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## Dangerous crosswalks

A THOROUGH DISCUSSION OF DANGEROUS CONDITIONS THAT MAKE GOVERNMENT LIABLE FOR PEDESTRIAN INJURIES

Pedestrians are legitimate users of the transportation system and have the legal right to cross roads safely and efficiently – while government planners and engineers have the legal duty to plan, design, and install safe and convenient crossing areas.

Marked crosswalks are delineated by white or yellow painted markings placed on the pavement. Pedestrians often feel that if they use a marked crosswalk when crossing a street, they are in a “safe zone” and therefore are de facto protected against oncoming vehicles. Crosswalks, in reality, are often death traps if located at

“uncontrolled” intersections (intersections without traffic signals or stop signs) or at midblock locations. Many of these crosswalks – due to inadequate traffic-control devices, inadequate lighting or other visibility issues due to the roadway, volume and speed of traffic, or unique pedestrian concerns – are highly dangerous to pedestrians.

In California, according to the Department of Motor Vehicle’s website, pedestrian deaths account for approximately 22 percent of all traffic-collision fatality cases. Indeed, the magnitude of unnecessary deaths and injuries at

uncontrolled marked crosswalks has driven increased awareness of this issue. As a result, in December 2017 the Federal Highway Administration issued a memorandum outlining acceptable methods of safety features to help increase pedestrian safety, specifically at uncontrolled marked crosswalks.

As lawyers, if we encounter a case that involves an injury or death to a pedestrian by a motor vehicle that occurred in a marked crosswalk at an uncontrolled intersection or at a mid-

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block location, we should always analyze the design and placement of the sidewalk as a potential contributing factor to the crash. *However, a public entity is not liable for an injury occurring on its property, except as provided by statute.*

To prevail on an injury claim resulting from an allegedly dangerous public crosswalk, there must exist a “dangerous condition of public property” that, due to negligent conduct of the entity’s employee or due to the entity’s failure to warn after having actual constructive notice of the condition, created a reasonably foreseeable risk of the kind of harm that occurred. (Gov. Code, §§ 835, 815; see also CACI 1100.) Moreover, all applicable governmental statutory immunities must be defeated (discussed below).

Although the plaintiff must prove *all* the elements of CACI 1100 (public property; dangerous condition; negligence and/or notice; causation; harm; foreseeability), this article focuses on the characteristics of a crosswalk that might constitute a “dangerous condition,” and how to get around the governmental immunities.

### What is a “dangerous” crosswalk?

A “dangerous condition” is a condition of property that creates a substantial 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. (Gov. Code, § 830, subd. (a).) California case law provides that what constitutes a “dangerous condition” depends on the particular facts and an “amalgam” of surrounding circumstances. (*Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466.)

Assume your client or his/her family member is severely injured or killed while lawfully crossing in a marked crosswalk. We need to explore whether that crosswalk was “dangerous” and if the design, placement, and/or layout of the crosswalk contributed or caused the harm.

As lawyers, not professional engineers, we should always consult with a traffic safety expert before making the

ultimate decision as to whether to take on or reject this kind of case. However, there are several factors and indicators, which, when analyzed, can help us to recognize a dangerous crosswalk at the outset:

**Prior accident history:** Research to determine whether there is a high pedestrian/motor vehicle collision history at the subject crosswalk. The California Highway Patrol maintains an Internet Statewide Integrated Traffic Records System (“SWITRS”), which stores data relating to California fatal and injury motor vehicle traffic collisions. Lawyers can electronically access the data and create reports relevant to subject location. We should always pull a SWITRS traffic collision report specific for the location encompassing the sidewalk and analyze it to count the number and frequency of similar incidents at that location.

#### **Pedestrian behavior/demographics:**

Do a site inspection and watch traffic pass by at various times of the day, including the time of day that your subject collision took place. Examine the volume and the characteristics of the pedestrian population who typically use that crosswalk (e.g., children, adults, handicapped).

