

# **DANGEROUS CONDITION OF PUBLIC PROPERTY**

**An Outline For Investigating Liability, Defenses & Immunities  
For Actions Against Public Entities In State Court**

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## **1. STARTING POINT**

A fundamental principle of the Tort Claims Act is that public entities are liable only to the extent provided by statute. *Govt. C.* §815. This code section abolishes all common law or judicially declared forms of liability for public entities. *Brown v. Poway Unified Sch. Dist.* (1993) 4 C4th 820, 829.

## **2. LIABILITY**

Public entity liability for dangerous property conditions is not based on respondeat superior. *Nishihama v. City & County of San Francisco* (2001) 93 Cal.App.4th 298, 302. Instead, liability depends on proof of the requisite statutory elements. (*Govt. C.* §§830-835.4 for entity liability; *Govt. C.* §§840-840.6 for employee liability.) In an action against an entity for dangerous condition, a plaintiff is not required to plead and prove that any specific employee of the entity was responsible for the dangerous condition. *Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172. Additionally, a public entities liability based on a dangerous condition of public property does not vary with the status of the plaintiff as invitee, licensee or trespasser. *Roland v. Christian* (1968) 69 Cal.2d 108, 119.

Government Code §835 provides the basis for liability in an action against a public entity for an injury caused by the dangerous condition of public property. To establish liability under *Govt. C.* §835, the following essential elements must be proved:

### **a. Public Property Owned Or Controlled By Public Entity**

The property must be owned or controlled by a public entity. *Govt. C.* §830(c) defines “public property” and “property of a public entity” as “real or personal property” that is “owned or controlled by the public entity.” Excluded are “easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity. *Govt. C.* §830(c)

If it is shown that the defendant public entity did not have either title or control over the property that was in a dangerous condition, there is no liability. *Aaitui v. Grande Prop.* (1994) 29 Cal.App.4th 1369.

### **i. Ownership**

#### **(1) General**

Ownership of public property is generally established as a matter of law by evidence of holding title or other similar evidence. Ownership of property may be a basis of liability even when control is vested elsewhere. *Huffman v. City of Porway* (2000) 84 Cal.App.4th 975, 989.

#### **(2) Streets & Highways**

Proof that a public entity owns streets and highways that were laid out by subdividers, and therefore has a duty to maintain them, can be established only by evidence that the public entity “accepted” the streets and highways into the city or county road section by formal resolution. *See*

Rink v. City of Cupertino (1989) 216 Cal.App.3d 1362. Before acceptance, the public entity is statutorily immune from liability for failing to maintain such streets and highways. *Str. & H. C.* §§941 (county highways) and 1806 (city streets).

ii. **Control**

Control may be established by whether the defendant public entity had “the power to prevent, remedy or guard against the dangerous condition.” Huffman v. City of Porway (2000) 84 Cal.App.4th 975, 990.

iii. **Ownership Or Control Must Exist At Time Of Accident**

The requisite ownership or control of the public property, as a predicate to governmental tort liability for a dangerous condition, must exist at the time of the accident. Longfellow v. County of San Luis Obispo (1983) 144 Cal.App.3d 379.

iv. **Joint & Several Liability May Result If Ownership & Control Are Divided**

Ownership and control may be divided between the parties, thereby resulting in liability by more than one public entity. Low v. City of Sacramento (1970) 7 Cal.App.3d 826. The doctrine of comparative negligence was held fully applicable to dangerous condition actions in Levine v. City of Los Angeles (1977) 68 Cal.App.3d 481. Moreover, the doctrine of comparative equitable indemnification was held applicable to dangerous condition actions in E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497.

b. **Dangerous Condition**

*Govt. C.* §830(a) defines “dangerous condition” as “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 a manner in which it is reasonably foreseeable that it will be used.”

i. **“Condition of Property”**

The term “condition of property” under *Govt. C.* §830(a) has been the subject of considerable litigation, and has been defined in at least three ways.

(1) **Public Improvement That Is Damaged Or Deteriorated**

“Condition of property” has been defined as a public improvement that has become physically changed, flawed or damaged, or has deteriorated to a degree that makes it potentially dangerous to reasonably foreseeable users, even when used with due care. Examples include:

A sharp drop at the edge of a highway. Murrell v. State ex rel Dep’t of Pub. Works (1975) 47 Cal.App.3d 264.

A boulevard stop sign that was obscured by foliage. De La Rosa v. City of San Bernardino (1971) 16 Cal.App.3d 739.

An inadequately maintained road that had crumbled away. Elias v. San Bernardino County Flood Control Dist. (1977) 68 Cal.App.3d 70.

(2) **Defective Design, Location Or Latent Hazard**

“Condition of property” has also been defined as public property that is in a dangerous condition because of the design or location of the improvement, the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use. See Warden v. City of Los Angeles (1975) 13 Cal.3d 297. These conditions can create a substantial risk of injury to foreseeable careful users.

The following are examples of this type of “condition of property”:

A submerged pipe near the surface in recreational waters. Warden v. City of Los Angeles, supra.

A nondefective highway overpass rendered dangerous by a negligently issued oversize load permit that routed a truck over the overpass. Hill v. People ex rel Dep’t of Transp. (1979) 91 Cal.App.3d 426.

A sharp curve incorporated into a highway improvement without signs warning of the need to reduce speed. Anderson v. City of Thousand Oaks (1976) 65 Cal.App.3d 82.

A model airplane field in close proximity to high voltage power lines. Branzel v. City of Concord (1966) 247 Cal.App.144.

