Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2022

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Who's at fault?

ISSUE SPOTTING PAST THE COLLISION TO FIND DEEPER POCKETS

California has more uninsured drivers than any other state and with California's minimum bodily injury insurance limits of $15,000/$30,000 ($15,000 per person and $30,000 per occurrence), the chance that the at-fault driver has enough insurance or assets to cover your seriously injured client is not likely. This will still hold true in many instances, even if SB-1107 (Dodd), becomes law.

If Dodd passes, on January 1, 2025, there will be a mandated increase in the amount of liability insurance coverage an owner or operator of a motor vehicle is required to maintain, essentially doubling the minimum limits for bodily injury from $15,000 to$30,000 for bodily injury or death of one person and from $30,000 to $60,000 for bodily injury or death of all persons. While the passage of this law should be applauded and lauded as a vast and much-needed improvement, it would do little in the most catastrophic of cases.

Often, attorneys only look to potential secondary defendants when the at-fault driver does not have any insurance, or not enough insurance. However, some of the most virtuous cases are against a government entity or against the vehicle manufacturers because your case can encourage actual change that will save lives.

Finding other tortfeasors

For example, we once took a case where the Plaintiff rear-ended another vehicle. She was over the legal blood alcohol limit and she should not have been driving. However, her airbags did not deploy, and her seat belt did not engage. While the case was declined by several other lawyers, we pursued the matter and achieved a sizeable result for the heirs. Perhaps more importantly, during our investigation and prosecution of the case, a recall was issued as the defect had become established. While it is difficult to predict how many lives were saved, it is indisputable that cars were made safer from a case that many would, and did, cast aside.

As part of every vehicle-collision case, the intake process entails determining the proper defendants in the collision, i.e., driver of the defendant vehicle, owner of the defendant vehicle, and whether there is a course and scope of employment issue in the case. However, during intake, each case should also first evaluate whether there is a potentially dangerous condition case against a governmental entity. Additionally, each case should be evaluated to determine if there could be an auto defect that caused or contributed to the collision and/or plaintiff's injuries. This later evaluation requires preservation of the vehicle, which we will discuss below. We mention it here, however, because of the tendency for many lawyers to fail to do so, letting potentially large and important cases slip through their fingers when the car disappears after being declared a total loss.

Dangerous condition

Dangerous roads cause countless deaths each year as a result of vehicle and/or pedestrian accidents in California. The danger of the road or highway is often disregarded by law enforcement when they are preparing a report on the cause of the accident. Regularly, the traffic-collision report will state that the driver was at fault when in reality the collision was caused by the road's design or unsafe factors.

This often makes the government entity that designed the roadway liable for any damages caused during an accident. Claims against large government entities are extremely complex. A public entity may be held liable for injuries caused by a dangerous condition of public property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, and that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred. (Gov. Code, § 835.)

In addition, the plaintiff must establish that either: (a) a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition, or (b) the public entity had notice of the dangerous condition, a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104-05.)

A public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving) if some physical characteristic of the property exposes its users to increased danger from third-party negligence. Public entity liability lies under Government Code section 835 when some feature of the property increased or intensified the danger to users from third-party conduct. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457-1458.)

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There are many different types of dangerous conditions, such as defective road design, inadequate barriers, shoulder and/or drainage defects, inadequate road maintenance, missing or insufficient signage, missing or defective guardrails, inadequate traffic control, inadequately marked construction zones, etc. In order to evaluate whether you have a dangerous condition case you should take the following steps:

Inspect the scene

Often, the traffic collision report takes some time to be prepared, and if the government entity believes a lawsuit may be forthcoming, it may take even longer. Instead of just sitting idly by, you should go to the scene of the collision to determine if there are any apparent dangerous conditions. Although it may be helpful to look at satellite maps on the internet, it is much more beneficial to actually go to the scene.

