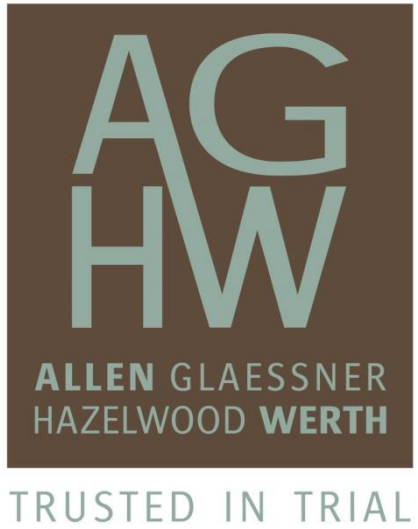
Successful Strategies:

Immunities as a Defense Against Dangerous Conditions Claims

Presented By:
Maria Nozzolino, Esq.
Tony Giles, General Manager (CJPRMA)



CALIFORNIA JOINT POWERS
RISK MANAGEMENT AUTHORITY

Dangerous Condition of Public Property Govt. Code § 835

Plaintiff must prove the following elements:

1. The public entity owned or controlled the property at the time of the injury
2. Public property was in a dangerous condition at the time of the injury
3. The injury to plaintiff was legally caused by the dangerous condition
4. The kind of injury that occurred was reasonably foreseeable as a consequence of the dangerous condition
5. Either:
   - The dangerous condition was created by a public employee's negligent or wrongful act or omission within the scope of his/her employment

     OR
   - The public entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury

Ownership or Control of the Property (Govt. Code § 835)

- The Public Entity must be in a position to protect against or warn of the hazard whether or not it owns the property
- Standard: Whether the Public Entity had the power to prevent, remedy, or guard against a dangerous condition.

Low v. City of Sacramento (1970) 7 Cal.App.3d 826, 833-834

Tolan v. State of California (1979) 100 Cal.App.3d 980, 984

Huffman v. City of Poway (2000) 84 Cal.App.4th 975, 990

Public Utils. Comm'n v. Superior Court (2010) 181 Cal.App.4th 364, 373

Definition of Dangerous Condition Govt. Code § 830(a)

- Statutory definition: "A condition of property that creates a substantial (as distinguished from 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."

- Can include public improvement which has become changed, flawed, damaged or has deteriorated to a state that is potentially dangerous to reasonably foreseeable users

- Potential risks are not sufficient to impose liability.

Alexander v. State of California (1984) 159 Cal.App.3d 890, 897

Case Examples of Dangerous Conditions of Public Property

- Submerged pipe near surface of recreational waters
  Waters v. City of Los Angeles (1975) 13 Cal.3d 297
- Inadequately maintained road that had crumbled away
  Elias v. San Bernardino County Flood Control Dist. (1977) 68 Cal.App.3d 70
- Mud hole in an improved parking strip
  Low v. City of Sacramento (1970) 7 Cal.App.3d 826
- Boat launching ramp with a missing plank
  Strongman v. County of Kern (1967) 255 Cal.App.2d 308

Cases Involving Non-Obvious Hidden Danger

- Non-defective highway overpass rendered dangerous by a negligently issued oversize load permit that routed truck through the overpass

  Hill v. People ex rel. Dept. of Transportation (1979) 91 Cal.App.3d 426

- Sharp curve incorporated into a highway improvement without posted warning signs of need to reduce speed

  Anderson v. City of Thousand Oaks (1976) 65 Cal.App.3d 82

- Children's sandbox located close to a baseball diamond

  Bauman v. City & County of San Francisco (1940) 42 Cal.App.2d 144

Injury Caused by Third Party Conduct

- A public entity is not liable for a dangerous condition of public property based on third party conduct alone

- There must be some concurrent contributing defect in the property itself

Pekarek v. City of San Diego (1994) 30 Cal.App.4th 909.