(3) **Condition of Property and Negligent/Criminal Conduct of Others**

Finally, “condition of property” has been defined to include all public property that may be substantially dangerous to reasonably foreseeable users who sustain injury as a result of a combination of a “condition of the property” (either physical defect or the absence of adequate safety features) and negligent or criminal conduct by others on or about the property. Examples of this third definition of “condition of property” include:

Low parking lot curb, combined with negligence by driver whose vehicle jumped the curb. Constantinescu v. Conejo Valley Unified Sch. Dist. (1993) 16 Cal.App.4th 1466, 1473.

Thick, untrimmed foliage and trees adjoining a college parking lot stairway, combined with criminal conduct of third party. Peterson v. San Francisco Community College Dist. (1984) 36 Cal.3d 799.

Inadequate lighting near women’s restroom on state highway roadside rest stop, combined with criminal assault of third party. Constance B. v. State (1986) 178 Cal.App.3d 200 (but summary judgment for state affirmed as proximate cause lacking).

If the risk of injury from third parties is in no way increased or intensified by any condition of the public property, including the acts of third parties, the courts ordinarily decline to ascribe the

resulting injury to a dangerous condition of the property. In other words, there is no liability for injuries caused *solely* by acts of third parties. Peterson v. San Francisco Community College Dist., *supra*.

ii. **Substantial Risk Of Injury: Trivial Risks Excluded**

(1) **Substantial Risk Under Govt. C. §830(a)**

The second component to the definition of “dangerous condition” is “substantial risk of injury.” *Govt. C. §830(a)*. A full assessment of all surrounding circumstances is necessary to determine whether the risk is substantial, as opposed to minor, trivial or insignificant, and thus whether the condition is dangerous. This is generally (although not invariably) treated as a question of fact. Fielder v. City of Glendale (1977) 71 Cal.App.3d 719, 734.

In making this determination, a relevant circumstance to consider is the manner in which the property condition caused the accident, especially when it supports an inference that similar injuries are likely in the course of foreseeable careful use. It should be noted, however, that the mere happening of the accident (except when *res ipsa loquitur* may properly be invoked) is declared by statute as “not in and of itself evidence that public property was in a dangerous condition.” *Govt. C. §830.5(a)*.

A history of similar accidents during the course of normal use of a property supports an inference that its condition creates a substantial risk of injury and is dangerous. Baldwin v. State (1972) 6 Cal.3d 424. The absence of prior accidents tends to prove that there is no substantial risk of injury. See Sambrano v. City of San Diego (2001) 94 Cal.App.4th 225, 243.

(2) **Trivial Risk Statutorily Excluded: Govt. C. §830.2**

The definition of “dangerous condition” expressly excludes a condition that creates minor, trivial or insignificant risks. *Govt. C. §830(a)*. *Government Code §830.2* defines “excluded conditions” as those that a trier of fact determines are of “such a minor, trivial or insignificant nature in view of the surrounding circumstances” that, when the property is foreseeably used with due care, the risk of injury created would not be substantial.

Whether the defect is too trivial to be dangerous under *Govt. C. §830.2* may be decided as a matter of law. Kahn v. East Side Union High School Dist. (2002) 96 Cal.App.4th 781, 800. However, if reasonable minds differ on whether the defect is dangerous, the question becomes one of fact for the jury. Felder v. City of Glendale (1977) 71 Cal.App.3d 719, 734. The courts should also consider the circumstances surrounding the accident that might have made the defect more dangerous than its size would indicate. Felder v. City of Glendale (1977) 71 Cal.App.3d 719, 731.

iii. **Such Property Or Adjacent Property Under Govt. C. §830(a)**

The third component of the definition of dangerous condition is “such property or adjacent property.” *Govt. C. §830(a)*.

(1) **“Such Property”**

Under *Govt. C. §830(a)*, “such property” includes the risk created by the condition of public property that may extend beyond its boundaries and be a hazard to persons or property nearby. See *Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829. “A tree located on public property may have a decaying limb overhanging private property and creating a hazard to that property and the persons on it.” Moreover, the presence of “explosives on public property may create a hazard to a wide area of private property adjacent to the public property.” *Law Revision Commission Comment to Govt. C. §830*.

(2) **“Adjacent Property”**

Liability may also arise under *Govt. C. §8305* “if a condition on the *adjacent property* exposes those using the public property to a substantial risk of injury.” In that situation, the public property may be considered dangerous. *Gross v. State* (1978) 82 Cal.App.3d 426, 429.

Other cases in which the conditions on adjacent private property exposed users of public property to a substantial risk of injury are:

Sign and trees on adjacent private property obscured sight distance of drivers on highway. *Carson v. Facilities Dev. Co.* (1984) 36 Cal.3d 830.

State highway held to be dangerous when adjoining private property had propensity to produce mudslides that covered portions of highway. *Briggs v. State* (1971) 14 Cal.App.3d 489.

Determining whether a condition on adjacent property constitutes a dangerous condition of public property requires a judicial assessment of the scope of the public entity’s duty to protect *foreseeable careful users* of its property from hazards derived from conditions on nearby premises. Efforts to extend the principle have resulted in judicial reluctance to expand the entity’s duty. See *Beyer v. City of Los Angeles* (1964) 229 Cal.App.2d 378.

iv. **Used With Due Care**

The fourth component of the definition of “dangerous condition” under *Govt. C. §830* is “used with due care.” Public property is in a “dangerous condition” under the Tort Claims Act only when its condition creates a substantial risk of harm when it or adjacent property is used with due care in a reasonably foreseeable manner. *Govt. C. §830(a)*; *see also* BAJI 11.54.

The “due care” clause is merely part of the definition of a dangerous condition, and does not require the plaintiff to plead or prove absence of his or her own negligence or that of a third person. *Matthews v. State ex rel. Dep’t of Transp.* (1978) 82 Cal.App.3d 116. A plaintiff’s negligence in a dangerous condition case is an affirmative defense and “has no bearing upon the determination of a ‘dangerous condition’ in the first instance.” *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799.

