No More Deep Pockets!
Defending Your Dangerous Condition of Public Property and Inverse Condemnation Claims

STRATEGIES TO AVOID LIABILITY AND MINIMIZE EXPOSURE FOR DANGEROUS CONDITIONS OF PUBLIC PROPERTY AND INVERSE CONDEMNATION CASES

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Presentation Outline

- Dangerous Conditions – Ownership, Maintenance Responsibilities
- A Major Problem Made Worse – TREES!
- Early Investigation of Claims
- Inverse Condemnation – Early Intervention Strategies
- Training Public Works and Other Departments
  - How to investigate “dangerous conditions”
  - Set up design immunity defense
  - What not to put in an investigative report
- Strategic Use of Demurrers
- The CCP Section 1038/Motion for Summary Judgment Threat

Presentation Outline Continued

- Subrogation Issues
- Cutting Edge Immunities
  - Trail Immunity – Government Code Section 831.4
  - Reasonable Inspection Immunity – Government Code 835.4
  - Hazardous Recreational Activity Immunity – Government Code 831.7
- Adjacent Property Owner Liability to Third Parties
  - Necessary ordinance
  - What if no ordinance?

Ownership/Maintenance Responsibilities

- Who owns/maintains that tree? Who owns/maintains those tree roots? Who owns/maintains those sewers?
- Who owns/maintains what and who is liable if a claim and then a lawsuit is filed because of personal injuries and property damages caused by trees and tree roots causing defective sidewalk or sewer lines or other related causes of action.

Ownership/Maintenance

Ownership/Maintenance

Ownership/Maintenance

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Ownership/Maintenance

A Major Problem Made Worse – TREES!

Public Entities for years have assumed maintenance responsibility for streets, trees, sidewalks and lateral sewers that run from private residences to the main sewer located in the middle of the Street.

Entities have paid claims for personal injuries and property damages caused by dangerous conditions of public property and other causes of action.

Liability claims are increasing and costs are going up, including exposure for attorney's fees.

Carriers increasingly file suits for reimbursement of monies paid to insured under inverse theories.

A Major Problem Made Worse – TREES!

City of Pasadena v Superior Court August 14, 2014 228 Cal.App.4th 1228

Carrier paid homeowner $293,000 after tree fell on house and then sued City contending City liable under inverse and nuisance theories. City filed an MSJ arguing a tree was not a work of public improvement. MSJ denied by trial court and City filed a writ challenging the ruling.

The court of Appeal held the City's MSJ was properly denied because there *were issues of fact regarding whether the tree which caused damage was part of a public improvement project.* The City offered testimony that City had an urban forestry program that strives to enhance quality of life in City, a tree data base and had maintained the tree in question. The Court found these facts indicated the tree might be part of a City public program. Issues of fact remained whether this Tree was part of a forestry program that constituted a public improvement, and thus, would be a proper basis for an inverse claim.

A Major Problem Made Worse – TREES!

Court also found City had not preserved for appeal its argument that a tree is not "deliberately designed and constructed" (see *Albers* case: 62 Cal.2d 250, 263 holding "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable [by inverse claim] whether foreseeable or not"). But, court finds issue not preserved on appeal as City did not challenge trial court's ruling w/ respect to "causation." Only whether tree can be public improvement.

Note: The City's petition for review and de-publication was denied by the Supreme Court. Therefore, the case is good law, and clarifies that trees may be seen as part of a public improvement project and therefore subject to an inverse claim when they cause damage.

Mercury Casualty v. City of Pasadena – Decided August 24, 2017

- Tree on parkway abutting home fell in a freakish storm event. Mercury paid $800,000 to homeowner in damages and filed a subrogation action against the City.
- Court held bench trial and found that tree was a public improvement, awarded $800,000 plus $329,000 in fees and costs. City appealed.
- Court of appeal noted that: 1) there was no evidence as to who planted the tree, only that it was planted on public property in the 1940's; 2) City had ordinance promoting public interest in maintaining trees; 3) City had twice pruned tree, in 1993 and 2007; 4) City had a "five year or less" inspection protocol for City trees.

Mercury Casualty v. City of Pasadena

- Court of Appeal ruled that a tree is a work of public improvement *only if deliberately planted by, or at, direction of entity as part of planned project or design serving public purpose*.
- Court also found that there was no evidence the City's maintenance plan (five year inspection cycle) was deficient.
- Takeaways:
  - Determine which trees would fall under Court's ruling (deliberately planted)
  - Create an inspection/maintenance plan for trees considered City trees (five year inspection cycle de facto adequate)
  - Consider contradicting authority: Existing case law allows City to pass tree maintenance responsibility to abutting homeowner under Streets and Highways Code section 5600.

