# Walk like it's safe

## *"They were not paying attention." Using CACI 411 and a pedestrian's reasonable expectation of safety*

**By Jeremy Cloyd**
*The Veen Firm, P.C.*

Thousands of pedestrians are injured or killed each year by motorists or dangerous conditions of property. When injured walkers, joggers or hikers seek compensation for their injuries, they often face the defense that they simply should have been paying more attention. The pedestrian is faulted for not anticipating the negligence of others.

But should a pedestrian have a legal obligation to anticipate that a motorist will violate the law and, for example, exceed safe speeds? Or should the pedestrian have a legal right to assume that the car up the street will go a reasonable speed and therefore provide sufficient time to cross the street? The answer to such questions is often unclear – or clearly mixed.

Juries should be instructed, through CACI 411, that pedestrians are entitled to rely on others to provide them with safe access. CACI 411, entitled "Reliance on Good Conduct of Others" provides:

> Every person has a right to expect that every other person will use reasonable care [and will not violate the law], unless he or she knows or should know, that the other person will not use reasonable care [or will violate the law].

There are two aspects to this instruction: (1) the plaintiff's right to expect lawful conduct; and (2) what plaintiff should or actually did expect. This article suggests that by using CACI 411 to emphasize the reasonableness of a pedestrian's expectation of safety, the plaintiff's attorney can minimize the comparative fault defense. Framing the comparative in this manner can even set the defense up for summary dismissal before trial.

### Pedestrians have rights

Pedestrians have a right to expect safe access and travel. California Vehicle Code section 21949(a) states: "The Legislature hereby finds and declares that it is the policy of the State of California that safe and convenient pedestrian travel and access, whether by foot, wheelchair, walker, or stroller, be provided to the residents of the state." This public policy dovetails with CACI 411's principle that a pedestrian has a right to expect that others will act reasonably and follow the law.

Prior case law supports apportioning greater fault to those who create the harm to pedestrians rather than the pedestrians who assume they will be provided safe access and travel.

### Right to expect good conduct

The current authority for CACI 411 is *Celli v. Sports Car Club, Inc.* (1972) 29 Cal.App.3d 511, 16-17, where spectators at an auto race obtained "pit passes" allowing them to watch the race with only a single row of cars parked between them and the racers. A race car lost control, came to rest in the pit area, and injured plaintiffs. Defendants requested and argued that the court give a jury instruction on contributory negligence because the plaintiffs should have recognized that the pit was not entirely safe for spectators. (*Id.* at 523.)

The Court of Appeal disagreed, in part, because "every person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable ground to think otherwise; it is not negligence to assume that he is not exposed to danger

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

which could come to him only from violation of law or duty by such other person." (*Ibid.*) The plaintiffs were entitled to presume that the race operators and sponsors had conducted a critical examination of the pit's suitability for spectators before selling tickets for that purpose. (*Ibid*.)

In *Tannyhill v. Pacific Motor Transport Co.* (1964) 227 Cal.App.2d 512, 518, a man was standing on the side of the freeway to provide assistance to a stranded driver when defendant's vehicle went off the traveled way, struck and killed him. Defendant argued that the decedent was negligent for knowingly standing in a dangerous area. But the Court held there could be no contributory negligence because "there is no reasonable basis for [decedent] to even suspect that a vehicle would come off the traveled portion of the highway and run into him and the car alongside of which he was standing." (*Id.* at 519.)

Both *Celli* and *Tannyhill* involved plaintiffs exposing themselves to arguably dangerous situations. The defense in pedestrian injury cases is often based upon this idea that the plaintiff voluntarily exposed herself to the dangerous situation. These cases stand for the proposition that a generalized knowledge that people sometimes break the law or fail to use due care does not relieve a specific defendant from the personal duty to follow the law and use reasonable care.

### No obligation for pedestrian to look both ways

Everyone has heard and repeated to their children the admonition to look both ways before crossing the street. But the principle of CACI 411 was applied in one case to relieve a pedestrian from any finding of negligence where she failed to do just that. In *Medlin v. Spazier* (1913) 23 Cal.App. 242, 244, the plaintiff alighted from a street car into the path of defendant motorist who struck her. Defendant argued that plaintiff negligently failed to look for traffic. Plaintiff argued that, at the time of the collision, the motorist was within four feet of the street car in violation of a city ordinance requiring motorists to keep that distance from street cars.

The *Medlin* court found plaintiff to be free of negligence *as a matter of law* even though she could have done more to protect herself: "Plaintiff had the right to assume that while within such zone she occupied a position of safety, and in the absence of any warning or reason to believe that defendant would violate the city ordinance, she was not negligent in failing to look up and down the street when she alighted from the car…" (*Id.* at 245) (emphasis added). The court agreed that the jury could not even consider contributory negligence because "want of care cannot be predicated upon the fact that plaintiff did not assume a violation of law on the part of defendant." (*Id.* at 247.)