For example, if the crosswalk is near a senior center or a hospital, and the pedestrians who typically use that crosswalk are the elderly who often walk slower, additional safety measures should likely be implemented to allow for longer walking speeds (flashing beacons, road markings, etc.). The crosswalk should also allow for additional spacing for the use of wheelchairs or walkers and have appropriate timing and warning indicators to alert oncoming motorists of a potential delay in crossing.

If the pedestrians are typically younger children, and the crosswalk is near a school zone or a church, additional considerations should be considered to account for users perhaps running in the crosswalk, and their smaller stature (i.e., smaller children are harder to see and implicate visibility concerns, discussed below). We should also think about the general placement of the crosswalk in the environment, and the possibility of other crossing choices.

**Traffic:** Consider, for example, the speed of traffic, volume of traffic, and the number of lanes. If the speed of traffic is high in relation to the surrounding neighborhood, additional safety features should be added near the crosswalk to enhance its safety (for example, adding speed bumps or other traffic control devices to adjust for slow-moving pedestrians). In addition, studies have shown that on multilane roads with traffic volumes above about 12,000 vehicles per day, having a marked crosswalk alone (without other substantial improvements) was associated with a higher pedestrian crash rate (after controlling for other site factors) compared to an *unmarked* crosswalk. Therefore, traffic volume and the number of lanes in relation to the location of the crosswalk needs to be analyzed. A traffic engineer can be hired to study traffic volume and flow patterns of that particular street.

**Lighting:** If the crash occurred during the day, analyze how the sun may have affected the driver’s visibility, and whether a traffic control would mitigate the risk of being “blinded” by the sun. If the crash occurred at night, determine whether the lighting is too low/inadequate, absent, or malfunctioning near or at the crosswalk. If the lighting seems “off,” consider whether additional common-sense safety measures could have been used to enhance lighting at the crosswalk to better illuminate pedestrians in or near the crosswalk. Although governments are typically immune for malfunctioning lights, other factors may come into play. A human-factors expert along with the traffic engineer can scientifically analyze lighting issues for you.

**Other Visibility Issues:** Bus stops increase volume of pedestrians near crosswalks and the large buses can impede visibility of the pedestrians entering the crosswalks. Is there a bus stop near the crosswalk which is hindering the visibility of the pedestrians entering/exiting the crosswalk? Are there parked cars that may be blocking the motorists’ view of pedestrians entering the crosswalk? The design of the adjacent street parking may be contributing to the dangerous condition.

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**Signage:** Are there any signs and/or alerts that a crosswalk is present? Are there other features accompanying the crosswalk?

There are particular features that will weigh against the finding of a dangerous crosswalk. If the crosswalk is controlled by a traffic light or stop sign, for example, the crosswalk is less likely to be found hazardous. Low traffic volume at the crosswalk will similarly likely weigh against the finding of a dangerous condition. The presence of flashing lights and/or a high-intensity activated crosswalk beacon (known as a “HAWK” signal), which is a traffic-control device used to stop road traffic and allow pedestrians to cross, are well-accepted, and often suitable, adequate safety-enhancement features.

Safely marked crosswalks often also utilize other measures to enhance safety, such as curb extensions, raised crossing islands/medians, traffic signals with pedestrian signals, roadway narrowing, enhanced overhead lighting, and speed reducing/traffic calming measures (e.g., speed bumps/humps.) A crosswalk will more likely be deemed unsafe if these additional safety measures are absent.

Regarding markings, signage, and signals, the Federal Manual on Uniform Traffic Control Devices (“MUTCD”) is a document issued by the Federal Highway Administration of the United States Department of Transportation, which specifies the standards by which traffic signs, road surface markings, and signals are designed, installed, and used – *crosswalks included*. In the United States, all traffic control devices must legally conform to these standards. The manual is used by state and local agencies (as well as private construction firms) to ensure that the traffic control devices they use conform to federal standards. While some state agencies have developed their own set of standards, including their own MUTCDs, the state standards must substantially conform to the federal MUTCD; California is no exception and has its own conforming MUTCD, issued by California Department of Transportation.

