An assault in a city parking garage could bring several defendants into play.

"There should have been a stop sign"

The tools to defeat defendant's motions based on statutory defenses for a dangerous condition of public property

By Gregory L. Bentley and Steven M. Schuetze

When pursuing any case involving a dangerous condition of public property, you will be required to navigate through the various statutory defenses and immunities in opposing motions for summary judgment, motions for nonsuit, and motions for directed verdict. Oftentimes your case will involve issues of a third-party's negligence contributing to the cause of the accident. In such situations, the public entity may claim that no dangerous condition exists because the third party "failed to exercise due care". In many cases, the public entity will also claim a complete defense based on immunities for the failure to post signs and signals under California Government Code section 830.4, or design immunity under Section 830.6. In addressing and defeating these potential defenses, an understanding of the relevant case law is imperative. Here is a general overview of some of the most important cases.

Dangerous conditions and third-party negligence

A dangerous condition of public property is defined by California Government Code section 830, subdivision (a) to mean "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." The plaintiff is "required to establish that the condition was one that created a hazard *to a person* who foreseeably would use the property or adjacent property with due care." (Law Revision Commission Comments to Government Code § 830, emphasis added.) Even though a dangerous condition exists when there is a substantial risk of injury to *any foreseeable user* using the property with due care, public entities quite often improperly assert that a dangerous condition does not exist when there is also third-party negligence causing the accident.

California law is clear that the existence of third-party negligence does not

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preclude a finding of liability caused by the public entity's failure to provide reasonable and adequate safeguards to "protect against" a dangerous condition of public property. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 153-154; *Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 811; *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 718-719; *Baldwin v. State of California* (1972) 6 Cal.3d 424, 428, fn. 3; *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789.) As was stated in *Swaner,* "[t]he third party's negligence, however, does not negate the existence of a 'dangerous condition.'" (*Swaner,* 150 Cal.App.3d at 804, cited with approval in *Bonanno, supra,* 30 Cal.4th at 153 fn. 5.)

In *Baldwin* the plaintiff's vehicle was struck from behind by another vehicle as he was stopped to make a left-hand turn. The plaintiff contended "that the intersection of Hoffman and Central constituted a dangerous condition for northbound motorists desiring to turn left onto Central because of the absence of a left-turn lane, the heavy traffic, and the high speeds on Hoffman Boulevard." (*Baldwin,* 6 Cal.3d at p. 428.) The *Baldwin* court stated that the fact that the third party was negligent was not a defense to the State's liability for a dangerous condition.

> Of course the fact that any negligence by the state would not have resulted in injury to the plaintiff without the additional negligence of the driver who struck him from the rear is no defense to plaintiff's claim against the state. 'If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other. [Citations.] The fact that neither party could reasonably anticipate the occurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury. [Citations.]

(*Baldwin,* 5 Cal.3d at p. 428, fn. 3.)

In *Ducey,* the California Supreme Court held that the State had a duty under California Government Code section 830, subdivision (b) to protect against cross-median accidents by providing the safeguard of median barriers. The *Ducey* court further held "the state gains no immunity from liability simply because, in a particular case, the dangerous condition of its property combines with a third-party's negligent conduct to inflict injury." (*Ducey,* 25 Cal.3d at 718-719.)

In *Peterson,* the plaintiff alleged a dangerous condition existed for the failure to properly trim trees and foliage when she was assaulted in a public parking lot. The California Supreme Court held that a public entity may be liable under section 835 if it maintains its property in a manner that fails "to protect against harmful criminal conduct on its property." (*Peterson,* 36 Cal.3d at p. 811.)

The California Supreme Court re-visited the interplay of third-party negligence and a dangerous condition in *Bonanno.* There, the plaintiff pedestrian was struck by a car as she crossed a busy thoroughfare at an uncontrolled intersection to get to a bus stop. The *Bonanno* court held that the location of the bus stop could constitute a dangerous condition. As to the third-party's negligence, the *Bonnano* court stated the general rule "that a physical condition of the public property that increases the risk of injury from *third-party conduct* may be a 'dangerous condition' under the statutes." (*Id.* at p. 154.)

Swaner provides a good example of a public entity's liability for failing to provide safeguards to protect against a third-party's negligence. *Swaner* was in fact cited by the California Supreme Court with approval in *Bonnano,* 30 Cal.4th at 153 fn. 5.

