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Winning bicycle-crash cases that have adverse traffic-collision reports

FIGHTING BACK AGAINST BOGUS FINDINGS OF FAULT AGAINST CYCLISTS

We are often contacted by cyclists injured in a crash due to a driver's negligence, who are nonetheless blamed for the crash in the traffic collision report ("TCR"). Whether it is due to lack of training for police officers in bicycle-related traffic collisions, insufficient time for investigation, or bias against cyclists, TCRs that blame cyclists who were not truly (or solely) at fault are unfortunately common.

Most attorneys who deal with traffic collision cases know that TCRs are generally not admissible in civil personal injury trials per California Vehicle Code section 20013. Still, an adverse TCR provides a strong incentive for many attorneys to turn down a case. This is understandable, as an adverse TCR may result in substantially more work, since insurance companies and defense firms are often emboldened to fight especially hard when the TCR is in their favor, regardless of whether the actual *facts* are in their favor.

This article shares some of the many experiences and successes we have had involving bicycle crash cases with adverse TCRs. While we do not intend to suggest that adverse TCRs should be completely disregarded when considering whether to take a case, we hope this article will provide some ideas for how to win bicycle crash cases with adverse TCRs and encourage more attorneys to fight back against bogus findings of fault against cyclists.

Attacking incorrect conclusions in TCRs

Physically impossible facts

The facts presented in an adverse TCR should be carefully examined. It is not uncommon for the narrative told by

the driver, and accepted by the officer as true, to fall apart under scrutiny. In one such case, a cyclist had been placed at fault for traveling at an excessive speed, and we were able to demonstrate that it was not *physically possible* for that cyclist to have been traveling at an excessive speed in the circumstances.

The cyclist contacted our firm, distraught, after being struck by a vehicle making a right turn through the bike lane into a parking lot. The car had failed to yield to the cyclist, but the cyclist was nonetheless blamed for traveling at an excessive speed. His arm was broken in the crash, at the very beginning of an important summer internship. To make matters worse, the insurance company denied his claim based on the TCR.

The client had been riding a single-speed beach cruiser bike with a front chain ring of 44t and a rear chain ring of 18t – a gear ratio of 2.44. This means that for every rotation of the pedals, the wheel rotates 2.44 times. Professional cyclists can maintain a cadence of 100 rpm, but average cyclists will maintain a cadence closer to 60 rpm, going up to 80 rpm for shorter bursts. On a bike with 26-inch wheels and a gear ratio of 2.44, 60 rpm achieves a speed of 10.4 mph and 80 rpm achieves a speed of 13.9 mph. When traveling on a flat road (with a speed limit of 35 mph), our client would have needed a truly super-human level of fitness to be traveling at a speed that could reasonably be considered excessive.

When presented with this calculation, the insurer relented on the validity of the TCR and was willing to negotiate a settlement. No insurance company wants to be the carrier who later loses a bad faith claim because they based their

denial on a scientific impossibility. Where the size of the case makes it possible, it can be helpful to have an expert demonstrate these calculations. Otherwise, BikeCalc.com provides a helpful tool in calculating bicycle physics.

In another case, the description of the collision in the TCR simply made no sense to us and appeared to be physically impossible. The description seemed to suggest that the car had moved sideways, and the bicycle somehow moved backwards. The case eventually went to trial after the only offer the insurance company made was a 998 offer for \$0. At trial, we brought a tiny model car and bicycle. During cross-examination of the driver, we handed the models to the driver and asked her to demonstrate for the jury how the collision had occurred. She could not do it. On cross-examination of the passenger, we did the same thing, and the passenger could not do it either. The jury found the driver had been negligent.

Incorrect legal conclusions

Police officers are not lawyers and are not trained in the nuances of negligence law. Legal conclusions arrived at by officers in TCRs, therefore, should be carefully scrutinized.

A cyclist once contacted our firm after being struck by a car while she was riding in a crosswalk. The TCR put her at fault based entirely on a city law prohibiting adult cyclists from riding on sidewalks or in crosswalks. The cyclist had been turned down by several other firms before we took the case.

Further examination of the facts, however, revealed that the legal conclusion reached by the officer was incorrect. The cyclist had approached a large intersection

and activated the crossing signal. She had successfully crossed to the median of a four-lane road. As she continued across the remaining two lanes, the car in the #1 lane stopped for her, but the car in the #2 lane did not stop, despite a flashing cross signal. Even though the law requires drivers to yield to those in crosswalks, the police officer placed the cyclist at fault, because of the city law prohibiting cyclists from riding in crosswalks.

Officers will frequently determine that simply because a cyclist violated a law, they are at fault for a collision. This is, of course, a gross misunderstanding of the doctrine of negligence per se. Violating a law, by itself, does not demonstrate negligence. Negligence per se has the further requirement that the harm caused by the violation of the law be the same *type* of harm that the law was intended to protect against. Laws against riding in crosswalks and sidewalks are clearly intended to protect pedestrians from faster-moving cyclists, not to protect cars from colliding with slow-moving bicycles. Thus, the conclusion that riding in the crosswalk constituted negligence per se was incorrect. Once the alleged vehicle code violation was removed from the equation, there was nothing that the insurance company could point to that the cyclist had done wrong.

In cases of a legally inaccurate adverse TCR, a lawsuit is highly likely. Like police officers, insurance adjusters are not well-versed in legal nuance and will see a citation or violation as proof the cyclist is at fault. Give that same TCR to a defense attorney, who would have to somehow try and make a similar argument in front of a jury, and a reasonable conversation is much more likely.

