (*Geren v. Lowthian* (1957) 152 Cal.App.2d 230, 233.) The care required is greater still when the driver knows that small children are in the immediate vicinity, such as near schools, parks and playgrounds. (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 542.)

If your case involves a child pedestrian, an important aspect of liability will be whether the motorist had ample opportunity to avoid the incident or was on notice as to the presence of children in the area. Obviously, a motorist proceeding through a school zone or near a playground would have a higher duty of care than a motorist operating along a highway. Another factor to consider with child

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pedestrian cases is whether there is any imputed negligence of a parent.

Cross-walks and jaywalking

A second type of pedestrian accident case which raises significant issues is when a pedestrian is crossing the roadway illegally. Accordingly, it is extremely important to evaluate whether the pedestrian had the right of way when deciding to accept the case for litigation. A pedestrian is generally considered to be crossing illegally at an intersection when they do not obey a walk sign or are crossing the roadway against a red light. Pedestrians are also prohibited from crossing a roadway mid-block when they are between two adjacent intersections controlled by traffic control signal devices. (Veh. Code, § 21955.) If that is the case, the pedestrian cannot cross the roadway at any place except in a crosswalk.

However, these are not the only circumstances that can arise. For instance, if a pedestrian crosses a roadway in a marked or unmarked crosswalk, the driver must yield the right-of-way to the pedestrian. (Veh. Code, § 21950(a).) As a result, if a person approaches a crosswalk while driving, they are required to exercise caution and reduce their speed to safeguard the safety of the pedestrian. (Veh. Code, § 21950; California Civil Jury Instructions (CACI) No. 710.) In contrast, every pedestrian crossing a roadway at any other point must yield the right-of-way to all vehicles on the roadway “so near as to constitute an immediate hazard.” (Veh. Code, § 21954(a).) However, the pedestrian’s

duty to yield the right-of-way does not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian on the roadway. (Veh. Code, § 21954(b).)

Regardless of whether any statute was violated, the principal issue in such cases is typically whether the requisite care has been exercised, not whether the right-of-way has been yielded. (*Biggar v. Carney* (1960) 181 Cal.App.2d 22, 28.) As a result, the question as to whether the requisite degree of care was exercised in a given case is ordinarily one of fact for the jury and that is why it is important to focus on the damages when doing the initial case evaluation. The mere fact that a plaintiff is crossing against a light or jaywalking does not absolve the defendant of liability. This becomes once again an issue of comparative fault.

Bicycles

By California law, a bicycle is considered a vehicle, and cyclists have the same rights and responsibilities as motorists. As such, both cars and bicycles share a responsibility to avoid accidents. However, many drivers of cars do not know how to share the road with cyclists, or they ignore their responsibilities due to a belief that bicycles should not be on the road. These cases are particularly susceptible to serious injuries or even death. A bicycle provides very little protection against contact with a motor vehicle – broken bones, internal injuries and even injuries necessitating surgery or amputation can all result when a cyclist is thrown from his bicycle after being hit.

Conclusion

The moral of these examples is that the plaintiff often faces a very difficult case in automobile/pedestrian incidents. If an attorney evaluates the case for these factors, they will be able to eliminate the majority of pedestrian-collision cases with a low likelihood of success. However, it is important to give due deference to the damages potential of a case if only a few red-flag factors are present; it is these outlier cases that permit this niche to thrive in California litigation.

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