The “used with due care” requirement refers to use by the public generally. *Callahan v. City & County of San Francisco* (1967) 249 Cal.App.2d 696. The plaintiff is required to establish

only “that the condition ... creates a substantial risk of harm when used with due care by *the public generally*, as distinguished from the particular person charged as concurrent tortfeasor.” Murrell v. State ex rel Dep’t of Pub. Works (1975) 47 Cal.App.3d 264, 267.

v. **Reasonably Foreseeable Manner Of Use**

The fifth component of the definition of “dangerous condition” is “used in a reasonably foreseeable manner.” Under *Govt. C.* §830(a), a condition of property is dangerous only if it 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.”

The test of liability under this component is whether a condition is a hazard to all *foreseeable users*, not merely those who are intended to be users. Public entities are liable “for maintaining property in a condition that creates a hazard to foreseeable users even if those persons use the property for a purpose for which it is not designed to be used or for a purpose that is illegal.” *Law Revision Comment of Govt. C.* §830; Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789.

The following are examples:

Malfunctioning traffic signal at intersection, with lights stuck on red and green, held dangerous to motorists foreseeably passing through the intersection. Matthews v. State ex rel Dep’t of Transp. (1978) 82 Cal.App.3d 116.

Sudden narrowing of paved street, without adequate lighting or warning signs, held dangerous to motorcyclists because “any reasonable person” would know that cyclists at night “would be exposed to its danger.” Levine v. City of Los Angeles (1977) 68 Cal.App.3d 481.

“Y” intersection held to be dangerous condition because persons using it in foreseeable manner are exposed to injury. Becker v. Johnston (1967) 67 Cal.2d 163.

c. **Injury Caused By Dangerous Condition**

To recover for injuries based on a dangerous condition of public property, the plaintiff must establish that “the injury was proximately caused by the dangerous condition.” *Govt. C.* §835. If the complaint in a dangerous-condition action fails to show a casual relationship between the alleged dangerous condition and the plaintiff’s injury, no cause of action exists. Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 766.

i. **Dangerous Condition Need Not Be Sole Or Exclusive Cause Of Injury**

The plaintiff does not have to establish that the dangerous condition was the sole or exclusive cause of the injury. If the requirements of the Tort Claims Act are satisfied, the entity is liable even if the defective condition was actually created or maintained by a private person who is jointly liable with the public entity. Peters v. City & County of San Francisco (1953) 41 Cal.2d 419 (defect in sidewalk created by owner of abutting property for his own benefit).

ii. **Concurrent Negligence Of Plaintiff Or Third Party**

The concurrent negligence of the plaintiff or a third party does not break the chain of causation and relieve a public entity from liability for a dangerous property condition if the condition was a proximate cause (but not necessarily the sole proximate cause) of the plaintiff's injury. Peterson v. San Francisco Community College Dist. (1984) 36 Cal.3d 799 (cause of action stated against college when combination of untrimmed foliage adjacent to parking lot and plaintiff injured in criminal assault).

The following are further examples in which the chain of causation was not broken by the concurrent negligence of the plaintiff or a third person:

Combination of dangerous intersection and negligent operation of motor vehicle by third party. Baldwin v. State (1972) 6 Cal.3d 424.

Negligence of plaintiff's driver combined with dangerous highway condition. Hurley v. County of Sonoma (1984) 158 Cal.App.3d 281.

Negligence of plaintiff combined with dangerous highway condition. Erfurt v. State (1983) 141 Cal.App.3d 837.

Negligent storage by city of gasoline and other combustible chemicals, with no means to prevent or control fire ignited by negligent third party. Vedder v. County of Imperial (1974) 36 Cal.App.3d 654.

iii. **When Chain Of Causation Broken By Third Party**

If third party negligence or wrongdoing tends to prove that the plaintiff's injuries were not proximately caused by a dangerous condition of the public property, the chain of causation may be broken. Martinez v. Vintage Petroleum, Inc. (1998) 68 Cal.App.4th 695. Accordingly, it is essential for the plaintiff to plead and prove that the injuries were caused, at least in part, by the property's defective condition and not solely by the tortious conduct of third parties. Swaner v. City of Santa Monica (1984) 150 Cal.App.3d 789.

d. **Kind Of Injury Reasonably Foreseeable As Consequence Of Dangerous Condition**

In addition to proximate cause, *Govt. C.* §835 requires that the plaintiff establish, as a condition of liability, "that the dangerous condition created a reasonably foreseeable risk of the *kind of injury* which was incurred." Peterson v. San Francisco Community College Dist. (1984) 36 Cal.3d 799, 812.

The meaning of the phrase "kind of injury" under *Govt. C.* §835 has not been clarified by any court. Paterno v. State (1999) 74 Cal.App.4th 68, 99 (whether the "way" injury occurred must be foreseen or only the "kind of injury" not decided).

e. **Either:**

The dangerous condition was created by a public employee's negligent or wrongful act, or

omission within the scope of his or her employment (*Govt. C.* §835(a)), or

The entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury (*Govt. C.* §835(b)).

*Curtis v. State* (1982) 128 Cal.App.3d 668, 691 (court held that plaintiff need not prove that public entity was both negligent in creating condition *and* that it had notice of dangerous condition; either negligence *or* notice sufficient under *Govt. C.* §835).

i. **Negligent Or Wrongful Creation Of Dangerous Condition: Govt. C. §835(a)**

(1) **Basis For Liability**

The plaintiff need not prove that the employee’s conduct was unreasonable (*i.e.*, negligent or wrongful) in any other respect. Proof of the creation of a “dangerous condition,” as defined in *Govt. C.* §830(a), is itself evidence of negligent or wrongful conduct sufficient to support liability.

