Get your sidewalk-fall case to the jury

Beat the trivial-defect defense

Six strategies to keep the trial judge from throwing out your case based on a finding that the defect was "trivial"

By Clinton E. Ehrlich

The "trivial-defect doctrine" is the defense strategy of choice in sidewalk trip-and-fall lawsuits. It is a formidable weapon because it allows a judge to determine that the sidewalk defect that caused the plaintiff's fall was "trivial" and therefore not actionable as a matter of law instead of submitting the question of a defendant's negligence to a jury. In essence, the court holds that the defect at issue was so trifling that, as a matter of law, it was reasonable for the defendant to allow the defect to go unrepaired.

Although it is sometimes referred to as the "trivial-defect defense," and has been discussed as if it were an affirmative defense in certain appellate opinions, such as *Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 264 [241 Cal.Rptr. 706], and *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 396 [237 Cal.Rptr. 413], California courts now treat it as an element of duty which a plaintiff must plead and prove. (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 [19 Cal.Rptr.3d 254].) Recent cases treat the trivial-defect doctrine as a long-standing and self-evident rule, whose existence is compelled by the obvious impossibility of maintaining walkways in perfect condition.

Legal "telephone"

In reality, the modern trivial-defect doctrine is a heavily mutated version of legal principles from the 1920s, which are virtually unrecognizable in their current form and have ceased to serve their original function. Justice Brennan once analogized the evolution of legal precedent to the children's game "telephone" – a message is repeated from one person to another, and then another, and after some time, the message bears little resemblance to what was originally spoken. Such is the mode by which, in the decades since their inception, the message of the trivial-defect doctrine's forbearers has become heavily distorted.

At common law, citizens were unable to recover damages for personal injuries suffered as a result of defects in public property because municipalities enjoyed immunity for all acts performed in a governmental capacity. California's legislature sought to remedy that situation with the Public Liability Act of 1923, which created a two-pronged requirement for citizen suits against municipalities. (*Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 363 [54 P.2d 725].) First, a citizen had to establish that he or she was injured by a dangerous condition of public property. Second, the citizen had to establish that the municipality had knowledge or notice of the condition and failed to remedy it within a reasonable time. In essence, the Act functioned in a manner roughly analogous to that of the present-day Government Code section 835. (See *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 833 [15 Cal.Rptr.2d 679].)

The initial cases construing the 1923 statute recognized that even small sidewalk defects could be dangerous conditions. In *Rafferty v. City of Marysville* (1929) 207 Cal. 657, 664 [280 P. 118], the California Supreme Court recognized that for pedestrians, "misjudgment by the fraction of an inch is sufficient to disturb the physical equilibrium." The Court cautioned that the varying facts and circumstances of different cases made it impossible to create a broadly applicable rule about which conditions were dangerous. (*Id.* at 660-661.)

A pedestrian's ability to recover damages for small defects was reaffirmed in *Hook v. City of Sacramento* (1931) 118 Cal.App. 547, 552 [5 P.2d 643], which held that whether a one-half to one and one-half-inch sidewalk depression was a dangerous condition presented an appropriate factual question for a jury. The *Hook* court reasoned that "the public is entitled to be protected against small defects, which are liable to cause injury, as well as large ones." It held that whether a particular defect is dangerous cannot be determined by its size, "since small objects, as well as large ones, may render a street unsafe."

The first case to substantially reduce a plaintiff's ability to sue for small sidewalk defects was *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, 364. But even there, the Supreme Court recognized that "a minor defect may well be dangerous to travel." The Court held, however, that the existence of those defects, though potentially dangerous, was not itself sufficient to impart constructive notice on a municipality.

That approach seems fundamentally contrary to the way the modern trivial-defect doctrine is applied, which absolutely eliminates liability for "minor defects," irrespective of the issue of notice. That being the case, one might assume that in the decades since its opinion in *Nicholson*, the Supreme Court has renounced its analysis and expressly crafted a new rule for small defects. But surprisingly, the modern line of trivial-defect authority can all be traced back to an opinion that the Court issued only a year after *Nicholson*.

Whiting v. National City

That case, *Whiting v. National City* (1937) 9 Cal.2d 163, 164 [69 P.2d 990], centered on whether an injured pedestrian could recover under the Public Liability Act after falling on a three-quarter-inch rise in a city sidewalk. In reversing a judgment for the plaintiff, the Court used language that has since been relied on for the proposition that a small defect is too trivial to present a substantial risk of injury. The most commonly cited passage reads as follows:

> Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city could be held liable upon a showing of a trivial defect.

