



Using discovery to establish liability for bicycle accidents within construction zones

DON'T FOCUS TOO SHARPLY ON THE CONDITION THAT CAUSED THE INJURY. LOOK AT THE FAILURES OF THE PUBLIC AND PRIVATE ENTITIES THAT CREATED THE DANGEROUS CONDITION

Active construction sites present unique and significant hazards to cyclists. Uneven pavement, inconsistent surfaces, and confusion caused by striping or lack of warnings can be common. Municipalities seem to be in a constant state of roadway construction and roadway cyclists are among the most vulnerable to these inconsistencies. Even experienced cyclists are faced with dangerous challenges with little time to avoid incident.

This article will focus on incidents where a cyclist gets injured by a roadway condition within an active construction zone that involves a third-party private contractor. Understanding the differences in establishing liability is an essential starting point in these matters. With preparation and insight into the relationship between public and private entities, these cases can be discovered and prosecuted efficiently and with purpose.

Liability considerations for public and private entities

Public entity liability for dangerous condition of public property is established by statute, and private entity liability follows common law. Regarding the public entity, Government Code section 835 provides the framework for public entity liability for dangerous condition of public property:

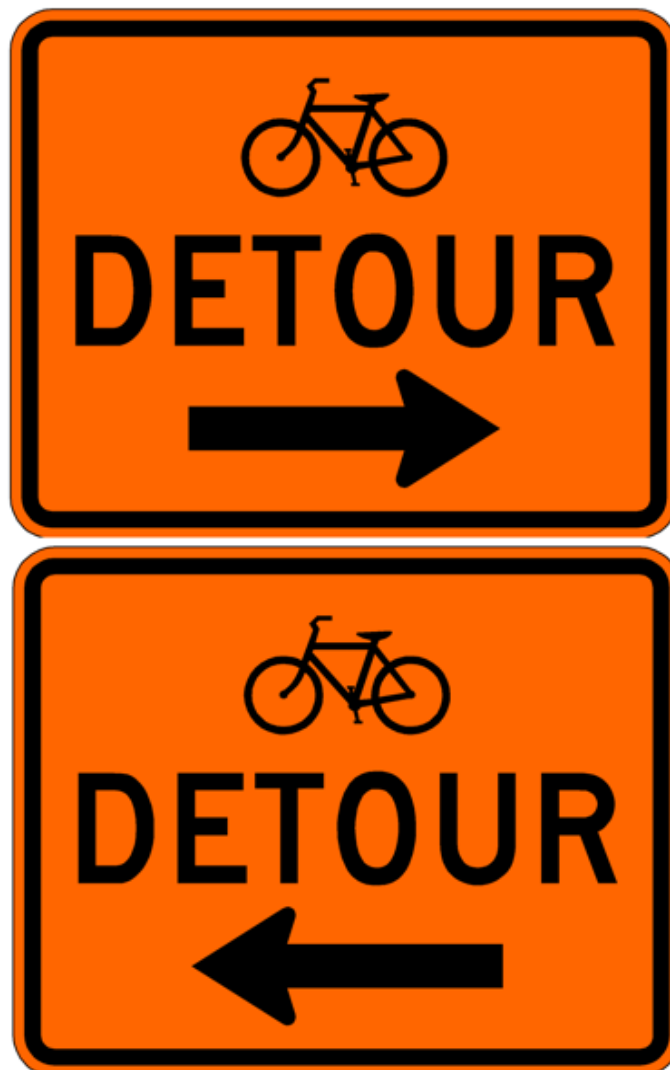
Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

- (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
- (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Showing the existence of the dangerous condition, alone, is insufficient. Government Code section 835 additionally requires either (a) the condition was negligently created by a government employee, or (b) that the entity had notice of the condition with enough time to warn or remedy the defect.

In the current context of an active construction site, it is worth pursuing subsections of section 835. Regarding negligent creation, one should explore the duties and activities of the public entity's employees during the construction. Regarding notice, the public entity's level of knowledge of the day-to-day construction activities is relevant. Further discussion, *infra*.

For a private entity, principles of common law negligence apply. CACI 401 Standard of Care provides:



Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. You must decide how a reasonably careful person would have acted in [name of plaintiff/defendant]'s situation.