Both the California and the Federal MUTCD provide that “crosswalk lines

should not be used indiscriminately,” and also *require that an engineering study be performed before marked crosswalks are installed at locations away from traffic control signals or stop signs (i.e., at “uncontrolled” locations)*. However, there are no specific rules (e.g., requirements concerning traffic volume, pedestrian volume, number of lanes, presence or type of median) regarding where marked crosswalks should or should not be placed at uncontrolled locations. It is a judgment call.

The MUTCD suggests various methods to enhance safety at uncontrolled marked crosswalks. These measures (also known as “treatments” in the engineering community) include: (1) the use of various types of crosswalk markings, (2) enhancing the edge of a standard Pedestrian Crossing warning sign with light-emitting diodes that can be activated by pedestrians, (3) adding traffic control devices (e.g., red beacon displays/flashing beacons), (4) adding motorist warning signs (e.g., crossing flags and in-street warning signs) and pavement markings, (5) installing lighting treatments, and/or (6) performing roadway narrowing. The use of median refuge islands and curb extensions are also alternatives which have been shown to improve pedestrian safety.

Hiring a traffic engineer for your case is a wise and necessary investment, as they have the expertise and knowledge to correlate the collision history rate with the other design factors described above in order to deem the crosswalk unsafe. Sometimes, human-factors experts are also useful to tie in visibility issues with pedestrian/motorist patterns, along with the physical aspects of the crosswalk. The most appropriate safety treatment, or combination of safety treatments, will depend on the specific conditions of each site. Your expert can conduct a road safety audit to help identify deficient safety features based on the specific roadway and user characteristics.

### Does a government immunity apply?

However, even where the plaintiff can prove that the dangerous condition exists, governments have immunities

against injuries occurring on their property. Government Code section 830.6 sets forth the affirmative defense of “design immunity.” (See also CACI 1123 (Affirmative Defense – Design Immunity).) This immunity was established to protect the government and their engineers when the construction is based on approved, reasonable design plans.

In addition, Government Code sections 830.4 and 830.8 provide for limited governmental immunities regarding inadequate traffic signaling devices and markings. (See CACI 1120 (Failure to Provide Traffic Control Signals) and CACI 1121 (Failure to Provide Traffic Warning Signals, Signs, or Markings).)

### Defeating the affirmative defense of design immunity

Design immunity (CACI 1123) is a complete defense to a plaintiff’s claim for a “Dangerous Condition on Public Property.” To establish design immunity, the public entity has the burden of proving three elements: (1) causation (i.e., there is a causal relationship between the design of the crosswalk and the injury); (2) existence of an approved design plan prior to the construction (a person or body vested with discretionary authority approved the design, or it was approved in conformity with preexisting standards); and (3) substantial evidence of “reasonableness” regarding the design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63; Gov. Code, § 830.6.)

The first two elements, if the facts are disputed, are for the jury to determine. The third element – the “reasonableness” element – is always for the court to decide. It is important to note that “reasonableness” does not require the property to be perfectly designed, only that there is “substantial evidence” of reasonableness. A government civil engineer’s opinion, and/or even the mere approval of the plan in and of itself by competent professionals, will likely constitute sufficient evidence of reasonableness. Therefore, simply getting your expert to disagree with the design plans

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will not create a triable issue of fact, and the government will prevail on this element.

First, ask if the immunity argument is even available. In a crosswalk case, it is necessary to first determine whether the immunity even applies. In written discovery, request all “approved” design plans and all “as built” design plans of the crosswalk (or area) at issue, including all updates and changes after the initial design. A special interrogatory requesting an enumeration of the standards that were used in the design and construction should also be sent. Also, take the depositions of the persons most qualified, and send document requests asking for the same. *If there are no design plans (which happened in one of my cases), this defense is not available for the defendant!*

Second, if there are design plans, have your expert review them: Once you obtain the design plans, have your “road design engineering” expert analyze these documents to determine if the area in question was built in accordance with the design plan. If the design of the crosswalk does not comport with the approved plan, or the standards were not followed in the design or construction, *the immunity does not apply*. In addition, as stated above, the MUTCD requires *that an engineering study be performed before* marked crosswalks are installed at uncontrolled locations. If the engineering study was not performed at all, this evidence can be used to disprove the “reasonableness” of the design plan (since the plan was approved in violation of California law), and the immunity will not apply.