Trivial Risks Excluded Govt. Code § 830(a)

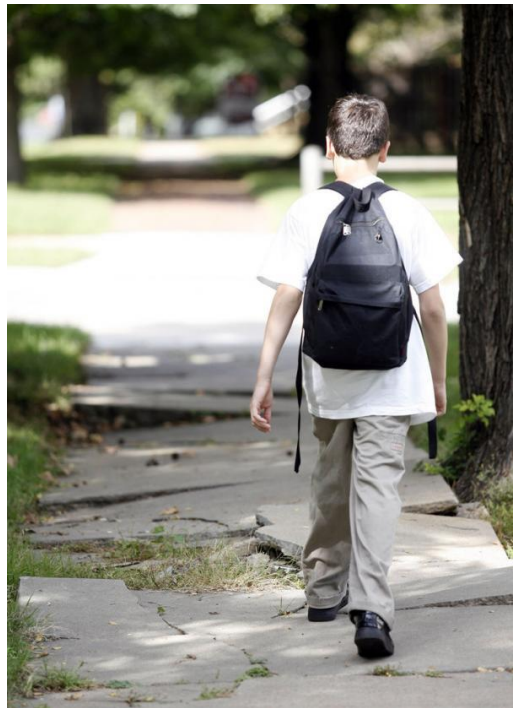
- Public entity is only liable when it creates a substantial risk of injury as opposed to minor, trivial, or insignificant risk
- Whether a defect is too trivial can be decided as a matter of law

  Sambrano v. City of San Diego (2001) 94 Cal.App.4th 225, 234
- A full assessment of all surrounding circumstances is necessary to determine whether the risk is substantial or trivial

  Fielder v. City of Glendale (1977) 71 Cal.App.3d 719, 734; *see also Calaroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927

Trivial Defect

- Specifically excluded from liability per Govt. Code § 830.2
- There is no "magic number" that makes a condition or defect trivial
- Courts use a Totality of the Circumstances test – may consider:
  - The size of the defect or condition
  - Whether view of the condition was obstructed
  - Whether the defect or condition had broken or irregular edges



Nunez v. City of Redondo Beach (2022) 81 Cal.App.5th 749

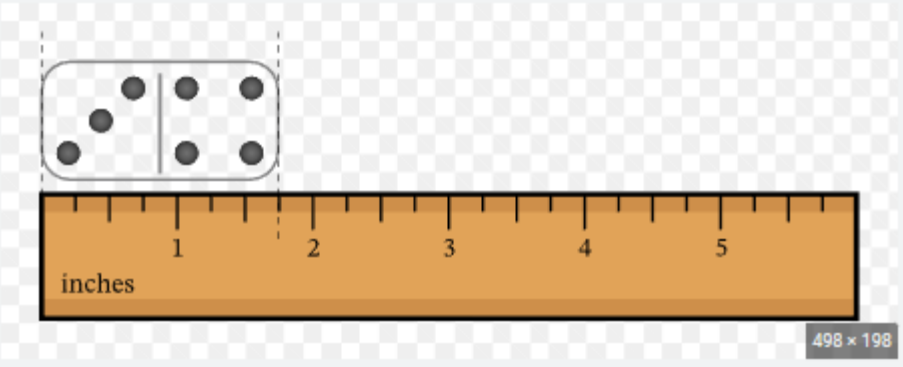
- City's policy to repair sidewalk uplifts of ½" or more did not create a dangerous condition
- Courts will consider the type and size of sidewalk defect along with any aggravating factors
- Here:
  - Plaintiff's back foot hit a raised sidewalk slab causing her to trip and fall
  - Height differential between sidewalk and slab at highest point – under ¾" inch
  - No aggravating circumstances: sunny, dry morning; no jagged edges; no debris; sidewalk free of cracks, holes and loose concrete; no prior complaints.

Delia Anguiano v. City of Manteca (Unpublished; January 12, 2023; 3rd District Court of Appeal)

- Plaintiff brought a personal injury action against the City of Manteca after she tripped and fell on a rise in a sidewalk.
- The City brought a motion for summary judgment, which the trial court granted, in part, because it found the defect was trivial as a matter of law.
- Court of Appeal affirmed.

1 ¾ Inch – Trivial Defect

- The rise between the two slabs of the sidewalk where Plaintiff fell was 1 and 3/4 inches (1 3/4”), at its highest along its slant.
- The Court found that the size of the rise was within a range that courts have found trivial when taking into account surrounding circumstances. *Beck v. Palo Alto* (1957) 150 Cal.App.2d 39, 41-42.
- In addition:
  - No record of claims or complaints of others being injured on the 1300 block of West Yosemite, and Plaintiff produced no evidence that others had fallen at the same spot.
  - It was a bright and nice day.
  - No broken concrete pieces or jagged concrete edges in the height differential or seam between the two concrete panels” where Plaintiff marked on a photograph as to where she fell.