(*Ibid*.)

But the *Whiting* Court never expressly held that the defect before it was too trivial, as a matter of law, to constitute a dangerous condition. Read in context, the quoted language simply suggests that municipalities will not "necessarily" be liable for minor defects because the existence of such defects is insufficient to impart constructive notice. The *Whiting* Court stated as much in a section of its opinion that has been virtually lost to history – its conclusion, which harmonized its holding with that of *Nicholson*:

> We are satisfied that the facts of this case bring it within the rule of the *Nicholson* Case. There it was held that it is not enough to charge the city with constructive notice of the existence of a minor defect in the sidewalk, but that in order to hold the city because of such defect there must also be notice of the dangerous character of such defect before the duty imposed by the statute is created. There is here present no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute. The holding in the *Nicholson* Case that the continued existence of a minor defect is in itself insufficient to impose liability upon the city for injuries resulting therefrom is recognized as the law in other jurisdictions. [Citations] In view of the holding in the *Nicholson* Case and the pertinent authorities elsewhere, we conclude that the constructive notice found by the court is insufficient to support the judgment.

(*Id*. at 166.)

Some courts of that time narrowly construed *Whiting* as preventing municipalities from being charged with constructive notice of small sidewalk defects. (See e.g., *Balkwill v. City of Stockton* (1942) 50 Cal.App.2d 661, 668-669 [123 P.2d 596].) But the overwhelming majority of opinions were not so circumspect. The year that the *Whiting* opinion was issued, the Court of Appeal uncritically cited it in a case against a private landowner as authority for the proposition that "minor defects are bound to exist in sidewalks and where the defect is trivial no liability exists." (*Dunn v. Wagner* (1937) 22 Cal.App.2d 51, 54 [70 P.2d 498].) This absolute bar to liability for so-called "trivial defects" continued to be applied in favor of private defendants for more than a decade without discussion. (See e.g., *Clarke v. Foster's, Inc.* (1942) 51 Cal.App.2d 411, 414 [125 P.2d 60]; *Robson v. Union Pac. R. Co.* (1945) 70 Cal.App.2d 759, 761 [161 P.2d 821].)

It was not until *Graves v. Roman* (1952) 113 Cal.App.2d 584, 585 [248 P.2d 508] that an appellate opinion considered the propriety of that rule. The plaintiff in *Graves* argued that the trivial-defect doctrine originated in cases against municipalities and its application should be limited to the question of constructive notice that arises in that context. But the court rejected that argument and said the "obvious answer" lay in the previous decisions that had, without comment, invoked the trivial-defect concept in cases against private entities where notice was not an issue. Truth had been created through repetition.

The following year, in *Barrett v. City of Claremont* (1953) 41 Cal.2d 70, 73 [256 P.2d 977], the California Supreme Court cited *Graves* as it held that if a defect was minor, "irrespective of the question of notice of the condition, no liability may result." In a strongly worded dissent, Justice Jesse W. Carter argued that the majority was misapplying the Court's prior authority about trivial defects, which had been exclusively concerned with constructive notice and that in so doing it was immunizing defendants from liability for unobtrusive but dangerous conditions. (*Id.* at 78.) He feared that the majority's approach, which provided no fixed rules or standards for which defects were sufficiently dangerous to impose liability, would leave trial judges and appellate courts to arbitrarily guess which defects were or were not trivial. (*Id*. at 79.)

Questioning the modern trial-defect rule

In *Barone v. City of San Jose* (1978) 79 Cal.App.3d 284, 289 [144 Cal.Rptr. 836], the Court of Appeal acknowledged the mistake that Justice Carter had pointed out over two decades earlier. Said the Court, "Although a number of cases which set forth [the modern trivial-defect rule] appear to misapprehend the actual holding in *Whiting*, nevertheless, the rule itself is well established and has been consistently applied." Put differently, the

rule had gained too much judicial inertia for its application to be restrained.

