Sidewalks

The often neglected people movers that injure pedestrians, often from defects the defense calls trivial

By Shaana A. Rahman

Thanks to the work of VisionZero, pedestrian safety is finally getting the attention from local governments that it deserves. There has been a new focus on the "3 E's:" engineering, enforcement and education, to eliminate traffic deaths within ten years. Many local governments are finding the resources to implement engineering solutions that are proven to reduce vehicle versus pedestrian collisions. These measures include pedestrian refuge islands, that reduce collisions by 56 percent, increased signal timing, reducing collisions by 51 percent and high visibility crosswalks that reduce collisions by 47 percent (Toolbox of Countermeasures and Their Potential Effectiveness for Pedestrian Crashes, *www.pedbikeinfo.org*.)

While these changes are laudable and should absolutely be encouraged and supported, they do not address injuries to pedestrians from the less sexy issue of sidewalk neglect. Uneven sidewalks, caused by tree roots, construction or earth movement, open, unguarded temporary construction, torn up walkways, and improperly designed accessibility ramps all can cause a pedestrian to trip and fall, leading to serious injuries. In assessing pedestrian trip and fall injury cases, issues to be addressed include determining if the defect is non trivial, and

identifying who is responsible for the section of sidewalk where the injury occurred, such as the adjacent property owner or the city or county public entity.

Identifying conditions that are hazardous to pedestrians

Since not every bump or crack in the sidewalk constitutes a defect, it is important to thoroughly examine the condition that caused the fall both by reviewing photographs and going to the scene itself. While property owners are not required to repair "trivial" or "minor" defects, California courts have held that differences in elevation measuring a half an inch or three-fourths of an inch constitute "minor" or "trivial defects." (See, *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927; *Whiting v. National City* (1937) 9 Cal.2d 163, 165-166.) However, "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.) Thus, the change in elevation must be more than one inch so as to not be considered "trivial."

Common causes of a sidewalk change in elevation include tree roots lifting up a section of the sidewalk, the settling of a section of walkway in which pavers were installed, or buckling of pavement from heat or water intrusion. In each case, it is important to both measure the change in elevation from the smallest to greatest point and to identify any factors that could cause the defect to be obscured from view of the casual pedestrian. Often in tree root cases, the depression or lip of the deviation can be obscured by fallen leaves, acorns, shadowing of the area by the tree itself or an absence of ambient lighting.

You should also examine and measure the cross-slope when evaluating sidewalk depressions. California Building Code Standards § 1133B.7.1, recommends a sidewalk surface have a cross-slope of no more than two percent. It often is the combination of the depression, slope and debris that cause a fall.

When inspecting the sidewalk, keep in mind the mechanics of your client's fall. A fall forward and a sensation that a foot struck something, can confirm that the fall was caused by a deviation with a raised lip. A fall backward is generally indicative of a slipping motion and while consistent with a foot rolling on acorns, inconsistent with hitting the lip of a raised sidewalk section. Although some defects will be apparent, and may be confirmed by witnesses or a prior accident history or notification to the property owner of a department of public works, many conditions will require the trained eye of an accident reconstructionist who can also properly photograph and measure the defect. Since property owners and public entities generally move swiftly to fix the defect after a report of injury, it is crucial to document the scene as soon as possible.

Determining who is responsible for the sidewalk

When you go to the scene to inspect the sidewalk, note the addresses of the properties adjacent to the sidewalk at issue. Also note if there looks to be any recent construction on or near the sidewalk or if the trees or other landscape look to have been freshly maintained. This will help you establish both the private property owner and whether a claim exists as to a public entity. Finally, canvas the area for video surveillance cameras that are pointed in the direction where your client fell.

As an initial matter, California Streets and Highway Code section 5610 clearly states that a property owner specifically has a duty to maintain any sidewalk that fronts his or her property in a safe manner:

> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, *shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public convenience in the use of those works or areas* save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under a like duty in relation thereto. (Cal. Civ. Code, § 5610, *emphasis added*.)

Additionally, courts have held a landowner who exercises possession or control over an adjacent sidewalk has a duty to warn or protect pedestrians and others who foreseeably may be in the area from dangerous conditions on the sidewalk. (See, *Alpert v. Villa Romano Homeowners Ass'n* (2000) 81 Cal.App.4th 1320, 1335-1337.) In *Alpert v. Villa Romano Homeowners Assoc*. (2000) 81 Cal.App.4th 1320, the court held that a landowner owed a duty of care to pedestrians using a sidewalk on adjoining property, where the defendant knew the sidewalk was hazardous due to roots from trees located on the defendant's property. In doing so, the court analyzed the impact of Civil Code 1714(a), Streets and Highways Code 5610, and other authorities in determining liability. In essence, Section 5610 of the Streets and Highways Code established the rule that the owner of the property adjoining the sidewalk has a duty to maintain it. (*Ibid*.)