History of Similar Accidents

- History of similar accidents during the course of normal use of a property can support a finding of a dangerous condition
  Baldwin v. State (1972) 6 Cal.3d 424

- Previous Accidents – Must be "substantially similar" *Salas v. Dept. of Transportation* (2011) 198 Cal.App.4th 1058
  - Trial court excluded traffic collision reports of previous accidents on the basis of relevance, finding the accidents in the reports were not substantially similar to the accident at issue because they did not involve pedestrians. Upheld on appeal.
  - "While there must be substantial similarity to offer other accident evidence for any purpose (i.e. notice), a stricter degree of substantial similarity is required when other accident evidence is offered to show a dangerous condition"

- Absence of prior accidents tends to prove no substantial risk of injury
  Thimon v. City of Newark (2020) 44 Cal.App.5th 745
    - Court found probative showing that over a 10-year period preceding accident, there had been no vehicle vs. pedestrian accidents within the subject sidewalk.

  Sambrano v. City of San Diego (2001) 94 Cal.App.4th 225, 243

  McKray v. State of California (1977) 74 Cal.App.3d 59, 62

  Beachamp v. Los Gatos Golf Course (1969) 273 Cal.App.2d 20, 36-38.

Use with Due Care

- *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380
  - Facts: Eight-year-old injured when attempting to ride his bike down a steep, wet, grassy hill in a park
  - Holding: Court affirmed summary judgment in City's favor because park's condition was not a dangerous condition
  - Reasoning: No reasonable person would conclude the property created a substantial risk of harm to reasonably foreseeable child users who used the property with the due care expected of children
- *Thimon v. City of Newark* (2020) 44 Cal.App.5th 745
  - Defendant was familiar with the subject intersection and testified he was familiar with the visibility issues presented by glare of the sun
  - Vehicle v. pedestrian accident – sole cause determined to be glare of sun in driver's eyes
- *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177
  - Evidence of community members expressing concern and evidence of pedestrian accident study did not preclude summary judgment

Causation

- The condition of the property was a legal cause of the injury
- Definition of legal cause: A cause which is a substantial factor bringing about the injury.

  CACI 1100

  Milligan v. Golden Gate Bridge Highway & Transp. District (2004) 120 Cal.App.4th 1; *Cordova v. City of Los Angeles* (2015) 61 Cal. 4th 1099

Kind of Injury that Occurred Was Reasonably Foreseeable

- Plaintiff must show that the precise manner in which the injury occurred was reasonably foreseeable
- Just because a condition is in a dangerous condition does not automatically ensure a finding that the "kind of injury" was reasonably foreseeable

Fuller v. Dept. of Transp. (2019) 38 Cal.App.5th 1034

Notice

- Actual Notice: The Public Entity knew of the condition and "knew or should have known of its dangerous condition" Govt. Code § 835.2(a)

- Constructive Notice: The condition existed for such a period of time and was of such an obvious nature that the Public Entity, in the exercise of due care, should have discovered the condition and its dangerous character. Govt. Code § 835.2(b)

Potential Affirmative Defenses

- Comparative Negligence
  - The more the Plaintiff argues that the Public Entity had "constructive notice" because the defect was open and obvious, the more comparative negligence there is on Plaintiff's part for similarly failing to observe and avoid it.