There are very significant differences between the showing required to prove a dangerous condition of public property claim and a negligence claim.

Discovery to divide and conquer

When pursuing discovery in bicycle-related construction site cases, a detailed discovery plan can be useful. The public entity may attempt to shift responsibility to the private contractor because they were in control of the project and may have created the feature that caused injury. Fault and liability can sometimes act oddly in construction site matters. For instance, if a private contractor creates a dangerous condition of the pavement surface, it would be at fault and liable. If the public entity did nothing to create the condition but had notice of that condition with sufficient time to warn or create a remedy, it too could be liable because it owned and controlled the public property. Delegation of construction activity to and/or a contractual indemnification by a third party does not alleviate the public entity of liability. Sticking to the elements of Government Code section 835 during discovery is essential.

Evidence gathered from one defendant may support the claim against the other. Deep investigation into the duties of the defendant entities is a good starting point during discovery. If the defendants disagree on which of them was responsible for a particular activity or the meaning of document, exposing and exploiting those disagreements can create positive results for your client. Having two defendants accuse the other of wrongdoing always benefits a plaintiff.

Pre-construction documents and plans

Public and private entities perform a significant amount of work prior to the commencement of construction. Plans, communications, and traffic control plans are all significant pre-construction matters that can create inferences of notice (to the public entity) and foreseeability (to the private entity).

Pre-project activities that led to the need for the project

The public entity created the project in response to some “need” and documents concerning that need can be enlightening. Some questions on this subject include:

- Were there safety issues with the pre-construction roadway, a spate of collisions, or a history of vehicle/cyclist incidents?
- Were traffic volume studies performed that revealed the need for increased capacity or different signage/stripping?
- Were there citizen complaints regarding the area?
- Why was this change promoted and why were public funds expended for this project?

Determination of why the project exists can create a theme that can be used throughout the case. For example, many municipalities are performing “road diet” projects: those that reduce the number of vehicular travel lanes and often include new or improved bicycle and pedestrian facilities.¹ If a cyclist is injured within a project intended to create new bicycle lanes, then it is difficult for a defense witness to be legitimately ignorant about the presence of cyclists during construction. It can have great impact to discuss the scope and purpose of the project with defendant employees and persons most qualified.

Pre-project bid and contract documents

Start the inquiry into the duties of the defendants with the bidding and contract documents. The California Public Contract Code requires a competitive bidding process that includes public advertisement of the project and the invitation to bid for the work. The bidding documents will include a wealth of information about the project including the project specifications and the proposed duties of the private entity should it be chosen to perform the project. These documents will usually contain traffic control plan requirements to be employed during the project.

With regard to the public entity, these documents can show notice of what types

of traffic precautions were needed during the construction process. For the private contractor, recall that part of the bidding process was analysis of the materials and labor needed to complete the project per the public entity’s requirements. If there are anticipated needs for traffic control flaggers or signage particular to predicted roadway hazards, these items can establish knowledge well prior to the start of construction.

Bidding and contract documents also define the financial relationship between the public and private entities. These contracts usually include indemnification relationships between the private and public entity. Most agreements require the contractor to hold a certain amount of insurance during the build and to either name the public entity as an additional insured or agree to indemnify it for claims made for incidents that occur during the construction. Remember that these relationships are contractual in nature and exist between the public entity and the private contractor. They do not act as an immunity or otherwise alleviate the public entity of liability.

Traffic control plans and related communications

The need for effective traffic control through active constructive zones is well known. Traffic control plans and related documentation are often helpful in construction-site matters.

Chapter 6 of the California Manual on Uniform Traffic Control Devices (“MUTCD”), “Temporary Traffic Control (TTC)” provides that the needs and control of all road users, including bicyclists, through a TTC zone shall be an essential part of highway construction.² The MUTCD also provides the following standard:

Before work begins, traffic control plans, when developed for handling traffic through a construction or maintenance project, shall be approved by the Engineer or the Engineer’s designee of the public agency or authority having jurisdiction over the highway.³

Municipalities often supplement the CA MUTCD in this area. A City of Oakland Department of Transportation Memorandum requires that “[e]very reasonable effort should be made to avoid and minimize construction impacts on pedestrian, bicycle, and bus facilities in Oakland.”⁴ The City of Oakland further requires any construction sponsor seeking a permit that will block a bicycle lane (*inter alia*) to submit a Temporary Traffic Control Plan to the Department of Transportation “for review and approval.”