### Has the government lost its design immunity?

If there is an approved plan that was complied with, determine whether the government *lost* its design immunity. (See CACI 1124, “Loss of Design Immunity (Cornette)”.) Even when a plan has been approved and the area built in conformity with the approved design, and even if the entity establishes the three elements of immunity under section 830.6, a plaintiff can avoid design immunity by proving that the “changed-conditions”

exception applies. To overcome design immunity and for the exception to apply, the plaintiff must show that: (1) the design became dangerous because of a change in physical conditions; (2) the defendant had actual or constructive notice of the change; *and* (3) the defendant had a reasonable amount of time to carry out corrective work *or* did not reasonably attempt to provide adequate warnings of the condition.

Look for factors such as population growth in the surrounding area, in combination with increased use of the crosswalk, change of state standards (e.g., MUTCD standards), increased accident history, and changed conditions of the area. The plaintiff must present *triable issues of fact regarding the loss of design immunity* to prevail in any motion for summary judgment based on design immunity. Triable issues of material fact also might include the changed circumstances of the area based on the length of time between the time the design was approved and/or built and the date of injury.

Analyze whether there is “causation” of the injury. If the injury was not caused by the design of the crosswalk itself but some other factor – there is no causation element. To assert design immunity, there must be proof that an alleged design defect was responsible for the accident, as opposed to some other cause. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-940.) The injury-producing feature must have been a part of an approved plan. (*Id.* at p. 941.) Therefore, for example, if plaintiff is alleging a visibility obstruction or sudden blast of sunlight caused the injury, the City will not have done anything from a design perspective connected to these issues.

Similarly, in *Flournoy v. State* (1969) 275 Cal.App.2d 806, 813, a woman died in a collision after her car hit ice on a bridge. The court held that the State failed to establish the “prime requisite” of design immunity, namely a design-caused accident. In that case, physical surroundings (icing on the bridge), and failing to remedy the condition and

maintain the bridge free of ice despite knowledge of other similar incidents – rather than bridge design – caused the collision. Because ice formation was not a design choice, nothing inherent in the bridge design caused the accident. The bridge design worked in other drier locations. Because of this, the design immunity was not applicable. (Note that the case was based on an older version of the Government Code, and did not address the “weather immunity” set forth in Government Code section 831 [exonerating public entities from liability for weather conditions as such].)

Getting past governmental immunity can also be accomplished if there are sight obstructions to drivers as they approach the crosswalk. Courts have held the following sight obstructions constitute dangerous conditions: a sudden blinding light as a driver went over a hill that had been blocking the sun (*Erfurt v. California* (1983) 141 Cal.App.3d 837); trees and signs, even when not owned by the city (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830); and shadows from a freeway and pillars (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531). Arguably, bus stops or parking spots adjacent to uncontrolled crosswalks that impede visibility, contributing to the pedestrian’s injury, might also defeat the causation element.

Finally: *a dangerous condition of public property does not always involve defective design*. If an entity caused a dangerous condition on its property by negligently constructing, installing, or maintaining the property, design immunity does not apply. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 575). In a case where defective design plays a role alongside other wrongdoing (inadequate maintenance, for example), the case survives immunity so long as the inadequate maintenance was a concurrent cause of injury. (*Ibid.*) In *Mozzetti*, a roadway was defectively designed to allow inadequate drainage, but it was also negligently maintained such that it kept clogging. Because negligent maintenance was involved, the city was not immunized from liability for the resulting flooding.

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**Practice tip:** As soon as you receive the defendant's answer, carefully review the affirmative defenses and send written discovery regarding the evidentiary basis for each of the asserted immunities. Having this information early will help you formulate your own defenses to the asserted immunity and will help you analyze other ways to get around design immunity, if applicable.