Many cities have also adopted municipal ordinances consistent with section 5610, placing the burden of repair of sidewalks on the property owner. (E.g., Berk. Mun. Ord. § 16.04.010; San Luis Obispo Municipal Code § 12.16.020; *Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127, 1137 [local ordinance expressly made landowners liable to members of public injured from unsafe conditions on abutting sidewalks].)

When doing your investigation, be sure to obtain information from the public entity about deficiency notices sent out to the property owner about the sidewalk. There are instances where the public entity has sent multiple notices to the property owner that a sidewalk needs repair, with no responsive action by the property owner. This lack of response from the property owner and failure of the public entity to take remedial action may give rise to a claim against the public entity.

General duties of property owners to maintain sidewalks

Property owners have a general duty to maintain their property in a reasonably safe condition. California Civil Code section 1714(a) provides that everyone is responsible, not only for the result of his or her own wrongful acts, but also for injury occasioned to another by his or her lack of ordinary care or skill in the management of property. (Cal. Civ. Code, § 1714(a); See, e.g., *Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170.) In an action alleging general negligence, a defendant owes a duty to all persons who are foreseeably damaged by the defendant's conduct. (*Rodriguez v. Bethlehem Steel* (1974) 12 Cal.3d 382.) Under the theory of premises liability, the premises' owner or possessor has the duty to exercise ordinary care in the management of the premises in order to avoid exposing persons to an unreasonable risk of harm. (*Rowland v. Christian* (1968) 69 Cal.2d 108.) This duty is grounded upon the rights of ownership and possession, and the attendant rights to control and manage property. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358.)

Thus, premises liability is a form of negligence, in which the owner or possessor of a premises is subject to a duty to exercise ordinary care in the management of the premises in order to avoid exposing persons to an unreasonable risk of harm. (See, e.g., *Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611.) Therefore, the owner or possessor of land owes people on that land a duty to exercise due care to keep the premises in a reasonably safe condition that prevents them from injury while on the premises. (*Ruoff v. Harbor Creek Community Association* (1992, 4th Dist.) 10 Cal.App.4th 1624.)

As discussed above, although the property owner is not required to maintain a sidewalk in pristine condition, the property must be reasonably free of defects that could reasonably injure a pedestrian.

Public entity liability for dangerous conditions of public property

In cases where the sidewalk at issue is owned, possessed, or controlled by a public entity, then an action for dangerous condition of public property may apply. Here, you are looking for prior complaints to the public entity of other falls, or a request to repair the defect, a pattern of prior inspection of the area at issue giving rise to either actual or constructive notice of the defect, and whether the defect at issue was caused by an employee of the public entity.

Some cities have formal documented sidewalk inspection programs, which may make the task of finding notice easier. Sadly, most cities do not have such programs but if public entity employees had done other work in the area, like trimming trees or installing street signs, then constructive notice may apply. When deposed, most city or county workers will admit that even if their job that day is to trim back a tree, they are also obligated to look for and report any other dangers in or about the public roadways. The most straightforward cases, of course, exist when the public entity employee completed some work that caused the defect, such as removing a portion of sidewalk for underground repair work. This scenario also can bring a utility into play like Comcast, AT&T or PG&E.

California Government Code section 835 provides that "a public entity is liable for injury caused by a dangerous condition[1] of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: (a) [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) [t]he public entity had actual or constructive notice of the dangerous condition under Section 835.2[2] and sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Cal. Gov. Code, § 835.)

Pursuant to section 835.4, the reasonableness of the public entity's act or omission creating the condition is determined by "weighing the probability and the gravity of potential injury to persons ... 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." (Cal. Gov. Code § 835.4.)

Of importance is the definition of "property of a public entity and *public property* pursuant to Gov. Code § 830(c) as "real or personal property owned or controlled by the public entity." (Cal. Gov. Code § 830(c), emphasis added.)

Section 835.2 defines constructive notice as such condition, which existed for such a period of time, which was of such an obvious nature that the public entity should have discovered the condition and its dangerous condition. Admissible evidence on the issue of constructive notice includes whether the condition would have been discovered by a reasonably adequate inspection system. (See, Cal. Gov. Code § 835.2.)

Additional considerations for disabled pedestrians

If your client was disabled prior to the fall, was using the sidewalk to access a location, and the location was owned,

possessed or controlled by a business or was a location accessible to the general public, you can also consider causes of action for violations of the Unruh Civil Rights Act and the California Disabled Persons Act ("DPA").[3] Both the Unruh Act and the DPA provide for civil penalties for violations, which include treble damages, attorneys' fees and injunctive relief. (Cal. Civ. Code, §§ 52, 54.3, 55 and 55.1.)

The Unruh Act broadly provides that all persons within California are "free and equal" and "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51(b).) The DPA additionally provides that individuals with disabilities "shall be entitled to full and equal access, as other members of the general public," to places to which the general public is invited. (Civ. Code, § 54.1(a)(1).) Both Acts broadly prohibit discrimination without qualification and require equal treatment in all public accommodations. (Civ. Code, §§ 51 & 54.) Indeed, "[i]t is the policy of this state to encourage and enable individuals with a disability to participate fully in the social and economic life of the state." (Gov. Code, § 19230(a).)