For example, in *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 720, the state was held liable for failing to erect a median barrier to protect freeway drivers from serious injuries inherent in cross-median accidents. The court found that the lack of a median barrier created a dangerous condition; evidence of negligence by any party, including the public employee, was not required.

(2) **Showing Of Notice Not Required**

Under *Govt. C.* §835(a), plaintiff is not required to prove that the public entity received either actual or constructive notice of the dangerous condition. The alleged basis of liability against the public entity for a dangerous property condition is the negligent or wrongful creation of the condition. The creation by the public entity of a “dangerous” condition dispenses with the necessity of notice, because the entity presumably knows already that it is dangerous. *Brown v. Poway Unified Sch. Dist.* (1993) 4 Cal.4th 820, 833.

ii. **Negligent Failure To Protect After Notice Of Dangerous Condition: Govt. C. §835(b)**

(1) **Basis For Liability**

As an alternative to liability for creation of a dangerous condition, *Govt. C.* §835(b) provides that liability exists when the public entity “had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.” It is applicable when a dangerous condition is not created by the entity or its employees. *Brown v. Poway Unified Sch. Dist.*, *supra.*, 4 Cal.4th at 836.

(2) **Showing Of Actual Or Constructive Notice Required**

Under *Govt. C.* §835(b), the plaintiff has the burden of proving that the public entity had actual or constructive notice of the dangerous condition and that such notice was received a sufficient time before the injury to allow the public entity to take measures to protect the plaintiff.

Briggs v. State (1971) 14 Cal.App.3d 489, 494. The plaintiff's failure to establish either actual or constructive notice under *Govt. C.* §835(b) is fatal to recovery. Van Kempen v. Hayward Area Park, Recreation & Park Dist. (1972) 23 Cal.App.3d 822, 827.

(a) **Actual Notice**

To prove that a public entity received actual notice of a dangerous condition within the meaning of *Govt. C.* §835(b), the plaintiff must show evidence of the following two facts under *Govt. C.* §835.2(a):

That the public entity "had actual knowledge of the existence of the condition": and

That the public entity "knew or should have known of its dangerous character."

Hilts v. County of Solano (1968) 265 Cal.App.2d 161.

Imputed notice, as defined by ordinary agency rules, satisfies the actual notice requirement, *i.e.*, the principal has notice of whatever the agent "has notice of." *Civil Code* §2332; Rodriguez v. City of Los Angeles (1963) 215 Cal.App.2d 463.

Actual notice may readily be proved by evidence that: (1) an actual inspection of the property was made; (2) the defect was in fact reported to an appropriate public officer (*See Mathews v. State ex rel Dep't of Transp.* (1978) 82 Cal.App.3d 116, 122); or (3) measures were taken regarding the defect, showing the public entity's realization that it was dangerous (*See Morris v. State* (1979) 89 Cal.App.3d 962).

Evidence that the public entity knew that repeated prior injuries had been caused in a substantially similar manner by the condition has also been held sufficient to support an inference of actual notice. Warden v. City of Los Angeles (1975) 13 Cal.3d 297.

(b) **Constructive Notice**

(i) **Burden Of Proof On Plaintiff**

Constructive notice of a dangerous condition is an alternative to actual notice as a basis for governmental tort liability under *Govt. C.* §835(b). As with actual notice, the plaintiff has the burden of proof on the issue of constructive notice. *Govt. C.* §835.2.

Under *Govt. C.* §835(b), a public entity has constructive notice of a dangerous condition only if the plaintiff proves that the condition has existed "for such a period 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." Gentekos v. City and County of San Francisco (1958) 163 Cal.App.2d 691, 697.

Constructive notice may be proved by various types of evidence, including reports of similar accidents at the site, complaints about the condition, governmental studies prepared by the public entity and application of the "reasonable inspection" test. The ultimate proof of constructive notice is whether the entity "in the exercise of due care" by inspections or otherwise

should have discovered the condition and its dangerous character. *Govt. C.* §835.2(b)

The length of time considered sufficient to support a finding of constructive notice depends on all of the relevant circumstances, and therefore is usually regarded as an issue for the trier of fact. *Erfurt v. State* (1983) 141 Cal.App.3d 837. However, if the period of time is so short that it would be unreasonable to expect the condition to be discovered by the entity in the exercise of due care during that period, the issue may be taken from the jury and it may be established as a matter of law that there was not constructive notice. *Van Kempen v. Hayward Area Park, Recreation & Park Dist.* (1972) 23 Cal.App.3d 822.

The plaintiff's inability to adduce evidence of the length of time that the dangerous condition had existed is fatal to the plaintiff's right to recover because the plaintiff has the burden of proof on the issue. *State v. Superior Court (Rodenhuis)* (1968) 263 Cal.App.2d 396.

(ii) **Reasonable Inspection Test Of Constructive Notice**

Constructive notice may be proved by many types of evidence, including evidence resulting from the application of the reasonable inspection test of *Govt. C.* §835.2. Although judicial decisions do not always link the issue of constructive notice to the reasonable inspection test, the Tort Claims Act indicates that, absent other persuasive evidence, the relationship between constructive notice and inspection may be crucial. *Carson v. Facilities Dev. Co.* (1984) 36 Cal.3d 830 (constructive notice may be imputed to defendant if it can be shown that obvious danger existed for adequate period of time prior to accident and defendant, by reasonable inspection, should have discovered and remedied the situation). *Nishihama v. City & County of San Francisco* (2001) 93 Cal.App.4th 298.

