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Dangerous condition of public roadways

OVERCOMING GOVERNMENT-IMMUNITY DEFENSES

Over the years, as in most states, California lawmakers provided the government a broad spectrum of immunities, attempting to give them a free pass. While the more recent decision in *Tansavatdi v. City of Racho Palos Verdes* (2023) 14 Cal.5th 639, seems to throw plaintiffs a bone, strict rules must still be followed to maintain your clients' rights.

A majority of the public entities' free passes can be found in Government Code sections 810-996.6, also known as the Government Claims Act. These can be frustrating as they are riddled with exceptions, and exceptions to those exceptions. There are several immunities, however that are worth learning well – specifically, the immunities that deal with dangerous conditions of public property, police and correctional activities, as well as medical hospitals and public health activities.

The case study in this article deals with the immunities for dangerous condition of public property, focusing on design immunity.

Evaluating the claim

Claims against the government are heavily litigated, complicated, and generally very costly, so the legal issues should be considered carefully from the outset, starting of course with liability. Additionally, because of the cost and attorney time spent prosecuting these claims, the injuries suffered must warrant action against the public entity. While the cause might be extremely just, it is difficult to justify the high costs of litigating against a government entity over a smaller injury. That does no service to the injured client, whose potential recovery is entirely swallowed by case costs.

Like good trial lawyers, we teach best by storytelling, using specific case facts as a vehicle for analysis of immunities. We had the privilege of representing a wonderful 21-year old client who was a student at Point Loma University, contracted to serve his country in the United States Marine Corps. (USMC). He was at the peak of his physical fitness and on track to graduate with high honors. Then came the crash that caused him serious physical injuries, forcing him to be medically discharged and released from his contract and completely changing the trajectory of his life.

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When the case came in, there was no question that the client's injury was huge, but the question of governmental entity liability was much more difficult. On the day of the accident, Daniel was traveling on his motorcycle on his way to class at Point Loma. It was a typical weekday morning, and he was driving within the posted 30 mph speed limit on Catalina Boulevard. Unfortunately, as he approached the intersection of Catalina Boulevard and Del Mar Avenue, a vehicle suddenly came out from his right, striking his motorcycle.

Upon impact, witnesses described Daniel as catapulting into the air, cartwheeling over the vehicle, and landing on the asphalt over 25 feet away from the point of impact. Numerous people rushed to his aid, and it was evident that Daniel had suffered severe injuries. While it was clear that the vehicle driver who entered the intersection from a stop sign bore liability, we questioned whether the old road designs of Point Loma had a role to play as well.

Was it a dangerous roadway?

To determine Daniel's litigation chances, we hired a civil engineer to view the subject roadway. It is crucial to meet the experts at the scene, see it with your own eyes and talk with the expert while everyone is looking at the same scene. Through the inspection, we discovered that the view of both drivers was obscured both by vehicles parked along the side of Catalina Boulevard and an overgrown hedge on the property located at the corner of Catalina Boulevard and Del Mar Ave. More importantly, and something that was not visible through internet imaging, we noted that these obstructions were compounded by the grading of the road. In short, not only could vehicles stopped at Del Mar Avenue not clearly see traffic approaching on Catalina Blvd., vehicles traveling on Catalina Blvd. couldn't see the stop sign or vehicles stopped at Del Mar Ave. With both views obstructed, both drivers were forced to commit to the intersection on a hope and a prayer that they would not be struck by oncoming traffic, establishing an inherent dangerous condition. (*Feingold v. County of Los Angeles* (1967), 254 Cal.App.2d 622.)

At the same time, we immediately issued public record requests seeking any documents evidencing speed surveys, line-of-sight evaluations performed at the intersection, work performed by the City at the intersection, landscaping performed in the area, prior accidents, and, of course, complaints made by citizens about the intersection.

These documents proved to be a gold mine. While they did not contain the obvious list of prior accidents in the form of a SWITRS report, they did have a number of complaints by citizens regarding the dangers of the intersection and nearby similar intersections. Also, while the City maintained that they had no obligation or right to cut the nearby hedges, landscaping records reflected the opposite. But most importantly, the documents provided us with numerous plans and accompanying evaluations where the City had clearly failed to perform any evaluation of line of sight at the intersection, *ever*. As well as a modification to approved plans, (which dated back to the 1920s), wherein the City arbitrarily added parking along Catalina Blvd, without ever evaluating the line of sight or seeking any internal discretionary approval from an engineer or authoritative staff.

Bolstered with the knowledge of the City's perceived shortcomings, we hired a private investigator to go door to door within the neighborhood and talk to residents about any concerns they had about the intersection. The interviews we received were overwhelming. While the accident history reflected very few prior accidents in the intersection, we were met with detailed accounts of numerous accidents just in the prior three years, as well as copies of complaints made to the city, that were not included in the public records.

