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Issues to consider when litigating a sidewalk case

YOU MUST DEAL WITH MANY ISSUES IN TAKING ON A SIDEWALK FALL CASE, BUT FIRST UP IS BEATING THE INEVITABLE SUMMARY JUDGMENT MOTION

Imagine you are sitting at your desk, and your (soon-to-be) client walks in with crutches and a banged up head. He tells you that, while he was running at night with his dog, he came across this house which had an old tree in the front, near the sidewalk. Because it was dark, he did not see the raised asphalt, which caused him to trip, fly in the air, and land head-first on the asphalt, causing a massive concussion and a broken hip. Since litigation is a chess game, and because you always have your ducks in a row, you start to think about how to proceed.

General rules on establishing liability

You should inspect the scene of the incident with your client immediately so that you can take measurements (take an expert with you) and take photographs of the defective or dangerous condition of the sidewalk. Make sure to take photos depicting the dimensions of the defect and, more importantly, the path your client took because most defects are not visible even to the most careful eyes.

If you are pursuing a claim against the adjoining homeowner, you would do so under the general theory of negligence and premises liability, as all property owners – landowners, landlords, store owners, or other businesses – have a

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duty to maintain their property in a safe condition, or alternatively, warn people of any dangers. "A landowner has an *affirmative duty* to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." (*Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, 330.) Keep in mind that your standard against the property owner would be measured by the lower "negligence standard" rather than the higher "dangerous condition" standard against a public entity.

In order to pursue a claim against a public entity under Gov. Code section 835, you must show: (1) that the property was owned or controlled by a public entity at the time of the incident; (2) the property was in a dangerous condition at the time of the injury; (3) the injury was proximately caused by the dangerous condition; (4) the dangerous condition created a reasonably foreseeable risk of injury; and (5) that there was a negligent or wrongful act or omission within the scope of employment of the public entity's employee that created the dangerous condition or the public entity had actual or constructive notice of the dangerous condition. (*Moncur v. City of Los Angeles, Dept. of Airports* (1977) 68 Cal.App.3d 118; Gov. Code §§ 830(a)-(c), 835.2.)

Also make sure you do not blow the six-month deadline on filing a government claim with the appropriate public entities. If the sidewalk is located in an un-incorporated part of the State, consider naming the County as potentially liable.

In general, a municipality is liable for injuries resulting from a dangerous or defective condition of the public streets where those having the authority to remedy it had notice or knowledge of the condition and failed to remedy it within a reasonable time. (*Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 72.) At the same time, a public entity is liable for a dangerous or defective condition created by a public employee's negligent or wrongful act or omission under circumstances in which the employees' involvement makes it fair to presume that the entity had notice of the dangerous condition. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836; Gov. Code §§ 830(a), 835.)

The rule of thumb, generally, is that a sidewalk offset that measures three-fourths of an inch or less, is not a dangerous condition, absent other contributing factors (e.g., shading or lighting or other obstruction that makes the offset difficult to see, or if the displacement is open and obvious). A determination of whether the defect involved is a minor or trivial one may be material in that minor defects inevitably occur, both in construction and maintenance, and that their continued existence is not unreasonable. (Gov. Code § 830.2.) In such case, irrespective of the question of notice of the condition, no liability may result. (*Graves v. Roman* (1952) 113 Cal.App.2d 584.)

California courts consider multiple factors when determining if a defect is "trivial" versus a dangerous condition. (*Aitkenhead v. City and County of San Francisco* (1957) 150 Cal.App.2d 49.) California Courts rarely find defects exceeding one inch to be trivial. Indeed, "when the size of the depression begins to stretch beyond one inch, the Courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726; see also *Rodriguez v. City of Los Angeles* (1963) 215 Cal.App.2d 463 [question of whether existence of sidewalk in which one slab was from one-half inch to one inch higher than the adjoining slab created a dangerous or defective condition within meaning of Public Liability Act was properly submitted to jury].)