The Act also declares that when the burden of proof is on the plaintiff, evidence may be adduced about whether:

the condition and its dangerous character “would have been discovered by an inspection system that was reasonably adequate . . . to inform the public entity” about whether the property was safe for its intended and foreseeable uses (*Govt. C.* §835.2(b)(1)); and

the entity “maintained and operated such an inspection system with due care and did not discover the condition” (*Govt. C.* §835(b)(2)).

(iii) **Trivial Defect Rule**

When a defect of which the public entity has notice is so trivial or inconspicuous that reasonable minds could not regard it as dangerous, the courts may also conclude as a matter of law that the constructive notice has not been established. The trivial defect or trivial risk rule is codified in *Govt. C.* §830.2.

f. **Damages**

The plaintiff in a dangerous condition action is required to plead and prove damages just as in any other tort action. Under *Govt. C.* §§830(a) and 835, liability is imposed for “injury” caused

by a dangerous condition of public property. “Injury” is defined in *Govt. C.* §810.8 as “death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.” This definition includes the recovery of damages for injury resulting from the negligent infliction of emotional distress. *Delta Farms Reclamation Dist. No. 2028 v. Superior Court* (1983) 33 Cal.3d 699.

### 3. **DEFENSES**

#### a. **Public Entity May Assert Any Defenses Available To Private Defendants**

A public entity may assert any defenses available to private defendants in similar situations. *Govt. C.* §815(b). Such defenses include but are not limited to comparative negligence, assumption of the risk and third party negligence. Note that *Govt. C.* §815(b) also reflects the concept that a public entity should not generally be liable when a private person has no liability. *Heieck & Moran v. City of Modesto* (1966) 64 Cal.2d 229, 232.

##### i. **Comparative Negligence**

Comparative negligence under the doctrine of *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, is the most important of the defenses that are available to both private defendants and public entities in dangerous condition actions. This doctrine was held fully applicable to dangerous condition actions under the Tort Claims Act in *Levine v. City of Los Angeles* (1977) 68 Cal.App.3d 481.

##### ii. **Assumption Of Risk**

Express assumption of risk is also available as a total defense to a public entity in dangerous condition cases. *Madison v. Superior Court* (1988) 203 Cal.App.3d 589. In *Knight v. Jewett* (1992) 3 Cal.4th 296, the Supreme Court held that in cases involving primary assumption of risk, the doctrine completely bars a plaintiff’s recovery; whereas in cases involving secondary assumption of risk, the doctrine is merged into the comparative fault system and the trier of fact can apportion the parties’ fault. *See also* *Hoffman v. City of Poway* (2000) 84 Cal.App.4th 975, 993.

##### iii. **Third Party Negligence**

Third party negligence is a total defense in a dangerous condition action when it constitutes a superseding cause that severs the chain of causation. *Akins v. County of Sonoma* (1967) 67 Cal.2d 185.

#### b. **Statutory Defenses**

##### (i) **Reasonableness Of Act Or Omission Creating Condition**

A public entity that is sued on the theory that it *created* a dangerous condition of public property may successfully defend by satisfying the trier of fact that “the act or omission that

created the condition was reasonable.” *Govt. C. §835.4(a)*. Under *Govt. C. §835.4(a)* reasonableness is determined “by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.” *City of Burbank v. Superior Court* (1965) 231 Cal.App.2d 675.

(ii) **Reasonableness of Protective Measures**

(1) **Reasonableness Test Under Govt. C. §835.4(b)**

In a dangerous condition action in which the public entity has notice of the dangerous condition but fails to protect against injury, the public entity may defend by establishing that it was reasonable in taking protective measures or in failing to take such measures. The reasonableness of the public entity’s action in protecting against the dangerous condition or in failing to protect against it is determined “by taking into consideration the time and opportunity [the entity] had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of *protecting against* the risk of such injury.” *Govt. C. §835.4(b)*.

The phrase “protecting against” as used in *Govt. C. §835.4(b)* is defined by *Govt. C. §830(b)* to include “repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.”

(2) **Evaluate Reasonableness In Light Of Degree Of Danger Under All Circumstances**

The adequacy or reasonableness of protective measures necessarily requires evaluation in light of the degree of danger to which persons are foreseeably exposed under all circumstances. Failure of a public entity to take *any* protective measures, after receiving notice of a dangerous condition, is generally not considered reasonable, because all that is usually needed is to post a warning signal or sign. *Baldwin v. State* (1972) 6 Cal.3d 424.

Whether a prolonged delay in taking protective or remedial steps is reasonable depends in part on the administrative problems involved and the relationship between the actual delay and that which would be normal. *Rodriguez v. City of Los Angeles* (1963) 215 Cal.App.2d 463.

#### 4. **STATUTORY IMMUNITIES**

a. **Design Immunity: Govt. C. §830.6**

The “design immunity” is an affirmative defense that must be pleaded and proved by the defendant. *Cameron v. State* (1972) 7 Cal.3d 318. The courts have treated all three elements of the defense as issues for the court to determine, not a jury. *Alvarez v. State* (1999) 79 Cal.App.4th 720, 727.

i. **Elements Required To Prove Design Immunity**

Design immunity under *Govt. C. §830.6* is an affirmative defense that the defendant public entity must plead and prove. *Cameron v. State* (1972) 7 Cal.3d 318, 325. Under “design

immunity,” a public entity is generally not liable for injuries caused by a dangerous condition of public property if the following three essential elements are satisfied:

A causal relationship between the plan or design and the accident;

Discretionary approval of the plan or design before construction or improvement;  
and

Substantial evidence supporting the reasonableness of the plan or design.

Cornette v. Department of Transp. (2001) 26 Cal.4th 63, 66. The failure of a defendant entity to prove any of these elements is fatal to the applicability of the defense. Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565, 574.