Early Investigation of Claims

- Recommended to complete pre-tort claim or immediately after tort claim is presented.
- Consider implementation of early settlement program – provide designated person limited authority to settle claims even before a tort claim is presented.
- Document incident through photographs, witness statements and diagrams.

Early Investigation of Claims

- Collect press reports, TV reports, police/fire audio recordings and CAD incident reports.

- Obtain pertinent city records, including any past claims/incidents.

- Meet with relevant entity employees.
  - Get facts straight, have a plan regarding comments to the press and meet with entity personnel to discuss current practices and how these practices comply with existing rules and ordinances.

Early Investigation of Claims – Inverse Condemnation Considerations

- Inverse condemnation claims not subject to claim presentation requirements.
  - But entity often aware immediately, particularly if significant issue (landslide, sewer lateral, etc.)
  - Conduct immediate investigation to determine causation.
- Inverse claims are high stakes because largely strict liability/no fault
  - No showing of negligence required with very limited exceptions.
  - Tort-based defenses like comparative fault do not apply to ordinary inverse claims (but can be used to apportion fault amongst multiple defendants).

Inverse Condemnation Considerations (cont)

- Be careful what you write!
  - Route any investigative reports to counsel.
  - Public works/maintenance not thinking liability when writing initial reports.
- Retain experts if necessary
  - But don’t misrepresent status or experts could be excluded.
- Seek early resolution if liability clear
  - But have the right people communicate with claimant.
- If counsel retained, research counsel
  - Inverse claims often fee driven, counsel may obstruct settlement.
  - If difficult counsel identified, consider early mediation/CCP 998 offer.

Training Public Works and Other Departments

- How to investigate “dangerous conditions”
  - Photographs
  - Measure
  - Interview witnesses
  - Write a clear report/route through City Attorney’s office
- Monitor problem areas
  - If there have been prior problems reported, it is hard to defend against new claims
    - Example: if City knows it has lights that are frequently vandalized, good to re-inspect often and document reasonable actions taken to ensure lights are functioning

Training Public Works and Other Departments

- Set up Design Immunity defense
  - When projects are constructed, make sure all plans are maintained and easily accessible.
  - Make sure all necessary approvals are obtained from certified engineers.
  - Make sure any deviations from the plans are approved in writing before construction.
  - Design Immunity is very powerful, but can be lost if sufficient documentation cannot be provided.
  - Inform city engineers of the importance of assisting defense counsel.
- Create and maintain adequate record – keeping system
  - Stored in manner to ensure easy/reliable access.
  - Lost Records are a constant and crippling defense problem.

Training Public Works and Other Departments

- What not to put in an investigative report
  - Teach public works personnel that anything they put in a report may be used against the entity in litigation.

Training Public Works and Other Departments: Problematic information in reports

SIDEWALK COMPLAINT FORM

PROPERTY ADDRESS:	520 Buck Ave.	NAME OF RESIDENT OR OWNER:	
GRID:		PHONE NUMBER OF RESIDENT OR OWNER:	
DATE REPORTED:	10-3-06	REPORTED BY:	Same
		PHONE:	
DATE INSPECTED:	10/4/06	INSPECTED BY:	DOUG
DATE TO ADMIN:			
DATE LETTER #1 SIGNED:			
DATE LETTER #2 SIGNED:			
DATE OF REPAIR:		REPAIR BY:	

DESCRIPTION OF DEFECT OR HAZARD: Sidewalk cracked and raised approx 1", Homeowner feels sidewalk is damaged due to a previous sewer dig

CALCULATIONS AND/OR SKETCH: VERTICAL LIFTS OF 3/4" AND 1" DUE TO SUNKEN UTILITY TRENCH, TRIP HAZARD

TYPE OF REPLACEMENT	RESPONSIBILITY		QUANTITY
	PROPERTY OWNER	CITY	
Sidewalk Replacement Program		YES	56 S.F.
Concrete Sidewalk Maintenance			
Curb and Gutter		YES	14 L.F.
Driveway Cut			
Utility Trench (W) S P G T			

PHOTOS AVAILABLE? (Y) N

TEMPORARY PATCH? (Y) N INITIALS DCS

Work Order

WorkOrderID	162560	TakenBy	Groves, Debby	DateSubmitted	10/5/2006
Priority	Within 10 Days	RequestedByName	Doug Schneider	Date Closed	10/12/2006
ParcelNbr		Phone		Status	COMPLETE
AddressNbr	520	StreetName	Buck Av	WO Type	CORRECTIVE
AccountNbr	67202	WorkOrderCode	Utility Repair Program	Crew	Street Maintenance
Category	Street Names	Location	Buck Av		