In determining whether the property is in a dangerous condition, the court may consider the seriousness of the condition, its visibility, the frequency with which the area is traveled, whether there is evidence any one else has been injured by the same condition, and the likelihood a reasonable inspection would have revealed the condition in time to take necessary precautions. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 568-569.) However, a court may not determine that a defect is trivial and thus not a dangerous condition as a matter of law if competing and conflicting evidence of the size, nature, and quality of the defect or the circumstances surrounding the plaintiff's injury raise triable factual issues as to whether the defect or condition of the property presented a danger to persons exercising ordinary care. (*Ibid*.)

If reasonable minds could differ on the issue, the jury decides the issue. (*Id*. at 570.) Where, a "danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning" and the property owner has no duty to warn of the condition. (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393.)

Assuming the dangerous condition is not trivial, in many instances, the plaintiff may not be able to show actual notice of the dangerous condition and must rely upon the constructive notice imputed to the municipality by the passage of time. Government Code section 835.2(a) expressly provides: "A public entity had actual notice of a dangerous condition if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."

In *Hook v. City of Sacramento* (1931) 118 Cal.App. 547, the court found the city had actual notice of a sidewalk condition where a city employee performed sidewalk inspections in the location where the defect existed even though the defendant denied having seen or having notice of the hole. The Court specifically held, "Having made inspections each month, [defendant's employee] must have seen the hole." (*Id*. at 553.)

Establishing constructive notice should not be that difficult as long as you can establish that city employees frequented the area and a sufficient amount of time had passed. Government Code section 835.2(b) expressly provides in pertinent part: "A public entity had constructive notice of a dangerous condition … only if the plaintiff establishes that the condition had existed for such a period

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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. On the issue of due care, admissible evidence includes but is not limited to evidence as follows:

(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

If the condition is brought about by natural wear and tear or by third persons, the defendant is not liable unless it either had actual or constructive knowledge of the condition or was able to discover it by the exercise of ordinary care. (*Bridgman v. Safeway Stores, Inc*. (1960) 53 Cal.2d 443, 447.) An owner or possessor must make reasonable inspections of those portions of the premises open to invitees, and the absence of inspections within a particular period of time prior to an accident may warrant an inference that a person exercising reasonable care would have discovered the condition. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1212-1213.) For the "it has never happened before defense," "when an unreasonable risk of danger exists, the landowner bears a duty to protect against the first occurrence, and cannot withhold precautionary measures until after the danger has come to fruition in an injury-causing accident." (*Robison v. Six Flags Theme Parks Inc*. (1998) 64 Cal.App.4th 1294, 1305.)

Who am I going to name in the lawsuit?

In all sidewalk cases, the first question that arises is "who do you sue?" The short answer is "Everyone." You should consider naming the adjacent homeowner, the management company in charge of maintenance (if there is one), the city, and the county. Then let the defendants come forward and start pointing the finger at each other as to who is liable.

The general rule is that an adjacent or abutting property owner is liable for injuries caused by a dangerous condition on the public sidewalk, if the dangerous condition was created through the negligence of the homeowner. (See e.g., *Selger v. Steven Brothers, Inc*. (1990) 222 Cal.App.3d 1585, 1592, 1594 [stating that "an abutting owner has always had a duty to refrain from affirmative conduct which could render the sidewalk itself or use of the sidewalk dangerous to the public"]; *Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 423. ["In California, it has long been the law that a person may be liable for injuries resulting from his failure to use ordinary care in the management of his property."]) If the trip and fall occurs as a result of a tree root problem, and the tree belongs to the city, then you have to look at the city ordinance to see whether it has clear and unambiguous language, making the homeowner liable for repairs and maintenance.

Case law indicates local ordinances cannot be inconsistent with state law as established by the Tort Claims Act. (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 899.) This precludes a city from absolving itself of all liability, but does allow concurrent or shared liability of adjacent property owners. In order for a city to impose concurrent liability on a property owner, it requires "clear and unambiguous language" in their municipal ordinance about their respective sidewalk policy. (*Schaefer v. Lenahan* (1944) 63 Cal.App.2d 324.)

It is well-settled law in California that a pedestrian has the right to assume that the public sidewalk is in a reasonably safe condition. (*Garber v. City of Los Angeles* (1964) 226 Cal.App.2d 349, 424.)