- Assumption of Risk
  - *Knight v. Jewett* (1992) 3 Cal.4th 296
  - Primary assumption of risk – Defendant owes no duty to Plaintiff and doctrine operates as a complete bar to recovery
  - Secondary assumption of risk – Defendant owes a duty, but the Plaintiff proceeds to encounter a known risk imposed by the Defendant's breach of duty
  - Part of comparative fault scheme where trier of fact considers the relative responsibility of the parties in apportioning the loss resulting from the injury
  - Critical Issue in determining primary or secondary assumption of risk: Whether the Defendant's conduct is an "inherent risk" of the activity such that liability does not attach as a matter of law

- Third Party Negligence

Potential Affirmative Defenses (Cont'd)

- Reasonable Time to Take Protective Measures
  - If the Public Entity did not create the condition, the Public Entity is not liable if it did not have sufficient time to protect the public from the danger. The jury may consider all the surrounding circumstances including what measures would have been appropriate to remedy the condition and the time necessary to have done so. Govt. Code § 835(b)

- Dangerous Condition Created by Reasonable Act
  - The Public Entity is not liable if the act or omission of its employee creating the condition was reasonable. The jury may weigh the foreseeability of the injury against the practicability and cost to have taken other action. Govt. Code § 835.4(a)

- Reasonable Action to Protect Against Dangerous Condition
  - The Public Entity is not liable if its failure to remedy the condition was reasonable. The jury may weigh the time and opportunity available to the Public Entity to have alleviated the condition, and the cost of doing so, against the foreseeability of the injury. Govt. Code § 835.4(b)

Potential Affirmative Defenses (Cont'd)

- Releases/Waivers –
- *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003
  - High School football player who suffered a TBI during a football game was barred due the release he signed
  - (Plaintiff and his father) signed release of liability and assumption of risk
  - Release checked off basketball and football as the activities Plaintiff was allowed to participate in
  - Plaintiff (and his father) also signed Parent Concussion/Head Injury Information Sheet
  - Release covered all allegedly negligent acts by coaches and employees
  - Plaintiff agreed to assume risk of injuries caused by negligent acts of District employees in coaching/supervising/diagnosing
  - Release expressly covered all injuries Plaintiff might suffer
  - Plaintiff could not establish gross negligence

Potential Affirmative Defenses (Cont'd)

- Contractual Indemnity
- Failure to mitigate damages
- Proposition 51 (Proportional Share of Non-Economic Damages)
- Failure to demonstrate or excuse compliance with claim procedures (Govt. Code § 905 et seq.)

Immunities

- Design Immunity (Govt. Code § 830.6)
- Regulatory Traffic Signs (Govt. Code § 830.4)
- Warning Signs (Govt. Code § 830.8)
- Weather Immunity (Govt. Code § 831)
- Discretionary Immunity (Govt. Code § 820.2)
- Natural Condition Immunity (Govt. Code § 831.2)
- Trail Immunity (Govt. Code § 831.4)
- Hazardous Recreational Activities (Govt. Code § 831.7)
- Lighting

Elements of Design Immunity
Govt. Code § 830.6

1. Causal relationship between the plan or design and the accident
2. Discretionary approval of the plan or design before construction or improvement
3. Substantial evidence supporting the reasonableness of the plan or design

Menges v. Dept. of Transp. (2020) 59 Cal.App.5th 13, 20; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939.

- A public entity need only show "substantial conformance" with the design plans; a minor deviation from the approved plan as designed will not preclude the application of the immunity. *Menges*, 59 Cal.App.5th at 24-25 ("substantial conformity, not exact, is all that is required").

Elements of Design Immunity
Govt. Code § 830.6

- First two elements are mixed issues of law and fact
  - Where facts are undisputed, they are properly resolved at summary judgment

    Grenier v. City of Irwindale (1997) 57 Cal.App.4th 931

- Third element is an issue of law
  - Requires only a "substantial evidence of reasonableness"

    Grenier 57 Cal.App.4th 931
  - Conflicting evidence produced by plaintiff will not create a triable issue of fact to defeat summary judgment as long as defendant has met this burden

    Wyckoff v. State (2001) 90 Cal.App.4th 45

Causal Relationship Between Plan/Design and Accident

- Must show that the Plaintiff's injuries were caused by a feature inherent in the approved plan or design, as opposed to some other cause
  - There must be a design, but it does not need to be in any particular form

    Thomson v. City of Glendale (1976) 61 Cal.App.3d 378

    Martinez v. County of Ventura (2014) 225 Cal.App.4th 364
- Referred to as "design-caused accident" by Courts
  - Where "lurching" commuter train caused the plaintiff to fall, and lurching was result of a designed wheel-traction system, design immunity defense available

    BART v. Superior Court (1996) 46 Cal.App.4th 476
  - Omission of median barrier on Golden Gate Bridge also an approved design decision making design immunity defense available