When you get to the scene, look for confusing signs, overgrown tree branches or bushes. You should also drive in the same exact direction of each party, which will help you see exactly what they saw on the day of the collision and not what the satellite images from an unknown time may reveal. While you are out at the scene you should look for any nearby cameras from businesses or homes that may have captured the collision and can be used for further investigation. The sooner you get out to the scene of the collision, the better, as conditions may change, such as traffic signals added or removed, trees trimmed, etc.

Traffic-collision report

As soon as you are retained, you should request the traffic-collision report. Typically, the officer that responded to the scene will provide your client with a card identifying the agency and report number. If your client was not provided such a card or lost it, you should call the California Highway Patrol office closest to the collision. If California Highway Patrol did not prepare the report, you should call the local sheriff's department. Once you have determined which agency prepared the report, you should request the following information:

- a complete copy of the traffic collision report and any supplemental reports;
- any toxicology reports;
- all 911 logs, tapes, and recordings;
- any dash cam footage, MVARS, body cam footage, audio recordings, or other recording related to the incident; photographs of the collision scene;
- any video footage obtained from third-party surveillance cameras during law enforcement's investigation;
- any 3D scans of the scene.

Once you receive the traffic-collision report you should focus on the parties' statements, and physical evidence documented, including any diagram of the scene. The defendant driver's statement could help identify a potentially dangerous condition. They may allege contributing factors such as overgrown trees, blocked traffic signs, construction, etc. The diagram of the scene may also identify dangerous conditions, such as curvatures in the road. If you requested photographs and video, as suggested above, this may also be very helpful in seeing the vehicles at their final resting places before they were moved or towed away.

While rare, some agencies are conducting FARO 3D scans of the scene. This data, taken on the day of the incident, will help your accident reconstructionist prepare simulations or animations based upon the actual conditions at the scene on the day of the incident.

The Statewide Integrated Traffic Records System ("SWITRS")

Since Plaintiff must prove that the public entity had notice of the dangerous condition, a sufficient time prior to the injury to have taken measures to protect against the dangerous condition, you need to look at the history of prior collisions. (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104-1105.)

While there must be a "substantial similarity" to offer evidence of previous accidents for any purpose, a stricter degree of "substantial similarity" is required when prior accident evidence is offered to show a dangerous condition of public property. The previous accidents must be connected in some way with the condition alleged to be dangerous. (*Mixon v. State of Calif.* (2012) 207 Cal.App.4th 124, 137-138; *Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1072.)

The Statewide Integrated Traffic Records System (SWITRS) is a database that collects and processes data gathered from a collision scene. The internet SWITRS application is a tool that leverages this database to allow California Highway Patrol (CHP) staff, members of its allied agencies, as well as researchers and members of the public to request various types of statistical reports in an electronic format. The application allows for the creation of custom reports requested by the user based on different categories including, but not limited to locations, dates, and collision types. (https://www.chp.ca.gov/programs-services/services-information/switrs-internet-statewide-integrated-traffic-records-system)

Each SWITRS report will be accompanied by a manual that will help you interpret the abbreviations used in the report. The reports will identify similar incidents which will provide concrete evidence, establishing the requisite elements of notice and dangerousness of the condition cause of action.

Timing

Under Government Code section 945.6, a claimant must present a tort claim to the proper entity within six *months* of the date of the incident. If the government entity timely responds, a lawsuit must be initiated within six months of the date the claim is rejected.

If the agency does not provide any written notice rejecting your claim, you have two years from the date of injury or damage. (See Gov. Code, §§ 911.3, subd. (b) & 912.4, subd. (c); see also *Phillips v. Desert Hospital Dist.*, 49 Cal.3d 699, 706, 263.) Failure to respond within the 45 days results in a claimant being permitted

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to file the action within two years. (See Gov. Code, § 945.6, subd. (a)(2); *Weston Construction Corp. v. County of Sacramento*, 152 Cal.App.4th 183, 190, 61.)