Whether or not Justice Carter's fears about the rule's impracticality have been realized is debatable. In some cases, courts have held that defects between a half-inch to an inch high were dangerous conditions. (See, e.g., *Rodriguez v. City of Los Angeles* (1963) 215 Cal.App.2d 463, 467 [30 Cal.Rptr. 180].) In other instances, they have held that defects as large as one and a half inches are trivial as a matter of law. (See, e.g., *Marin v. Carl Karcher Enterprises, Inc.* (Cal. Ct.App. 2006) 2006 WL 3323558.) The Court of Appeal summarized the situation with the observation that "when the size of the depression begins to stretch beyond one inch the courts have been reluctant to find that the defect is not dangerous as a matter of law." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 726 [139 Cal.Rptr. 876].) Yet that standard still leaves many seriously-injured plaintiffs unable to recover.

One potential solution may lie in the approach to duty adopted by *Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97], which could arguably render the triviality of a defect simply one relevant factor to consider in evaluating the reasonableness of a defendant landowner's conduct. The Court of Appeal rejected that argument in *Ursino v. Big Boy Restaurants*, 192 Cal.App.3d 398-399. But more recently, it has indicated that the trivial-defect doctrine should be "closely scrutinized in view of the 'marked changes in the law' made by *Rowland v. Christian*." (*Alpert v. Villa Romano Homeowners Assn*. (2000) 81 Cal.App.4th 56, 1343, n. 17.) If the Supreme Court were ever to grant review of that issue, it could provide it an opportunity to overhaul the current system.

Until such a change in the law, defendants will continue to invoke the trivial-defect defense at every opportunity. But within the existing legal framework, there are still several strategies that plaintiffs' lawyers can employ to maximize their clients' chances of overcoming the doctrine and allowing their cases to reach trial.

• Strategy 1: Prevent the defense from using a "tape-measure test"

The defense will inevitably argue that there is a consensus of California authority that defects below a certain height are trivial as a matter of law. When the defect at issue in a case is seven-eighths-inch or lower, the proffered consensus will be that a full inch in height is the clear line of demarcation. If the defect rises above an inch, the consensus will follow suit, fixing itself around an inch and a half.

It is critical that plaintiff's counsel prevent the defense from manufacturing such a threshold. Luckily, there is some very helpful California authority on that issue. "Obviously, no fixed measurement in inches of height, depth, or width of an obstruction or depression can be adopted or established as a standard because a determination of whether a condition is trivial or not depends upon all of the circumstances surrounding the existence of the conditions in the particular case." (*Aitkenhead v. City and County of San Francisco* (1957) 150 Cal.App.2d 49, 51 [309 P.2d 57].) "The size of the defect is only one circumstance to be considered, as no court has fixed an arbitrary measurement in inches below which a defect is trivial as a matter of law and above which it becomes a question of fact whether or not the defect is dangerous." (*Beck v. City of Palo Alto* (1957) 150 Cal.App.2d 39, 43 [309 P.2d 125].)

• Strategy 2: Whenever possible, treat the size of the defect as a triable issue of fact

In some cases, especially those where the defect in question still exists and has been exhaustively photographed and measured, it may be necessary to concede that it was clearly a certain height. But in many cases, the defect is eliminated soon after the accident, and there may be only a handful of amateur photos and measurements before the court. In those circumstances, plaintiff's lawyers do their clients a disservice by failing to argue that a reasonable jury could find that the defect was sufficiently high to satisfy whatever standard the defense has invoked.

A trial court cannot rely on photographs to hold that a defect is trivial as a matter of law if reasonable minds could differ on whether the photographs correctly depict the alleged defect and its surrounding circumstances. (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 26 [66 Cal.Rptr.3d 885].) Where the size of a defect is contested factual question, the probative value of photographs should be submitted to the jury. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 137 [199 P.2d 952].)

• Strategy 3: Emphasize the limited scope of a pedestrian's duty of reasonable care

The thesis of the contemporary trivial-defect doctrine is that defendants are not liable for conditions on their property that do not pose a substantial risk of injury when used with due care. (*Kasparian v. AvalonBay Communities*, 156 Cal.App.4th at p. 27.) Consequently, the defense will attempt to expand the scope of the due care owed by a pedestrian so as to render virtually any defect in a sidewalk trivial. Familiarizing oneself with the California authority that limits the scope of what constitutes due care by a pedestrian is therefore critical.

