

MASTERING THE SIDEWALK TRIP AND FALL CLAIM

PARMA Conference and Expo

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Presented by

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SYNOPSIS

This presentation covers prevention measures, general operations, liability issues, and key litigation factors arising from public agency sidewalk assets.

Participants will learn how to properly investigate sidewalk trip and fall claims. They will learn how to take proper measurements, photographs and statements as part of the fact development process. They will learn the importance of having a sidewalk inspection program and records retention system. They will learn about the trivial defect and trail immunities, as they pertain to sidewalk trip and falls. They will learn how to pin as much comparative liability on the claimant as possible and how to negotiate the best possible settlements.

DISCLAIMER

It is important for you to understand that specific legal needs cannot be addressed simply by reference to these materials. The particular facts involved in any legal situation will determine how the law applies. In addition, laws change often and vary among different jurisdictions, so that the information contained in these pages may not be the law that applies to you. You should not, therefore, consider these handout materials to be a substitute for proper, individualized advice from an attorney. The reader should not consider the information found in these pages to be an invitation for an attorney-client relationship. These materials are provided solely for educational purposes and guidance. They are not intended to, nor do they, and may not be relied upon to create any rights enforceable at law by any party in a civil or criminal action.

SCOTT J. GROSSBERG, ESQ.

Scott Grossberg is fiercely committed to guiding public entities and their employees to achieve peace of mind, reduce the risk of litigation, and maximize their resources in credible and cost-effective ways so they can start enjoying meaningful and efficient places to work. If you're looking for a proven professional who can guide you to address the risks of litigation, legal management of public property, and the mindset needed to handle the ever-changing landscape of addressing the public, you've come to the right place. With over 30 years of experience working with amazing clients with similar worries and concerns and guiding them to achieve and experience remarkable results, Scott's mission and commitment is to protect, defend, and educate public entities and their employees. He has served as lead trial counsel, advisor, and coach for political and business leaders, government agencies, and public employees. You're about to discover why Scott's clients say incredible things about the impact his life's work has had on their success. A recognized authority on public entity and municipal law, public speaking, memory, communication skills, and personal productivity, Scott has addressed such distinguished audiences as the Department of the Navy, the Federal Bureau of Investigation, the California Continuing Education of the Bar, the American Bar Association, League of California Cities, the California Joint Powers Insurance Authority, PARMA, the California Association of Joint Powers Authorities, and the Los Angeles and San Bernardino County Sheriff's Departments. He has also been a guest presenter multiple times at the prestigious Pepperdine University School of Law's Straus Institute for Dispute Resolution. Through his public speaking engagements and live events, Scott has directly impacted tens of thousands of people throughout the State of California, bringing his unique style of training, teaching, and enthusiasm to a wide variety of topics.

Scott is one of the founding partners of the California law firm of Grossberg & Hoehn. He holds a Bachelor of Arts from California State Polytechnic University in Philosophy and Theatre Arts and obtained his juris doctorate from the University of La Verne College of Law. A veteran trial lawyer, Scott is admitted to practice law before the Supreme Courts of the United States and California and has numerous published appellate decisions.

You can visit Scott online at <http://www.grossberghoehn.com>.

CHRIS KUSTRA

Account Executive | Carl Warren & Company

Chris Kustra is the current Liability Claims Manager for the California JPIA account at Carl Warren & Company. He has worked for Carl Warren & Company's public entity division since 2005 and, previous to his position as the Liability Claims Manager for the California JPIA, was the Liability Claims Manager for the City of Huntington Beach, City of Newport Beach, City of Cypress and Los Angeles County Sanitation District accounts at Carl Warren & Company. Prior to joining Carl Warren & Company in 2005, Mr. Kustra worked for Mercury Insurance Group in their litigation unit, where he was responsible for many of Mercury's most challenging claims.

Mr. Kustra is a graduate of the University of California at Irvine, where he obtained his Bachelor of Arts in Political Science in 2000. He has extensive experience handling auto claims and claims against public entities, including claims involving catastrophic injuries, police use of force, inverse condemnation, employment practices and civil rights violations. When he is away from the office, Mr. Kustra enjoys cooking, cheering on his Pittsburgh Steelers and spending quality time with his wife and two boys.