In *Swaner,* plaintiffs who were trespassing on the beach at 2:00 a.m., were injured when they were struck by a vehicle that was negligently and illegally racing on the Santa Monica beach. The plaintiffs sued the City of Santa Monica alleging a dangerous condition existed for failure to erect a fence or barrier to restrict and prevent vehicle access to the beach by negligently and/or illegally driven vehicles. The trial court sustained a demurrer without leave to amend. The Court of Appeals reversed.

The *Swaner* court framed the issue as follows:

> To successfully allege a 'dangerous condition' within the meaning of section 830, a plaintiff must allege that the condition of the public property created a substantial risk when 'used with due care' in a foreseeable manner. In the case on appeal, it is extremely difficult to conceive of a situation wherein an unauthorized driver of a vehicle on the Santa Monica beach can be said to be exercising due care, particularly in light of the City's Code section 3355.
>
> In essence, appellants assert that the beach was in a dangerous condition because the absence of a barrier or fence allowed for the foreseeable use of the beach by third persons who would not exercise due care. We must determine whether such a contention is in conflict with the definition of a dangerous condition in section 830, which requires a substantial risk when public property is used with due care. We conclude in our discussion below that there is no conflict.

(*Swaner, supra,* 150 Cal.App.3d at p.798.)

The *Swaner* court held that the third-party's negligence does not negate the existence of a "dangerous condition." (*Id.* at p. 894.) In *Swaner*, the court held that the absence of a barrier to prevent vehicle access constituted a dangerous condition of the property, and "*such third-party conduct may be the very risk which makes the public property dangerous when considered in conjunction with some particular feature of the public property, viz., the lack of a fence or barrier as alleged herein*". (*Id.* at 804, emphasis added).

Traffic signals and signs

California Government Code section 830.4 provides immunity for a public

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entity for the failure to install traffic control signals, stop signs, right-of-way signs, speed restriction signs, or distinctive roadway markings as described in section 21460 of the Vehicle Code.

When a public entity undertakes to install traffic signs and signals and "invites public reliance upon them, it may be held liable for creating a dangerous condition in so doing." (*De La Rosa, supra,* 16 Cal.App.3d at 746.) As was stated in *De La Rosa, supra*, a "crucial factual issue was whether *the position* of the stop sign constituted a dangerous condition." (*Id.* at 746.) "[A]lthough a public entity is not liable for failure to install traffic signs and signals, (Gov. Code, §§ 830.4, 830.8), when it undertakes to do so and invites public reliance upon them, it may be held liable for creating a dangerous condition in so doing. [Citations omitted]" (*Ibid.*) While there is no liability for the failure to install signs such as a speed limit sign under California Government Code section 830.4, once those signs are installed, the governmental entity is not immune from liability for the dangerous conditions created by virtue of the positioning of such signs. (*Id.;* see also *Bonanno, supra*, (dangerous condition created by *location of bus stop*.)

In *Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, the court held that a dangerous condition existed and there was no immunity under Government Code sections 830.4 and 830.8 where a stop sign was located at a point so far from the place where a stop was required that it was deceptive to motorists. The *Bakity* court stated the fact that the stop sign was located 36 feet east of the easterly line of the intersection could constitute a dangerous condition. The court stated that "it is common knowledge that stop signs are normally placed at the point where vehicles are intended to be stopped. In the present case there was expert testimony by defendant's traffic engineer to that effect. Placing a stop sign in an unanticipated position could constitute a trap for an unwary motorist. Although sections 830.4 and 830.8 of the Government Code . . . provide that a public entity may not be held liable for failure to install traffic signs or signals, when it does so in such a manner as to constitute a trap, liability may be imposed for the maintenance of a dangerous condition." (*Id*. at p. 31.)

In *Briggs v. State of California* (1971) 14 Cal.App.3d 489, the court held that once the state undertakes to sign an area (which in that case involved a location where there had been prior slides) it could be held liable for creating a dangerous condition for inadequate or deceptive signs. The *Briggs* court stated:

> The state's liability here can be predicated on the inadequate warning sign placed in the southbound lane. The uncontroverted evidence indicates that the non-reflective 24-inch sign with 4-inch letters placed in the southbound lane was not "very visible" to passing motorists, did not meet the specifications for a 30-inch by 30-inch reflecting sign with 5-inch letters called for by the state manual, and was placed only 320 feet north of the slide instead of the required 400 feet. Accordingly, here, as in *Bakity* and *Hilts*, the state having undertaken to sign the area was obligated to sign it properly and should have to answer for any inadequate or deceptive warning proximately contributing to the accident.