    Sutton v. Golden Gate Bridge Highway & Transp. Dist. (1998) 68 Cal.App.4th 1149
- Does not immunize decisions that were not made
  - Defense not available when no evidence that highway "banking", which caused accident, was not in approved design or plan

    Cameron v. State (1972) 7 Cal.3d 318
  - When environmental conditions – not engineering options or plan or design – result in icy condition on bridge, design immunity not available

    Flournoy v. State (1969) 275 Cal.App.2d 806

Causal Relationship Between Plan/Design and Accident

- A causal relationship between the design and the accident, can be established by the complaint. *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550.
- *Fuller v. Dept. of Transportation* – Defendant permitted to rely on plaintiffs' pleadings to establish "the necessary assertion of causation." (2001) 89 Cal.App.4th 1109.
- "This element is *ordinarily established* by the allegations in the complaint that the injury occurred as a result of the plan or design." (2 Van Alstyne et al., Cal. Government Tort Liability Practice (Cont.Ed.Bar 4th ed. 2021) §§ 12.69, pp. 12-93-94 (emphasis added).)

Causal Relationship Between Plan/Design and Accident

- *Cameron v. State* (1972) 7 Cal.3d 318 - the plaintiffs sued the State arising out of a collision where their vehicle left the roadway as they proceeded down a steep downgrade with a sharp "S" curve.
- On appeal, plaintiffs argued, in part, that the State was not entitled to design immunity because the approved plan did not specify the degree of superelevation and the improper superelevation was the cause of the accident.
- The appellate court agreed because the design plan "contained no mention of the superelevation intended or recommended." *Id.* at 326.

Discretionary Approval by Authorized Public Body or Official

- Requires pre-construction approval by "the legislative body of the public entity or some other body or employee exercising discretionary authority" or a showing that "the plan or design was prepared in conformity with standards previously so approved"
- To determine which board or officer has discretionary approval authority, courts look to both law fixing internal distribution of public entity's powers and applicable administrative arrangements
  - No requirement that plan be prepared by public employees as long as plan is duly approved *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378
    - For example, a detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. *Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 947 (citing *Grenier*, 57 Cal.App.4th at 940).
  - If applicable law requires approval by particular board, employee, or licensed professional, such entity must actually approve the design for the defense to be available (*Levin v. State* (1983) 146 Cal.App.3d 410)

Discretionary Approval by Authorized Public Body or Official

- Evidence of approval need not be provided by the actual people who approved the project; can rely on custom and practice. *Dobbs v. City of Los Angeles* (2019) 41 Cal.App.5th 159

- A former employee may testify as to the public entity's discretionary approval custom and practice even if the employee was not involved in the approval process at the time the plans were approved. *Gonzales*, 6 Cal.App.5th at 947. This element may be resolved as a matter of law where the facts are undisputed. *Grenier*, 57 Cal.App.4th at 940.

- No "implied" discretionary approval *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364

- But no requirement that the approval be expressed in any particular form
  - Oral approval may also be sufficient *Bane v. State* (1989) 208 Cal.App.3d 860

Any Substantial Evidence Establishing Reasonableness of Approval

- To satisfy court, must show that the plan could have been adopted by a "reasonable" public employee or legislative body
- Courts will look to whether the evidence "reasonably inspires confidence" and "is of solid value" *Muffett v. Royster* (1983) 147 Cal.App.3d 289
- Design immunity was intended, "to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design" which would "create too great a danger of impolitic interference with the freedom decision-making by those public officials in whom the function of making such decisions has been vested." *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939; *see also Fuller*, 89 Cal.App.4th at 1114.