OUTLINE

1. Introduction

- a. Why are you here?
 - i. Risk Management
 - 1. Ensuring safety rules are followed
 - 2. Ensuring regulations are adhered to
 - 3. Ensuring procedures are understood and complied with
 - ii. Public relations
 - 1. Responding to complaints
 - 2. Preparing news releases
 - 3. Marketing and publicity
 - 4. Meeting the needs of diverse groups and individuals
 - iii. Coordinate contracts and insurance agreements
 - iv. Engage in short- and long-term planning for agency-wide programs
 - v. Addressing other agency facilities and infrastructure items

2. Litigation Overview

a. Tort Claims Act

i. Timing Issues

b. Lawsuits

i. Timing Issues

ii. Possible Plaintiffs/Defendants

3. Risk Management

a. Qualified staff

b. Delegation

c. Responsiveness

d. Supervision

e. Follow-up/Follow-through

f. How to present yourself/presentation skills

4. Specific Areas for Litigation

i. Sidewalk installations/inspections

1. Lack of Sidewalks

- ii. Agency facilities versus private property
- iii. Personal injuries from agency programs
- iv. Aquatic Operations Centers
- v. Lighting conditions
 - 1. Dark Sky Policy, Customs, & Practices
 - 2. What happens when the lights go out?
- vi. Tree Trimming
 - 1. Consider Using an Arborist
 - 2. Tree Drop Versus Disease
- vii. Building Code
 - 1. Enforcement
 - 2. Americans with Disabilities Act
 - 3. Online Municipal Codes

5. Litigation Defenses

- a. How to keep them
 - i. California Government Code
 - 1. Design Immunity

2. Trail Immunity
 3. Recreational Immunity
 4. Document Retention Policies/Procedures
- ii. Contractual Risk Transfer
 1. Additional Insured Provisions
 - a. Lack of Coverage Challenges
 - b. Personal Services Agreements
 - b. How to lose them
 - i. Lack of Document Retention
 - ii. Lack of Proper Contracts
 - iii. Lack of Proper Insurance

6. Incident Investigation

- a. Incident
 - i. Review blank accident/incident forms with your attorney first
 - ii. Written Reports
 1. Incident Reports

2. Key Elements

- a. Thorough Reporting
- b. Be Specific
- c. Describe Injuries In Detail
- d. Include Source Information
- e. Seek Out Witnesses
- f. Keep Out Inappropriate Elements
 - i. Assumptions
 - ii. Opinions
 - iii. Stated Or Implied Fault
 - iv. How The Incident Could Have Been Prevented
 - v. How Staff Could Have Acted Differently
- g. Photographs
- h. Measurements
- i. Testing (e.g., co-efficient of friction on surfaces)
- j. Evidence Collection

7. Conclusion

PUBLIC ENTITIES

- Cal. Govt. Code § 815. Except as otherwise provided by statute: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.
- Cal. Govt. Code § 815.2. (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.
- Cal. Govt. Code § 815.4. A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.
- Cal. Govt. Code § 818.8. A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.
- Cal. Govt. Code § 862. (a) As used in this section, "pesticide" means: (1) An "economic poison" as defined in Section 12753 of the Agricultural Code; (2) An "injurious material" the use of which is regulated or prohibited under Chapter 3 (commencing with Section 14001) of Division 7 of the Agricultural Code; or (3) Any material used for the same purpose as material referred to in paragraphs (1) and (2). (b) A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person except that no presumption of negligence arises from the failure of a public entity or a public employee to comply with a provision of a statute or regulation relating to the use of a pesticide if the statute or regulation by its terms is made inapplicable to the public entity or the public employee. (c) Sections 11761 to 11765 of the Agricultural Code, relating to reports of loss or damages from the use of pesticides, apply in an action against a public entity under this section.

PUBLIC EMPLOYEES

- Cal. Govt. Code § 820. (a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person. (b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.
- Cal. Govt. Code § 822.2. A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.
- Cal. Govt. Code § 825.4. Except as provided in Section 825.6, if a public entity pays any claim or judgment against itself or against an employee or former employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of the employee or former employee of the public entity, he is not liable to indemnify the public entity.
- Cal. Govt. Code § 825.6. (a) (1) Except as provided in subdivision (b), if a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of that payment if he or she acted or failed to act because of actual fraud, corruption, or actual malice, or willfully failed or refused to conduct the defense of the claim or action in good faith. Except as provided in paragraph (2) or (3), a public entity may not recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his or her defense against the action or claim. (2) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted his or her defense against the claim or action pursuant to an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of the payment from him or her unless he or she establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his or her employment as an employee of the public entity and the public entity fails to establish that he or she acted or failed to act because of actual fraud, corruption, or actual malice or that he or she willfully failed or refused to reasonably cooperate in good faith in the