☐ CustomerServiceSurvey

Tasks

TaskCode	TaskDesc	TaskUnits	TaskHours	CompleteDate	TaskReferredTo
PS-110	Temporary Repairs	2	1.8	10/11/2006	

Comments

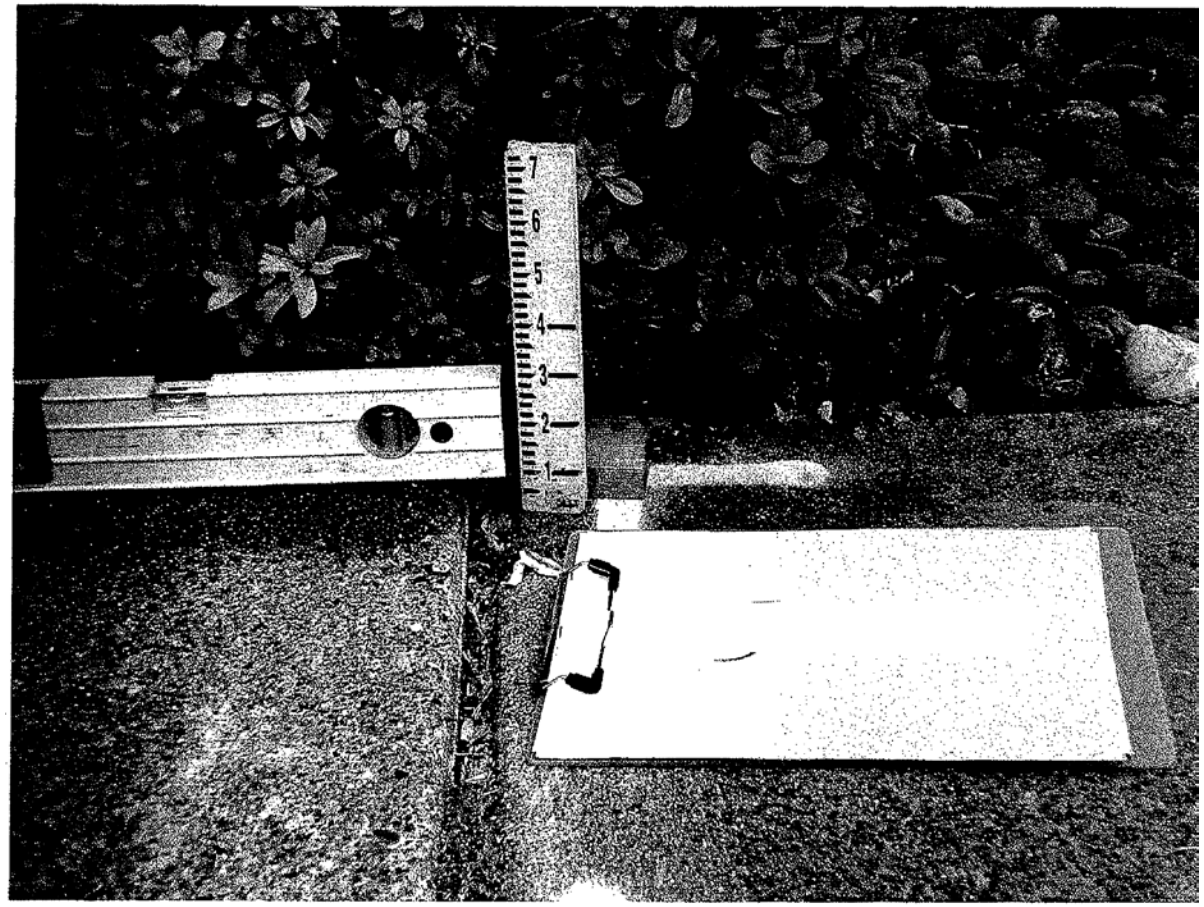
Install asphalt ramp at trip hazard

Vertical lifts of 3/4" and 1" due to sunken utility trench

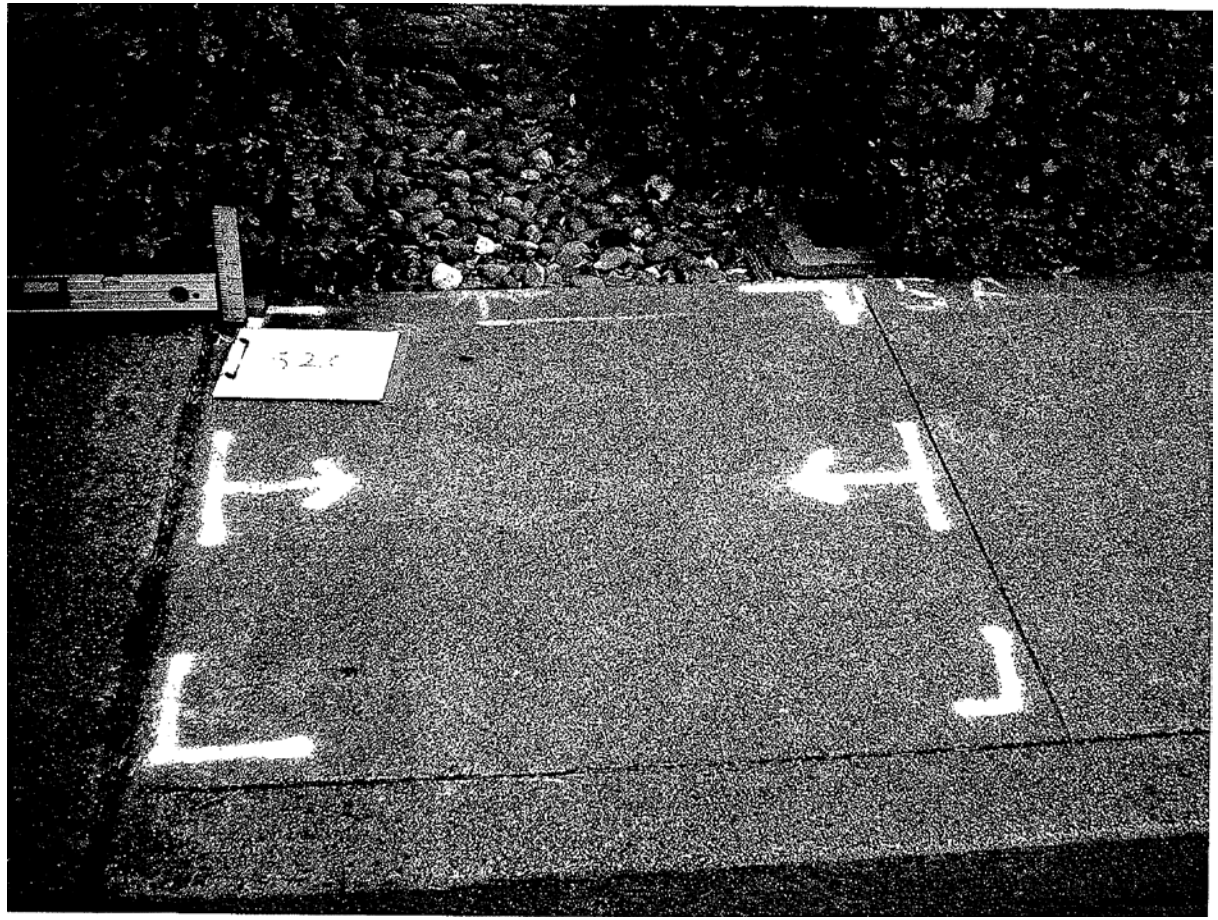
Employees

TaskCode	EmployeeID	TaskDate	Hours	Rate	LaborCost
PS-110	Vega, Bernardo	10/11/2006	0.3	$37.00	$11.10
PS-110	Simmons, Richard	10/11/2006	0.3	$37.00	$11.10
PS-110	Aispuro, Art	10/11/2006	0.3	$37.00	$11.10
PS-110	Express	10/11/2006	0.6	$14.93	$8.96
PS-110	Seasonal Laborers	10/11/2006	0.3	$13.08	$3.92

Training Public Works and Other Departments: Ineffective Measurements



Training Public Works and Other Departments: Poor Photographs



Strategic Use of Demurrers

- Under the California Tort Claims Act, the City's liability must be based on statute and cannot rest on common law theories of liability, including common law negligence. (Gov. Code §815; *Forbes v. County of San Bernardino*, 101 Cal.App. 4th 48, 53 (2002).) Therefore, the City may not be sued for "negligent hiring" or "negligent supervision" which is a direct negligence claim.

- Cases can be dismissed at the demurrer stage based on immunities or that there is not a dangerous condition.
  - Example: Young boy riding scooter at skate park injured when hit by BMX bike. Case dismissed because no dangerous condition contributed to incident.
  - Example: Rope swing accident – dismissed on hazardous recreational activity immunity.

