

Special Events Risk Management:
February 3, 2009
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SESSION GOALS:

- Early defense strategies for catastrophic claims
- Traffic control plan
- Dealing with outside agencies
- Risk mitigation strategies

I. BACKGROUND RE SANTA MONICA FARMERS MARKET

1. Location and operation
 - 1982 – 1987
 - 1987 – 7/16/03
 - Bollards
2. Bayside District Corporation
 - Services Agreement
 - Indemnity
 - Additional insured issues
3. Temporary Road Closures
 - Not limited to farmers markets
 - Post-incident survey by traffic engineer

4. Traffic control plans
 - Content/form of TCP?
 - What is a TCP?
 - Why is a TCP vital?
 - Design immunity (Government Code Section 830.6)
 - When is a TCP required? (CalTrans)

5. What happened on 7/16/03

6. Emergency Response & Operations Management

7. Potential exposure to the City; Bayside

8. NTSB
 - Report and findings?
 - Why involved?
 - How did City become target?
 - Admissibility in civil action.
 - Excluding NTSB report (Motion *in Limine*)
 - NTSB consultant
 - Response to NTSB report (preserving position)
 - What we found in D.C.

9. Lack of prior similar accidents (motion *in limine*)

II. RISK MITIGATION STRATEGIES

1. Not limited to Farmers Market
2. One-time or regular event?
3. Traffic Control Plan
4. Cal Trans Manual
5. MUTCD
6. WATCH Manual

The 35th Annual PARMA Seminar
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Dangerous Condition of Public Property Law: A Primer

Government Code section 835 provides:

“Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes (1) the property was in a dangerous condition at the time of the injury, (2) the dangerous condition proximately caused the injury; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; and (4) that either a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the condition, or the public entity had actual or constructive notice of the dangerous condition and sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”

In a dangerous condition of public property case, the jury will likely be given pattern CACI Jury Instruction 1100, which states that to establish liability, the plaintiff must prove all of the following:

1. The City owned or controlled the property; and
2. The property was in a dangerous condition at the time of the incident; and
3. The dangerous condition created a reasonably foreseeable risk of the kind of incident which occurred; and
4. Negligent or wrongful conduct of the City’s employee acting within the scope of his or her employment created the dangerous condition; or that the city had notice of the dangerous condition for a long enough time to have protected against it; and
5. The plaintiff was harmed; and
6. The dangerous condition was a substantial factor in causing the plaintiff’s harm.

The term “dangerous condition” is defined in *Government Code* §830(a), which provides:

“Dangerous condition” means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in manner which it is reasonably foreseeable that it will be used.”

In considering the meaning of “substantial risk,” the extent of the injury is immaterial. Rather, it is the probability that injury would occur that is crucial to the analysis. “[T]he legislature was concerned **not with the extent of the injury, but with the probability that the injury would occur.** *Fredette v. City of Long Beach* (1986) 187 Cal. App. 3d 122, 130, 231 Cal. Rptr. 598.

Government Code §830.5(a) states, as follows:

“(a) Except where the doctrine of *res ipsa loquitur*¹ 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.”

The California Supreme Court has held that the actions of a third party are not part of the court’s determination whether a defect existed on the property which created a dangerous condition at the time of the conduct of the third party:

“We emphasize . . . that liability is imposed only when there is some defect in the property itself and a causal connection is established between the defect and the injury. . . .courts have consistently refused to characterize harmful third party conduct as a dangerous condition -- absent some concurrent contributing defect in the property itself.” *Zelig*, at 1187.

In considering whether a defect existed which created a “substantial risk” of injury, courts have placed great emphasis on whether there is evidence of prior accidents at the site. A history of similar accidents occurring during the course of normal use of the property is strong evidence tending to prove that its condition created a “substantial risk” of injury. *Bonanno* at 151-153. In fact, in all cases cited² by the Supreme Court in *Bonanno* regarding its analysis of “substantial risk,” the determinative factor was the public entity’s knowledge of prior accidents or complaints related to the condition of the property.

Conversely, court decisions have emphasized that the absence of prior accidents is *overwhelming evidence* tending to prove that there was no “substantial risk” of injury. *Sambrano*, at 243.

Plaintiffs sometimes argue in opposition that a lack of prior accidents is not a proper basis upon which to grant summary adjudication, relying on *Robison v. Six Flags Theme Park* (1998) 64 Cal. App. 4th 1294, 75 Cal. Rptr. 2d 838. *Robison*, however, involved a *private* (Six Flags Magic mountain Amusement Park) landowner. The *Robison* decision does not involve the concepts of

¹ For the doctrine of *res ipsa loquitur* to apply, three conditions must be met: One of those conditions is that the accident must be caused by an agency or instrumentality under the exclusive control of the defendant.

² *Baldwin v. State of California* (1972) 6 Cal. 3d 424, 99 Cal. Rptr. 145; *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835; *Swaner v. City of Santa Monica* (1984) 150 Cal app. 3d 789, 198 Cal Rptr. 208; *Mathews v. State of California* (1978) 82 Cal. App. 3d 116, 121, 145 Cal. Rptr. 443; *Quelvog v. City of Long Beach* (1970) 6 Cal App 3d 584, 86 Cal Rptr. 127.

“dangerous condition” or “substantial risk” set forth in the Government Code. Rather, in *Robison* the Court analyzed a *private* landowner’s duty under principles of general negligence.

Design Immunity:

Design immunity is a complete defense to a cause of action for dangerous condition of public property. *Government Code* section 830.6 is a complete and affirmative defense to liability for an alleged dangerous condition of public property. Section 830.6 provides in relevant part as follows:

“Neither a public entity nor a public employee is liable . . . 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.”

In order, therefore, for a public entity to establish design immunity, it must establish three things:

- (1) A causal relationship between the plan and the accident; and
- (2) discretionary approval of the plan prior to implementation; and
- (3) substantial evidence supporting the reasonableness of the design. *Cornette v. Department of Transportation* (2001) 26 Cal. 4th 63, 66, 109 Cal. Rptr. 1.

Design immunity may be raised as an issue of law on a motion for summary adjudication. *Hefner v. County of Sacramento* (1988) 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291. Whether the public entity asserting the defense has proven design immunity is a question of *law* for the trial court; it is error to submit the design immunity defense to a jury. *Alvarez v. State* (1999) 79 Cal App. 4th 720, 727, 95 Cal. Rptr. 2d 719.