

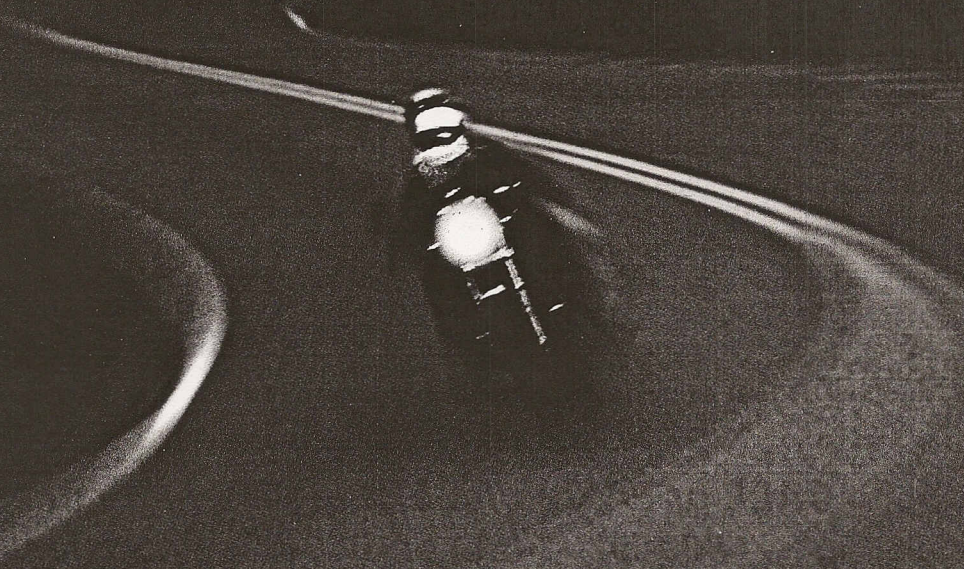
CONSUMER ATTORNEYS OF CALIFORNIA

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## Two-Wheeled Single Vehicle Collisions: Spotting the Viable Case





# Two-Wheeled Single Vehicle Collisions: Spotting the Viable Case – The Road to Recovery

By Shaana A. Rahman

Bicycle and motorcycle cases present their own unique set of challenges even under the best circumstances. Single vehicle collisions present themselves in many forms, including roadway defects such as road/shoulder deviations, grooved or gauged pavement, temporary paving leading to uneven roadway conditions, loose gravel, oil spills and poor roadway design. When you are faced with a single vehicle collision involving bicyclists or motorcyclists you will be taking on a case that will be contentious, expensive to litigate and expert intensive. However, if you choose your clients wisely, thoroughly investigate the cause of the collision prior to filing and focus your discovery, such cases are not only viable but have the potential for substantial recovery.

## The Right Client and the Right Case

Due to the complexity of these cases, an initial review of the injuries and damages is crucial, as cases involving minor injuries and minimal damages present serious recovery challenges. In a perfect world, your client will present as someone who is an experienced rider, wearing the appropriate protective gear, riding a vehicle that has all the requisite safety equipment. As your client's testimony on the particular details of the defect will be important, it will also be key to have a client who is articulate and familiar enough with riding such that they can describe what happened in significant detail.

Also important is your client's knowledge of the mechanics of the accident. For instance, it is important that your client be able to identify the particular roadway condition that caused either the initial loss of control or the accident itself. If the rider encountered an uneven pavement

situation, it is crucial that your client be able to describe the particular sensations experienced, i.e. front wheel wobble, or a loss of traction, such as from loose gravel. Oftentimes, clients cannot adequately describe the defect or roadway condition. In these circumstances, it is often helpful to take the client to the scene (if the condition has not been repaired) and go through the mechanics of the accident, using roadway markers or other identifying features of the roadway to aid the client's memory.