### Remember the additional limited immunities for inadequate traffic control devices or markings

If the poorly marked/signaled crosswalk causes the injury, other immunities are often implicated. Government Code sections 830.4 and 830.8 state that the governmental entity is not liable for a dangerous condition created *merely* from the failure to provide traffic controls, warning signals, signs, or markings. The lack of a traffic signal or other markings does not constitute proof of a dangerous condition. However, the government may be liable where a dangerous condition exists for reasons *other than or in addition* to the mere failure to provide such controls or markings. (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1536.) The "absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803.)

For example, blind corners, sight obstructions, blind spots, physical aspects of the roadway such as elevation variations, conditions adjacent, near and/or approaching the intersection which may obscure the view of the drivers, or other unusual conditions that make the crosswalk dangerous, *in addition to the lack of traffic control devices/markings*, could render the government liable. In *Gardner v. City of San Jose*, the lack of crosswalk markings, poor illumination, and lack of warning signs became important "factors" in the court's determination of finding liability against the City of San Jose.

Additionally, crosswalks on roads with higher speed limits, greater

amount of pedestrian travel, and prior incidents will support your dangerous condition claim. After establishing a dangerous condition, the plaintiff may introduce evidence that the governmental entity failed to eliminate or mitigate the dangerous condition via traffic signals, controls, or signs, and is therefore liable. Analyzing the physical area of the roadway and the surrounding circumstances, in combination with the failure to provide traffic control devices and markings, may allow your client to get around the immunities set forth in sections 830.4 and 830.8.

Please also remember that there are other potential governmental immunities that may apply, such as the weather immunity set forth in Government Code section 831 (see CACI 1122) and perhaps immunities set forth in Government Code sections 835.4(a) and (b) (see CACI 1111 and CACI 1112).

### Conclusion and tips

When analyzing whether we should accept a dangerous crosswalk case, we should look at the logistics of the subject crosswalk and see if something looks amiss. Pull and study the SWITRS report. How many similar collisions are there at that crosswalk? Visit the crosswalk and watch traffic pass by at various times of the day, including the time of day that your subject collision took place.

Look at traffic patterns – volume of cars and relative speeds. Look for buses or parked cars that might be obscuring the visibility of the pedestrians entering the crosswalk. Look at the pedestrians that are using the crosswalk and take note of their characteristics and behavioral patterns, as well as pedestrian volume. Look at the surrounding neighborhood (e.g., is there a school nearby? a hospital?) and the availability of alternate crossing areas. Look for other visibility concerns and possible lighting issues.

Then look at all the signage, lights, street markings, and other traffic control devices and physical features located at the crosswalk. Make a note of what devices and features are present, and

where they are located. Ask yourself if something about the crosswalk looks unsafe to you, and whether additional safety measures might have helped prevent the subject injury or death.

Take various photos of the crosswalk at multiple angles, at the appropriate time of day with similar lighting as your subject case, making sure to document any and all signs, devices, markings, etc. Once there is the potential for a dangerous crosswalk, then analyze the situation in the context of the immunities above. Often there is not enough information (e.g., design plans) to fully vet the design immunity defense. However, there might also be other "factors" to overcome the immunity defenses (as discussed above). Provide the traffic collision report, SWITRS report, and the photos to your expert to analyze. He or she can help you decide at the outset whether to take the case; this is highly recommended since these types of cases could be costly and it is better to know early on whether you have a good case before you spend a ton of money on it.

Remember, in order to have a claim against a governmental entity, you must first file a timely government claim form, compliant with the Tort Claim Act. Then, once the case is filed and is in discovery, make sure to obtain all design plans, warrants, and engineering studies performed of that crosswalk, as well as the collision history (should be the same as yours, but maybe not). A good expert can help you make sense of and analyze all that information, perform additional studies, and determine all the reasons why your subject crosswalk is dangerous.

Dangerous uncontrolled marked crosswalks are more prevalent than you probably realize. Take a look around you, and you will see all the potential hazards that await the unsuspecting innocent pedestrian, who will perhaps be your next client. Instead of thinking you only have the driver as a defendant (who often has a minimal policy), perhaps you have a deep-pocket governmental entity which may also be held liable.

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