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PERSPECTIVE

Establishing comparative fault in vehicle vs scooter claims

By Annette Mijanovic and Philip McDermott

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Scooter riders in San Diego, on July 20, 2019.

It can happen in a flash. One moment you are driving along, winding through the crowded streets of your busy downtown metropolis. The next minute you are slamming on your brakes and swerving into oncoming traffic to avoid taking out the motorized scooter that just zipped across your lane of travel. Whether on the roadway, in bike lanes, or even on the sidewalk, we have all had close calls with motorized scooters now made ubiquitously available by companies such as Bird and Lime.

But what happens when there is more than just a near miss? How do you mount a defense against those times when a vehicle (larger and capable of producing more injury) and a motorized scooter collide?

One strategy is to use the negligence per se doctrine to place comparative fault on the operator of a motorized scooter who commits a statutory violation. The California Vehicle Code, in Division 11, Chapter 1, dedicates a full Article to the "Operation of Motorized Scooters," which imposes certain requirements on motorized scooters and their operators. Vehicle Code Section 21220, et seq.

Subject to certain exceptions, motorized scooter operators must comply with the "rules of the road" concerning turning and rights of way. Vehicle Code Section 21228. For example, one little known requirement imposed on motorized scooter operators is that they must, in order to make a left turn, dismount the scooter at the right-hand curb, and cross the roadway on foot. Vehicle Code Section 21228(b).

The doctrine of negligence per se, as a brief refresher, creates a rebuttable presumption that the violation of a statute is a failure to act with "due care," i.e., that the violator's conduct fell below the applicable standard of care. Of import, this presumption only applies where the statute violated is designed to protect the victim and that the class of persons intended to be protected by the statute is the one so injured. Evid. Code Section 669 (a)(3-4).

The application of the doctrine of negligence per se to establish a comparative fault defense is well established in California law, and has been applied in the context of the California motorized vehicle requirements. *See Flury v. Beeskau*, 139 Cal. App. 398 (1934) (holding that contributory negligence of bicyclist in failing to comply with rules of road was question for jury to determine); *Swaner v. City of Santa Monica*, 150 Cal. App. 3d 789, 798-99 (1984) (holding that negligence per se of plaintiff could defeat public entity liability if shown that property, if used with due care, did not present dangerous condition.)

Thus, determination of whether negligence per se may apply in a given case involving a motorized scooter requires statutory interpretation. *Bologna v. City and County of San Francisco*, 192 Cal. App. 4th 429, 434 (2011). The statutory history shows that the initial purpose for specific regulations for motorized scooters in the Vehicle Code was to address confusion regarding the legal status of motorized scooters. CA B. An., S.B. 441 Sen., 8/31/1999. Police were issuing tickets to operators believing they were only allowed to be driven on private roads at that time. *Id.*

It was in 2000, long before the proliferation of consumer motorized scooters for rent, that the operation requirements for motorized scooters were put into place. A more recent amendment to one of these statutes, Vehicle Code Section 21235, reported during the legislative process that the justification for changes in the law was related to protection of the operators, and state and local governments. CA B. An., A.B. 2989 Sen., 8/16/2018 ("In order to provide clarity for riders, law enforcement, and city governments, the author contends that it is essential to have a clear definition for this new technology, with regulations similar to comparable vehicle types.").

The Vehicle Code's provisions as a whole apply to motorized scooters, except those provisions that, by their very nature, can have no application. Vehicle Code Section 21221. California Vehicle Code Section 21070 states that a driver who violates any provision of Division 11 of the Vehicle Code, which is applicable to motorized scooters, that proximately causes bodily injury or great bodily injury to another person is punishable as an infraction.

The legislative history for this statute provides that it was intended to curb the vast proportion of injuries caused by failures to comply with the right of way and other related "rules of the road." CA B. An., S.B. 1021 Sen., 8/14/2006 ("… of the 310,689 people who were hurt in vehicle accidents in 2002 … more than half of these injuries, 153,578, resulted from right-of-way violations.").

In short, then, the legislative history related to the motorized scooter operation requirements reveal that (1) the rules of the road are intended to protect and prevent injuries to the victims of unsafe operation of a vehicle; (2) a motorized scooter is indisputably subject to the rules of the road; and (3) the purpose of regulating the use of motorized scooters is intended to protect the operators of motorized scooters themselves.

Taking this in conjunction with the doctrine of negligence per se, the motorized scooter legislation appears to be intended to protect those injured in the operation of motorized scooters. This includes protection of the operators of motorized scooters themselves, who may be injured by other motorists on the road, but which may be caused by their own failure to follow the substantial regulatory law in place since 2000.

If your client one day finds herself in a situation where she has clipped or otherwise struck a motorized scooter due to an issue involving the "rules of the road," or under any other ground provided by the Vehicle Code, immediate response to the scene and investigation of the scooter and its operator is of paramount importance, as is familiarity with all requirements applicable to motorized scooter operation. ■

Annette Mijanovic *is a partner in Haight Brown & Bonesteel LLP's Los Angeles office. She is a member of the Business Solutions, Products Liability and Transportation Law Practice Groups.*

Philip McDermott *is an associate in Haight Brown & Bonesteel LLP's Los Angeles office. He is a member of the General Liability and Transportation Law Practice Groups.*