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Settling the "dangerous condition of public property" claim

How to maximize your chance of resolution during the first mediation session

By Fred Carr

Many potential claimants are under the mistaken belief that governmental entities are "strictly liable" for accidents that happen on their sidewalks and roadways. While the Government Claims Act,[1] also known as the "Tort Claims Act" ("TCA" or the "Act") clearly provides a cause of action for injuries and damages sustained as a result of dangerous conditions of public property, actually recovering for those damages is not as easy as one might think!

This article is far too abbreviated to address all of the intricacies of successfully litigating and defending such claims, however, it attempts to educate counsel as to how to best prepare their cases for mediation so as to maximize the chances of resolving the dispute during the first session and therefore avoiding additional mediation and litigation costs.

Establishing liability

Surprisingly, plaintiffs' counsel commonly assert public liability claims based upon common law principles such as the status of the plaintiff as an "invitee" and/or "licensee." To plaintiffs' counsel's chagrin, defense counsel properly submit that the Act abolishes all public-entity common-law tort liability and a finding of public-entity liability must strictly comply with the requirements of the TCA as well as fully rebut the statutory affirmative defenses (of which there are many) found within the Act.

Government Code section 835 clearly establishes the basis for liability and sets forth the required elements of pleading such a claim:

> 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 that 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) the public entity had actual or constructive knowledge of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Let's look at that code section a little more closely.

Dangerous condition

A "dangerous condition" is defined as a "condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable

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that it will be used."[2] Case law has further expanded the definition to include: conditions that are physically flawed, or damaged, or deteriorated to a degree that makes them *potentially* dangerous to reasonably foreseeable users exercising due care; conditions that are dangerous because of design or location, the interrelationship of their structural or natural features or the presence of latent hazards associated with normal use; and a combination of the condition of the property and the negligent or criminal acts of others.

As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts.[3]

Well-supported claims should include evidence of: statutory code sections addressing required construction (design) elements; government agency written inspection and repair protocols; insufficient lighting; adverse weather conditions; other accidents in the same location; restricted view corridors (i.e., limited vision due to untrimmed trees and bushes etc.); surfaces with depressed areas accumulating water so that the depth of a pot hole or depression in the sidewalk cannot be reasonably determined; inability to avoid walking/driving through a defect due to surrounding circumstances such as parked cars, construction hoarding, etc.; and the existence of foreign materials such as trash or greasy/oily substances obscuring the dangerous condition.

As noted above, the property itself need not be damaged or in a deteriorated state. Rather, it may be dangerous as a result of its design (see § 830.6 design immunity discussion below) or how it is integrated with adjacent natural or structural features such as trees, water courses, buildings or signs, or the presence of latent hazards associated with its normal use. "These conditions can create a substantial risk of injury to foreseeable, careful users."[4] Even a brand new roadway may be considered "dangerous" if it has sharp curves and there is insufficient signage warning of the condition.[5]

Causation

Liberal pleading principals provide plaintiffs' counsel with the opportunity to allege several theories of liability based upon the same underlying operative facts. This is particularly true in connection

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with satisfying the causation element of a dangerous condition of public property case. "There may be two concurring proximate causes of an accident. Although usually set in operation by different actors, these separate concurring causes may be produced by a single defendant who is guilty of an affirmatively negligent act and a passively negligent act." Take for example, the case where the state constructed a bridge in a way that water from the stream below condensed on the bridge's surface and froze on cold days before the adjacent roadway froze, thereby creating a dangerous icy condition. The state had notice of the condition but did not post any warning signs. A motorist driving at a normal rate of speed lost control on the ice and was killed. In the ensuing action, the trial court sustained the defendant's motion for summary judgment based upon design immunity. On appeal, the court ruled that the plaintiffs could be denied recovery based on the state's active negligence as a result of the design immunity, but might still recover based upon the state's passive negligence for failing to warn of the danger.[6]

What's more, the governmental entity need not be the "sole cause" of the injury and damages. The entity may be liable for a dangerous condition even where a third-party tortfeasor is the primary or immediate cause, if some physical characteristic of the property exposed the plaintiff to an *increased* danger. That said, neither the third-party conduct alone, nor the dangerous condition alone, will result in public-entity liability, rather, the defect in the property must have some *causal* relationship to the conduct that results in injury to the plaintiff. More simply put, the property is not "dangerous" if it is safe when used with due care. Plaintiffs must establish "a physical deficiency in the property itself" that creates a substantial risk of injury when used with due care." [7]

As noted above, a public entity may be liable even where the immediate cause of injury is the negligent or criminal act of others "if some physical characteristic of the property exposes its users to *increased* danger." The evidence must establish a physical deficiency in the property itself, that creates a substantial risk of injury when used with due care." The textbook example of such a condition is the poorly lit staircase of a public parking structure creating the opportunity for third-party criminal behavior. While the criminal behavior may clearly be the proximate cause of the injury, the "dangerous condition" created by the dark hallway resulted in an *increased danger* of such activity and injury. Similar arguments arise out of a combination of negligent driving by a third-party coupled with a dangerous intersection or roadway.