It is well settled that a pedestrian has a right to assume that a sidewalk is in a reasonably safe condition and is not required to keep his or her eyes fixed on the ground or to be on constant lookout for defective conditions. (*Peters v. City and County of San Francisco* (1953) 41 Cal.2d 419, 424 [260 P.2d 55].) Nor does a momentary lack of attention to the condition of a sidewalk constitute contributory negligence, as such distractions are matters of common occurrence. (*City of San Diego v. Perry* (1953 9th Circuit) 124 F.2d at p. 632, Citing *Perkins v. Sunset Telephone Co.* (1909) 155 Cal. 712, 722 [103 P. 190] and *Barry v. Ferkildsen* (1887) 72 Cal. 254, 255 [13 P. 657].)

A trial court commits a "basic error" if it makes "the assumption that a pedestrian is bound to anticipate and be on guard against dangers in walking over an area designed for pedestrian use. The rule is just the contrary." (*Roberts v. Patterson* (1959) 170 Cal.App.2d 661, 667 [339 P.2d 236].) "A pedestrian making use of city walks is not bound to constitute himself an inspector of walks." (*Peters v. City and County of San Francisco*, 41 Cal.2d at p.428.) Unless a pedestrian sees something unusual in the sidewalk ahead of her, she has the right to assume that the surface will be safe, and it would be negligent for her to walk with her eyes directed towards her feet, not looking where she was going. (*Garber v. City of Los Angeles* (1964) 226 Cal.App.2d 349, 358 [38 Cal.Rptr. 157].)

• Strategy 4: Frame the defect as one element of a broader dangerous condition

If the defect which injures a plaintiff is simply one part of a broader dangerous condition that the defendant created, the trivial-defect doctrine does not apply. (*Clark v. City of Berkeley* (1946) 143 Cal.App.2d 11, 16 [299 P.2d 296].) Instead, the defendant's duty must be measured against the collective risk of harm posed by the dangerous condition's various elements, not the particular defect that the plaintiff happened to encounter.

The court in *Clark* held that a plaintiff could recover against a city after she was injured on a half-inch variance in the sidewalk. Though that defect was trivial when viewed in isolation, the sidewalk itself was in such a dilapidated condition that the court concluded its cumulative perils posed a substantial risk of injury. If plaintiff's counsel can identify a broader hazard of which the defect that injured his or her client is but a constituent element, he or she may be able to circumvent the trivial-defect doctrine. Such a hazard may be obvious, such as the obviously fragmented sidewalk in *Clark*. But the same analysis can be used with respect to latent issues, such as erosion or sinkholes, which may create a pattern of defects in a broader area.

• Strategy 5: Use the Defendants' safety standards against them

Defendants will often emphasize the stringent safety standards that they purport to employ on their property. If plaintiff's counsel can establish that, under those standards, a defect the size of the one at issue would have been repaired, he or she will have powerful evidence that the defect that injured the plaintiff was not trivial.

The California Supreme Court made that clear in *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 812 [155 P.2d 633], which held that the testimony of the defendant city's sidewalk inspector provided substantial evidence to defeat the trivial-defect defense:

> [The inspector] admitted that if he had seen a condition of the sidewalk such as that testified to and pictured in the photographs, he would have considered it hazardous and as requiring a correction of the defect or condition. In view of that evidence, it cannot be said as a matter of law that the defect was such a minor defect to be insufficient to impose liability upon the city for injuries resulting therefrom.

(*Ibid*.)

The Court's holding reflects the general rule that proof of practice and custom is admissible to assist in determining what constitutes due care. Both the majority and dissenting opinions of the Supreme Court in *Palmer v. City of Long Beach*, 33 Cal.2d at pp. 144-145, thoroughly explained the extreme relevance of such evidence to the question of whether a sidewalk defect is trivial.

• Strategy 6: Highlight aggravating circumstances

The defense will cite multiple cases where relatively large defects were held to be trivial as a matter of law. Plaintiffs' lawyers need to give the courts the opportunity to distinguish those cases by presenting them with factors that may be cited as "aggravating circumstances", which allow liability for an otherwise trivial defect. (*Fielder v. City of Glendale*, 71 Cal.App.3d 719, 726.)

Was the defect, by its nature, especially likely to cause injury?