defense conducted by the public entity. (3) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his or her act or omission, and if the public entity conducted the defense against the claim or action in the absence of an agreement with him or her reserving the rights of the public entity against him or her, the public entity may recover the amount of that payment from him or her if he or she willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity. (b) (1) Upon a felony conviction for a violation of Section 1195 of this code, or of Section 68, 86, 93, 165, 504, or 518 of the Penal Code, by an elected official or former elected official of a public entity for an act or omission of that person while in office, the elected official or former elected official shall forfeit any rights to defense or indemnification under Section 825 with respect to a claim for damages for an injury arising from that act or omission. (2) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an elected official or former elected official of the public entity, for an injury arising out of an act or omission of the elected official or former elected official of the public entity, which act or omission constituted a felony violation of Section 1195 of this code, or of Section 68, 86, 93, 165, 504, or 518 of the Penal Code, the public entity shall recover from the elected official or former elected official the amount of that payment upon the felony conviction of the elected official or former elected official for that act or omission. Upon that conviction, the public entity shall also recover from the elected official the costs of any defense to a civil action filed against the elected official for that act or omission. (c) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

DANGEROUS CONDITIONS OF PUBLIC PROPERTY

- Cal. Govt. Code § 830.2. A condition is not a dangerous condition within the meaning of this chapter 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 that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.
- Cal. Govt. Code § 830.4. A condition is not a dangerous condition within the

meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

- Cal. Govt. Code § 830.5. (a) Except where the doctrine of *res ipsa loquitur* is applicable, the happening of the accident which results in the injury is not in and of itself evidence that public property was in a dangerous condition. (b) The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury.
- Cal. Govt. Code § 830.6. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning.
- Cal. Govt. Code § 830.8. Neither a public entity nor a public employee is liable

under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

- Cal. Govt. Code § 831. Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions.
- Cal. Govt. Code § 831.2. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.
- Cal. Govt. Code § 831.3. Neither a public entity nor a public employee is liable for any injury occurring on account of the grading or the performance of other maintenance or repair on or reconstruction or replacement of any road which has not officially been accepted as a part of the road system under the jurisdiction of the public entity if the grading, maintenance, repair, or reconstruction or replacement is performed with reasonable care and leaves the road in no more dangerous or unsafe condition than it was before the work commenced. No act of grading, maintenance, repair, or reconstruction or replacement within the meaning of this section shall be deemed to give rise to any duty of the public entity to continue any grading, maintenance, repair, or reconstruction or replacement on any road not a part of the road system under the public entity's jurisdiction. As used in this section "reconstruction or replacement" means reconstruction or replacement performed pursuant to Article 3 (commencing with Section 1160) of Chapter 4 of Division 2 of the Streets and Highways Code.
- Cal. Govt. Code § 831.7. (a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational

activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity. (b) As used in this section, "hazardous recreational activity" means a recreational activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator. "Hazardous recreational activity" also means: (1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

(2) Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable

warning thereof has been given. (3) Animal riding, including equestrian competition, archery, bicycle racing or jumping, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging, waterskiing, white water rafting, and windsurfing. For the purposes of this subdivision, "mountain bicycling" does not include riding a bicycle on paved pathways, roadways, or sidewalks. (c) Notwithstanding the provisions of subdivision (a), this section does not limit liability which would otherwise exist for any of the following:

(1) Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose. (2) Damage or injury suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee. For the purpose of this paragraph, a "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or injury arose. (3) Injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose. (4)

Damage or injury suffered in any case where the public entity or employee recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity. For purposes of this paragraph, promotional literature or a public announcement or advertisement which merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion. (5) An act of gross negligence by a public entity or a public employee which is the proximate cause of the injury. Nothing in this subdivision creates a duty of care or basis of liability for personal injury or for damage to personal property. (d) Nothing in this section shall limit the liability of an independent concessionaire, or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization.

- Cal. Govt. Code § 840.2. An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity 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) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or (b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.