Given the short time frame in which to file a claim, you cannot wait to start your investigation. Determining if there is a potential dangerous condition quickly will allow you to obtain critical evidence while it is still available. Moreover, while there might be certain circumstances permitting the filing of a late claim, or giving rise to equitable estoppel or even an argument based upon delayed discovery, these are paths fraught with peril and should be avoided.

Potential dangerous-condition defendants

If after your investigation, you determine that there is enough evidence to pursue a dangerous condition case, you should file government claim forms against any public entity that could potentially own and/or maintain the property where the dangerous condition is located.

Generally, no suit for money or damages may be brought against a government entity (or against a government employee acting in the scope of employment) unless and until a timely claim has been presented pursuant to the Government Claims Act (Gov. Code, § 810 et seq.) and either acted upon or deemed rejected by the passage of time. (Gov. Code, §§ 945.4, 950.2, 912.4; see *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 989-990; *Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 246; and *Stanley v. City & County of San Francisco* (1975) 48 Cal.App.3d 575, 581-582.)

For example, if you only file a claim against the city where the property is located but the area is actually owned or maintained by the county or state, you will be prevented from bringing your case. It's much better to be overinclusive and dismiss defendants once you are absolutely sure who the property public entity defendant is in discovery.

Auto defect/product liability

People rely on their vehicle to travel safely every single day. However, automobile manufacturers often sell vehicles that have defects that can lead to injuries or death. Unfortunately, there is a long history of auto safety defects where many lives have been lost or destroyed from either dangerous designs or manufacturing errors. Approximately, 13% of all automotive accidents are the result of mechanical failures.

An automotive defect can be undetected during the manufacturing process. Some vehicles have inherent faults that may not be uncovered until a collision. Below are some common automobile defects:

- **Airbag failure**: Airbags can help to minimize injuries and reduce fatalities. We all expect our airbags to protect us in a collision, but if the airbags fail to deploy in a collision, the injuries may be severe.
- **Seatbelt failure**: Seatbelt failures may occur if the latch or retractor fail. When this happens the seatbelt does not prevent the occupant from striking an object in front of them, whether that is the steering wheel, dashboard, or seat in front of him or her. Such failure can also lead to the occupant's ejection from the vehicle.
- **Seat-back failure**: Some automobile manufactures attempt to cut corners and make seats as cheaply as possible. However, this may cause a seat to collapse, injuring the person sitting in the seat or falling back and on top of other occupants in an accident. This can be extremely dangerous not only for the person in the seat that fails, but also for anyone sitting in the back seat.
- **Rollovers**: A dangerous vehicle design can lead to a vehicle being prone to roll over. According to National Highway Traffic Safety Administration (NHTSA) statistics, SUVs were involved in 36% of the rollover-related deaths in the United States, more than any other type of vehicle.
- **Roof crush**: In the event of a rollover accident, the roof of a vehicle should be strong enough to withstand a certain amount of force, protecting the occupants from further injury. When the roof of a vehicle is not enforced, it can lead to serious injuries or even death.

The elements of a strict products liability cause of action are a defect in the manufacture or design of the product or a failure to warn, causation, and injury. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560.) In California, a manufacturer, distributor, or retailer of a product may be held strictly liable if a defect in the design of its product causes injury to a person while the product is being used in a reasonably foreseeable way. (*Id*. at 560). A design defect may be established under either the consumer expectation test or under the risk-benefit test. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432.)

The "strict product liability" theory of recovery exposes a broad range of defendants to legal accountability for "defective" products. Liability attaches upon proof of the product "defect" and a sufficient causal connection between defendant, the product and plaintiff's injury. (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1000 ["in order for there to be strict liability, the product does not have to be unreasonably dangerous – just defective"]; see also *Webb v. Special Elec. Co., Inc.* (2016) 63 Cal.4th 167, 179; *O'Neil v. Crane Co.* (2012) 53 Cal. 335, 347; *Carlin v. Sup.Ct.* (Upjohn Co.) (1996) 13 Cal.4th 1104, 1110.)