Having timely filed the government claim, this incredible evidence made taking the next step of filing a lawsuit a relatively easy decision. However, we were still unsure whether we would be able to overcome both our client's alleged negligence and the array of immunities we would face. We knew we would have to take depositions of the interviewed witnesses, the City's police officers, staff, as well as the defendant, to lock in the statements provided in the police report. We began the process of peeling back the layers of the onion, keeping in mind the immunities we would likely have to overcome.

Naturally, the City argued the intersection was not a dangerous condition since there had been fewer than five accidents on record in the past 10 years. They also asserted design immunity in reliance on their 1920s plans.

Dangerous condition of public property under Government Code § 835

To prove a dangerous condition of public property under Government Code section 835, a plaintiff must prove that the condition is dangerous at the time of injury, proximate causation, and that the risk was reasonably foreseeable.

Additionally, the plaintiff must prove that the danger was caused by either a negligent or wrongful act or omission of a public entity employee acting within the scope of his employment *or* that the governmental entity had actual or constructive notice of the dangerousness, with enough time to actually implement a change.

In Daniel's case, we found that in the five years preceding the collision, the City had performed numerous site inspections due to residential complaints, construction projects, and speed surveys performed in and around the subject intersection, and should therefore, have been knowledgeable of the dangerous condition the intersection presented. Through depositions of City employees, we uncovered the processes by which City employees were to report such conditions and the manner in which the area had been evaluated on all of these prior occasions, supporting the City's notice of

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the condition, well before Daniel's accident.

Additionally, we were able to evidence the unsupported changes to the intersection, which created the dangerous condition, which meant the City sat with knowledge of the dangerousness, for years, ignoring the evidence provided by numerous resident complaints and accidents that had gone undocumented, per City policy, as they lacked "serious injury."

In other words, not only did the City create the dangerous condition, it also had the requisite "notice" to establish its liability under section 835, subdivision (b). (It is not necessary to prove both prongs – see *Curtis v. State* (1982) 128 Cal.App.3d 668, 693 – but in this case we were able to argue both.)

Additionally, through review of the deposition of the defendant driver as well as our own client, we discovered that both parties spoke to an inability to see one another until each had committed to the intersection, at which time, the accident was unavoidable. Through extensive research, we discovered *Feingold v. County of Los Angeles* (1967), 254 Cal.App.2d 622, which spoke directly to this type of situation, and found that due to the topography of the road, the inability of the drivers to see one another for "some period of time or space after such driver is committed to the intersection created a dangerous condition of public property." (*Mitterhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 11 citing *Feingold v. County of Los Angeles* (1967) 254 Cal.App.2d 622, 625-626.)

Design immunity

Government Code section 830.6 is an affirmative defense, which required the City to plead and prove a causal relationship between the design and the area, discretionary approval of the design prior to construction or that the design was prepared in conformity with approved standards, and substantial evidence supporting the reasonableness of the design.

Causal relationship

A *causal relationship* is typically established by allegations in the complaint that the injury occurred as a result of the plan or design. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940.) The immunity is only applicable to incidents caused by an intentional design decision. Therefore, when establishing this causal connection, the government is not immunized if the injury-producing condition was *not* part of the discretionarily approved design. (See, for example, *De La Rosa v. City of San Bernardino* (1971) 16 Cal.App.3d 739, where design immunity did not apply because there was no evidence that the installation and position of a stop sign was part of an approved plan/design.)

In Daniel's case, the City was able to argue that the intersection was the subject of specific design plans and as the plaintiff was alleging the poor design of the intersection contributed to the occurrence of the accident, the causal relationship appeared to be established. However, extensive review of these plans, along with subsequent depositions, revealed that the plans omitted any of the design components Plaintiff was arguing contributed to the collision. Specifically, there was no demarcation evident in the plans that called for parking along Catalina Blvd. or spoke to the current placement of the stop sign and limit line located on Del Mar Ave. In fact, at the time of the collision, the placement of said limit line and stop sign were approximately 10 feet further back into Del Mar Ave., making it imperceivable to traffic traveling on Catalina Ave. Moreover, no evidence was provided by the City that at the time either of these changes were made, any evaluations of line of sight were performed, for purposes of motorist safety. Thus, we argued that the City failed to satisfy the first element because the design deviated from the plans and did not include a required consideration of motorist safety.

Design approval

Design approval is a fact-specific analysis. (*Uyeno v. State* (1991) 234 Cal.App.3d 1371.) This makes it easier to argue on summary judgment. The people who actually have authority to approve a design are often declared by local statute. Use discovery to determine who approved the design, their authority to do so, and the basis of the approval. Use these facts to challenge this element.