The breadth of the Acts was well-established long before Congress enacted the ADA in 1990. The predecessor California statute to the Unruh Act became law in 1897 and required places of public accommodation "to serve all customers on reasonable terms without discrimination." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839, citation and internal quotations omitted.) In 1959, in response to court decisions *restricting* the places covered by the original statute, the Legislature reenacted sections 51 and 52 as the Unruh Civil Rights Act, and in doing so deleted the list of places and replaced it with a reference to "all business establishments of any kind whatsoever." (Stats. 1959, ch. 1866, § 1, p. 4424; see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1151.) Since that time, whenever the Legislature has amended the Unruh Act, it has consistently done so to broaden and strengthen its protections. For example, in 1961, the Act's protection of "citizens" was extended to all "persons." (Stats. 1961, ch. 1187, § 1, p. 2920.) In 1984, the Legislature added "blindness or other physical disability" to the categories of prohibited discrimination. (Stats. 1987, ch. 159, §§ 1-2, pp. 557-558; see *Harris*, 52 Cal.3d at 1153.)

In 1992, the Legislature expanded the Unruh Act yet again to provide that a violation of the ADA independently constitutes a violation of the Unruh Act. The Legislature explicitly stated that the amendment made ADA violations *independently actionable* while retaining California law "when it provides more protection for individuals with disabilities" than the ADA. (Stats. 1992, ch. 913, § 1; Stats. 2000, ch. 1049, § 2; see also Gov. Code, § 12926.1(a) [although the ADA "provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections"].)

The ADA provides that discriminatory policies and practices must be modified unless to do so would "fundamentally alter" the nature of the accommodation and that "architectural barriers" in existing facilities must be removed to the extent it is "readily achievable" to do so. (42 U.S.C. §§ 12182(b)(2)(A)(ii) & (iv).) The ADA also provides that nothing in its provisions "shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any *State* . . . that provides greater or equal protection for the rights of individuals with disabilities." (42 U.S.C. § 12201(b), emphasis added.)

Thus, under the plain and specific language of the Unruh Act, the DPA, and the ADA itself, a violation of the ADA is merely a *subset* of potential violations for disability discrimination under California's civil rights laws.

Heeding the Legislature's mandate, the Supreme Court has held that the Unruh Act must be interpreted "in the broadest sense reasonably possible" in order to "banish [discriminatory] practices from California's community life." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 76; see also *Burks v. Poppy Constr. Co.* (1962) 57 Cal.2d 463, 468.) As the Court noted in *Harris*, "[e]xclusion and unequal treatment form the core of any public accommodations violation and are covered by all statutes." (*Harris*, 52 Cal.3d at 1174, fn. 19, quoting Note, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws* (1978) 7 N.Y.U. Rev.L. & Soc. Change 215, 244.)

As the California Supreme Court concluded, the Unruh Act "stands as a bulwark protecting each person's inherent right to 'full and equal' access to 'all business establishments.'" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167, *citing* Civ. Code, § 51(b) & *Isbister*, 40 Cal.3d at 75.) The Unruh Act, "like the common law principles upon which it was partially based, imposes a compulsory duty upon business establishments to serve all persons without arbitrary discrimination [and] serves as a preventive measure, without which it is recognized that businesses might fall into discriminatory practices." (*Id.*, citations omitted.) Accordingly, the Supreme Court has repeatedly endorsed a broad construction of the Unruh Act. It "must be construed liberally" to "create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination." (*Id.*, citations omitted; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28.)

Similarly, the DPA, as the Supreme Court noted over 25 years ago, is part of "a growing body of legislation intended to reduce or eliminate the physical impediments" to persons with disabilities to promote integration and participation in community life, and to attain "the commendable goal of total integration of handicapped persons into the mainstream of society." (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 738, 740.)

Adding these additional causes of action serves as an additional remedy in cases involving disabled pedestrians. It also builds awareness of the specific needs of vulnerable roadway users.

Handling the pedestrian sidewalk case requires a fair amount of sleuthing to uncover both the good and bad facts. It also requires a carefully constructed narrative about the mechanics of the fall and the precise way in which the sidewalk posed a hazard. While on first blush a few blurry pictures of the sidewalk defect taken on your client's cellphone may not seem like much, a fresh inspection is important to look at the totality of the circumstances.

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Endnotes

[1] Government Code section 830 defines a "dangerous condition" as "a condition of property that 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."

[2] Section 835.2(a) sets forth: "[a] public entity had actual notice of a dangerous condition ...if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. Section 835.2(b) defines constructive notice as such condition which existed for such a period of time which was of such an obvious nature that the public entity should have discovered the condition and its dangerous condition. Admissible evidence on the issue of constructive notice includes whether the condition would have been discovered by a reasonably adequate inspection system to inform the public entity whether the property was safe for its use. (See, Cal. Gov. Code section 835.2.)

[3] For locations under the control of a public entity, you can additionally plead a violation of California Government Code § 11135, Discrimination Under Program Receiving Financial Assistance From The State.