These cases also require a substantial amount of pre-litigation discovery. In addition to inspecting the scene, it is important to discover whether any prior accidents of a similar nature occurred at the location. This can be done by sending a request to the CHP for all SWITRS and TASAS reports and by utilizing Freedom of Information Act requests, Sunshine Act requests or California Public Records Act requests pursuant to Government Code Section 6250 et seq.

## Potential Theories of Liability

Depending on the nature of the defect and the location of the roadway, there may be several potential defendants, including public entities, such as Caltrans, or the town, county or city in which the collision occurred, and private entities such as general contractors, their subcontractors and project managers. As in any case, know your facts before you start down the road. First, identify who owned, controlled and possessed the roadway at issue. Second, identify the defect. If there are multiple defects, determine if each on its own presented a hazard or whether it was the combination of the defects that created the hazard. Third, establish how the defect came into effect – who created it, how long it existed, whether there is a history



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of prior accidents. Finally, understand the mechanics of a bike or motorcycle accident. Retain an expert early on who can look at the physical evidence and help you establish if your motorcyclist or bicyclist client lost control from hitting a roadway deviation or got a pant leg caught in the chain mechanism.

## A. Premises Liability

If your case involves either a construction failure, a failure to maintain a roadway or an obstacle in the roadway, you may assert that the potential defendant failed to maintain the area in a reasonably safe condition. For defendants other than public entity defendants, a general premises liability analysis can be used. In order for plaintiff to prevail on a negligence cause of action, plaintiff must establish the following: (1) that the defendants owed plaintiff a legal duty; (2) that the defendants breached the duty; (3) that the breach was a proximate or legal cause of injuries suffered by the plaintiff; and (4) damages. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

Generally, there are two types of duty imposed by law. First, Civil Code § 1714(a) provides that everyone is responsible for injuries occasioned to another by their want of ordinary care or skill in the management of their property or person. (Civ. Code § 1714(a).)



Ordinary care is that degree of care which people of ordinarily prudent behaviors can reasonably be expected to exercise under the circumstances. In essence, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. (*Hilyar v. Union Ice Co.* (1955) 45 Cal.2d 30; *Marois v. Royal Investigation & Patrol, Inc.* (1984) 162 Cal.App.3d 193.)

In addition to this general duty to use ordinary care, an individual may have a duty to act affirmatively to warn or protect others or to control the conduct of others if a special relationship exists between the actor and either the person to be controlled or the person who needs

protection. (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799.) It is important to note that a duty of care may arise through statute, contract, the general character of the activity or the relationship between the parties. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.)

In determining whether a defendant owes a duty of care to the plaintiff, several factors must be considered, including, the foreseeability of harm to the injured party, the degree of certainty that the injured party suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant, the policy

of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty on the defendant to exercise care with its resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) The inquiry into foreseeability must not be based on whether the plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather on whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party. (*Ballard v. Uribe* (1986) 41 Cal.3d 564.)

To determine liability under a premises liability theory, the crucial elements are ownership, possession and control of the premises. (*Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715.) The person who owns, possesses or controls the premises may be responsible for any injuries arising from the condition of the premises. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358.)

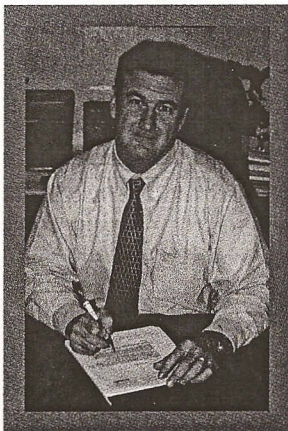
The court in *Rowland, supra*, stated that "[a] departure from [the] fundamental principle [of Civ. Code, § 1714] involves the balancing of a number of considerations." (*Rowland, supra*, 69 Cal.2d at pp. 112-113; see also, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666.) In determining the existence and scope of a duty, the *Rowland* factors must be evaluated.