In order to sue the city, you will have to prove that the sidewalk was owned or controlled by the public entity at the time of the incident. Almost always, the city will point to the adjacent landowner as the responsible party for the sidewalk upkeep, or at least, reporting the condition to the city. California State and Highways Code section 5610 states that owners of lots fronting any portion of a public street shall maintain any sidewalk in such a condition that the sidewalk will not endanger persons or property."

But section 5610 does not impose on owners tort liability or a duty to indemnify municipalities for pedestrian injuries, except where a property owner created the defect or exercised dominion or control over the abutting sidewalk. (*Williams v. Foster* (1989) 216 Cal.App.3d 510, 516.) In short, the adjacent landowner would only be liable if it acted negligently with respect to the sidewalk, thereby giving rise to independent liability.

For instance, a property owner may be liable if he or she alters the sidewalk for the benefit of the owner's property. (*Sexton v. Brooks* (1952) 39 Cal.2d 153, 157.) A property owner may also be liable if he or she negligently damages the sidewalk. (*Moeller v. Fleming* (1982) 136 Cal.App.3d 241, 245 [break in sidewalk caused by the property owner's tree]; *Alpert v. Villa Romano Homeowners Association* (2000) 81 Cal.App.4th 1320, 1335, 1336 [issue of liability created where owner planted plants and trees on both sides of the sidewalk, allegedly causing a sidewalk trip hazard that injured a person].)

Every city has its own municipal codes mandating that owners must maintain sidewalks surrounding their property in a reasonably safe condition. Whether this creates a duty to the public in general depends on the language of the ordinance. Despite the state law and local ordinances, some of which are listed below, the city remains the owner of

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public sidewalks and street trees, and California Government Code section 835 does provide for statutory liability against a public entity for injuries caused by a dangerous condition. Therefore, even if the adjacent lot owner has the responsibility and the financial obligation to maintain the sidewalk, the public entity is not immunized from liability. (See *Gonzalez v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1138-1139 [A governmental entity is not immunized from liability for the dangerous conditions of sidewalk by the concurrent liability of an abutting landowner]; *Peters v. City and County of San Francisco* (1953) 41 Cal.2d 419, 428-429 [liability of the governmental agency and property owner for a dangerous condition on a city-owned sidewalk is determined by each of their individual wrongful acts or omissions]; *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833 [in an action against a city and a private landowner for injuries caused by a dangerous condition of a sidewalk, the city and the landowner may be joint or concurrent tortfeasors and may incur joint liability].)

Los Angeles ordinance

Recently, the city of Los Angeles passed an ordinance with "clear and unambiguous" language, which states that the adjacent property owner is liable for maintenance and repairs of the sidewalk. California has 58 counties, which contain a total of 482 municipalities. This article cannot possibly list all 482 ordinances, but here are the ordinances from the cities with the top six populations in California:

"As of January 1, 2017, Los Angeles Municipal Code 62.104(b) was amended to read as follows: "…the owner of a lot shall maintain any sidewalk driveway, approach, curb return, or curb *will not endanger any person* or property passing thereon or violate the Americans With Disability Act." (Emphasis added.) California courts have yet to decide whether this is enough to create a duty on the part of the adjacent homeowner. Therefore, if the incident happened in the city of Los Angeles, always name the adjacent property owner, and the property owner's homeowners' policy should cover the loss. From the language of the municipal code, it can be argued that the ordinance is clear and unambiguous in that the adjacent owner owes a duty to the public, and is therefore liable. Note that although a city can add liability to a property owner, it cannot legislate away its own liability by an ordinance.

Given that the Los Angeles ordinance now includes language regarding ADA violations, here is something important worth pondering:

In *Mark Willits, et al. v. City of Los Angeles,* filed in the Central District of California, Case No. 2:10-cv-05782, the Honorable Consuelo B. Marshall approved a $1.4 billion class action settlement reached between the city of Los Angeles and disabled individuals to repair the crumbling sidewalks, in what was claimed to be the largest disability access settlement in U.S. history. Details can be read on Law 360. If your client tripped and fell at or near a "place of public accommodation," and he or she is a disabled individual, you should definitely consider alleging ADA violations in your complaint. You may ask, "why?"