(1) **Causal Relationship Between Plan Or Design And Accident**

The first element of the design immunity requires a showing that the plaintiff’s injuries were caused by a feature inherent in the approved plan or design, as opposed to some other cause. Grenier v. City of Irwindale (1997) 57 Cal.App.4th 931, 940. When the injury-producing feature or the absence of a safety feature is shown to be a part of the design or plan, the immunity is a defense.

The design immunity of *Govt. C.* §830.6 does not attach to risks arising during the *construction* of an improvement. In other words, the statute provides no immunity for a temporary dangerous condition of public property during the construction of an improvement to public property. *Govt. C.* §830.6 does not immunize the state when the plaintiffs were injured because of a preparatory excavation for a freeway median barrier. The statute immunizes “the plan or design of the finished product and not the plan or design for constructing the improvement.” Winig v. State (1995) 37 Cal.App.4th 1772, 1777.

(2) **Approval By Authorized Public Body Or Official Required**

Under the second element of design immunity, the defendant must establish either that the plan or design was approved before construction by the “legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval; or that the plan or design was prepared in conformity with standards previously so approved.” *Govt. C.* §830.6. Even an informal plan or drawing may suffice because there is no requirement that the design be expressed in any particular form. Thomson v. City of Glendale (1976) 61 Cal.App.3d 378. The authorized approval need not be in writing, but may be oral. Bane v. State (1989) 208 Cal.App.3d 860.

(3) **“Any Substantial Evidence” Required To Establish Reasonableness of Approval**

The third element of design immunity under *Govt. C.* §830.6 requires that the defendant present “any substantial evidence” sufficient to satisfy the trial or appellate court, as a matter of law, that the plan or design, or the standards under which the plan or design was prepared, could have been adopted by “a reasonable public employee” or approved by “a reasonable legislative

body or other body or employee.” Higgins v. State (1997) 54 Cal.App.4th 177, 186.

In deciding whether there is substantial evidence that the plan or design was reasonably approved or adopted, the courts examine whether the evidence “reasonably inspires confidence” and “is of solid value.” Muffett v. Royster (1983) 147 Cal.App.3d 289, 307.

ii. **Loss Of Design Immunity**

The “plan or design” immunity of *Govt. C.* §830.6 is not perpetual. That code section specifies the circumstances under which a public entity retains its design immunity despite having received notice that the plan or design has become dangerous because of a change in physical conditions. Cornette v. Department of Transp. (2001) 26 Cal.4th 63, 71. In that case, the supreme court held that plaintiff must establish three elements to demonstrate loss of design immunity:

- (1) the plan or design has become dangerous because of a change in physical conditions;
- (2) the public entity had actual or constructive notice of the dangerous condition thus created; and
- (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition because of practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.

Cornette v. Department of Transp., *supra.*, 26 Cal.4th at 72.

b. **Regulatory Traffic Signals, Signs, Markings; Govt. C. §830.4**

*Govt. C.* §830.4 provides a qualification to the definition of a dangerous condition. It states that a condition is *not* dangerous if the property deficiency relied on by the plaintiff consists “merely . . . of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs . . . speed restriction signs, . . . or distinctive roadway markings as described in *Vehicle Code* §21460. The regulatory signals, signs and markings referred to in *Govt. C.* §830.4 include the following:

- regulatory traffic control signals (*Veh. C.* §§445, 21361, 21400);
- pedestrian traffic control signals (*Veh. C.* §§21456-21456.1);
- stop signs (*Veh. C.* §§21354-21355);
- yield-right-of-way signs (*Veh. C.* §21356);
- speed restriction signs (*Veh. C.* §§21357-21359); and
- distinctive double line roadway markings (*Veh. C.* §§21459-21460).

c. **Traffic Warning Signals, Signs & Markings; Govt. C. §830.8**

*Govt. C. §830.8* provides a qualification for public entities from liability for injuries caused by their failure to provide “traffic or warning signals, signs, markings or devices described in the Vehicle Code.” The public entity, however, loses this protection and is liable for injury when it fails to provide traffic regulatory or warning signals of a type other than those described in §830.4 that are “necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.” *Govt. C. §830.8*; Kessler v. State (1988) 206 Cal.App.3d 317, 322.

d. **Effect of Weather Conditions On Streets; Govt. C. §831**

*Govt. C. §831* provides that public entities are not liable under the Tort Claims Act for injuries resulting from the effect of weather conditions on the use of streets and highways, except when the hazard “would not be reasonably apparent to, and would not be anticipated by, a person exercising due care.” This immunity expressly covers the effect of fog, wind, rain, floods, ice and snow; but does not affect liability based on “physical damage to or deterioration of streets and highways resulting from weather conditions.” *Govt. C. §831*.

e. **Natural Conditions Of Unimproved Property; Govt. C. §831.2**

*Govt. C. §831.2* provides that injuries cause by “a natural condition on any unimproved public property” are not actionable under the Tort Claims Act. Under this statute, unimproved public property includes, but is not limited to, “any natural condition of any lake, stream, bay, river or beach.” *Govt. C. §831.2*. The “natural” condition of an artificial lake falls within the scope of this immunity. Osgood v. County of Shasta (1975) 50 Cal.App.3d 586.

f. **Unpaved Access Roads and Recreational Trails; Govt. C. §831.4**

Under *Govt. C. §831.4*, neither a public entity nor a public employee is liable for an injury caused by a condition of certain unpaved roads and trails, whether paved or improved, that provide “access to fishing, hunting, camping, hiking, riding (including animal and all types of vehicular riding), water sports,” and other types of “recreational or scenic areas.” Whether a particular road or trail comes under this immunity is ordinarily a question of fact. Hernandez v. Imperial Irrig. Dist. (1967) 248 Cal.App.2d 625. But see Carroll v. County of Los Angeles (1997) 60 Cal.App.4th 606 (county bicycle path qualified as trail, as a matter of law, whether paved or not); Armenio v. County of San Mateo (1994) 28 Cal.App.4th 413 (issue becomes question of law if only one conclusion possible).

