The public entity case for the pedestrian and bicyclist

Dangerous conditions of public property cause many of the injuries to those on foot or bike

By Casey Kaufman

When a vehicle injures a pedestrian or bicyclist, lawyers should always look beyond the driver to explore whether or not a dangerous condition of public property contributed to the incident. A dangerous condition may sometimes be difficult to recognize, and I have never seen a traffic collision report identify one as a concomitant cause of an accident. So it is up to us to identify whether a roadway or other feature was in a dangerous condition, determine how it contributed to the incident, and develop the case through discovery.

In this article, I will first discuss public entity liability basics and then discuss pedestrian and bicyclist matters that commonly include dangerous conditions of public property.

Bringing the cause of action

Dangerous condition of public property

Actions against public entities are not based on common law, but are derived from statute. They may be liable only to the extent allowed by these statutes, and only then in certain conditions.[1] For example, there is no simple negligence cause of action that a person may bring against a public entity.[2] Rather, claims of dangerous condition of public property may only be brought under Government Code section 835.[3]

• Statutory basis for liability

Section 835 provides the following elements for a finding of dangerous condition of public property:

1. The public property was in a dangerous condition at the time of the injury;
2. Plaintiff's injuries were proximately caused by the dangerous condition;
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and

a. The dangerous condition was created by a public employee's

negligent or wrongful act or omission within the scope of that employee's employment; or

b. The public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken corrective measures to protect against the injury.

Most public entity cases arise under section 835(b), where the property was in a dangerous condition, was not caused by a specific negligent or wrongful act or omission of an employee, but rather through the intended features of the roadway. For section 835(b) cases, the requisite notice is often the hardest part of the case to prove. It is of no matter how dangerous a roadway feature may be to a pedestrian or bicyclist; if the governing entity had insufficient notice of its dangerous nature, no liability will be found.

Section 830 defines dangerous condition 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 that it will be used.

This definition includes two very important parts. First, there is an abundance of opinions that discusses a substantial risk of injury. This topic alone is too broad to tackle in here, but I urge you not to assume that the alleged risk in your matter creates a "substantial risk" simply because it may have resulted in substantial injuries. For example, a sidewalk defect could cause catastrophic injuries, but if the fall was caused by an upraise of less than three-fourths of an inch in elevation, then that defect will likely be found trivial as a matter of law.[4]

Second, note that section 830 creates potential public entity liability if a condition on *adjacent property* exposes those using the public property to injury. This may greatly increase the scope of liability for public entities, particularly when there are roads owned by two different entities or public roads abutting private property. For example, consider an onramp to a freeway. The streets leading to the onramp are owned, controlled and maintained by the local entity, and the freeway is Caltrans property. If a feature of the local roadway is causing accidents on the onramp, then Caltrans may be held responsible even though the dangerous condition is technically not on their property.

Above is the fundamental framework of a public entity claim. The significant differences from common law negligence suits make public entity matters procedurally more difficult to prosecute.

•Establishing notice pursuant to section 835(b)

Notice is an element of the vast majority of dangerous condition of public property matters. Often, notice can best be established through prior accident/ injury history. There are two main sources of this information for incidents that include a vehicle: SWITRS and TASAS. SWITRS, or Statewide Integrated Traffic Records System is a database that collects and processes data gathered from collision scenes. One can obtain traffic collision data for free via the online SWITRS resource at http:// iswitrs.chp.ca.gov/. While the information contained on a SWITRS report lacks significant detail, it does provide past reported accidents at a location as well as the parties (i.e. pedestrian, automobile, etc.) and a brief description of the cause of the accident. Certainly, this information can provide a good basis for further discovery.

TASAS, or the Caltrans Traffic Accident Surveillance and Analysis System, is not available prior to litigation but is also a very important tool. While it may not be relevant to most pedestrian or bicycle accidents, many non-highway roads have been adopted by Caltrans as "traversable highways." For example, portions of Van Ness Avenue in San Francisco from Golden Gate Avenue to the US 101 onramp were adopted by Caltrans in 2000 with Caltrans taking responsibility for the roadbed, and the City and County of San Francisco taking responsibility for sidewalks. When dealing with a TASAS inquiry, remember to specifically request Table C, which is a quarterly data report used to identify high collision concentration areas on Caltrans roads. These documents are important when trying to establish that the government entity in question knew, or should have known, about a particular dangerous condition.