Evidence that can Establish Reasonableness of Approval

- Engineering Opinions
  - Opinion of a civil engineer about reasonableness of design
  - BUT not if the opinion is sufficiently flawed so as to destroy its substantiality

    Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789
- Professional Standards
  - Satisfaction of applicable codes and regulations supports reasonableness of approval

    Moritz v. City of Santa Clara (1970) 8 Cal.App.3d 570
- Accident History
  - Accident rate of 1 in 685,000 vehicles since construction of designed intersection supports reasonableness of approval

    Callahan v. City & County of San Francisco (1971) 15 Cal.App.3d 374

Evidence that can Establish Unreasonableness of Approval

- No fully articulated set of criteria to determine whether approval is "unreasonableness"
- Unreasonable where hazard "obvious" to "any reasonable person"

  Levine v. City of Los Angeles (1977) 68 Cal.App.3d 481
- Court may balance foreseeability of danger against burden of implementing alternative design that reduces or eliminates the danger

  Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789

Tansavatdi v. City of Rancho Palos Verde (2021) 60 Cal.App.5th 423

- Mother of bicyclist killed when his bicycle collided with a turning truck on City street brought action against City, alleging City created a dangerous condition by removing a bicycle lane from the area of the accident and had failed to warn of that dangerous condition
- Trial Court granted summary judgment to City based on design immunity; upheld by Court of Appeal (2nd Dist.)
- Accident occurred on Hawthorne Blvd. between Dupre and Vallon Drive; No bicycle lane at this location. Were bicycle lanes at other areas on Hawthorne Blvd.
- 1st Element – City submitted plans for a 2009 street resurfacing project, which showed the design never included bicycle lanes at Dupre and Vallon; City submitted declaration stating City decided against bicycle lanes at this location to retain on-street parking for the benefit of an adjacent park
- 2nd Element – Licensed engineer who worked for Dept. of Public Works signed the plans "on behalf of City of Ranch Palos Verdes"
- 3rd Element – Declarations from license engineer and experts that the design was reasonable.

Design Immunity & Failure to Warn

- *Tansavatdi* – Plaintiff argued even if design immunity was met, the City was still liable for failure to warn of that dangerous condition (lack of a bicycle lane constituted a concealed trap for which City had a duty to warn)
- Plaintiff relied on *Cameron v. State of CA* – Supreme Court held design immunity may not necessarily shield the state from liability for a failure to warn of the same dangerous condition
- In *Cameron* – Plaintiffs were injured when driver lost control negotiating an "S" curve constructed with inconsistent superelevation
- Court of Appeal distinguishes *Cameron* –
  - *Cameron* involved failure to warn of a hidden dangerous condition that was NOT part of the approved design of the highway (no superelevation was considered in the *Cameron* plans)
  - Here – Court upheld design immunity and remanded to the trial court for consideration of Plaintiff's failure to warn theory (which the trial court had not considered)

Loss of Design Immunity

- A public entity may lose the defense of design immunity if the following three conditions are met:
  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
  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 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
- Plaintiff must plead and prove the loss of design immunity, and is entitled to a jury trial on the associated issues if there are triable issues of material fact

  Cornette v. Dept. of Transp. (2001) 26 Cal.4th 63

Loss of Design Immunity

- Reliance on citizen complaints and/or increased traffic flow without more is insufficient to establish changed physical conditions.
- In *Grenier*, plaintiff provided evidence of one other accident that occurred where his accident occurred, but the court rejected this, observing that plaintiff "[had] shown no evidence that this single accident in seven years constituted a change in conditions."
- Likewise, in *Laabs v. City of Victorville*, the court noted that the record contained no statistical data and "no attempted correlation between increased traffic flow, increased speeds, and increased accidents." (2008) 163 Cal.App.4th 1242, 1268-69.

Regulatory Traffic Sign Immunity
Govt. Code § 830.4; 830.8

- A public entity cannot be found liable for a dangerous condition of public property based on its alleged failure to provide "traffic or warning signals, signs, markings or devices." Govt. Code §830.8

- Govt. Code §830.4: "A condition is not a dangerous condition … 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…"

- The immunity applies except if "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." Govt. Code § 830.8; Mixon v. Pac. Gas & Elec. Co. (2012) 207 Cal.App.4th 124, 135-136.

Regulatory Traffic Sign Immunity

- Applies to regulatory traffic control signals, pedestrian traffic control signals, stop signs, yield right-of-way signs, speed restriction signs and distinctive double line roadway markings

Frazier v. City of Sonoma (1990) 218 Cal.App.3d 454

- Where the dangerous condition exists for reasons other than, or in addition to, the mere failure to provide such controls, this immunity does not apply

Washington v. City & County of San Francisco (1990) 219 Cal.App.3d 1531

Warning Signs Immunity
Govt. Code § 830.8

- Applies to detour signs, pedestrian-crossing prohibition signs, railroad warning signs, road work warning sign and school crossing signs
- Does not apply if signs were necessary to warn of a "trap"

  Cameron v. State (1972) 7 Cal.3d 318
- Public entity is not liable for injuries caused by a dangerous condition if it renders an "adequate warning".
- Public entity not liable for failing to warn of a condition of which the plaintiff is fully aware.