g. **Recreational Activities**

i. **Immunity For Hazardous Recreational Activities; Govt. C. §831.7**

(1) **Definition of Hazardous Recreational Activities**

*Govt. C. §831.7* provides that a public entity or public employee is not liable to anyone who participates in “hazardous recreational activity,” or to any assistant or spectator, for any

damage or injury to property or persons arising from the activity. The term “hazardous recreational activity” has been broadly defined in *Govt. C.* §831.7(b) to include the following activities: diving, archery, animal riding, bicycle racing or jumping, boating, skiing, hang gliding, kayaking, motorized vehicle racing, offroad motorcycling or four-wheel driving of any kind, mountain bicycling (but not if the bicycle is being ridden on paved pathways, roadways or sidewalks), orienteering, paragliding, shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports, surfing, trampolining, tree climbing, tree rope swinging, waterskiing, white water rafting and wind surfing.

(2) **Exceptions to *Govt. C.* §831.7 Immunity**

*Govt. C.* §831.7(c)(1)-(5) provides several exceptions to the hazardous recreational activity immunity. Under these exceptions, the immunity does not apply in the following situations:

- (a) When a public entity or employee fails to warn of a known dangerous condition or of another hazardous recreational activity that was not reasonably assumed by the participant to be part of the activity. *Govt. C.* §831.7(c)(1).
- (b) When the public pays a specific fee to the public entity for participation in the hazardous recreational activity. *Govt. C.* §831.7(c)(2).
- (c) When the injury was caused by the public entity’s negligent failure to properly construct or maintain any structure, recreational equipment or work of improvement used in a hazardous recreational activity. *Govt. C.* §831.7(c)(3).
- (d) When the damage or injury suffered when the public entity or employee recklessly or with gross negligence promotes participation in or observance of an hazardous recreational activity, or when an act of gross negligence by the public entity or public employee is the proximate cause of the injury. *Govt. C.* §831.7(c)(4)-(5).

ii. **No Immunity for Recreational Activities Under *Civil Code* §846**

In 1983, the California Supreme Court held that *Civil Code* §846, which limits a property owner’s duty of care to gratuitous users of property for recreational purposes, does not immunize public entities from liability for dangerous conditions of publicly owned recreational property left open for gratuitous use by the public. *Delta Farms Reclamation Dist. No. 2028 v. Superior Court* (1983) 33 Cal.3d 699.

h. **Reservoirs, Canals, Conduits, Drains; *Govt. C.* §831.8**

i. **Reservoir Immunity Applies If Use Of Property Unintended/Unpermitted**

(1) **Scope of Immunity**

*Govt. C.* §831.8 sets forth a qualified governmental immunity for *artificial* conditions arising from man-made water improvement and distribution facilities, such as reservoirs, canals, conduits and drains. Keyes v. Santa Clara Valley Water Dist. (1982) 128 Cal.App.3d 882, 887. As a general rule, all public entities are immune from liability for injuries resulting from a dangerous condition of a reservoir “if at the time of the injury the person injured was using the property for any purpose other than that for which the public entity intended or permitted the property to be used.” *Govt. C.* §831.8(a).

(2) **Limitations On Reservoir Immunity**

The reservoir immunity is subject to three limitations:

- (a) The reservoir immunity does not apply when the particular use was one that was either “intended” or “permitted” by the public entity. *Govt. C.* §831.8.
- (b) Under *Govt. C.* §831.8(a), if an entity “permitted” use of its reservoir, it would be immaterial that the kind of use in question was not “intended,” and the immunity would not apply. Moreover, it is possible that persistent customary use of a reservoir for an unintended purpose, if known by the public entity and allowed to continue without interference, constitutes a “permitted” use within the meaning of §831.8(a), which would make the immunity inapplicable.
- (c) In express terms, the reservoir immunity is declared to be “[s]ubject to subdivisions (d) and (e)” of *Govt. C.* §831.8. Subdivisions (d) and (e) provide that nothing in §831.8 exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of public property if certain circumstances are met. These circumstances are set forth in *Govt. C.* §§831.8(d)(1)-(4), (e)(1)-(4) and are discussed below.

ii. **Canals, Drains, Unintended Purposes; Govt. C. §831.8(b)**

(1) **Canal Immunity Applies When Use Of Property Was Unintended**

*Govt. C.* §831.8(b) of the Tort Claims Act grants immunity to the state and to irrigation districts from liability for injuries caused by a dangerous condition of “canals, conduits or drains used for the distribution of water” if the injured person at the time of the injury “was using the property for any purpose other than that for which the district or State intended it to be used.”

The canal immunity applies only to the state and irrigation districts. Thus, water distribution facilities owned and operated by cities, counties, water districts, flood control districts, public utility districts or similar entities are excluded.

(2) **Definition of “Irrigation District”**

The meaning of “irrigation district,” as used in *Govt. C.* §831.8(b), is not entirely clear.

Many irrigation districts exist pursuant to and are governed by the Irrigation District Law (*Wat. C.* §§20500-26875) and thus are unquestionably covered by §831.8(b).