Other ways to establish notice are from past lawsuits and citizen complaints. Other types of notice can come from internal communications regarding the particular portion of public property or from maintenance logs. During litigation, this information is relevant to establishing the notice element of section 835(b) and properly produced during discovery.

Statutory immunities that protect public entities

Just as governmental liability is defined by statute, so are governmental immunities. There are several statutory immunities which are wide ranging and often leave plaintiffs without a remedy. The case law regarding these immunities is vast, so I will give brief summaries of the most important immunities to anticipate.

•Design immunity

Design immunity is one of the broadest and most effective immunities public entities enjoy. This immunity extends to a public entity if the injuries were caused by a feature of an approved design, the design was discretionally approved prior to construction, and there is substantial evidence of the reasonableness of that design. The purpose of design immunity was to prevent juries from analyzing the propriety of the factors that went into any particular design or plan.

The easiest way to defeat design immunity is to show that the roadway or other dangerous feature, as it existed on the day of the incident, did not conform to the original designs. Very often, as-built drawings show different features than the original designs, rendering this immunity inapplicable. Don't forget to visit the accident scene with a tape measure to make sure that the property in question actually conforms to the design.

When a feature that you claim was dangerous is found in an approved design and conforms as well, one can allege that the entity has lost the immunity by virtue of changed conditions. To support a changed condition claim, one must show:

1. The design has become dangerous as a result of changed circumstances;
2. The entity had actual or constructive notice of the dangerous condition that has been created; and
3. The public entity had reasonable time and funds to remedy the condition or, if time or funding was insufficient, that the entity failed to provide adequate warnings to users.[5]

Design immunity is usually very hard to defeat. Proper discovery is the key to defend against the anticipated motion for summary judgment alleging this powerful immunity.

•Failure to provide traffic signals, signs, markings, or devices

A condition is not dangerous if the plaintiff merely alleges the failure to provide signs, signals, markings, or devices.[6] This includes traffic and pedestrian control signals, stop and yield signs, speed limit signs, and double line roadway markings. The California Supreme Court has held that cities generally have no affirmative duty to install traffic control signals![7] This exception to the definition of a dangerous condition appears to be related to the discretionary nature of installing such devices.

This immunity is unavailable when the absent warning sign or signal is necessary to warn of a concealed trap.[8] This immunity and the applicability of the concealed trap exception are often at issue in cases where lack of crosswalk markings may indicate to drivers that they have the right of way.

•Other immunities to note

The above immunities are certainly the most prevalent in public entity liability litigation, but others exist that are worth noting.

• Recreational Immunity – Public entities are not liable for injuries that occur when a person is participating in any "hazardous recreational activity" on public land.[9] A hazardous recreational activity is defined as one that creates a substantial risk of injury to a participant *or* spectator, including diving, animal riding, boating, skiing, surfing, and tree rope swinging. For perspective, fishing from a canoe has been held to be within the immunity as it is related to boating.[10]

Exceptions to this immunity are found when the entity failed to warn of a known dangerous condition not reasonably assumed by the activity's participants, when the public pays a fee to the entity to participate in the activity, when the injury was caused by a negligent failure to properly construct/maintain any structure, or for recklessness or gross negligence. An additional, but separate, immunity also exists for access roads and recreational trails that provide access to any recreational activity, even those that are not hazardous.[11]

• Weather Conditions – Entities are immune when weather conditions cause injury except when the weather-related hazard would not be reasonably apparent to, or anticipated by, a person exercising due care in their use of the facility.[12]

• Naturally Occurring Conditions – If the public entity has not improved a piece of land (lake, stream, beach, etc.), then it cannot be held liable for injuries that result from those natural conditions.[13]

Procedure for filing a government claim and subsequent lawsuit

The government claims' process is a trap for the unwary. Below are a few highlights on timing and form of the government claim.