The ADA permits a disabled individual denied access to public accommodations to recover damages in a government enforcement action only, not through a private action by the aggrieved person. But by incorporating the ADA into the Unruh Civil Rights Act, California's own civil rights law covering public accommodations, which does provide for such a private damages action, the Legislature has afforded this remedy to persons injured by a violation of the ADA. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 673.) In short, a violation of the ADA constitutes a violation of both the Unruh Civil Rights Act and the Disabled Persons Act.

The Unruh Civil Rights Act (Civ. Code § 51, et seq.) and the Disabled Persons Act (Civ. Code § 54, et seq.) clearly have significant areas of overlapping application, although the Unruh Civil Rights Act applies to many more types of discrimination. (Compare Civ. Code § 51(b) ["all business establishments of every kind whatsoever"] with Civ. Code § 54(a) ["streets, highways, sidewalks, walkways, public buildings ... and other public places"] and Civ. Code § 54.1(a)(1) ["accommodations, advantages, facilities, ... telephone facilities, ... places to which the general public is invited"].) Although the ADA Accessibility Guidelines (ADAAG) do not completely address sidewalks and pedestrian pathways, you will have to establish that your disabled client encountered an "architectural barrier" whose removal was readily achievable.

The Ninth Circuit in *Chapman v. Pier 1 Imports (U.S.) Inc.* (9th Cir. 2011) 631 F.3d 939, 947 stated that a barrier amounts to an interference if it affects the plaintiff's full and equal enjoyment of the facility on account of his particular disability. The Ninth Circuit went on to state that "[b]ecause the ADAAG establishes the technical standards required for "full and equal enjoyment," if a barrier violating these standards relates to a plaintiff's disability, it will impair the plaintiff's full and equal access, which constitutes "discrimination" under the ADA… As we have held, once a disabled plaintiff has encountered a barrier violating the ADA, "that plaintiff will have a 'personal stake in the outcome of the controversy' so long as his or her suit is limited to barriers related to that person's particular disability." (*Ibid*.)

Now to answer the question as to why you should consider alleging ADA violations: If you successfully establish a violation of the ADA, here is what you are entitled to under the Unruh Civil Rights Act (Civ. Code § 52), and the Disabled Persons Act (Civ. Code § 54.3): actual damages which can be *trebled* to a maximum of three times the amount of actual damages, and attorney's fees. Now you start to think to yourself, how amazing would it be if you can triple your six- or seven-figure judgment, and get all your attorney's fees paid by the defendant? You will also strike fear in the heart of the defense attorneys and the adjusters defending your client's claims, which is always a plus in and of itself.

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Other municipality ordinances

San Diego: See City of San Diego Sidewalk Maintenance Policy 200-12. The City is responsible for the maintenance of sidewalk damage caused by vehicle accidents, water main breaks, grade subsidence and trees within the Right-of-Way. Normal sidewalk wear and tear or age damage is the responsibility of the homeowner who can take advantage of the City's 50/50 Cost Sharing Program to help offset the cost of repairs.

San Jose: See San Jose Municipal Code section 14.16.2200 to Section 14.16.2270. Section 14.16.2205 imposes liability on the property owner, if the injury results as a failure of the property owner to maintain the sidewalk area in a non-dangerous condition as required by Section 14.16.2200.

San Francisco: San Francisco Public Works Code Section 706 mandates that owners must maintain sidewalks surrounding their property in a reasonably safe condition. Section 805 likewise mandates that it is "the duty of owners of lots or portions of lots immediately abutting on, fronting or adjacent to any street tree to maintain such tree."

Fresno: See Section 13-217 of Article 2, stating that the owner shall have the duty to maintain and repair the sidewalk area.

Sacramento: See City of Sacramento Code, section 12.32, which specifically creates a duty for the adjacent homeowner to the public to keep and maintain the sidewalk area in a non-defective condition. See 12.32.040, Civil liability for injuries.

You can go to https://library.municode.com/ca to search the respective ordinance for each city.

Having these general rules in mind, your next step will be to gather evidence in support of your opposition to the city's inevitable motion for summary judgment, arguing that the dangerous condition was trivial, or if not, your client has no evidence to carry his burden of proof that the city had actual or constructive notice of the defect.