Courts have recognized that characteristics other than abstract height may substantially increase the risk of injury from a particular defect. Plaintiff's counsel should consider whether the pathway at issue had any broken pieces or jagged edges. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567 [78 Cal.Rptr.3d 910].) The presence of grease, debris, or water on the defect may also make it more dangerous. (*Ibid*.) Even in the absence of those factors, the presence of several irregularly shaped defects just inches apart may elevate the danger they pose by decreasing a pedestrian's ability to regain his or her balance after first stumbling. (*Id*. at 569.)

Courts have sometimes been willing to consider the size of a defect in broader terms than simply its vertical rise above a pathway. For example, an otherwise trivial rise in the sidewalk may be considered dangerous if a gap in the adjacent curbing is likely to trap the shoes of pedestrians whose feet strike the rise. (*Aitkenhead v. City and County of San Francisco* (1957) 150 Cal.App.2d 49, 52.)

Courts have also differentiated between the risk posed by nonaligned sections of sidewalks and that posed by "protrusions" that extend up through the surface of the sidewalk. (*Dolquist v. City of Bellflower*, 196 Cal.App.3d at 269-270.) The latter may pose an increased tripping hazard. For example, a quarter-inch-high protrusion of metal rebar has been deemed "large enough to cause an injury while being small enough to avoid easy detection." (*Ibid*.)

Was the defect readily visible to the plaintiff?

A central aggravating factor that courts have considered is whether there were any circumstances which impeded the plaintiff's ability to detect the defect. These include the plaintiff's lack of

familiarity with the area, the presence of foreign substances, poor weather conditions, or inadequate lighting. (*Stathoulis v. City of Montebello,* 164 Cal.App.4th at 567-568

Even in the absence of those clear impediments to visibility, a defect may still be so difficult to detect as to render it particularly dangerous. For example, the Court of Appeal has held that a drain that was recessed by approximately one-third of an inch may constitute a dangerous condition based on the difficulty a pedestrian would have in detecting the change in elevation. (*Kasparian v. Avalon-Bay Communities*, 156 Cal.App.4th 11, 21.) It noted that, even in daylight, there was no difference in color or texture to distinguish the drain from the surrounding pavers and that a pedestrian would reasonably expect the surface to be level in light of the construction of all the surrounding drains. (*Id*. at 28-29.)

Was the defendant on notice of the defect and the danger it posed?

The Supreme Court held in *Barrett* that if a defect is so minor that its continued existence is not unreasonable, no liability may result, irrespective of the question of notice. (*Barrett v. City of Claremont*, 41 Cal.2d at 73.) But the Court of Appeal has since qualified that holding and indicated that evidence of prior accidents attributable to the defect, standing alone, is normally sufficient to raise a triable issue of fact about whether it is dangerous. (*Barone v. City of San Jose* (1978) 79 Cal.App.3d 284, 290.)

Similarly, the Court of Appeal declined to apply the trivial-defect doctrine when there was evidence that the defendant city was aware that its activities had resulted in a defect but decided not to repair it based on the mistaken belief that, because the defect was in front of private property, the city could not be held liable. (*Aitkenhead v. City and County of San Francisco*, 150 Cal.App.2d at 52-53.) The court considered that one of the circumstances aside from the physical condition of the area that established the defect should not be excused as the type of imperfection that reasonably exists even with the exercise of due care.

Was the defect caused by something beyond normal wear and tear?

Courts have long held that one important circumstance to be considered is the "nature of the defect, that is, whether it is a constructional one, one caused by natural causes such as normal wear or tear, the elements, or tree roots, etc., or whether it is an artificial break in the sidewalk." (*Gentekos v. City and County of San Francisco* (1958) 163 Cal.App.2d 691, 698 [329 P.2d 943].)

Though it may be impossible to perfectly maintain sidewalks and pathways, defendants presumably have a duty to refrain from creating tripping hazards in the first instance. Thus, where plaintiffs have been able to establish that defects were not the product of normal wear and tear, courts have often been reluctant to resort to the trivial-defect doctrine to excuse their existence. (See *Johnson v. City of San Leandro* (1960) 179 Cal.App.2d 794, 800 [4 Cal.Rptr. 404]; *Dolquist v. City of Bellflower*, 196 Cal.App.3d at 270.)

Conclusion

Despite its questionable historical origins, the trivial-defect doctrine has become firmly ensconced in California law, and it is likely to remain a fixture in sidewalk trip-and-fall cases. As long as that remains the case, plaintiffs' lawyers can maximize their chances at overcoming the doctrine and defeating summary judgment by employing the strategies outlined above.


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