(3) **Limitations On Canal Immunity**

The immunity provided by *Govt. C.* §831.8(b) for canals, conduits and drains is subject to the following limitations:

- (a) The immunity under §831.8(b) applies only when the injured person was using the canal, conduit or drain for any purpose other than that for which the irrigation district or state intended it to be used at the time of the injury.
- (b) The canal immunity, like reservoir immunity, is “[s]ubject to subdivision (d) and (e)” of *Govt. C.* §831.8. These two subdivisions provide that nothing in §831.8 exonerates a public entity or public employee from liability for injury proximately caused by a dangerous condition of public property if certain circumstances are met. Again, those two subdivisions are addressed below.
- (c) The canal immunity is expressly limited to liabilities that would otherwise arise under “this chapter,” *i.e.*, *Govt. C.* Title 1, Div 3.6, pt 2, ch 2. As a result, this immunity does not affect liability based on other statutory provisions. (*See, e.g., Govt. C.* §815.6 - imposing liability for failure to discharge mandatory duty.)

iii. **Exception: Trap For Noncriminal User Under *Govt. C.* §831.8(d)**

*Govt. C.* §831.8(d) provides a “trap” exception to the immunities granted in both reservoir cases and canal cases. However, this exception applies only if the following four requirements of *Govt. C.* §831.8(d)(1)-(4) are satisfied:

- (1) The person injured by a dangerous condition of a reservoir or canal must not have been guilty of criminal trespass in entering or using the subject public property. *Govt. C.* §831.8(d)(1). Ordinarily, an entry is a misdemeanor under the Penal Code only if the property has been posted against trespassing. *See Penal Code* §§552-555.5.
- (2) The injured person must show that the condition created “a substantial and unreasonable risk of death or serious bodily harm” when used with due care in a foreseeable manner. *Govt. C.* §831.8(d)(2).
- (3) The dangerous character of the condition was not “reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care.” *Govt. C.* §831.8(d)(3).
- (4) The public entity had actual knowledge of the condition, and either actual or constructive notice of its dangerous character a sufficient time before the injury occurred to have taken protective measures. *Govt. C.* §831.8(d)(4).

These four requirements for imposing “trap” liability in reservoir and canal cases presuppose that the injured person was using the property for a purpose other than that for which the property was intended or permitted by the entity. *See Govt. C. §831.8(a)-(b).*

iv. **Exception: Attractive Nuisance To Children Under 12; Govt. C. §831.8(e)**

*Govt. C. §831.8(e)(1)-(4)* provides another exception to both the reservoir immunity and the canal immunity. Under this exception, neither the reservoir nor the canal immunity applies if the person injured was under 12 years of age, the use of the property by children was reasonably foreseeable, the condition was highly dangerous and not likely to be discovered or appreciated by children, and the condition was actually known to the entity long enough before the accident for the entity to have taken appropriate precautions.

v. **Other Statutory Immunities**

(1) **Miscellaneous Immunities Under Tort Claims Act**

*Govt. C. §818*, which grants immunity from liability for punitive or exemplary damages, clearly does apply in dangerous condition cases because §818 by its terms is applicable, “notwithstanding any other provisions of law.”

Specific statutory immunities, distinguished from the general immunities found in *Govt. C. §§814-825.6*, may also properly limit dangerous condition liability in particular cases. *Govt. C. §835* specifically qualifies the rules of dangerous condition liability by the introductory phrase, “except as provided by statute.” In addition to the specific immunities in *Govt. C. §§830-831.8*, other sections in the Tort Claims Act that may apply in certain circumstances include the following:

(a) *Govt. C. §844.6(a)* - immunity for injury to or caused by prisoner; *see Hughes v. County of San Diego* (1973) 35 Cal.App.3d 349;

(b) *Govt. C. §850.4* - immunity for defective conditions of firefighting facilities; *see Razeto v. City of Oakland* (1979) 88 Cal.App.3d 349;

(c) *Govt. C. §854.8(a)(2)* - immunity from injury to mental patient;

(d) *Govt. C. §855.4* - immunity for decisions to prevent disease or control the communication of disease; *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689;

(e) *Govt. C. §905.5* - immunity of school district and their officers, directors or employees from civil liability for damages caused after January 1, 1989, by exposure to asbestos in buildings owned, leased or otherwise used by a school district, unless damages are caused by the negligence of the school district, its officers, directors or employees.

(2) **Statutory Immunities Provided By Other Statutes**

Certain specific statutory immunities from liability in dangerous condition cases are

provided outside the Tort Claims Act itself. Included among them are the following:

- (a) *Civil Code* §847 - immunity for property owners, including public entities, from liability resulting from any of 25 specified felonies that occur on their property; *see* Calvillo-Silva v. Home Grocery (1988) 19 Cal.4th 714.
- (b) *Civil Code* §1714.2 - administering cardiopulmonary resuscitation.
- (c) *Civil Code* §1714.5 - civil defense shelters.
- (d) *Str. & H. C.* §941 - immunity for failing to maintain road not yet accepted as part of county road system.
- (e) *Str. & H. C.* §942.5 - immunity of county for closing road in certain cases.
- (f) *Str. & H. C.* §954 - immunity of county for dangerous condition on stock trail.
- (g) *Str. & H. C.* §954.5(e) - immunity for “the death of or injury to a vehicle owner, operator or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition on such highway” if the county (1) has terminated the maintenance of a county highway in the manner prescribed by law, (2) duly recorded its resolution to that effect, and (3) posted signs as required by statute, thereby giving notice to the public that the road is not being maintained.
- (h) *Str. & H. C.* §1806 - immunity of city for failing to maintain street not yet accepted as part of city street system. *See* Nelsen v. City of Gridley (1980) 113 Cal.App.3d 87, 97.
- (i) *Health & S. C.* §19167 - special immunity declaring cities and counties not liable for damages to persons or property resulting from earthquake, “on the basis of” any earthquake hazard assessment or evaluation or other actions taken, or not taken, under the Earthquake Hazardous Building Reconstruction Act.