



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, fleeing 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 42,724 in 2002 to 75,303 in 2013.¹ 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.²

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.³ 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 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.⁴ 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. CVC 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) 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. (*Spriesterbach 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. (*Spriesterbach 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.

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.

Unless the impact was to the rear wheel, rear drop-out, the rider's foot, or leg, there are relatively few remaining points of potential impact as the vehicle passes from rear to front. Damage from the small plastic end-plug securing handlebar tape on curved road handlebars, for example, may appear at a height of about three feet, be very faint, and would likely disappear if rubbed or washed. End-plugs are often made of plastic with a faux-chrome finish that rubs off easily in a crash, and may have transferred. A road bicycle's brake lever will protrude



slightly to the outside, and may also leave a mark at a height that will be easy to match against the scuffed lever. In terms of contact that would cause the rider to fall, these areas are key in addition to hand, arm or elbow.

If the vehicle cannot be located immediately, a letter to the driver to preserve physical and photographic evidence is wise, followed up with early discovery. Twenty days after service of process has been perfected, consider serving a demand to inspect the vehicle 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 investigation of a collision should include potential sources of video, e.g., nearby security systems, GoPro footage would be hard to beat to demonstrate the vehicle's movement, and whether the rider maintained a straight line. Such camera systems are not inexpensive, however, and in most cases will not be available.

Fitbit produces a range of watches, called trackers. The model I've been using lately has a GPS feature, which can record a shocking level of detail about my every move. That data can be uploaded and analyzed. Strava is an online service quite popular among cyclists, who upload stored data from such trackers, share and compare with others. Strava is compatible with no less than 20 different GPS devices. Map My Ride is another such service. If this type of data 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.

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 swerve into a passing vehicle is conceivable. Over 15 miles per hour, a bicycle becomes incredibly stable, and the likelihood of a swerve more remote.

Collisions with lone cyclists

In a vehicle-overtaking-a-lone-cyclist collision, it will be important to get a clear understanding of what the cyclist was doing just before impact, and at what speed. Take care not to overlook the basics during the initial consultation. Was the cyclist wearing a helmet? Using headphones or earbuds? Carrying something in one or both hands? Riding no-handed? Changing or adjusting clothing?

If at 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 care. A long gap between gutter and pavement may be cause for cyclists with skinny tires to move left to avoid it. In hot weather, crack sealer can become soft, 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, 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's front wheel perpendicular, look for a mark or dent on the frame's downtube from the front brake, or lateral scraping damage to the front tire and rim. The wheel may now resemble a pretzel. If instead you discover bilateral dents in the rim bulging the braking surface, and perhaps twin slits cut through the inner tube, those would be consistent with riding into a hard object on the ground, which could also have led to a similar fall.

Collisions involving group rides

When a training group is struck by a passing motorist, the consequences can be disastrous. Photos taken after the fatal crash in Kalamazoo on June 7 are a heart-breaking reminder of the risk, and how vulnerable cyclists are against a vehicle.⁵ In investigating such an incident, it will be essential to understand what the group was doing and how it was configured just before impact. Some group rides are just that, a group of cyclists riding together to socialize and exercise. Others will have a specific training purpose. Regardless, few juries would be overly sympathetic to a



large group of cyclists taking over the lane in an overtaking case, making CVC section 21760 all that much more helpful in framing the narrative as the driver's violation of a simple rule and needlessly endangering the cyclist.

Where a group is out training for competition, primary assumption of the risk may be an issue to consider. In *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, the court held that an organized, long-distance, group bicycle ride is a sporting activity to which assumption of the risk applies. (*Id.* at 1221.) *Moser* arose out of a collision between two riders participating in the annual 200-mile non-competitive Death Ride. One rider swerved into another as a vehicle appeared to be overtaking. The Court was careful to express no opinion as to other forms of recreational riding. (*Id.* at 1221, FN 4.) The Court was also careful to note that there are traffic-related risks that might not be considered inherent in the activity, such as those involving automobile negligence. (*Id.* at 1223, FN 6.)

Again, for those who do not follow bicycle racing, a short description of what exactly riders on group rides are preparing for may be helpful in evaluating a potential case. Road racing is a team sport, often involving 200 riders. A favorite of mine was a 100-mile event held in Trenton, NJ, with long cobblestone sections which we covered in just three hours. This was part of a week-long lead-up to the US Professional Championship, and drew an outstanding international field.

In such races, the speed is sometimes slow and racers will bunch up, riding ten abreast. When the speed is very high, the group will stretch out and narrow to two abreast, or one. A strong team may organize at the front, and have one rider at a time do the hardest work in the lead

with teammates resting behind in a slipstream. In even intervals of 20 to 30 seconds, the front rider moves to one side and slowly slips back behind the team to rest, and the next rider in line maintains an even, high speed. One teammate will act as gatekeeper at the back, blocking the rest of the field to make sure competitors do not join or take advantage of the effort. As lead riders peel off one after another to the same side, this should become a rotation with one line of faster moving riders passing a line of slower moving riders just inches apart for maximum drafting advantage. While racing for a Dutch team, I learned how this sort of organized effort at the right time can split a large group in half, or worse, and improve the team's chance of success.

This rotating pace line is fundamental to team tactics, and often practiced during training rides. Not always at full speed, but as a format. Many weekly training rides have sections where the speed goes up, and riders fall into such a pace line. A pace line may also be used to set up a sprint by raising the speed leading up to a known point, with several riders contesting the sprint at full throttle. Sprinting is a game of timing and skill, takes a great deal of practice, and training rides may have many sprint points along the route. Skilled sprinters are able to swing quickly to one side to overtake a cyclist ahead. If a group of cyclists is struck, the specific activity the riders were engaged in at the moment of impact would be one area to investigate very carefully.

The Bay Area is home to the most diverse cycling community I've ever known. We are way ahead of the curve on green living, sustainable urban development, and promoting physical fitness. Infrastructure improvements are making

a positive difference, but take time. In the meantime, the justice system will be called on to protect cyclists. The auto overtaking cyclist collision will remain a problem for the foreseeable future, and the Three Feet for Safety Act provides a great tool to level the playing field for cyclists



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Endnotes:

¹ USA Cycling is cycling's domestic governing organization which issues such licenses, and is recognized by the International Olympic Committee and International Cycling Union. For its most recent Fact Sheet covering membership and a brief history of the organization, see <https://s3.amazonaws.com/USACWeb/forms/media/Fact-Sheet.pdf>.

² For a brief history of so-called mechanical doping, see <http://www.cyclingnews.com/features/mechanical-doping-a-brief-history/>

³ California Vehicle Code § 21760.

⁴ Note that CVC § 21760 applies to highways, defined under CVC § 360 as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Compare Vehicle Code § 21202 dealing with a cyclist's obligation to keep to the right and exceptions, discussed below. That section applies to roadways, more narrowly defined under CVC § 530 as "that portion of a highway improved, designed, or ordinarily used for vehicular travel." Oddly, CVC § 21760(d) limits inability to comply with subsection (c)'s three feet rule: "due to traffic or roadway conditions."

⁵ See <http://www.wsj.com/articles/five-bicycles-in-kalamazoo-1465945453>