Created by the public entity

While the negligent or wrongful act or omission of a public employee creating the dangerous condition may support liability under the TCA, such conduct need not be proven, as knowledge of the dangerous condition and sufficient time to remedy the same is itself evidence sufficient to support liability.[8]

Notice and sufficient time to remedy

A critical element of a properly asserted claim of dangerous condition of public property is "notice." The plaintiff has the difficult burden of proving that either the public agency responsible for maintaining the property had *actual notice* of the defect or that the defect existed for a sufficient period of time that the agency, exercising due care, *should have discovered* its existence.[9] Logically, "actual notice" is presumed if the public entity created the condition.[10]

When the dangerous condition is *not* created by the public entity, the plaintiff must prove *both* notice and sufficient time prior to the injury to remedy the defect. Failure to do so is fatal to the claim. While potholes in roadways and uneven sidewalks are among the most common conditions requiring sufficient notice to remedy, sufficient notice is often the most difficult element for plaintiffs to satisfy, and they must often rely upon circumstantial evidence.

The primary and indispensable element is a showing that an obvious condition existed for a sufficient period of time before the accident.[11] Constructive notice may be *imputed* if plaintiff can demonstrate that had public entity employees exercised due care by operating under an inspection system that was "reasonably adequate (considering the practicality and cost of inspection weighed against the likelihood and magnitude of the potential danger…), to inform the public entity whether the property was safe for the [intended] use or uses…."[12] This has become known as the "reasonable inspection test."

Well-supported claims and defenses often include documentary evidence prepared by the agency responsible for maintaining the property (such as a "Request for Action" utilized by the Department of Public Works or similar documents) indicating the date of first notice of the defect and a description of the same. Such documents actually recording first and subsequent notices of the defect, and repair dates if any, can provide persuasive evidence as to whether the agency had actual notice and/or sufficient time to remedy the condition. In adjudicating the claim, courts must consider the seriousness of the defect, its visibility to foreseeable users, the frequency with which the area is traveled, and the likelihood that a reasonable inspection would have revealed the defect in time to make the necessary repairs. Therefore in order to be well-prepared at mediation, counsel for both the plaintiff and defense should garner as much evidence in this regard as possible as success at mediation will require convincing the other side and the mediator of the strength of your case.

Affirmative defenses

Not only are public entities entitled to assert any defense available to private defendants in similar situations (such as comparative negligence, assumption of risk, and third-party negligence), the TCA includes no less than a dozen express affirmative defenses!

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Plaintiffs' counsel should be well aware of the "blunderbuss" affirmative defense created by section 835.4. "A public entity is not liable … if [it] establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission shall be determined by weighing the probability and gravity of potential injury … against the practicability and cost of taking alternative action." Given the limited financial resources available to public entities in recent years, plaintiffs' counsel should fully prepare for this affirmative defense to be pursued vigorously. Though arguably cursory, given the current financial climate a periodic visual inspection may satisfy defendant's burden on this issue.

"Open and obvious" and "trivial defect" defenses

Defense counsel invariably allege as an affirmative defense that the subject condition was so "open and obvious" that a reasonably prudent plaintiff should have seen the condition and avoided it, or, that the defect was so "trivial" that it did not constitute a dangerous condition at all![13] Likewise, plaintiffs' counsel often allege that because the defect in the road/sidewalk surface that caused the injury was X inches deep and Y inches wide, the condition was patently dangerous. This argument has become known as the "tape measure test" and has been soundly rejected by the courts.

> California does not classify defects as trivial or substantial according to a tape measure test – the mere depth or height of the defect in comparison to the rest of the sidewalk. Instead, courts look to the *totality of the circumstances*, which include: 1) the physical characteristics of the defect, (i.e., the size, jagged edges, broken pieces); 2) the setting (lighting, weather, other factors affecting visibility) and 3) history (plaintiff's familiarity with the area, any previous injuries attributable to the defect).[14] Hence, plaintiffs' counsel should assemble as much evidence of the surrounding circumstances as possible. "The courts are required to determine that there is evidence from which a reasonable person could conclude that a *substantial*, as opposed to a possible, risk is involved before they may permit the jury to find that the condition is dangerous.[15]

In mediation, both plaintiffs' and defense counsel often fail to consider the "totality of the circumstances," and focus

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only upon the precise condition proximately causing the injury. Counsel should be aware of as much of the surrounding circumstances as possible and assess whether there is liability exposure due to "cumulative dangers." "Where an entire sidewalk area is in a broken, dilapidated and fragmented condition, so that pedestrians using it must undergo the hazards of many inequalities, any one of which might cause a fall, the reason behind the [trivial defect] rule should cease to operate. An isolated minor defect may be so trivial, that though it creates a peril to pedestrians using it, the city as a matter of public policy may not be held liable to repair it. An entire sidewalk crumbling and falling apart is an entirely different matter and the city should not be entitled to ignore the cumulative perils presented by its generally fragmented condition."[16]

Trial immunity

Another broad affirmative defense commonly pled in actions involving joggers, mountain bikers, equestrians and other outdoor enthusiasts, is the "recreational trail" immunity provided by section 831.4. That section creates immunity against claims arising out of injuries caused by a condition of: a) any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all type of vehicle riding, water sports, recreational or scenic areas [...]; b) any trail used for the above purposes; c) any paved trail, walkway, path or sidewalk; ... so long as the public entity reasonably attempts to provide adequate warnings of any condition [on such paved areas] which constitutes a hazard to health or safety."