In Daniel's case, the City was able to provide evidence of who had authority to approve the design plans they were relying on in seeking design immunity, but they failed to provide any evidence as to who has authority to alter that design or what considerations were made at the time of alteration. Investigation and discovery revealed the appropriate process necessary for the alteration and approval of the previously approved designs would have been by an engineer, followed by a presentation to the City Council for final approval. Instead of showing they complied with the process, the City simply argued that such process was not necessary in this case, as the road was originally designed with sufficient width to accommodate the street parking later added and therefore, such additions, were not "true deviations" from the original plans and merely a reasonable exercise of their discretionary authority, without providing any proof of who, when, or how this "discretionary authority" was exercised.

Reasonableness

In satisfying the *reasonableness* element, the public entity need only present "any substantial evidence" that the plan was reasonably approved or adopted. (*Higgins v. State* (1997) 54 Cal.App.4th 177, 186.) In examining this, the courts must determine whether the evidence provided "reasonably inspires confidence" and is "of solid value." (*Muffett v. Royster* (1983) 147 Cal.App.3d 289, 307.) Further, in determining reasonableness, the court is usually aided by evidence about prevailing professional standards of design and safety. (*Moritz v. City of Santa Clara* (1970) 8 Cal.App.3d 573.) Thus, when evidence demonstrates that the design or plan fails to satisfy accepted engineering standards and thereby creates an avoidable risk of injury, the courts have concluded the approval of

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the design or plan was not reasonable. (*Levin v. State* (1983) 146 Cal.App.3d. 410.)

The City in Daniel's case proffered little evidence to support the reasonableness of the changes to the design, stating only that the plans provided for adequate width in the road for the addition of parking along Catalina Blvd. and that the movement of the limit line was done to provide safe pedestrian crossing in compliance with the American Disabilities Act (ADA). Ultimately, they produced a retained expert that testified the changes were "reasonable and in conformity with the relevant standards then existing" and that the addition of the parking was not a deviation from the plan, as the width of the road was specifically designed in this manner to allow for such an addition, in the future.

We argued that the City should have considered standards set forth in any major engineering manual, such as Highway Design Manual (HDM) or AASHTO, which would have advised the City of the line-of-sight requirements when revising the placement of stop signs and limit lines. Had the City simply consulted these manuals, they would have seen that the language in the manuals specifically states minimum sight-distance requirements at intersections such as the one in our case, a standard this intersection failed to meet by over 200 feet.

Additionally, we argued that in 1920, when the City approved the subject plan, there was no way that street-side parking was considered or even contemplated, as the Model T was the most popular car being driven and only owned by a select few. Thus, the curb markings and implementation of the subject parking were not governed by the 1920s plan and were not entitled to protections under design immunity.

We further argued that implementing these changes without proper safety considerations was not reasonable, and the court agreed, finding design did not govern the modifications to street parking and the changes to the stop sign and limit line unreasonable in light of the professional standards set forth in the HDM and AASHTO.

It's equally important to note, that a governmental entity can also lose its design immunity even if it is established, under a limited exception carved out in *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63. To take advantage of this exception a plaintiff must show a change in the physical condition that makes the area dangerous now, even if it wasn't dangerous at the time of the design. The plaintiff must also show that the defendant had notice of the changed condition, and that there was a reasonable amount of time for the entity to obtain funds and do the necessary corrective work.

What constitutes a "change in physical condition," is a factual consideration, making it difficult to prove. Examples from case law include the passage of time (*Cameron v. State* (1972) 7 Cal.3d 318.); changes in the public entity's design standards (*Dole Citrus v. State* (1997) 60 Cal.App.4th 487); technological advances (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149.); great increase in traffic volume (*Wyckoff v. State* (2001) 90 Cal.App.4th 45.); and the fact that median barriers are installed on similar roads. (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2016) 212 Cal.App.4th 335.)

Because of the limited guidance from the courts, it is best to identify several conditions that may be considered collectively as examples of "changed physical condition" and attempt to distinguish your case from the above referenced cases. In the end, California courts have set a high bar when considering whether a public entity has lost their immunity.

Keep in mind, if you wait until immunity is established before you begin comprising the necessary arguments to combat it, you have already lost. While challenging the establishment in Daniel's case, we made multiple alternative arguments to combat immunity, should the court find that it was established.

Conclusion

Establishing a duty to warn or defeating design immunity is a technical, fact-dependent practice. When facing a suit alleging a dangerous condition of public property, anticipate all immunities from day one and direct your discovery efforts toward defeating an almost certain summary judgment motion. Depositions, interrogatories, and California Public Records Act requests are crucial to success.

We succeeded in overcoming the City's defenses in Daniel's case and take great pride in knowing our efforts provided Daniel funding which has given him access to resources and advanced medical treatment, contributing to an improvement in his quality of life. Additionally, we take great pride knowing that the City is safer due to the changes made to the roadway after this lawsuit.

Taking on these cases can be both challenging and very risky, but when they result in changes that protect the public, it is more than rewarding.

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