



DEFENSES AVAILABLE TO PUBLIC ENTITIES & MUNICIPALITIES

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Falling Through the Cracks: LA Refuses to Pay Claims for Injuries Suffered on City's Broken Sidewalks

INTRODUCTION

- Defenses available to public entities and municipalities
- Risk management overview and tips for initial investigation, evaluation and early resolution
- Recent legal authority and developments
- Trivial Defect Doctrine
- Importance of Experts

KEY PLAYERS

- Risk Managers
- City Managers
- Claims Adjustors
- Other Public Agency/Entity Representatives

RISK MANAGEMENT

- Lawsuits are commonly brought against cities and its employees
- Any claim for money or damages can be brought against a public entity (Government Code Section 905)
- At first, claims may be confusing and overwhelming, however, the intricate government codes can be easily deciphered to respond effectively
- Entities can respond in a variety of ways when a claim is brought against them and must ensure choosing the best available defense

TIMELY PRESENTATION OF CLAIMS

- Before litigation can be brought against the public entity, a written claim for either money or damages must be timely presented to a public entity (Government Code Section 945.4)
- Failure by a claimant to timely present a valid claim completely bars a claimant from filing a lawsuit against the entity (Government Code Section 911.3 or 913)
 - Under some circumstances this failure may be excused
- Two different timing requirements based on the type of claim brought against the entity:
 - 1. Claims relating to a cause of action for death, personal injury, or injury to personal property must be presented to the public entity within six (6) months from accrual
 - 2. A claim relating to any other cause of action must be presented to the public entity within one (1) year of accrual
- Exception: The public entity must, at all times, keep an accurate and complete statement on file with the Roster of Public Agencies in the office of the Secretary of State and the county clerk of each county in which the public agency has office

TIMELY RESPONSE TO CLAIMS

- Within forty-five (45) days, a public entity must give written notice of its response to the claimant in a manner pursuant to Government Code Section 913
 - This time period may be extended by written agreement
- The public entity may reject the claim, entirely or in part, allow the claim, or take no action

TYPES OF CLAIMS SUBMITTED TO CITIES

- Slip and Falls
- Motor Vehicles
- Tree Branches
- Public Events
 - Theater Production
- General Employee Negligence
- Slander

THE TRIVIAL DEFECT DOCTRINE

- Main weapon a city can use when defending against claims of dangerous conditions on public property
- Trivial defects that do not create a substantial risk of injury are not actionable
- Public entities are not insurers of public ways and cannot be expected to maintain them in perfect condition at all times
- Cities should proactively look for damaged sidewalks and inspect areas complained of by its citizens soon after learning of the problem

THE TRIVIAL DEFECT DOCTRINE

- In order for an injured pedestrian to prevail on its claim against the city, it must show that the dangerous condition was created by the negligence of a public employee or that the city had actual or constructive notice of the condition
- A common tactic used by Plaintiffs to overcome the trivial defect doctrine defense is to show that under the city's own guidelines, the defect was significant enough to warrant repair
- Plaintiffs frequently depose city personnel, who sometimes admit that the condition should have been repaired
- Cities should carefully evaluate their criteria for repair and set reasonable criteria to reduce wait time and the overall cost of repairs

STATUTORY OFFER TO COMPROMISE

California Code of Civil Procedure Section 998

- “If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.”
- “The costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.”

EXPERTS

- Who is an expert
- Expert Designation
- Timing of Expert Designation
- Expert Costs

Typical Experts

- Bio Mechanical Engineer
- Orthopedic
- Specialty
- Construction Expert
- Motor Vehicle Accident Reconstructionist

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Declaration of Plaintiff Attorney Robert Ives in support of his expert designation of Dr. Thomas Bakehorn:
 - “I, Robert N. Ives, declare and state as follows regarding each person designated and identified by these Plaintiffs to provide expert opinion testimony”
 - “Mr. Thomas Bakehorn is a consultant with extensive experience in concrete construction project management, estimation and sales. He is holds a Ph.D. and M.S. in Biochemistry...He will testify based on his training and experience regarding the proper installation, height, function and dangers of wheel stops in concrete parking structures”
 - “Mr. Bakehorn has agreed to testify at the time of trial and will be sufficiently familiar with the pending action”
 - “I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct”