Prior to abolishment of California's "all or nothing" contributory negligence scheme, many California appellate decisions tested the boundaries of when a plaintiff's conduct could be considered negligence with interesting or somewhat surprising results like that of *Medlin*. Courts today are probably less inclined to make such a ruling for a number of reasons. But *Medlin* has not been overruled and it applies a current rule of law. Even if a trial or appellate court might not follow *Medlin* it provides an interesting example of how CACI 411 might be argued factually in a difficult pedestrian liability case.

### The reasonableness of the pedestrian's expectations

The second aspect of CACI 411 is that the plaintiff's reliance on another's good conduct must be reasonable. Although the pedestrian has a right to expect safety, the defendant may still argue that the plaintiff knew or should have known that defendant would act unsafely. In a dangerous condition of a public property case, the argument might be that the defect in the sidewalk was obvious and should have been observed by the plaintiff before she tripped and fell.

By confronting defendants with the reasonableness of the pedestrian's expectation of safety, the plaintiff's attorney should be able to obtain admissions undermining this affirmative defense. For example, California Vehicle Code section 21952 provides that "The driver of any motor vehicle, prior to driving over or upon any sidewalk, shall yield the right-of-way to any pedestrian approaching thereon." Ask the driver that violates this statute about pedestrian expectations. "Should people expect you to drive unsafely? Would it be fair for the pedestrian to expect you to follow this law? Did you give the plaintiff reason to believe you were going to violate this law?" Most witnesses and defendants will answer favorably to these questions because they consider themselves reasonable and safe and want others to view them that way.

Confronting the defendant with the reasonableness of the pedestrian's expectations also works well for injuries arising from dangerous conditions of property. Ask the person who was responsible for maintaining a dangerous sidewalk: "Is it your job to maintain this sidewalk and keep it safe for public travel? Should people expect you to do the best job possible maintaining this sidewalk?" Again, most people want to be considered reliable and will answer affirmatively to these questions.

Most plaintiff attorneys use statutes, regulations, company safety manuals, and industry best practices to show that the defendant was negligent because he or she violated a safety rule. These same sources can be used in the manner described above to establish a pedestrian's reasonable expectation for safe access and travel and thus minimize the comparative fault argument.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**

### Opportunities to eliminate comparative fault defense

Developing your facts and case theory within the context of the pedestrian's expectation of safety can set the comparative fault defense up for summary dismissal. Defendants have the burden of proof on affirmative defenses such as comparative fault. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6.)

Defendants must prove both that (1) the plaintiff's conduct was unreasonable; and (2) that the unreasonable conduct was a legal cause of the plaintiff's injuries. (See *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 809.) If there are no facts supporting the theory that a pedestrian's reliance on the good conduct of others was unreasonable, then the comparative fault defense should not be presented to the jury. (See CACI 411.)

When and whether to raise the argument that defendant has no evidence to move forward on the comparative fault defense is a judgment call. Raising the issue on a motion for summary adjudication pursuant to Code of Civil Procedure section 437c(f)(1) may needlessly alert defense counsel to focus more attention on the issue. One could also object to defendant's request for a comparative fault jury instruction because a party must present "[s]ome evidence of a substantial character" to justify a jury instruction on an issue. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548.) Also consider a motion for partial directed verdict on the issue of liability pursuant to Code of Civil Procedure section 630(b). (See e.g., *Newing v. Cheatham* (1975) 15 Cal.3d 351, 364-66.) Even if the comparative fault defense goes to the jury, plaintiff's counsel may still argue that CACI 411 precludes any apportionment of fault to the pedestrian plaintiff.

### Conclusion

A jury's apportionment of fault in a pedestrian injury case is a policy judgment about the degree to which pedestrians need to look out for harm as opposed to the need to avoid the risk of harm in the first instance. Using CACI 411 to highlight the reasonableness of the pedestrian's expectation of safety can help obtain a judgment in favor of the pedestrian.

Cloyd

*Jeremy Cloyd is an attorney on the Label Trial Team at* The Veen Firm, P.C. *He litigates injury cases involving negligence, wrongful death, products liability and industrial accidents. For more information on this article, please e-mail j.cloyd@veenfirm.com or visit our Web site at www.veenfirm.com.*

### Endnote

[1] *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 eliminated much of the impetus for appellate review of lower court decisions regarding contributory negligence but it neither addressed nor undermined the limitation on contributory negligence set forth in the current version of CACI 411.

Copyright © 2014 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**