

# Dangerous Conditions of Public Property

## *How to Recognize and Respond*



*By*

Marcus Beverly

Association of Bay Area Governments

Webinar, April 15, 2008

# Purpose

- Provide tools to:
  - **Recognize** conditions or activities that could result in liability (to public entity and yourself).
  - **Respond** to the conditions or activities in an appropriate manner, to reduce the potential for liability.

# Outline

- Public Entity Liability
  - General
  - Dangerous Condition of Public Property
    - What is it?
    - Immunities
    - Defenses
      - *Refer to Handout/CD for detailed description*
- How to respond
  - Duties of property owner
  - Reasonably Prudent Person

# Public Entity Liability

- May be liable for damages only as provided by statute - *no common law negligence*
- Greater protection against claims
  - More narrow definitions triggering fault
  - Immunities
- However, common law standards are used to evaluate liability in key areas

# Elements of a D.C. Claim

Plaintiffs must prove the following through substantial evidence:

- (1) the entity owns or controls the property;
- (2) the property was in a dangerous condition at the time of the incident;
- (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which occurred; and

# Elements of a D.C. Claim

(4) the condition was created by a negligent or wrongful act or omission of an employee within the course/scope of employment,

**OR**

the entity had actual or constructive notice of the condition a sufficient amount of time prior to the injury to have taken preventive measures.

# Breaking Down the Elements of a D.C. Claim

Courts have interpreted the key terms in the elements of a D.C. claim. We'll review some of those claims and decisions as a way to identify dangerous conditions.

# Public Property

- The property must be owned or controlled by a public entity at the time of accident
  - Owned:
    - Real or personal property: title or other evidence
    - Streets & Highways: “accepted” by formal resolution
  - Controlled: power to prevent, remedy or guard against the dangerous condition
  - Exception - 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, such as a utility box in the sidewalk.

# Dangerous Condition of *Public Property*

- *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.”

# Condition of Property

## *At Least Three Definitions*

- Public Improvement That Is Damaged Or Deteriorated
  - 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 - stop sign obscured by foliage; sharp drop at edge of road; road crumbled away

# Condition of Property

## *At Least Three Definitions*

- Defective Design, Location Or Latent Hazard
  - 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.
    - Examples: submerged pipe in recreational waters; model airplane field next to high voltage power lines; sharp curve without warning signs

# Condition of Property

## *At Least Three Definitions*

- Condition of Property and Negligent/Criminal Conduct of Others
  - 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: low curb, combined with negligence of driver who jumped curb; untrimmed foliage and trees adjoining a college parking lot stairway, combined with criminal conduct of third party

# Substantial Risk

- Full assessment of all facts concerning how the condition caused the accident is needed
  - Often a question of fact for jury to decide
  - Mere happening of accident not evidence
  - History of prior accidents
    - None - supports no substantial risk
    - Many - increases chance of substantial risk
    - History of complaints?

# Substantial Risk

- Trivial Risk Statutorily Excluded *Govt. C.*  
§830.2

- Conditions 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.

# True or False

“Any offset less than  $3/4$ ” is a trivial defect”

# FALSE

- Juries have found offsets  $> 1 \frac{1}{2}$ " to be "trivial" and offsets  $< \frac{3}{4}$ " to be "substantial".

## Must use "Totality of Circumstances" test

- should decide whether a defect is dangerous only after considering all of the circumstances surrounding the accident. This analysis should include looking at whether there is something besides the size of the crack that causes a fall, such as whether a view of the condition was obstructed, or if the walkway had broken or jagged pieces.
- $\frac{1}{2}$ " or more offset in sidewalk is good to use a *guide* for when to patch or repair, but there is no "magic number" that makes it trivial or not.

# Trivial Defect?



Or "Open & Obvious" Condition?  
What about child? Blind person?