The court in *Rowland* articulated a standard in which a possessor of land must use reasonable care in maintaining their property in order to prevent an unreasonable risk of harm. (*Rowland, supra*, 69 Cal.2d 108, 119.) As explained by the Court in *Rowland*:

The proper test applied to the liability of the possessor land (according to section 1714 of the Civil Code) is whether in the management of his property, he has acted as a reasonable man in view of the probability of injury to others. (*Id.* at 119.)

### 1. Contractual duties

When dealing with a defective roadway, obstacle case or failure to warn of danger issue, it is important to obtain all contracts,



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including those between the owner of the premises and the general contractor as well as all subcontractor agreements, and any contracts entered into with the architects of the project. Many contracts involving public roadways include clauses which require the general contractors, and their subcontractors, to perform all work in strict accordance with all specifications, plans and applicable city, county or state standards and ordinances. Such contracts often include particular design standards that must be followed, such as the Caltrans Highway Design Manual, the Greenbook or the WATCH manual. The contracts will give you some of the most important information in your case. The contracts are the instructions which were required to be followed. Once you know what was supposed to be done, you can fill in what was omitted and what just was not done.

Important in a case involving loose gravel or other debris creating a hazard or obstacle to two-wheeled vehicle traffic are the clauses in standard construction contracts identifying who is responsible for what type of roadway cleanup, both during the construction and after the construction is completed.

Contracts will also often address types of warning to be provided as well as the type of Traffic Control Plan that will be implemented. In cases involving ongoing or active construction projects, obtaining a copy of the Traffic Control Plan is important as it outlines not only what warnings are to be provided, to cars, motorcycles and bicycles, but also where the warnings are to be placed and how traffic is to be routed. Traffic Control Plans are generally divided into four areas which include: 1) the advance warning area; 2) the transition area; 3) the activity area; and 4) the termination area. The advance warning area warns the public of what to expect. In evaluating where the signs should be located, the contractor must evaluate how much time the public has to perceive and react to the condition ahead. With respect to the activity area, long-term work spaces are delineated by channelizing devices or shielded by barriers to exclude traffic and pedestrians. (See, Caltrans Manual, § 5-02.1.)

For instance, in a case involving repaving a two-laned roadway with a shoulder known to be used by bicyclists, a delay in

the project caused a condition by which bicycles traveled downhill for 500' on new pavement, which then abruptly ended, creating a two inch, grooved drop, complete with substantial loose gravel. While there was a warning at the top of the grade that there was construction in progress, there were no other signs of construction as the job had been effectively shut down. In such a circumstance, the element of warning to bicyclists was key to establishing negligence on the part of the contractor.

## **2. Failure to supervise / failure to warn**

More than one defendant means finger-pointing. In order to move past this, ascertain through discovery which entity was responsible for supervision of the project, traffic control, other subcontractors and for general safety. You may find that different defendants were each responsible for these areas, meaning there will be enough liability to go around. The failure to supervise a job site is a frequent source of maintenance or roadway hazard issues.

Although contractors are all required to attend safety meetings and weekly meetings, you will often uncover that the various heads of the project have failed to keep the troops informed on important elements of the project, including the timeline. This may mean that the day-to-day workers may dig a trench and secure it for use the next morning, when unbeknownst to them, the project manager determined that the trench would not be filled for several months until another phase of a project could be completed. It is these lapses in the communication chain which cause roadway defects. In addition, you will need to follow the paper trail to determine whether inspections of the roadway were routinely done, and if so, by whom and for what purpose. When inspections are required, that means that someone is physically supposed to look at the roadway and the status of the construction, providing you with the actual or constructive notice you need for your case.

A breakdown in the communication on a construction job can lead to a failure to use proper warnings to motorists, bicyclists and pedestrians regarding hazards. Failures in this regard combined with the actual defect create a strong basis for liability.

## **B. Dangerous Condition of Public Property**

Depending on the nature of the defect, you may also need to pursue claims against any public entities who owned, possessed or maintained the roadway, even if the public entity used the services of a private contractor to perform the road work which gave rise to the defect.