Where do I get my evidence?

Where do I get my evidence to oppose the Motion for Summary Judgment? Whenever litigating a sidewalk case, one of the first things you should do is to send a California Public Records Act ("CPRA") Request to the appropriate agencies, which include, but are not limited to Department of Public Works for your county, Caltrans, Department of Transportation, Urban Forestry Department, Bureau of Street Services, the City Council, the County, and any other government entities that may responsible for cleaning, inspecting, maintaining, and/or repairing the sidewalks and the streets.

These entities are going to be your best friends in establishing constructive notice of the dangerous condition, even if the city claims that they had no inspection program for sidewalks (thereby establishing that they had no actual notice). Having no inspection program may prevent the city from gaining actual notice, but it doesn't protect the city from liability for having constructive notice. Your goal is to show that the condition was there for a long time and was obvious, and would have been seen if they had a reasonable inspection program. For instance, the city may argue that there was never any inspection, but you may get records from the forestry department, showing that the department was out there surveying the streets and/or pruning the street trees.

It is highly recommended that you read and familiarize yourself with the Act, as valuable information may be gained from these requests. A detailed guide can be found here: https://www.cacities.org/Resources/Open-Government/THE-PEOPLE%E2%80%99S-BUSINESS-A-Guide-to-the-California-Pu.aspx, and here http://ag.ca.gov/publications/summary_public_records_act.pdf. There are many intricacies that you have to be aware of when sending these requests, which will not be discussed here. However, in your request, you want to ask for records pertaining to the section of the street where the incident happened, for at least a five-year window of time.

The most important thing to remember is that you have to send your CPRA request *before* you file your lawsuit. Do not make your request on your letterhead, and note that some entities have their own CPRA record request forms.

Conduct interviews

Once the case is filed, you should continue your discovery by also talking to the neighbors and finding out if they remember seeing any city workers or construction people working near that area in the past, or if they ever saw any similar incidents. This will help you identify the appropriate people or entities who can then be deposed to establish actual and/or constructive notice. You can also find out if the city ever gave notice to the homeowner to repair the sidewalk pursuant to Section 5615 of the Streets and Highways Code, and whether the City had sufficient time to repair the sidewalk. Always depose these folks and do not forget the garbage personnel (if connected to the city), and make sure to ask if there was any road work done near the sidewalk. Prior to these depositions, you should have already talked to the nearby neighbors to find out if prior repairs or maintenance was done either to the sidewalk or to the street.

Remember that notice (actual or constructive) and "dangerous conditions" are major issues not to be overlooked. Therefore, always remember that you will need an expert to document the defect before it is changed, and address any questions about a tree, length of time at residence, prior complaints, prior repairs, sewer or pipe problems (tree root issue?), planting, watering, gardening, or vendors doing tree or lawn service in the area where the incident happened.

Also remember that even if a dangerous condition exists, if the landowner

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or the public entity did not create it, and did not have actual or constructive notice of the condition, you will find yourself on the losing side of a motion for summary judgment.

Using Google Maps

One way to get clues to establish actual or constructive notice is to go on Google Maps and look at the section of the street where the incident happened, and then go back in time and determine whether the sidewalk was ever repaired, or if there was any construction going on. You may want to talk to the landowner and determine whether the pictures look familiar. Remember that your goal is to establish ownership, control, and notice (actual or constructive). Do not forget that if you use Google Street View photos, you have to get Google to authenticate those documents via a declaration under penalty of perjury. Send a subpoena to Google requesting Google Street View historical images for that address, for at least 5 years prior to the incident.

Your written discovery should also be directing to the following: first send out RFAs to all the parties, and request that each party admit ownership and control over the section of the sidewalk where the incident happened, and admit that another person did not own or control the sidewalk. Also, do not forget to get the city to admit that another owner did not contribute by act or omission to the incident. You then want to send out special interrogatories to each party, finding out the dates when any person or entity repaired, inspected, or maintained that section of the street (from the city), or was observed doing so (from the landowner). These defendants will not hesitate to backstab each other, so that they can help their respective clients (the insurance companies) to lower their exposure.

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