  Foremost Dairies Inc. v. State of California (1986) 190 Cal.App.3d 361, 367

Weather Immunity
Govt. Code § 831

- Applies to the effect of fog, wind, rain, flood, ice or snow on the use of streets
- Must show that a reasonably careful person using the public streets and highways would have noticed the weather condition and anticipated its effect on the use of the street or highway

  Allyson v. Dept. of Transp. (1997) 53 Cal.App.4th 1304
- Does not apply to the physical damage to or deterioration of streets and highways resulting from weather conditions
- Does not apply to situations where the weather combines with other factors to make the roadway dangerous

  Erfurt v. State of California (1983) 141 Cal.App.3d 837, 845–846

Discretionary Immunity
Govt. Code § 820.2

- Except as otherwise provided by statute, a 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 vested in him, whether or not such discretion be abused.
- The act must result from the exercise of discretion in the making of a basic policy decision at the planning, rather than ministerial or operational level
- *Young v. United States* (9th Cir. 2014) 769 F.3d 1047
  - Discretionary immunity did not apply to National Park Service employee's decision not to warn of a hazard it knew of and created

Natural Condition Immunity
Govt. Code § 831.2

- Neither a public entity nor a public employee is liable for an injury caused by a natural condition of an unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach
- Policy reason: To permit members of the public to use public property in its natural condition without placing the burden on public entities to keep the property safe

Cases Interpreting Natural Condition of Unimproved Property

- State immune from claim brought by parents of child attacked by mountain lion on marked trail in state park

  Arroyo v. State of California (1995) 34 Cal.App.4th 755

- Action by bodysurfer who was gravely injured when wave action hurled him against hard sand bottom barred against City, County, and State

  Knight v. City of Capitola (1992) 4 Cal.App.4th 918

- Claim by horseback rider on state park trail that park constituted a dangerous condition barred

  State of California v. Sonoma Cty. Superior Court (1995) 32 Cal.App.4th 325

- Immunity for unimproved public property does not extend to injuries occurring to nonusers on adjacent land

  Milligan v. City of Laguna Beach (1983) 34 Cal.3d 829

When Public Property Ceases to be Unimproved

- No precise standard when public property in its natural state ceases to be unimproved
- "Improved" – "must change the physical nature or characteristics of the property at the location of the injury to the extent it can no longer be considered a natural condition"

  Mercer v. State (1987) 197 Cal.App.3d 158, 165

Cases Interpreting Improvements to Natural Condition

- Court rejected theory that upstream dam made river unnatural
  County of Sacramento v. Superior Court (1979) 89 Cal.App.3d 215
- Immunity applied against plaintiff injured in bodysurfing accident, even though beach reconstructed by rock formation years earlier
  Knight v. City of Capitola (1992) 4 Cal.App.4th 918
- Unimproved public property does not become "improved" simply because warning signs are used
  Eban v. State (1982) 130 Cal.App.3d 416

Trail Immunity
Govt. Code § 831.4

A public entity is not liable for injury caused by a condition of

- Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all other types of vehicular riding, water sports, recreational or scenic areas and which is not a street or highway;
- A trail used for the above purposes;
- Any paved trail, walkway, path or sidewalk on an easement of way which has been granted to public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirements shall not construed to be a standard of care for any unpaved pathways or roads

Exclusions: Unpaved roads that are city streets; county, state, or federal highways; or public streets or highways maintained by a special district

Cases Interpreting Trail Immunity

The trail immunity doctrine applies when the dangerous condition is inherently connected and exists only because of its connection with the trail. (*Reed v. City of Los Angeles* (2020) 45 Cal.App.5th 979)

Case Examples:

- Trail immunity barred pedestrians' claims for injury from golf ball (*Leyva c. Crockett & Co.* (2017) 7 Cal.App.5th 1105)
- County immune from claim brought by bicyclist for injury incurred on paved county trail (*Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413)
- Immunity given to county for claim brought by rollerblader injured by crack in bicycle path (*Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606)
- Path within dog park deemed a trail for purposes of trail immunity (*Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074)
- Wrongful death action barred where trail used for recreational and maintenance purposes (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391)
- Immunity upheld where plaintiff fell over protruding tree trunk on path (*Montenegro v. City of Bradbury* (2013) 215 Cal.App.4th 924)

Hazardous Recreational Activity Immunity Govt. Code § 831.7(b)

- Definition: "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 spectator
- Govt. Code § 831.7(b)(3): List of the types of activities that are specifically included within the definition
  - Not an exhaustive list
- To determine whether an activity not included in the list is a hazardous recreational activity, courts look to the listed activities and make analogies

Exceptions to Hazardous Recreational Activity Immunity Govt. Code § 831.7

- Failure to warn of a known dangerous condition or other hazardous recreational activity that was not assumed by the participant as inherently part of the activity
- When the public pays a specific fee to the entity for participation in the hazardous activity
- Negligent failure to construct or maintain equipment, structures or improvements
- Gross negligence

Cases Interpreting Hazardous Recreational Activity

- Tree rope swinging deemed hazardous recreational activity
  Devito v. State (1988) 202 Cal.App.3d 964
- Immunity applied when 14-year-old boy drowned while swimming in lake
  Perry v. East Bay Regional Park Dist. (2006) 141 Cal.App.4th 1
- College not immunized after baseball player intentionally beaned by a pitch
  Avila v. Citrus Community College Dist. (2006) 38 Cal.4th 148
- After hours basketball game in junior high school gym considered hazardous recreational activity
  Yarber v. Oakland Unified School Dist. (1992) 4 Cal.App.4th 1516
- Soccer match during P.E. class cannot constitute hazardous recreational activity
  Iverson v. Muroc Unified School Dist. (1995) 32 Cal.App.4th 218
- University held responsible for injuries to ultimate frisbee participants who was injured when striking glass door in gym
  Eddy v. Syracuse University (1980) 433 N.Y.S.2d 923

Mubanda v. City of Santa Barbara (2022) 74 Cal.App.5th 256

- City immune under the hazardous recreational activity immunity for the drowning death of a paddleboarder.
- The City sought summary judgment based on governmental immunities, including hazardous recreational activity
- The trial court granted the motion and Court of Appeal upheld.
- City did not have a duty to warn paddle boarders of the risk of falling off a stand-up paddle and drowning in the Harbor because the risk was inherent in that type of recreational activity.
- The Court of Appeal agreed with the trial court's finding that there was no evidence showing paddle boarders were not aware of the dangers of the choppy water or inclement weather and the associated risk of drowning.
- No facts supporting a claim for gross negligence, which requires a showing of the want, scant care or gross departure from the ordinary standard of conduct. Govt. Code § 831.7(c)(1)(E).
- The City had taken many steps prior to Plaintiff's drowning to promote safety while paddle boarding.
- Fact that the City received a 10 percent fee on rentals did not render the hazardous recreational immunity inapplicable under Government Code section 831.7(c)(1)(B). The Court of Appeal found that a percentage of gross sales as part of a lease agreement was not the same as receiving a specific fee.

Lighting

- In general, public entity has no duty to light its streets even though it has the power to do so
  - BUT a duty to light may arise from a "peculiar condition" that "renders lighting necessary in order to make the streets safe for travel"

    Antenor v. City of Los Angeles (1985) 174 Cal.App.3d 477
- Darkness is a naturally occurring condition that a public entity is under no duty to eliminate

  Plattner v. City of Riverside (1999) 69 Cal.App.4th 1441
- There may be liability for failure to light if a Plaintiff relies on the fact that a route is lighted and foregoes other protective action to take that route

  Plattner v. City of Riverside (1999) 69 Cal.App.4th 1441

QUESTIONS?

Maria Nozzolino, Esq.

mnozzolino@aghwlaw.com

Tony Giles

tony@cjprma.org

Complete Session Surveys on the App

Find the App, Click on Events, Click on Browse by Day, Click on the Specific Session, Click on Rate Event.