TCRs reflecting bias

Cyclists seem to frequently be blamed for collisions simply based upon the perception that bicycle riders are reckless or inattentive. This tendency to blame cyclists can be heightened when the cyclist is a person of color or otherwise marginalized, such as a non-native English speaker or person experiencing homelessness.

In one instance, a client called us after a hit-and-run collision. He had been riding on Valencia Street in San Francisco, one of the city's most heavily trafficked bike routes. The lights on Valencia are timed for travel at 13mph, to facilitate the flow of bicycles. The client proceeded into an intersection on a fresh green light and was struck by a driver running a red light from a side street in an apparent attempt to beat the light. The driver fled, but fortunately onlookers recorded the license plate, and the driver was tracked down and arrested.

Despite arresting the driver for a hit-and-run, the police had the audacity to blame the cyclist in the TCR. This finding of fault was based on the cyclist's statement that he was applying his brakes as he approached the intersection. The officer interpreted this to mean that the cyclist did not actually have a green light. When the cyclist first provided us with the TCR and explained the situation over the phone, we were confused as to why the cyclist was being treated so unfairly. The client then added that he was a young black male.

While we cannot prove that the police acted with either implicit or intentional bias, this is always a concern and must be considered when dealing with insurers and law enforcement. By acknowledging structural inequality in the demand letter and in conversations with the insurer or defense counsel, you can get in front of these issues, highlighting the facts and evidence of the case rather than the inadmissible conclusions of police officers.

Winning anyway

It is not always possible to convince an insurance company or defense attorney that an adverse TCR is incorrect and should be disregarded, but that does not mean that you cannot still win the case.

Beating an adverse TCR by investigating the driver

A client came to us who, according to the driver and the TCR, had run a red light while cycling at night without his

lights on. Our client had a brain injury and could not remember anything from the evening of the crash, but he was not in the habit of running red lights on his bicycle and did not believe the driver's story. We could not find any independent witnesses or any other evidence to contradict the TCR's conclusions, so we turned our attention to investigating the background of the driver. As it turned out, the teenage driver had a provisional license that required him to be accompanied by an adult. During the incident, he only had other minors in the car. Once confronted with this fact, the insurance company decided it did not want to fight and settled for the policy limits.

Attacking the driver's failure to keep a proper lookout

We have seen many adverse TCRs in which the obvious conclusion should have been that the driver's failure to keep a proper lookout for cyclists was the primary cause of the collision. Yet, with circular logic and tortured interpretation of various provisions of the California Vehicle Code, the officers writing these reports somehow found ways to blame the cyclist involved. In some cases, the cyclist admittedly did something wrong, but the TCR completely ignores the issue of whether the driver *also* failed to keep a proper lookout.

A client came to us after her husband had, while under the influence of narcotics, attempted to ride across a four-lane road. Shortly after entering the road, he was hit by a car and killed. The TCR blamed the collision entirely on the cyclist, end of story, even though in the driver's statement to police she claimed she had not seen the cyclist until *after* the crash – which is always a good indication that the driver may not have been keeping a proper lookout.

We took the deposition of the only other witness, a man driving a car a few car lengths behind the car that hit the cyclist. The insurance defense attorney came into the deposition confident that this witness would destroy our case.

Indeed, the witness was adamantly against the cyclist, stating repeatedly that there was nothing the driver could have done to avoid the crash. However, we got the witness to admit that he had been keeping an eye on the cyclist for up to a dozen seconds prior to the crash because the cyclist “looked like he was going to do something crazy and enter the road.” We also got the witness to admit that while his view of the cyclist was obstructed by the car that hit the cyclist, there were no other cars on the road, and no visual obstructions between the other driver and the cyclist.

When we asked the witness if he could think of any possible reason why the other driver, who was *in front of* this witness, had *no visual obstructions*, and was *significantly closer* to the cyclist, had not seen the cyclist *at all*, he was forced to admit that the only explanation he could think of was that she was not looking and/or was distracted. Less than a week after that deposition, the insurance company completely reversed its position and paid the policy limits.

Polarizing the adverse TCR case

We are big fans of Rick Friedman’s *Polarizing the Case* techniques and have found the strategy especially effective and applicable in our adverse TCR cases –

indeed, insurance defense lawyers tend to polarize these cases almost completely on their own. The jury, who never sees the TCR, is perplexed by the defense attorney treating the injured cyclist so poorly, when the actual facts are on the side of the cyclist. This, of course can lead to especially large reactionary verdicts in the plaintiff’s favor.

Trying adverse TCR cases

While it is becoming harder and harder to get trial experience, especially for new attorneys, certain adverse TCR cases can be great opportunities for new associates to get trial experience while securing justice for a client. In our experience, an adverse TCR often causes the insurer to get tunnel vision and fail to consider all of the facts that would be presented at trial, increasing the likelihood of a plaintiff’s verdict. In addition, clients with an adverse TCR are often more mentally prepared for a fight than the average client, and often have a strong urge to seek justice (to remedy not only the injuries from the financial aspect of the verdict, but also to rectify the insult and blame from the verdict’s declarative aspect). This win-win, for the client and attorney, of trying even smaller adverse-TCR cases can be one more reason to consider taking these cases on.

Conclusion

Taking a chance on bicycle crash cases with adverse TCRs helps to give cyclists a fair shake but can also be great for the attorney. As we have shared in this article, an adverse TCR certainly is not an impossible barrier to a great settlement or verdict.

Kyle Smith has been riding a bike since 1990 and practicing law since 2013. After starting out as a defense attorney, he joined Bay Area Bicycle Law in 2017 in order to focus his career on standing up for the cycling community. In addition to representing victims of collisions he specializes in bicycle products liability cases.

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