Piercing the government immunity – When crossing the road

By Parisima Roshanzamir

Introduction

A client walks into your office and tells you that a distracted driver killed his mother while she was legally crossing a pedestrian crosswalk. The family is in mourning. They look to you to deliver them justice for the wrongful death of their beloved. The at-fault driver carries the minimal insurance policy limits of $15,000. Should you consider suing a government entity that designed, created, and maintained the subject crosswalk?

In the United States access to justice is a fundamental right, and yet so often this access that most take for granted is denied to many. This is especially true when attempting to hold a government, or public entity, accountable for a human harm.

For most of our nation's history, sovereign immunity protected the federal and state governments and their employees from being sued. The government enjoyed absolute immunity much like the King that rules with absolute power.

As our nation evolved, so did the public attitude in holding our government accountable. In 1946 the federal government passed the Federal Tort Claims Act allowing suits against the federal government in limited actions. (28 U.S.C. § 2674 et seq.) Many states, including California, soon followed. In 1963, the California Legislature adopted the California Claims Act to allow recovery in a limited number of cases. (Gov. Code § 810 - 996.6.)

California Claims Act (CCA)

If you have a set of facts with a possible claim against a public entity defendant, your claim will be subject to the rules set out by the California Claims Act ("CCA").

The goal of CCA is to "(1) provide the public entity with sufficient information [so it can make] a thorough investigation of the [claim]; (2) to facilitate settlement of meritorious claims; (3) to enable the public entity to engage in fiscal planning; and (4) to avoid similar liability in the future."[1]

These goals, however, are often missed because the rules are complicated and not well known. Not knowing the procedural rules often plays to the detriment of the injured party. CCA procedural rules are known to bar meritorious claim, closing the doors of justice.

The rules of CCA can pose a number of pitfalls for the unwary. Government claims not properly presented pursuant to CCA rules are subject to a general demurrer. This article does not cover the CCA procedural rules; however, I encourage you to read *Nuts and Bolts for California Tort Law* published in volume 46 of the Forum. There you will find a detailed discussion of CCA's procedural rules to follow, dates to calendar in ink including the six months statute to present your claim, the 45 day window to receive a response, and how you might resuscitate a time barred claim.[2] [Editor's note: Also, refer to Paymon Khatibi's article on p. 14 of this edition.]

This article provides an overview on the substantive law of how to maintain a claim against a government entity for existence of dangerous condition(s) on its property. In the context of the family we discussed earlier, this article focuses on the substantive law of maintaining a claim against a public entity involving intersections, crosswalks, and sidewalks.

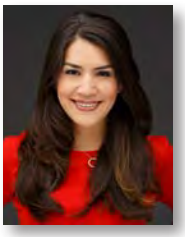
Piercing the immunity: Dangerous conditions on a public property

As a matter of law, a public entity is not liable for an injury, except as provided by statute. Thus, any claim made against the government must be based on statute.[3]

The California Claims Act provides a narrow exception to the above general rule allowing access to justice in a limited number of cases. The statute provides "[A] public entity is *liable for injury* proximately *caused by a dangerous condition of its property* if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures."[4]

A "dangerous condition" is "a condition of property that creates a *substantial* 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."[5]

How you frame the particular condition that resulted in harm to your client can make the difference between your case



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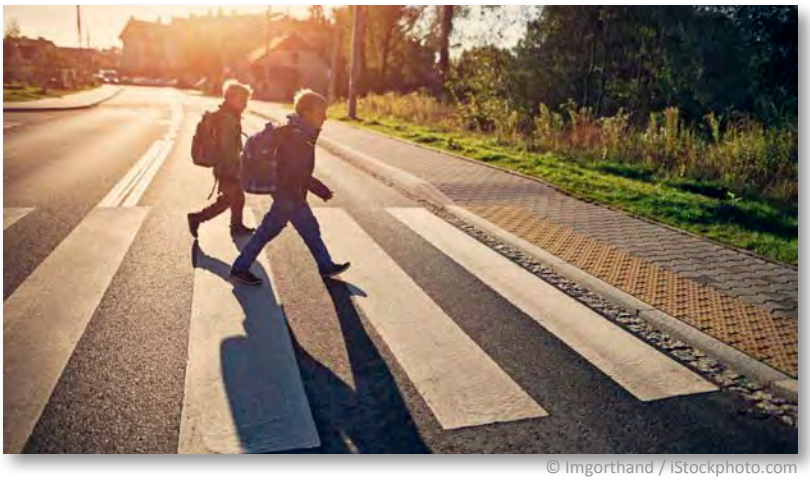

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Framing the dangerous condition in the light most favorable from the start will boost your chances of winning the race.