- Demurrers can reduce the number of claims and reduce the scope of discovery.

Strategic Use of Demurrers

- Demurrers can be bad in that they educate plaintiff's counsel – if a complaint is poorly plead, consider answering so you do not educate plaintiff's counsel.
- Be aware of new meet and confer requirements under C.C.P. §430.41.
  - Must be in person or by phone.
  - Must be done 5 days in advance of responsive pleading deadline.
  - If can't meet and confer, do declaration (30 day automatic extension).
- Inverse Condemnation Considerations
  - Liability based on Article I, Section 19 of California Constitution
  - Demurrer vs. Answer
    - If claim not plead as inverse condemnation when it could be, leave it alone.
  - Cross-Complaints
    - Identify potential at outset, consider tolling agreements.

The CCP Section 1038/Motion for Summary Judgment Threat

- Code of Civil Procedure Section 1038 is a potent fee-shifting statute allowing public entities to recover the costs, including attorney's fees in defending against unmeritorious and frivolous litigation. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*, 19 Cal.4th 851, 857 (1998).)
- The trial court shall, upon motion of the defendant public entity, determine at the time of granting a summary judgment whether or not the plaintiff brought the proceeding with **reasonable cause and in the good faith** belief that there was a justifiable controversy under the facts and law which warranted the filing of the complaint. If not, then the lower court decides the reasonable defense costs (in additional to routine costs) that should be awarded to the prevailing public entity.
- We frequently use this statute to force dismissal of lawsuits that appear frivolous.

Subrogation Considerations

- Uptick in subrogation lawsuits by aggressive insurance companies
  - Typically brought under dangerous condition of public property, inverse condemnation, nuisance and or trespass theories
  - Insurer steps into the shoes of insured and may assert legal theories on behalf of insured
  - Insurer can only seek damages for payments made to insured plus interest (no emotional distress, typically no wage loss)
- Both insurer and insured may seek recovery against entity
  - Insured will sue to recover deductible, out of pocket expenses, uninsured losses, emotional distress and wage loss
  - Insurer will sue to recover payments made to or on behalf of insured