### **1. Bases for liability**

California Government Code § 835 provides that "a public entity is liable for injury caused by a dangerous condition of its 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, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and 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) [t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2<sup>1</sup> a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code § 835.)<sup>2</sup>

Government Code § 840.2 provides:

An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonable foreseeable risk of the kind of injury which was incurred, and that either:

(a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or

(b) The employee had the authority and it was his responsibility to take



adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.04 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Dangerous condition cases which are easily identified may include conditions such as an unsecured trench or large sinkhole which cannot be traversed by a two-wheeled vehicle, temporary pavement patches with abrupt transitions, and loose gravel, creating a serious hazard for two-wheeled vehicles. Other cases are more difficult to identify and may present as a loss of control around a curve, an impact to a temporary guardrail without an adequate guide line or a loss of control on a straightaway, caused by an oil slick or loose gravel.

In these cases, it is important to visit the scene as soon as possible and look at all the possible factors that created the danger, including visibility issues, curve angles, and debris in the roadway. Assess the scene from a bike or motorcyclist's perspective – not from a car's perspective as it is often a confluence of events that give rise to a danger.

## 2. Helpful cases

As discussed in *Hilts v. Solano Co.* (1968) 265 Cal.App.2d 161, a wrongful death action involving a curved, unmarked condition of a roadway, and a lack of a traffic control device, the conjunction of factors, including failure to provide signs or signals, the differences in elevation in the roadway and the method of striping at the intersection, constituted sufficient evidence of a dangerous condition, making the immunities found in Government Code §§ 830.4 and 830.8 inapplicable. (*Hilts*, 265 Cal.App.2d 161, 173-74.) The court in *Hilts* also found that the admission of prior accidents at the intersection without a showing of similarity was not error. (*Id.* at 168-169.)

Similarly in *Bakity v. Co. of Riverside* (1970) 12 Cal.App.3d 24, where a collision occurred when a driver failed to stop at a stop sign at an intersection where visibility of the driver was obstructed by

foliage, the court concluded that the jury could reasonably have found the existence of a dangerous condition at the intersection due to the visual obstruction and lack of a sign. (*Bakity*, 12 Cal.App.3d 24, 30.) The facts of the California Supreme Court's holding in the case of *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, are instructive. In *Bonanno*, the court addressed the issue of whether or not the location of a bus stop by a county transit agency may constitute a dangerous condition of public property under sections 830 and 835. In *Bonanno*, a bus stop was located near an intersection which resulted in residents in the neighborhood complaining to county officials that they were having difficulty crossing the roadway to get to and from the bus stop due to the vehicular traffic. In response, the county installed a crosswalk which did not resolve the issue of pedestrian safety as there was heavy commuter traffic, drivers were relatively inattentive and the speed limit was often disregarded. (*Bonanno*, 30 Cal.4th 139, 144.) Thirteen years after the crosswalk was installed, plaintiff was struck by a car while crossing to get to the bus stop. Prior to the collision there had been one prior motor vehicle versus pedestrian collision. (*Id.*) Plaintiff sued the transit authority, the county, who owned the roadway, and the driver.

In finding that the location of the bus stop was a dangerous condition, the court reiterated the well established law that "the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under §§ 830 and 835" and that "a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno*, 30 Cal.4th 139, 153.) In support of its holding, the *Bonanno* court relied on the prior opinions set forth in *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378 and *Branzel v. City of Concord* (1966) 247 Cal.App.2d 68.

Of note is the case of *Branzel v. City of Concord* (1966) 247 Cal.App.2d 68, involving a user of a city park who was electrocuted while flying a model plane that became caught in PG&E power lines,

which the city did not own. In holding that a dangerous condition of public property existed, the court opined that as it was foreseeable that users of the park would fly model airplanes within the park and that the city had knowledge that the park was in close proximity to the power lines, the accident was reasonably foreseeable. (*Branzel* 247 Cal.App.2d 68, 73-76.) In so holding, the court determined that a dangerous condition of public property determination could be predicated on dangers created by adjacent property or conditions, not owned or maintained by the public entity. (*Id.* at 73-74.) What *Branzel* suggests is that we look beyond the plain roadway and identify other roadway features and features of the adjacent property to establish a dangerous condition.