(*Briggs,*14 Cal.App.3d at p. 497.)

In *Hilts v. County of Solano* (1968) 265 Cal.App.2d 161 the court found that once the County of Sonoma undertook to install signs at an intersection, it be could liable based on the inadequacy of such signs. The court explained that, where the public entity undertakes to install signs and such signs themselves create a dangerous condition, liability may be predicated on this basis.

In *Hilts,* the state of the evidence was such that the trier of fact could conclude that the subject intersection was a trap to a person using the street or highway with due care. Accordingly, it was also a question of fact whether County failed to provide the *warning* devices or signals necessary to warn of the dangerous condition. The warning signs that were installed were such as to warrant the inference that they did not accurately depict the intersection and might themselves have been partly responsible for the dangerous potential of the intersection. The court therefore concluded that it did not appear that as a matter of law [that] County was immune from liability under sections 830.4 or 830.8." (*Hilts,* 265 Cal.App.2d at p. 174.)

In *Bunker, supra*, the plaintiff Bunker was riding a motorcycle up a steep hill on Adams Street. Approximately 55 feet on the far side of the crest of the hill, a driver was backing her car out of the driveway. As Bunker reached the crest of the hill, he was traveling 25 to 30 mph and unable to stop before colliding with the backing vehicle. While the posted speed limit on Adams Street was 25 mph, approximately 500 feet from the crest of a hill there was a sign that stated "Slow to 15 mph." The jury found that Bunker was 44 percent comparatively negligent and the City was 56 percent negligent under California Government Code section 830.8 for the failure to warn. The Appellate Court in *Bunker* affirmed the judgment. The *Bunker* court stated:

> The sign which advised oncoming traffic to slow to 15 miles per hour was sited three intersections away from, and approximately 500 feet below, the crest of the hill. There was evidence that motorists could not tell whether the warning applied to the intersections or to the grade of the hill. The jury's conclusion that the City failed to warn motorists about a dangerous condition is supported by evidence which, if not exactly overwhelming, squeaks by the current standard for substantiality of evidence.

(*Id.* at pp. 328-329.)

Design immunity

California Government Code section 830.6 provides the statutory basis for a public entity to assert a defense of design immunity.

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A public entity claiming design immunity must show the existence of three elements: "(1) [a] causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; [and] (3) substantial evidence supporting the reasonableness of the design." (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940.) The first two elements, causation and discretionary immunity, are questions of fact for the jury to decide, and only become issues of law if the facts are undisputed. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 74-75; *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940.)

> The immunity of section 830.6 is an affirmative defense which must be pleaded and proved." (*Cameron v. State of California* (1972) 7 Cal.3d 318, 325.) "[T]he defendant public entity has the burden of pleading and proving the defense of design immunity and each of the essential elements of it, and that an eventual failure to prove any of the enumerated ingredients is fatal to the applicability of that defense.

(*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 574.)

Design-caused accident required

"By force of its very terms the design immunity of section 830.6 is limited to a design-caused accident." (*Fluornoy v. State* (1969) 27 Cal.App.3d 806, 811.) "The conditions of the project in actual use after completion may generate intervening causative forces." (*Id.* at 813.) "Stated otherwise, it [design immunity] does not immunize against liability caused by negligence independent of design, even though independent negligence is only a concurring proximate cause of the accident." (*Mozzetti, supra,* 67 Cal.App.3d at p. 575.)

In *Fluornoy,* an accident occurred because of ice that developed on a bridge as a result of moisture that condensed and froze from the flow of water under the bridge. The *Fluornoy* court held that design immunity was not available for the presence of ice on the bridge. "Ice on the roadbed was not an element or feature of the plan or design of Cleer Creek Bridge. Section 830.6 protects the public from liability for reasonably conceived design choices made in the exercise of discretionary authority. [Citation omitted]. The ice on the Cleer Creek Bridge was a consequence of the bridge's physical surroundings, not a design choice." (*Fluornoy, supra,* 275 Cal.App.2d at p. 812.)

In *Mozzetti,* the owner of a motel and trailer park brought an action for flood damage to his property. Some of the evidence demonstrated the flooding and damages "were caused, at least partially, by the poor maintenance and clogging of the drainage system." (*Mozzetti, supra,* 67 Cal.App.3d at p. 575.) *Mozetti* held that the required element of causation between the design and the flooding was absent since the damages were proximately caused in part by negligence, the defense of design immunity was not available to the City of Brisbane.