The naturally distinguishing feature of these cases is that it is not an inquiry into the reasonableness of the conduct of the defendant(s). Unlike negligence, the strict liability cause of action does not require proof of "duty" and "breach" (conduct falling below the applicable "reasonable" standard of care). In other words, negligence focuses on "reasonableness" of the defendant's conduct; but strict liability ordinarily is predicated solely on the nature of the product (although defendant's conduct becomes important in "failure to warn" strict liability cases). (See generally, *Carlin v. Sup.Ct.* (Upjohn Co.) (1996) 13 Cal.4th

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1104, 1110-1115; *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 33-34; *Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 478-479, 485.)

A design defect exists when the product is built in accordance with its intended specifications, but the design itself is inherently defective. (*Barker,* 20 Cal.3d at p. 429.) In *Barker*, the California Supreme Court recognized two tests for proving design defect. The "consumer expectation test" permits a plaintiff to prove design defect by demonstrating that "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id.* at pp. 426-427.)

This test, rooted in theories of warranty, recognizes that implicit in a product's presence on the market is a representation that it is fit to do safely the job for which it was intended. (*Id.* at 430; see also *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 566 ["ordinary users or consumers of a product may have reasonable, widely accepted minimum expectations about the circumstances under which it should perform safely. Consumers govern their own conduct by these expectations, and products on the market should conform to them"].)

If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and "the objective features of the product which are relevant to an evaluation of its safety." (*Soule* at 564.) This leaves the fact finder to "employ its own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." (*Id.* at 563.)

In *McCabe v. American Honda Motor Co*., (2002) 100 Cal.App.4th 1111, a motorist who was injured when the driver's side air bag in her car failed to deploy in a frontal collision with another car sued the air bag's manufacturer and the reseller, alleging the air bag was defective in both its manufacture and its design. The plaintiff provided sufficient evidence for a jury to infer that the nondeployment of an air bag, in the context of the high-speed, head-on collision violates minimum safety expectations of the ordinary consumer. Indeed, the consumer expectation theory, rooted as it is in a warranty heritage, would seem necessarily to encompass a case in which it is alleged the product failed to perform in accordance with the representations contained in its own owner's manual. (*McCabe* at 1125.)

The alternative jury instruction, the risk-benefit test, is typically preferred by Defense because it involves weighing factors involving technical issues. These technical issues are typically within the manufacturer's knowledge, the likelihood that the harm would occur, the practicability of a safer alternative design, the cost of the safer alternative design, the disadvantages of the alternative design, etc. (CACI 1204.)

Investigation

As with the investigation of a dangerous-condition case, the initial steps in determining if there is a potential auto-defect case are similar. However, where we started initially in inspecting the scene of the collision in a dangerous-condition case, we will start here by inspecting the vehicle. As you might expect, it is imperative to inspect and retain the vehicle. Without the vehicle, it will be nearly impossible to establish an auto-defect claim.

Instructive on this point is the case of *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 136, 337. In *Stephen* the granting of a nonsuit was held to be proper where plaintiff's experts failed to satisfy foundation for opinion that defective tire design and auto design caused the accident. The case involved a Ford Firestone tire failure, and plaintiff did not have the tire to pursue that case. The court excluded plaintiff's expert on the basis that his opinion was not reliable to provide testimony as to a defective tire on photographs alone.

If the vehicle belongs to or is in the possession of someone other than your client, such as a tow yard, send a spoliation letter immediately to preserve the vehicle. Once the vehicle is preserved, request that it be made available for an inspection as soon as possible.

Often, the subject vehicle is under the control of your own client's insurance carrier. An insurer has no tort duty to preserve evidence. (*Cooper v. State Farm Mut. Auto. Ins. Co.* (2009) 177 Cal.App.4th 876, 884, citing *Farmers Ins. Exchange v. Superior Court*, 79 Cal.App.4th 1400, 1404 [insurer has no duty to maintain an allegedly defective tire].) However, you should attempt to obtain an agreement from the carrier to preserve the evidence.