Once discovered, TTC Plans can be used as the standard set by the defendants for their own construction project. A deviation from that TTC Plan that led to your client’s injuries is a clear deviation from the standard of care.

Plans may identify future dangerous conditions

These documents represent the project itself – what the public entity hired the contractor to build. A close look at the construction project plans can be enlightening and provide evidence of notice (regarding the public entity) or foreseeability (for the private entity). For example, when a project includes the creation or improvement of bicycle facilities, it is clearly set within an area that has significant bicycle traffic. A reasonable contractor would then know to anticipate a high number of cyclists within the construction zone. Similarly, if the project plans include signage that is to be utilized to warn users or cyclists of particular features, then it is logical to inquire as to what signage or warnings were present during the construction to notify cyclists of those same features.

Communications reveal real-time issues

Communications between the public entity and the contractor must also be discovered. They may discuss aspects of the construction or traffic control plan as well as need for

clarifications of plans or duties of the entities. Permits that the private entity requests for project-related matters can also be helpful. There may be pre-incident communications regarding the subject defect that can be very useful with regard to showing notice. Post-incident communications are discoverable and often survive a subsequent remedial measure challenge if there is also a dispute regarding feasibility or existence of a duty.⁵

Inquiry into communications with third parties may be insightful as well. For example, there may be railroad tracks within the construction zone or other entities that hold easements that were implicated by the construction. Communications with these third parties can reveal pre-incident knowledge of potential hazards.

Activities during construction

Public entity presence and scope of work at the site

For larger projects, the public entity may have an employee present at the worksite during construction, possibly daily. That employee may have contributed or authorized the creation of the dangerous condition. Separately, their presence may create evidence of notice to the public entity of the dangerous condition, even when created by the private entity.

Change requests and related communications

In many construction projects there are changes that need to be made to address unforeseeable events. A contractor may discover that it needs more materials at an additional cost or there may be an unanticipated topographic feature that requires a significant amount of labor. Communications regarding these changes identify the entity’s knowledge and also may provide evidence of public entity notice of the condition.

Logs and photographs

Logs and photographs kept by forepersons or other site supervisors can reveal day-to-day issues and communications related to them. These logs may contain the only records of relatively minor daily issues that can become hazards for bicyclists. Photographs are often the only way to track day-to-day site changes.

Conclusion

When a cyclist gets injured within a construction zone, it can be easy to sharply focus on the condition that caused the injury. Broadening the scope of discovery allows us to better understand the failures of the public and private entities that created the dangerous condition, and how our client’s injuries could have been prevented.

Casey Kaufman represents plaintiffs in the areas of personal injury, product liability, mass torts, and actions against public entities at his firm, Kaufman Law (caseykaufmanlaw.com). He is a member of the California, Arizona, Washington State, and Washington D.C. bars, is rated AV Preeminent by Martindale-Hubbell, and is recognized by Super Lawyers and Best Lawyers (2021 Lawyer of the Year by Best Lawyers for Personal Injury Litigation). He is a member of the Board of Directors for the ACCTLA and the CAOC and past chair of the CAOC New Lawyers Division.

Endnotes:

¹ See Road Diet Fees Bike and Ped - <https://dot.ca.gov/-/media/dot-media/programs/risk-strategic-management/documents/f0006404-mm-2015-q2-bike-ped-a11y.pdf>

² CA MUTCD - <https://dot.ca.gov/-/media/dot-media/programs/safety-programs/documents/ca-mutcd/rev6/camutcd2014-rev6.pdf>

³ *Ibid.*

⁴ https://cao-94612.s3.amazonaws.com/documents/OakDOT-Updated-Guidance-Temporary-Traffic-Control_2017_01_06.pdf

⁵ See Evid. Code § 1151; *Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573; *Morehouse v. Taubman* (1970) 5 Cal.App.3d 548, 555. ☒