surviving a summary judgment motion, or losing before the race even begins. A condition of property is not dangerous "if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature *in view of the surrounding circumstances*."[6]

Thus, how the dangerous condition is described should be framed carefully before the claim is ever laid in ink. There are no hard and fast rules in how the condition is described. In cases involving dangerous condition(s) on sidewalk(s), crosswalk(s) or intersection(s), there may be an amalgam of factors contributing to the creation of a dangerous condition.[7]

Consider all the *surrounding circumstances*, and not just the main underlying danger. For example, presence of fallen leaves from the nearby tree concealing the pot hole or the cracked sidewalk may elevate an otherwise trivial minor defect to the level of a substantial risk of injury to its users.

"Ordinarily, the existence of a dangerous condition is a question of fact, but whether there is a dangerous condition may be resolved as a question of law if reasonable minds can come to but one conclusion."[8]

Thus, framing the dangerous condition in the light most favorable from the start will boost your chances of winning the race, or at the very least give you an advantage in surviving a motion for summary judgment. Always consider the surrounding circumstances in determining if it elevates the presence of a condition to the level of a dangerous one. Consider the time of day and the season when considering the surrounding conditions.

Immune even if dangerous

When considering the claim of dangerous condition against a public entity, be mindful of the specific immunities that may bar your claim. There are conditions that, though dangerous, are strictly immune from lawsuits. CCA carves out a sliver of an exception allowing access to justice, but still maintains a tight grip against opening the flood gates. Knowing the applicable immunities before you frame the relevant condition, will allow you to maneuver around the common pitfalls, and give you an advantage for the challenges ahead.

A. Design immunity

"A public entity may avoid liability for an injury caused by a dangerous condition if it pleads and proves the affirmative defense of design immunity."[9]

The rationale behind this immunity is to prevent a jury from second-guessing the work of the government engineers who have approved a particular design; and also to provide engineers "the freedom of decision-making," without the fear of litigation.[10]

Design immunity is an affirmative defense, and a public entity claiming design immunity must establish three elements:

(1) a causal relationship between the plan or design and the accident;

(2) discretionary approval of the plan or design prior to construction; and

(3) substantial evidence supporting the reasonableness of the plan or design.[11]

If you have a case involving a crosswalk, or an intersection, locate a copy of the approved/as built design plan(s) of the intersection or crosswalk in question. Once you have the plans, ask your retained engineers to analyze the plan(s) and determine if the area is built in accordance with the approved design plan. If the design of the intersection or crosswalk does not follow the approved plan, then the immunity does not apply.

A note to keep in mind regarding the third element, i.e., evidence of reasonableness of the design, requires only substantial evidence.[12] California courts have held: "As long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances. Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element. Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness. That a plaintiff's expert may disagree does not create a triable issue of fact."[13]

Thus, be careful not to rely too heavily on the third element. It would be rare for an engineer who has approved the plan, or is retained by the government, to opine that the approved design should not have been approved or built.

B. Loss of design immunity

"Design immunity does not necessarily continue in perpetuity."[14] Even when a plan has been approved and the area built in conformity to the approved design, if its "operation under changed physical conditions produces a dangerous condition

of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6."[15]

To overcome the design immunity defense, you must establish the following three elements:

(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 it created; and

(3) the public 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 the public entity had not reasonably attempted to provide adequate warnings.[16]

Where triable issues of material fact are presented, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity.[17]

In arguing loss of immunity, you might consider the length of time between the time the plan was approved/built, and the time that the injury resulting crash occurred. You may also consider the population growth rate in the surrounding area from the time the plan was approved and the incident. Gathering the facts that support a changed condition argument early can help turn the tides in your favor, or warn you if you are likely not going to prevail in the battle.

C. Traffic control signals and signs immunity

1. Mere absence of regulatory traffic control signal is not dangerous

As a matter of law, a "public entity does not create a dangerous condition on its property merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction sign, or other distinctive roadway markings."[18]

CCA's statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices. In short, the lack of a traffic signal at the intersection does not constitute proof of a dangerous condition.[19]

In the scenario mentioned earlier, where the family lost their beloved, it was not enough to claim that the intersection was dangerous because the intersection lacked traffic signals. Had we merely framed the dangerous condition on the presence, or the lack, of the traffic signal, our ship would have been sunk long before it ever reached shore. We considered whether there were blind corners, obscured sightlines, elevation variances, or other unusual conditions or physical characteristics of the street that made the crosswalk dangerous in combination with the lack of traffic lights.