# Such Property or Adjacent Property

- Property includes risk that may extend beyond its boundary
  - Examples: tree limb overhanging property; storage of explosives or haz materials
- Adjacent Property: if exposes *foreseeable careful users* of the public property to a substantial risk of injury
  - Examples: signs and shrubs of neighbor obscured sight distance on highway; frequent mudslides from neighboring property on to road

# Used With Due Care

- By the public generally v. individual
- Claimant's negligence is a defense but doesn't mean not a dangerous condition
- If claimant was *reckless* in use of property and that led to injury then not a dangerous condition
  - Example - diving from pier into shallow water

# Reasonably Foreseeable Manner Of Use

- The test of liability is whether a condition is a hazard to all *foreseeable users*, not merely those who are intended to be 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.
  - Examples: Sudden narrowing of street, without adequate lighting or warning signs; "Y" intersection; malfunctioning traffic signal; kids in fountain or skating on steps

# Injury Caused by Dangerous Condition

- The injury was proximately caused by the dangerous condition - common law standard
- A causal relationship between the alleged dangerous condition and the plaintiff's injury
  - Examples of no cause: person with pre-existing condition; excessive or unnecessary treatment

# Liability of Public Entity

- 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)*).

# Notice Of Dangerous Condition

- If PE created condition = notice
- Actual Notice
  - Imputed notice if agent has notice
  - Actual inspection of the property
  - Defect reported to appropriate agent
  - Measures taken regarding defect
  - Knowledge of repeated similar accidents/injuries

# TRUE OR FALSE

- You can avoid “notice” by not performing inspections.

# FALSE

- No News ≠ Good News!
- There IS such a thing as constructive notice!
- There is also an affirmative duty to have a reasonable inspection program, whether you have the money to fix anything or not.
  - Doesn't have to be expensive.
- Responding to complaints can only be part of an inspection program.
  - Do you encourage reporting from public & staff?
  - Have a documented procedure and follow up?

# *Constructive* Notice Of Dangerous Condition

- Claimant burden to prove
- 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.”
- Will look for:
  - Reports of similar accidents at site
  - Apparent age/condition of defect
  - Complaints
  - Prior studies
  - Reasonable Inspection Test

# Reasonable Inspection Test

- Would the condition have been discovered by an inspection system that was *reasonably adequate* (weighing cost/practicality v. frequency and severity of potential danger) to inform the public entity about whether the property was safe for its intended and foreseeable uses
- The entity *maintained and operated such an inspection system with due care* and did not discover the condition

# Dangerous Condition Immunities

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

# 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 or if unable to remedy the condition because of practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.

# Dangerous Condition Immunities

- Effect of Weather Conditions On Streets
- Natural Conditions Of Unimproved Property
- *Unpaved* Access Roads and Recreational Trails
- Hazardous Recreational Activities

\* *Govt. C.* §831 et al

# Hazardous Recreational Activities (HRA)

- 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.

# HRA – Skateboarding

- Added to the HRA list via Health & Safety Code §115800
- Limited Immunity
  - 14 or older
  - Injury caused by stunt, trick, or luge skateboarding activity.
  - Operator must pass ordinance, post signs and not supervise
- Have seen few to no claims.

# On The Other Hand ...



If this is your skateboard park, we need to talk.

# Exceptions to HRA Immunities

- Failure to warn of a known dangerous condition or activity that was not reasonably assumed by the participant to be part of the activity.
- Fee Charged by PE for participation in HRA
- Failure to properly construct or maintain any structure, recreational equipment or work of improvement used in a HRA.
- Recklessly or with gross negligence promote participation in or observance of an HRA



# Dangerous Condition Defenses

- Comparative Negligence - claimant at least partially at fault for injuries
- Assumption of Risk - claimant accepted the *known* risks of participation
- Third-party negligence
- *Reasonableness* of act or omission creating the condition
- *Reasonableness* of protective measures

# How to Respond

- Now that you know what a dangerous condition is and is not, how should you respond when you recognize one?
- Even though public entities have more limited liability, it is helpful to understand and follow the duties of *any* property owner in order to limit your liability.

# Duties of Property Owners

## # 1 = MAINTAIN

- ALL property owners have a non-delegable **duty to maintain** their property in a "safe" (non-dangerous) condition.
- From that comes a **duty to inspect** and **duty to respond** to any "hazards" found.

# Duties of Property Owners

- **Duty to inspect** - look for hazards via a *reasonable* inspection schedule & methods. No schedule = no defense!
- **Duty to respond**
  - If a hazard is found, duty to:
    - **Correct or repair** (even after accident)
    - **Remove** - includes blocking access
    - **Warn** foreseeable users of hazard
      - Response may include a combination of above

# Good Advice?

- I don't have the budget to fix the problems I know I'll likely find if I inspect my sidewalks, roads, trees, playgrounds, etc., so my city attorney tells me I shouldn't inspect them because it's better not to know.