Discretionary approval required

Discretionary approval before construction, "means approval in advance of construction by the legislative body or officer exercising discretionary authority." (*Granier, supra,* 57 Cal.App.4th at 940.) "An actual informed exercise of discretion is required. The defense does not exist to immunize decisions that have not been made" (*Levin v. State of California* (1983) 146 Cal.App.3d 410; *Cameron, supra,* 7 Cal.3d at 326.) As was stated in *Cameron, supra,* "[t]hus, there would be no reexamination of a discretionary decision in contravention of the design immunity policy because there has been no such decision proved." (*Ibid.*) Since this accident was not a "design-caused" accident but rather one which occurred in actual operation subsequent to its design, Caltrans also cannot prove the second element of discretionary approval to establish design immunity.

In *Cameron,* it was alleged that superelevation around a curve constituted the dangerous condition causing plaintiffs to lose control of their car. The plans showed the course of the right-of-way and the elevation of the white center strip of the road, but there was no evidence "the superelevation which was actually constructed on the curve ... was the result of or conformed to a design approved by the public entity vested with discretionary authority." (*Id.,* 7 Cal.3d at p. 326.) The Court held that the state failed to prove a discretionary decision was actually made regarding the dangerous condition which caused plaintiffs' accident. (*Ibid.*) While in *Cameron,* there is an overlap between the two required elements of discretionary immunity of causation and discretionary approval, it has been held "[t]he distinction is academic. If the injury-producing element was not part of the discretionary approved design, immunity is defeated." (*Granier, supra*, 57 Cal.App.4th at p. 941, fn. 7.)

In *Levin, supra*, the plaintiffs asserted a dangerous condition of Highway 37 based on a 1974 reconstruction. In 1969, eight-foot shoulders were added on the north and south sides of Highway 37 with two lanes of travel. In 1974, the eight-foot shoulder was eliminated, creating three lanes of travel, with only a three-foot paved shoulder on top of an embankment with no guardrail. The plaintiff introduced evidence that the Division of Highways 1971 Traffic Manual required guardrails at the location. Caltrans introduced evidence that the plans were approved by deputy highway engineer, J.A. Legarra, within his authority. The Court of Appeal held that the State had failed to meet its burden regarding discretionary authority. "The state made no showing that Legarra, who alone had the discretionary authority, decided to ignore the standards or considered the consequences of the elimination of the eight-foot shoulder. It follows that the state also failed to establish the second element of the defense." (*Id.* at 418.)

Similarly, in *Hernandez v. Department of Transportation,* (2004) 114 Cal.App.4th 376, the plaintiffs offered evidence that the state violated Caltrans' then

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applicable guardrail installation guidelines completed in May 1971 on an off ramp. It was noted that "[a]ny deviation from the applicable guidelines required the designer to obtain formal approval, which would be recorded in 'project approval guidelines.'" (*Id.* at p. 539). There was no evidence that any of the three engineers who signed the as-built plans actually considered the guardrail installation guidelines and approved the purported deviation from the guidelines' requirements. (*Ibid.*) The Court of Appeal reversed the trial court and held that there existed triable issues of material fact as to the discretionary authority since "[c]onflicting evidence was presented in the trial court as to whether the off-ramp design at issue in this case deviated from the applicable guardrail standards and, if so, whether the deviation was knowingly approved by the responsible Caltrans authorities." (*Id.* at p. 545.)

Loss of design immunity

If a public entity is able to meet the elements for design immunity under California Government Code section 830.6, the design immunity can be lost based on evidence of changed physical conditions. (CACI 1123; *Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63; *Baldwin v. State of California* (1972) 6 Cal.3d 424.)

Baldwin succinctly stated:

> [D]esign immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard. . . we conclude that it did not intend that the design immunity provided by section 830.6 would be perpetual.

(*Baldwin, supra*, 6 Cal.3d at p. 429.)

The elements for proving the loss of design immunity are set forth in *Cornette, supra,* 26 Cal.4th at 66.

> To demonstrate loss of design immunity a plaintiff must also establish three elements: (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 due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.

(*Ibid.*)

The *Cornette* court held that plaintiffs have the right to a jury trial as to the claim of loss of design immunity. CACI 1123 sets forth these elements and should be requested on any case where the loss of design immunity is claimed.

Conclusion

If you are pursuing a claim for a dangerous condition of public property, you will undoubtedly be served with a motion for summary judgment raising some of these issues. Defeating the motion will often hinge on your understanding and application of the immunities and the case law interpreting these immunities.

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