•Time to file – Six months from date of injury

The most important feature is the six-month statute of limitations for injury claims.[14] If one misses the six-month cutoff, there is a rarely-successful late claims process that must be started no later than one year after the accrual of the cause of action.[15]

•Form of the government claim

Many public entities have specially prepared forms that are required for filing a claim, and many of the special forms are only available by calling the entity and requesting a mailed copy. Make sure that you are prepared with the correct form well in advance of the six-month limitation. Part and parcel to submitting the correct form is confirming the correct public entity that is liable for the injuries.

One essential requirement is that the claim form must describe all of the bases of liability in order to provide adequate notice and opportunity to investigate to the public entity.[16] Failure to state all of the factual circumstances in a claim opens one up for demurrer upon filing the suit.

One procedure that has worked well is to file a claim with an attachment that includes the statutory and factual basis along with generalized damages claims. This attachment usually takes form much like a causes of action in a complaint. Once the claim is denied (as most are), it is quite easy to transfer the substance of this attachment to a complaint.

•Denial of claim – By letter or the passage of time

In order to file suit in a court of law, a claim must be both filed and denied. Denial may either be by official correspondence or by passage of time. If a public entity does nothing in response to a filed claim, it is considered denied by operation of law on the 45th day after a claim is presented.[17]

•Filing suit – Six months after denial of claim

Only after denial of a claim can a plaintiff file a lawsuit against a public entity. The lawsuit must be filed within six months of the denial of claim by operation of law or the *mailing* of the written rejection. The complaint can generally look like any other complaint, with a few important exceptions.

You must include an allegation that plaintiff complied with the claim presentation and rejection procedures.[18]

As stated above, you can only allege facts constituting a cause of action that

were substantially alleged in the claim. This includes the statutory basis for government liability.

Establishing public entity liability

Shifting liability to the public entity through evidence of due care of all parties

Recall from above that Government Code section 830 requires that the facilities be used "with due care in a manner in which it is reasonably foreseeable" in order for there to be a dangerous condition. This requirement applies to the injured pedestrian or bicyclist as well as the driver of any vehicle that hits them.

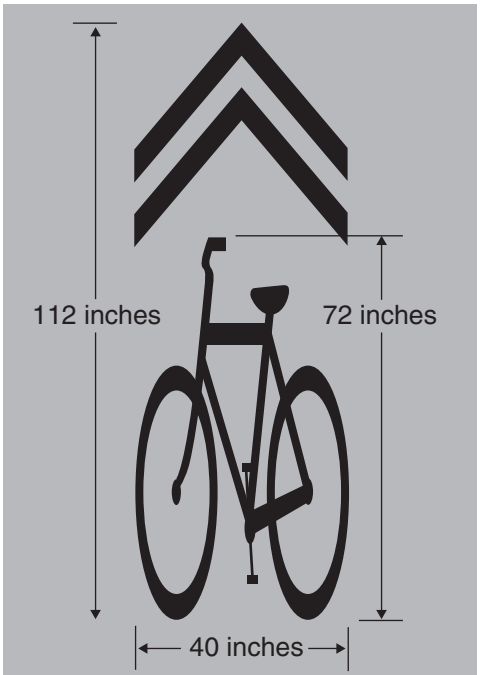
Pedestrians must not be jaywalking or be struck while in an unreasonably foreseeable location. For bicyclists, the "due care" requirement poses real obstacles as well. In a common law case, cyclist negligence is an oft-seen affirmative defense. But in a public entity case an essential element of the dangerous condition claim requires a positive showing that the cyclist was properly using the facilities, i.e., within the law. This is often difficult to do and it may also pose problems with juries that may negatively view cyclists.

In addition to proving that your client was behaving appropriately, you must also show that the defendant driver was using the road with due care. A speeding, distracted, or drunk driver is not driving with due care, and this fact can gut a public entity's liability. Therefore, it is very important to establish early in a public entity case that all parties were using the facilities in a reasonably foreseeable manner or at least identify and analyze.

An example pedestrian public entity case – The unprotected crosswalk

Sadly, pedestrian accidents are extremely common and very often result in catastrophic injuries or death. It is our duty to these clients to explore whether a public entity may share responsibility along with the driver.

Unprotected crosswalks are a common source of public entity liability. An unprotected crosswalk is a marked crosswalk that is alone on the street without any stop sign or other traffic device "protecting" it by providing notice to drivers. These types of crosswalks are very dangerous, and public entities have known of the dangers they carry for decades.