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Deposition of Dr. Thomas Bakehorn:
 - Q: And as you sit here today, you are a retained expert for Mr. Allan Reumont?
 - A: Yes.
 - ...
 - Q: I apologize that apparently what you expected when you agreed to be retained as an expert by Mr. Reumont is different than what has actually transpired, but I assure you that is something that I had nothing to do with.
 - A. I was pressured into this because of the mistakes that Bob Ives made by not responding to most of the documents in the beginning of this case and I was pressured to come here and do this. Otherwise, they were - you, I believe, were threatening them with sanctions, which then puts me under - you know, I told them yesterday I have revoked, I am not your expert, I don't want to be your expert, I don't want to do this deposition, I don't want to be involved. I specifically told the lawyer and I told Allan Reumont that and you could pat that obviously on record because mentally, physically, emotionally, I'm not here.

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Deposition of Dr. Thomas Bakehorn Cont'd.:
 - Q: Do you have any educational experience, and I'll clarify it as formal education, related to construction-related issues?
 - A: No.
 - Q: The same question, any formal education related to any engineering issues?
 - A: No.
 - Q: Do you hold any licenses?
 - A: No.
 - Q: Not a general contractor?
 - A: No.
 - Q: Not a subcontractor?
 - A: No.
 - Q: Not an engineer?
 - A: No.
 - Q: Not a structural engineer?
 - A: No.
 - Q: Not a mechanical engineer?
 - A: No.
 - Q: No formal education in the area of engineering whatsoever?
 - A: Correct.
 - Q: No formal education in the area of construction whatsoever?
 - A: Correct.

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Deposition of Dr. Thomas Bakehorn Cont'd.:
 - Q: The Expert Designation reads, “Mr. Thomas Bakehorn is a consultant with extensive experience in concrete construction project management, estimation and sales. He holds a Ph.D. and M.S. in biochemistry.” Do you hold a Ph.D.?
 - A: I do.
 - Q: In biochemistry?
 - A: Yes.
 - Q: And when did you get that Ph.D.?
 - A: 1983.
 - Q: Where is the Pacific Western University?
 - A: They’re gone. Last time I heard, they moved to Hawaii. They turned out to be fraudulent.
 - Q: Where were they located?
 - A: In Los Angeles up by the Westwood campus.
 - Q: When you say “Westwood campus,” do you mean UCLA?
 - A: UCLA.

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Deposition of Dr. Thomas Bakehorn Cont'd.:
 - Q: Did you physically attend class there?
 - A: No. It was one of those where you submitted your dissertation and all your work.
 - Q: And how long did that program last?
 - A: About three years.
 - Q: And they issued you a degree?
 - A: No. They never issued it because they disappeared at the end.
 - Q: Okay.
 - A: You know, I mean, technically the Ph.D. program was in place. They never issued it. I never got the certificate.
 - Q: Okay. So technically you're not a Ph.D.; correct?
 - A: By all cents and measures, no.

EXPERT DEPOSITIONS

- Example: Dr. Thomas Bakehorn
 - Deposition of Dr. Thomas Bakehorn Cont'd.:
 - Q: And when you say he took some liberties with that, what do you mean?
 - A: I was never notified.
 - Q: That doesn't accurately reflect what your understanding of the scope of your testimony was going to be in this case?
 - A: I was never informed...I was here to give an opinion. What the attorney has put on this paper I never authorized, I never agreed to.
 - Q: And it doesn't accurately reflect the scope of your testimony at the time of trial; correct?
 - A: Correct.
 - Q: Do you consider yourself an expert?
 - A: No.
 - You don't consider yourself to be an expert in wheel stops?
 - A: No.
 - Q: And you don't consider yourself to be an expert as it relates to parking structures -
 - A: No.

Q & A

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