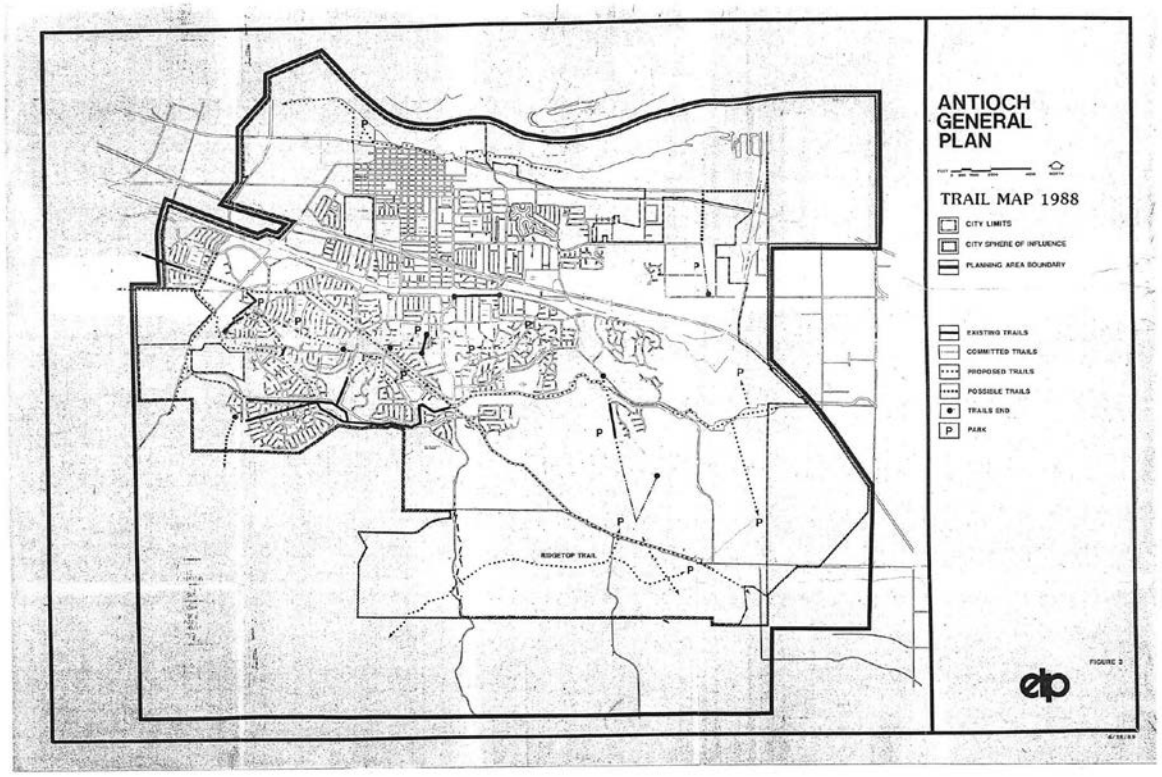
Tips for Defending Subrogation Claims

- No double recovery!
  - Insured and subrograting insurer cannot recover for same damages
- But double exposure to attorney's fees!
  - Both insured and subrogating insurers can simultaneously sue for inverse condemnation
- Subrogating insurers will often overpay on claims for which they know they have an easy subrogation target!
  - Depose claim adjusters to establish lack of reasonableness of payments to insureds
  - Depose insured to establish insurance proceeds were pocketed
    - Use as leverage to negotiate with insurer

Cutting Edge Immunities:
Trail Immunity – Government Code Section 831.4

- A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:
  - (a)Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational **or scenic areas** and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.
  - (b)**Any trail used for the above purposes.**
  - (c)Any paved trail, walkway, path, or sidewalk **on an easement of way** which has been granted to a 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 requirement shall not be construed to be a standard of care for any unpaved pathways or roads.

Cutting Edge Immunities:
Trail Immunity – Government Code Section 831.4



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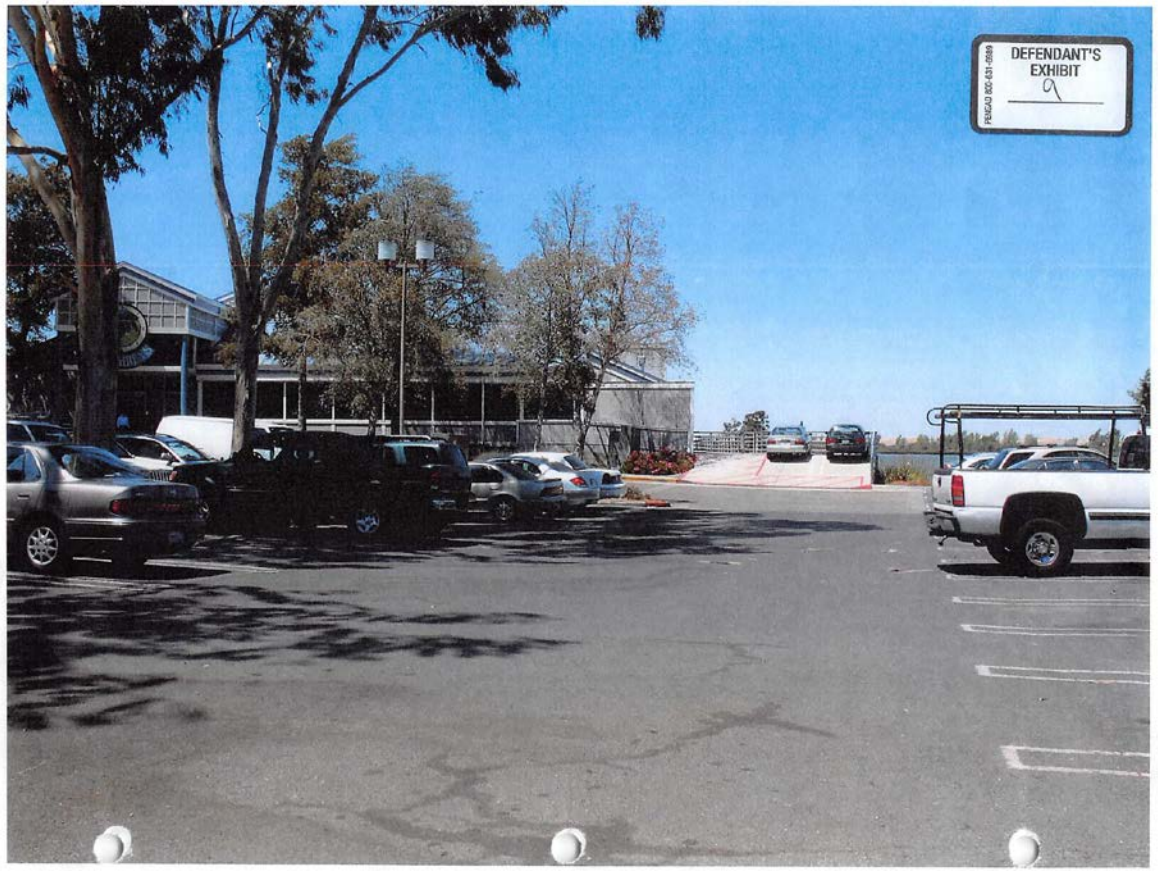