In cases where the insured property is totaled and the insured has sustained additional injury or damage, and the insurer has a claim for subrogation against a third party, counsel for plaintiff should consider obtaining an agreement from the insurer to reserve all the salvage or a relevant part thereof. Although having no initial duty to do so, a carrier that undertakes to come to the aid of its insured is under a duty to exercise due care in performance and is liable if the harm is suffered because of the other's reliance upon the undertaking. (*Cooper v. State Farm Mut. Auto. Ins. Co.* (2009) 177 Cal.App.4th 876, 892, fn. 3 [State Farm adjusters agreed to preserve the tire which caused the accident as evidence].) If a defendant enters upon an affirmative course of conduct affecting the interest of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions. (*Cooper v. State Farm Mut. Auto. Ins. Co*., 177 Cal.App.4th 876, 894 [holding negligent spoliation case could be stated].)

Given the potential liability of the carrier created by agreeing to preserve evidence, you may meet reluctance to do so. If that is a situation that counsel meets, it should be remembered that pre-filing relief and discovery is available. One who expects to be a party in a California action may obtain discovery to perpetuate testimony *or preserve evidence* in the event an action is subsequently filed. (Code of Civil Procedure § 2035, subd. (a); 2 Witkin

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California Evidence 4th (2000) Discovery § 210, page 1037.) The method of preserving evidence is by way of filing a petition in the Superior Court. (Code Civ. Proc., § 2035.030 [Description of the contents of the petition].)

If a court determines that all or part of the discovery requested may prevent a failure or delay of justice, it may make an order authorizing that discovery. (Code Civ. Proc., § 2035.050, subd. (a).) The order shall identify any witness whose deposition may be taken, and any documents, things or places that may be inspected. (Code Civ. Proc., § 2035.050, subd. (b).)

When you arrange for the inspection, you should have an expert present to take photos and download any information from the vehicle's Event Data Recorder ("EDR"). Event Data Recorders are devices installed in motor vehicles to record technical vehicle and occupant information for a brief period before, during, and after a triggering event, typically a crash or near-crash event. This information includes vehicle speed, occupant seat belt use, air bag deployment, as well as vehicle speed and brake input for the five-second period leading up to impact. The National Highway Traffic Safety Administration (NHTSA) estimates that by 2010, at least 85% of all vehicles manufactured would have EDRs.

In rear-impact collisions, look to see if any of the seats that the driver or passengers were occupying are completely laid back, which may indicate a seatback failure. In frontal impact or side-impact collisions, look to see if there was a defect in the air bag failing to deploy. In rollover crashes, you should keep an eye out for stability issues, a roof crush, a seat belt spool-out, an unintended seat belt buckle release or false latch, or a tire failure due to tread or belt detachment.

Once you have inspected the vehicle, obtain the traffic collision report, photos, and video prepared by the police or California Highway Patrol, as stated in the dangerous condition analysis above. In one of the auto-defect cases we are currently handling, our client, a 16-year-old passenger, died in a single-car collision. In the traffic-collision report, the driver made a statement to the responding officer that his brakes were not working at the time, causing him to lose control.

At the initial inspection, your experts should be able to help you develop and support your liability theory. Start with an accident reconstructionist to analyze vehicle speed, vehicle motions, forces acting on vehicle, and the direction of forces acting on the vehicle. From there, retain an expert in the exact defect involved (i.e., airbag or seat belt). A biomechanical expert may also help evaluate driver and/or passengers' causation of injuries and how they relate to the defect involved. All of these experts should work together to make sure that their opinions are consistent and do not contradict.

Do it for your client, and all of us

During your evaluation of every significant vehicle collision case, it is your duty to perform an analysis about the existence, or non-existence, of a dangerous-condition claim and/or auto-defect claim. Obtaining and preserving key evidence as soon as possible after the collision is crucial, particularly as it relates to the vehicle and the scene.

After all, not only is such an evaluation critical to the proper representation of your client's best interests, but it is for the improvement of safety for us all.

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