Dog parks,[17] paved bike paths,[18] and even roadways within parks[19] qualify for section 831.4 immunity, as courts are particularly sensitive to the "difficulty cities and counties might face in inspection and repair."

Unpaved trails are subject to changing irregularity of surface conditions due to seismic movement, natural settlement or stress from traffic. Additionally, the weather can cause dirt or sand to be blown on a trail, creating an unsafe surface for almost any user. Rocks, tree branches and other debris often find their way onto a trail. Bicycle paths (or bikeways) are not velodromes, and are not necessarily designed for a user to travel as fast as she or he can, although some people often do. It does not take a

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very large crystal ball to foresee the plethora of litigation cities or counties might face over bicycle paths, which are used daily by a variety of people [...] all going at different speeds. The actual cost of such litigation or even the specter of it, might well cause cities or counties to reconsider allowing the operation of a bicycle path, which, after all, produces no revenue." [20]

Given the broad nature of the trail immunity, counsel should come to mediation well-prepared to address the reasonableness of the governmental entity's efforts to provide adequate warning of the alleged dangerous condition. Doing so may well involve the collection of budgetary information that will likely require an extended period of time to acquire.

Design immunity

"Design immunity" is another commonly pled affirmative defense.[21] This defense requires a showing of three elements: 1) a causal relationship between the plan or design and the accident; 2) discretionary approval of the plan or design before construction or improvement; and 3) substantial evidence supporting the reasonableness of the plan or design. The failure of the public entity to establish all three elements is fatal to the defense.[22] Both plaintiffs' and defense counsel should be aware, however, that the statute provides a defense to claims resulting from "the plan or design of the *finished product* and not the plan or design for constructing the improvement."[23]

What's more, the immunity may be denied if the plaintiff can establish that: 1) the plan or design has *become* dangerous because of a *change in physical conditions*; 2) the public entity had actual or constructive notice of the dangerous condition thus created, and 3) the entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or, the public entity, unable to remedy the condition because of practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.[24] Clearly, there are a plethora of arguments that can be made in this regard, but when it comes to design immunity cases, counsel should allow for ample time to obtain the pertinent documents prior to mediation so as to maximize effectiveness during the session.

Hazardous recreational activities

Public entities are immune from liability to anyone who participates in "hazardous recreational activities!"[25] Such activities are broadly defined and expressly include diving, archery, animal riding, bicycle racing or jumping, mountain bicycling, boating, skiing, hang-gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, mountain bicycling (but not if the bicycle is being ridden on paved pathways, roadways or sidewalks – see "trail immunity" discussion *supra*), orienteering, paragliding, shooting, rock climbing, rocketeering (darn it, I sooo wanted to get shot out of a cannon!), rodeo, spelunking, skydiving, sport parachuting, body contact sports, surfing, trampolining, tree climbing, tree rope swinging, waterskiing, white water rafting and wind surfing. In other words, have fun at your own risk!

That said, there are of course exceptions to the immunity. The defense doesn't apply if: 1) the entity fails to warn of a known dangerous condition or of another hazardous activity that was not reasonably assumed by the participant to be part of the activity; 2) when the participant

pays a fee to the public entity in order to participate; 3) when the injury was caused by the entity's negligent failure to properly construct or maintain any structure, equipment or work improvement used in the activity; 4) if the entity recklessly or with gross negligence promotes participation in, or observance of the activity, or 5) when the entity's gross negligence is the proximate cause of the injury.[26]

Conclusion

As in any mediation, counsel's goal is not only to convince the opposing party of the strengths of his/her client's case and the weaknesses of the opposition's, but also to convince the mediator. Without question, the best way to achieve those goals is to be well aware of each and every *element* of the claim and defenses that *each* party must prove in order to prevail at trial, and be well-prepared to address them at mediation. In some situations, such as with the "design immunity" defense, or attempting to establish "constructive notice and ample time to repair," marshalling evidence can take months. Better to "take the time it takes" to prepare the case thoroughly before attending mediation so that the *first* mediation session can be highly productive, and avoid the necessity of having to "go get that information and come back for another session!"


Carr

Fred Carr, of Carr & Venner ADR, *is an international, AV®-rated attorney-mediator, with over 20 years of experience. He has served as lead counsel in trials and appellate matters in both Federal and State courts in California, Oregon, Washington, Hawaii and Arizona. He has represented clients on both the plaintiff's and defense sides of the bar and has managed litigation in the eight-figure range. He has also served as a legal consultant to the Emirate of Abu Dhabi, United Arab Emirates in the Middle East. As a mediator, Fred Carr is highly accomplished at analyzing litigation strategies and possesses strong conflict resolution, communication and leadership skills.*

To read the entire article including endnotes, see plaintiffmagazine.com.