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- *Burgueno v. U.C. Regents* (Cal. Ct. App., Jan. 13, 2016) 16 Cal. Daily Op. Serv. 410.
  - Sixth Appellate District ruled in January that dual use of trail for both recreational purposes and non-recreational purposes (e.g. transportation) does not preclude the trail immunity provided by Govt. Code § 831.4. Significance: Burgueno should preclude liability of public entities for development of trails as part of a transportation plan but are also used for recreational purposes.
  - Student Burgueno was killed in an accident when bicycling home from class on a paved bikeway that runs through the UC Santa Cruz campus and that is used for transportation and to access nearby mountain bike paths.
  - Under Govt. Code 835, plaintiffs alleged a dangerous condition of public property due to an unsafe downhill curve, sight limitations, lack of runoff areas, lack of adequate signage, lack of adequate roadway markings and lack of physical barriers to prevent nighttime use.
  - The trial court granted the UC Regents motion for summary judgment, holding that UC was absolutely immune for injuries from condition of the bikeway under Govt. Code § 831.4. The decision was affirmed on appeal.
- Recent success – Bicycle accident/Take judicial notice of a tort claim/demurrer sustained without leave to amend.

Cutting Edge Immunities: Reasonable Inspection Immunity – Government Code Section 835.4

- Government Code §835.4 provides that a public entity is not liable for a dangerous condition of public property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable.
  - In assessing reasonableness, weigh probability and gravity of potential injury against practicability and cost of protecting against such injury.

Cutting Edge Immunities: Reasonable Inspection Immunity – Government Code Section 835.4

- Even if plaintiff successfully establishes the existence of a dangerous condition of public property, the public entity may not be liable for any injury suffered by plaintiff caused by the condition if the public entity can establish that its system for addressing such conditions is reasonable.

Cutting Edge Immunities: Reasonable Inspection Immunity – Government Code Section 835.4

- Reasonable Inspection Immunity Applied
  - *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 352-54
    - The California Supreme Court affirmed that under Section 835.4, a public entity's creation or maintenance of a dangerous condition does not render the entity liable if the measures taken to protect against a particular dangerous condition were reasonable.
  - *Metcalf v. County of San Joaquin* (2008) 42 Cal. 4th 1121
    - The Supreme Court noted the legislative comment that a public entity may avoid liability if it shows that it acted reasonably in the light of the practicability and cost of pursuing alternative courses of action available to it.

Cutting Edge Immunities: Reasonable Inspection Immunity – Government Code Section 835.4

- Recent application of the immunity at Bertrand, Fox, Elliot, Osman & Wenzel
  - Plaintiff sued City for negligence and dangerous condition of public property after she fell off of her bicycle due to an uneven sidewalk. The City filed a motion for summary judgment and successfully applied the Reasonable Inspection Immunity under Government Code Section 835.4.
    - The City provided evidence that it had developed and implemented a reasonable system for addressing asphalt maintenance and hazard repairs given its limited resources.
      - The Street Maintenance Division used a Work Order system to efficiently prioritize maintenance tasks in light of available resources based on prompt in-person response to all reports of asphalt defects, assessment of risk and scheduling needed repair.
      - The City reasonably weighed the probability of potential injury against the practicability and cost of taking alternative action, as required by the Government Code's immunity statute.

Cutting Edge Immunities: Reasonable Inspection Immunity – Government Code Section 835.4

- Tips in Using Reasonable Inspection Immunity
  - Assert the Reasonable Inspection Immunity under Government Code Section 835.4 as an affirmative defense in an answer to a complaint.
  - Investigate the public entity's policies and procedures to fully understand its course of action regarding the alleged dangerous condition.
  - In preparing a dispositive motion or at trial, present evidence regarding why the public entity's action or inaction regarding the alleged dangerous condition was reasonable:
    - Limited budget
    - Alternative courses of action were not available and/or optimal

Cutting Edge Immunities: Hazardous Recreational Activity Immunity– Government Code Section 831.7

- Government Code Section 831.7 provides that, unless a specific exception applies, public entities are immune from liability to persons who suffer injury while engaging in “hazardous recreational activities.”