Shared Lane Marking

The danger of these crosswalks comes from two sources. First, the pedestrian feels that they are more protected and more easily seen when in an unprotected crosswalk than when jaywalking. This false sense of security emboldens pedestrians to enter the roadway. You will often hear from clients that they saw the car that hit them, but they incorrectly thought that they were seen and the car was slowing for them.

The second danger comes from the driver's point of view. Drivers simply don't see these crosswalks because they don't have the additional warning cues like stop signs and traffic signals. Unprotected crosswalks appear on any kind/size of road and require an increased amount of driver vigilance to recognize and stop for a pedestrian. Given the proliferation of driving while texting, or otherwise being preoccupied, these types of accidents will likely increase as long as unprotected crosswalks are used.

The bicycle case – Failure to provide adequate bicycle facilities

As bicycle use increases, so do the conflicts between bicycles and other vehicles on the roadway. Public entities have made varying efforts to accommodate for bicycle riders. While one cannot usually claim a dangerous condition existed simply because a roadway lacked bicycle markings, the immunity is unavailable when the markings that are present create a trap.

For example, many public entities have utilized "sharrows," a shared-lane marking that includes a bicycle and chevron and has been approved by the U.S. Manual on Uniform Traffic Control Devices.[19] According to the MUTCD, sharrows are used to assist bicyclists with lateral positioning on streets with parallel parking, direct cyclists away from car doors as well as narrow streets shared with cars, alert drivers to the existence of cyclists, to encourage safe passing of bicyclists, and to reduce the incidence of wrong-way bicycling.

However, one may find sharrows incorrectly placed, funneling the cyclist too close to parked cars, or used on roads that do not meet the MUTCD requirements for use. Don't assume from the fact that a roadway marking is present that it is used correctly. Using a street marking incorrectly can be evidence of the creation of a trap and support a claim for public entity liability.

Many municipalities are also experimenting with different markings or bicycle lanes. For example, in San Francisco there are several iterations of dedicated bike lanes, with some painted green and others that use sharrows and traffic dividers.[20] While the intent to protect cyclists should be commended, often there exist unique roadway features that require creative solutions. These unique solutions can create traps, as often the public entity

performs little research or investigation before putting the marking on the roadway. Good intentions can lead to unanticipated results and increase the danger to bicyclists.

When investigating a potential dangerous condition of public property after a bicycle accident where there are some bicycle-type roadway markings, a deeper investigation is often required to ensure that the markings were used correctly.

Conclusion

Pursuing a public entity case is not as simple as a common law negligence matter. However, our duty to our clients requires us to fully investigate their case and to recognize when dangerous conditions of public property may have contributed to their injuries.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Endnotes

[1] Government Code section 815.
[2] California Civil Code section 1714 which defines negligence, does not provide for a negligence claim against the government outside the Government Claims Act. See *Eastburn v. Regional Fire Protection Auth.* (2003) 31 Cal.4th 1175.
[3] There are other statutory bases of government liability for dangerous condition of public property, but they are irrelevant to the types of personal injury claims discussed in this article.
[4] See *Fielder v. City of Glendale* (2005) 71 Cal.App.3d 719.
[5] *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63.
[6] Government Code sections 830.4 and 830.8.
[7] *Paz v. State of California* (2000) 22 Cal.4th 550.
[8] This exception applies to § 830.8 immunity, but not § 830.4 immunity for specific "regulatory" signs, signals, and markings.
[9] Government Code section 831.7.
[10] *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960.
[11] Government Code section 831.4.
[12] Government Code section 831. See *Erfurt v. State* (1983) 141 Cal.App.3d 837.
[13] Government Code section 831.2.
[14] Government Code section 911.2.
[15] Government Code section 911.4.
[16] *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Auth.* (2004) 34 Cal.4th 441.
[17] Government Code section 912.4.
[18] *Chase v. State* (1977) 67 Cal.App.3d 808.
[19] http://mutcd.fhwa.dot.gov/htm/2009/part9/part9c.htm; Section 9C.07.
[20] http://www.sfmta.com/getting-around/bicycling/bike-lanes.