Is this good advice?

NO – you can't bury your head in  
the sand!



You **MUST** have an inspection  
program, like it or not, and even if  
you can't correct things right away

# Duty to Inspect

- No news does NOT equal good news!
- MUST have a reasonable inspection schedule to identify potential hazards
  - Sidewalks, trees, playgrounds, streets, sewers, signs - any property you own or control.
- Must be documented to be of any value
  - **Being right isn't enough – you must *prove* you're right in court!**
  - “The shortest pencil is better than the longest memory”

# Duty to Inspect

- Includes duty to respond to complaints
  - Have a contact person and procedure
  - Keep a complaint log!
    - Date, time, source, complaint, and response
    - Respond to each complaint
    - Inspect or make note of other response
  - More difficult to prove you've had no prior complaints without this documentation

# How Do Grocery Stores Prevent and Defend Slip & Fall Claims?

- A. Water spraying on vegetables contains anti-slip compound.
- B. Send call out to clean up spills.
- C. "Mop and Doc"
- D. Locate staple goods on bottom shelves.
- E. All of the above

# Answer

- C. "Mop & Doc"
  - Every 30 minutes someone mops each aisle and documents when done
    - Juries have agreed that's a "reasonable inspection program" and denied \$

Q: What is a reasonable inspection program for your agency's property?

# Duty to Respond

- If you can fix it - do so promptly
- If you can't fix it - remove it
- If you can't remove - restrict access
  - Board up, cone off, caution tape, detour
- WARN of the hazard - while waiting repair or removal or if those aren't an option
  - sign, paint, yellow tape
- Doesn't have to be expensive

# TRUE OR FALSE?

- If I warn of an offset by painting the sidewalk orange that means I have notice of a potentially “dangerous condition” and agency will be liable if someone trips and is injured. Therefore, I shouldn’t paint the sidewalk orange.

# FALSE

- The orange paint IS your warning & defense!
- Without it you'll likely get tagged with "constructive notice" anyway, especially if you have no inspection program.
- Without a program for responding to actual notice of hazards you will never have a defense – question is only:

**"How much do I owe?"**

# Duty To Respond



Don't Just Stand Around!

# How to Respond?

- How to respond is based on all the facts known to you, *or that should have been known to you*, at the time of the accident.
- Varies from from situation to situation.
- Ultimately up to a judge or jury to decide.
  - **What would a jury say?**
    - Look at jury instructions
  - **Reasonably Prudent Person (RPP) Standard**

# RPP Rule Test

- Ask yourself whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he or she would have ***foreseen*** or anticipated that ***someone might have been injured*** by or as a result of his or her action or inaction. If the answer is "yes", and the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

# Reasonably Prudent Person Rule

- Negligence is the failure to use ordinary or reasonable care - *the care which a prudent person would use in order to avoid injury to themselves or others.*

# Let Your Kid Swing?



# Common Situations

- Sidewalk trip & falls
- Falling tree limbs/trees
- Road hazards
- Defective play equipment
- Water or sewer damage
- Bikes on the skate park or no safety gear
- Your favorite?

# Claim Example

- Slip & Fall on Sidewalk
- Person files claim v. City with City Clerk
- City refers claim to examiner
- Examiner conducts investigation
  - Claimant statement & damages
  - Sidewalk inspection
  - Request for City documentation

# City Documentation re Sidewalk

- Claimant will allege the sidewalk was a dangerous condition. What will you be asked to provide to disprove?
  - \* **Inspection records**
  - \* **Repair records**
  - \* **Complaint log**
  - \* **Maintenance/repair schedule**
  - \* **Procedures for all of above**
  
- \* **What will you be able to provide?**

# City Documentation

- If you don't have a DOCUMENTED procedure for responding to complaints, inspecting and maintaining your property, and responding to potential hazards you run the risk of having NO DEFENSE in the event of a claim.
- It is *each person's responsibility to respond* in a reasonable manner when noticing a hazard or maintenance issue.

# Dangerous Condition?

- Yes or No?
- What would you do to respond?



# Adequate Warning?

- Yes or No?
- What would you do differently?



# Adequate Warning?



Invitation?

# Questions?

For more information

<http://www.abag.ca.gov/plan/resources.html>

**THANK YOU!**