- A “hazardous recreational activity” is defined by a nonexclusive list of activities that qualify, including tree rope swinging, water contact activities, animal riding, mountain biking, skydiving, etc. (Section 831.7(b).)

- The goal of the immunity is to keep public property open to the public without imposing a duty on entities to maintain or remove all items on their property that could potentially pose hazards to individuals not using due care.

Cutting Edge Immunities: Hazardous Recreational Activity Immunity– Government Code Section 831.7

- In *County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, plaintiff swung from a rope tied to a tree that was located above a ravine. The rope broke and caused plaintiff to fall onto debris located in the ravine, which included tree limbs and other brush left by the County's maintenance crews. The County owned the property, had no policy requiring maintenance personnel to remove rope swings in the park and there were no signs posted in the park forbidding rope swinging.

- Plaintiff sued the County of San Diego asserting the following causes of action: (1) dangerous condition of public property under Government Code section 835 arising from the County's actual and constructive notice of the defective condition of the rope swing, failure to properly maintain the rope swing, failure to protect against the dangerous condition and failure to provide a warning; (2) dangerous condition of public property under Government Code section 835 arising from tree debris left in the ravine by the County's personnel; and (3) general negligence, including failing to remove the rope swing.

Section 831.7 continued

- The Court of Appeal issued a detailed opinion about the application of the hazardous recreational activity immunity and how it specifically precludes the imposition of liability on a public entity **unless a statutory exception applies**. (*County of San Diego,* 242 Cal.App.4th at 468.) The Court of Appeal determined NONE of the exceptions applied and the County of San Diego was absolutely immune from liability.
- The following are the statutory exceptions to the immunity:
  - **Failure to warn** of a condition or another hazardous activity known to the public entity/employee that is not reasonably assumed by the participant as an inherent part of the activity. (subd. (c)(1)(A));
  - Damage or injury suffered where participation in a hazardous recreational activity was granted pursuant to a **fee** (subd. (c)(1)(B)) ;
  - **Failure to maintain** in good repair recreational equipment utilized in the hazardous recreational activity (subd. (c)(1)(C));
  - Damage or injury suffered where the public entity or employee recklessly or with gross negligence **promoted the participation** in the hazardous recreational activity (subd. (c)(1)(D)); and
  - **Gross negligence** by a public entity proximately causing injury. (subd. (c)(1)(E)).

Successful Use of the Hazardous Recreational Activity Immunity on Demurrer

- In July 2016, we successfully demurred to a complaint using the hazardous recreational activity immunity. In a case involving a local water district, plaintiff swung from a rope tied to a tree on the district's property. The rope snapped, plaintiff landed on his back and became paralyzed from the waist down. We asserted the hazardous recreational activity immunity and explained why the applicable statutory exceptions to the immunity did not apply using the holding and rationale in the *County of San Diego* case*:*
  - Failure to warn: No duty to warn of inherent risks in the activity and falling from a rope swing is an inherent risk of the activity.
  - Failure to maintain: Entities are under no duty to maintain or remove all items on their property that could potentially pose hazards to individuals not using due care. Further, individuals engaging in hazardous recreational activities utilizing recreational equipment abandoned by unknown third parties on public property are not exercising due care.
  - Gross Negligence: Entities are under no duty to maintain or remove items and therefore the existence of the rope on the District's property did not constitute gross negligence by the District.

Adjacent Property Owner Liability to Third Parties

- Typically, the owner of land bounded by a road is presumed to own to the center of the way. (Civil Code §831.)
- Streets & Highways Code §5610 provides that owners of such land must maintain the sidewalk in a non-dangerous condition.
- This statute has been interpreted as only providing a means for entities to seek reimbursement for the cost of repairs to the sidewalks and not as imposing liability on adjacent property owners for injuries to third parties.
- Adjacent property owner still can be liable if they cause the condition (e.g. tree roots from their tree.)
  - What if roots are from tree in planting strip?

Adjacent Property Owner Liability to Third Parties

Adjacent Property Owner Liability to Third Parties

- City Ordinances
  - City can shift duty of maintenance/landscaping to adjacent property owner through its ordinances – this can reduce City's liability by 50%.
- Liability to third party only if city ordinance explicitly states the adjacent property owner has a duty to third parties to maintain sidewalk in non-dangerous condition and that the property owner is liable to any person who suffers injury due to adjacent property owner's failure to maintain sidewalk in non-dangerous condition. (See *Gonzales v. City of San Jose* (2004) 125 Cal. App. 4th 1127.)
  - Why adopt such an ordinance/why Cities do not?