When analyzing cases involving dangerous conditions on a public sidewalk, crosswalk or intersections, discuss these issues with an engineering expert even before the case is filed. By doing so, you will have an advantage of framing the condition well in advance of the inevitable summary judgment motion.

2. A defectively installed regulatory traffic signal is dangerous

While traffic signals or signs are not required, "if the government installs traffic signals and invites the public to justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur."[20] The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to go in all four directions of an intersection simultaneously, with predictable results.[21]

There is a caveat, however. "[I]f the government turns off traffic signals entirely to avoid confusion, liability does not attach." In *Chowdhury* v. *City of Los Angeles*, when the traffic lights were turned off, their defective condition could no longer mislead or misdirect the injured party. Thus the court found the condition created was not dangerous since there was no confusion. Whether the traffic signal was turned off by design or mistake, it was as though none was installed and the immunity applied pursuant to Government Code section 830.4.

3. Crosswalks with no traffic signals may or may not be dangerous

In *Gardner v. City of San Jose*, the Court of Appeal held that a pedestrian was entitled to recover damages against the city because the city created a trap for pedestrians crossing an unlighted subway. The condition made it appear to both the driver and the pedestrian that they had the right-of-way, resulting in harm.[22]

Although Government Code section 830.4 provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, "the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors."

In *Gardner,* the lack of crosswalk markings, better illumination and warning signs became important factors in the court's determination finding liability against the city. Thus, even where immunities are strictly applicable, the surrounding circumstances may eliminate application of the government immunity, allowing a narrow path toward recovery.

Conclusion

While access to justice is a fundamental right, that access can be easily taken away because of the pitfalls in government tort liability. This article does not provide an exhaustive list of every immunity that applies involving claims against public entities, however, it highlights the most commonly used immunities that the government entities invoke when defending claims of dangerous conditions on their properties.

If you are handling a serious case involving catastrophic injuries or a wrongful death and faced with limited recovery from the third party wrongdoer, it is essential that you consider the pitfalls early and often, and to forge ahead with caution. Think how you may want to frame the dangerous condition, consider the immunities that may bar recovery, and the exceptions that can get you over the bar. ■

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[1] *Westcon Const. Corp v. City of Sacramento* (2007) 152 Cal.App.4th 183, 200; *Traffic School Online, Inc. v. Clarke* (2003) 112 Cal.App.4th 736, 742.

[2] Roshanzamir, Parisima, (2016) Nuts and Bolts for California Tort Law: a quick overview of claims against public entities, *CAOC Forum*, Vol. 46, No. 4, pp 10-13.

[3] Gov. Code § 815.6; codified in Gov. Code §§ 810-996.6.

[4] Gov. Code § 835, emphasis added; *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68.

[5] Gov. Code § 830, subd.(a), emphasis added.

[6] Gov. Code § 830.2, emphasis added; see also *City of San Diego v. Sup. Ct. (Hanson)* (2009) 137 Cal.App.4th 21, 28-30 [the city was not held liable for injuries caused by illegal racing on long, poorly lit road]; *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 367 [the city was held not liable, as a matter of law, for the defect on its sidewalk].

[7] *Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1069; citations omitted.

[8] *Salas, supra*, 198 Cal.App.4th at p. 1070, "It is for the court to determine whether, as a matter of law, a given defect is not dangerous. This is to guarantee that cities do not become insurers against the injuries arising from trivial defects."

[9] Gov. Code § 830.6; *Cornette, supra*, 26 Cal.4th at p. 69.

[10] *Cornette, supra*, 26 Cal.4th at p. 69; see also Gov. Code § 820.2 "public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion in him, whether or not such discretion be abused."

[11] *Cornette, supra*, 26 Cal.4th at p. 69; see also Gov. Code § 830.6 granting design immunity to the public entity in cases where the construction conforms with the approved design.

[12] *Grenier v. City of Irwindale* (1997) 57 Cal. App.4th 931, 941.

[13] *Grenier*, *supra*, 57 Cal.App.4th at p. 941.

[14] *Cornette, supra*, 26 Cal.4th at p. 66.

[15] *Baldwin v. State of California* (1972) 6 Cal.3d 424, 438, fn. omitted, superseded by statute on another ground as stated in *Cornette, supra*, 26 Cal.4th at pp. 70–71.

[16] *Cornette, supra*, 26 Cal.4th at p. 72

[17] *Id.* at p. 67.

[18] Gov. Code § 830.4.

[19] *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 135, internal citation omitted.

[20] *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194–1195, internal citations omitted; see CACI 1120.

[21] *Chowdhury*, *supra*, 38 Cal.App.4th at p. 1195.

[22] *Gardner v. City of San Jose* (1967) 248 Cal. App.2d 798, 803.