## 3. Design immunity

When pursuing cases involving roadway design, you will face the public entity's favored defense of design immunity. To meet the initial burden required to effectively assert the design immunity defense, a public entity must prove three elements: 1) a causal relationship between the plan and the accident; 2) discretionary approval of the plan prior to construction; and 3) substantial evidence supporting the reasonableness of the design. (Gov. Code § 830.6; *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 88-89; *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, 748.) With respect to the first element, it has long been held that "design immunity does not immunize decisions which were not made." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326.) Thus, the public entity has the burden of establishing that at the time the design was approved, the specific conditions which caused the injury were contemplated and part of the approved design. Thus, if you can assert that a combination of factors created the danger, it is more difficult for the public entity to prove that all facets of the design were contemplated and approved.

Moreover, design immunity requires the public entity to establish "an actual informed exercise of discretion" occurred. (*Levin v. State of California* (1983) 146 Cal.App.3d 410, 418.) The Court in *Cameron v. State of California*



(1972) 7 Cal.3d 318, held that the defense of design immunity was not applicable as the State failed to prove that the superelevation of the roadway was the result of or conformed to a design approved by the public entity as the plan produced in evidence did not show the actual superelevation of the roadway. (*Cameron* (1972) 7 Cal.3d 318, 326.)

Of course, be mindful that Section 830.6 does not immunize a public entity

from a claim of general negligence, particularly if that negligence is a concurrent cause of the damages sought. (*Flournoy v. California* (1969) 275 Cal.App.2d 806 at 814.) Although a government entity may have immunity for such actions as failing to provide a sign, signal or marking device, Section 830.8 dispenses with such immunity where such a device was "necessary to warn of a dangerous condition." (Gov. Code

§ 830.8.) It has long been held that where a public entity is aware of a dangerous condition, yet fails to warn of the impending danger, a separate cause of action for failure to warn exists and the design immunity defense is inapplicable. (*Bunker v. City of Glendale* (1980) 111 Cal.App.3d 325; *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82, 91-92.)

It is axiomatic that design immunity does not run in perpetuity. (*Baldwin v. State of California* (1972) 6 Cal.3d 424, 434.) Design immunity can be extinguished by evidence that the plan or design "under changed physical conditions has produced a dangerous condition"; there was notice of the dangerous condition and the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work; or if unable to timely remedy the condition, the entity did not reasonably attempt to provide adequate warnings. (*Baldwin*, 6 Cal.3d 424, 439; *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63.) When plaintiff puts forth evidence of such changed conditions, the burden shifts to the public entity to establish that the immunity is still intact.

### Conclusion

Two-wheeled vehicle collision cases should be approached cautiously with a focus on the particular hazards that present themselves to such vehicles. Many roadway defects go undetected as they present no hazard to cars or trucks but these same issues can and do create actual obstacles to roadway travel for those on two-wheels. ■

<sup>1</sup> Section 835.2 defines constructive notice as such condition which existed for such a period of time which was of such an obvious nature that the public entity should have discovered the condition and its dangerous condition. Admissible evidence on the issue of constructive notice includes whether the condition would have been discovered by a reasonably adequate inspection system. (See Gov. Code § 835.2.)

<sup>2</sup> The definition of "property of a public entity" and "public property" pursuant to Government Code § 830(c) is "real or personal property owned or controlled by the public entity." (Gov. Code § 830(c), emphasis added.)

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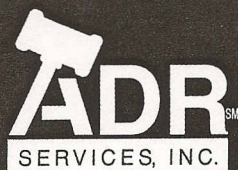


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