Bike crashes due to a dangerous roadway or trail condition

An updated look at the key elements of bringing your action against a government entity to trial

By Steven Kronenberg

As your client rode her bike on a public road, her front wheel caught in a large crack that came out of nowhere and caused her to fall. Despite wearing a helmet and riding safely, she suffered serious injuries. Can you fight City Hall?

First things first: Know your deadlines

Under the Government Claims Act, one must file a tort claim against a public entity within six months of the date of injury. (Gov. Code, § 911.2.) This is a condition precedent to filing a complaint. (Gov. Code, §§ 905, 945.4.) Never count on the ability to file a "late" claim due to mistake, surprise, inadvertence, or excusable neglect. (Gov. Code, § 946.6.) While this might sound like a flexible standard that tracks the text of Code of Civil Procedure section 473, subdivision (b), the requirements for relief are restrictive. (See, e.g., *Munoz v. State* (1995) 33 Cal.App.4th 1767, 1785.)

Case evaluation: Does immunity bar the claim?

One article cannot exhaustively evaluate whether your client's case is viable. However, you should consider whether the injury occurred on a trail (Gov. Code, § 831.4) or arose from a "hazardous recreational activity," for which public entities are immune from liability. (Gov. Code, § 831.7.) Notably, the definition of "hazardous recreational activity" expressly excludes (1) "riding a bicycle on paved pathways, roadways, or sidewalks," (2) risks that are not inherent or about which the public entity knew, (3) gross negligence, and (4) liability for an entity's failure to maintain a road. (Gov. Code, §§ 831.7, subds. (b)(3), (c)(1).)

Some clients claim that they had no warning of the hazard, and that a sign would have prevented the incident. Accordingly, you should consider whether the injury-causing condition was a "trap." A public entity is liable for failing to provide a sign warning of a condition that is "a trap to a person using the street or highway with due care." (Gov. Code, § 830.8, Law Rev. Com. Comment.) "This 'concealed trap' statute applies to accidents proximately caused when, for example, the public entity fails to post signs warning of . . . a fact known to the public entity but not to unsuspecting motorists . . ." (*Chowdhury v. City of L.A.* (1995) 38 Cal.App.4th 1187, 1196-1197.)

Identifying target defendants

The target defendants' identity may not be obvious. Just because a road is *within city limits* does not necessarily mean that that city owns, controls, or maintains it. Consider whether the street may be a state highway, or if another public agency might have some responsibility for the area.

Unfortunately, there are limited online resources available to identify these defendants. In addition to public records, consider consulting with a traffic engineer or similar expert to help identify entities with responsibility for the area of the incident. The Secretary of State maintains a Registry of Public Agencies (still on microfiche) in its "Special Filings" division that one can call during business hours to identify the proper names and contact information for all public agencies.

Preserve evidence

Try to locate and image or scan the roadway defect that caused the incident as soon as practicable so that you can support your claims about what made the condition dangerous. Ideally, this will identify facts demonstrating that the defect is a hazard not just to recreational cyclists, but also to other road users; this is important for rebutting the affirmative defense of assumption of the risk, discussed *infra*.

Investigation

Public record requests: Your tax dollars at work

The California Public Records Act ("CPRA," Gov. Code, § 6250 et seq.) is one of the most effective litigation tools against public agencies for three reasons. First, one can request a wide range of documents regarding, e.g., the design, construction, inspection, and maintenance of the area. This includes correspondence, emails, meeting minutes, public complaints, work orders, etc.

Second, the cost of a CPRA search is nominal. (See *North County Parents v. Department of Education* (1994) 23 Cal.App.4th 144, 148). Electronic document production is usually free.

Finally, one can conduct CPRA research any time; one does not need to wait until a complaint is filed. It is a useful pre-litigation tool to help identify additional target defendants, draft written

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discovery, and locate specific persons with knowledge of the area. One can also make CPRA requests directly to agencies during litigation, even if they are represented by counsel. (*Ardon v. City of Los Angeles* (2014) 232 Cal.App.4th 175, 184; State Bar Formal Op. No. 1977-43.)

Online research for similar complaints (and settlements)

Some municipalities publish meeting minutes online about claims and approval of settlements. You may be able to use this research to identify colleagues who have litigated similar cases and would be willing to share what they have learned in discovery. (Thank you, Jayme Walker.) Published meeting minutes also likely identify the amount of settlements to help gauge case value.

Collision and injury history

Collision and injury history can be important to demonstrate notice of the condition and its danger. SWITRS data from the CHP can provide both, for free.

However, even if SWITRS does not identify any significant incident history, the data are only as good as the people who enter it. If a Traffic Collision Report was prepared for your claim, review the "Roadway Conditions" section to see if the officer identified the condition at issue as a cause of your incident, which may raise a question of fact about constructive notice. (Gov. Code, § 835.2, subd. (b).) Periodically renew your CPRA requests to see if the public entity's employees ever notified a public works department about the hazard so it could be repaired. (If not, consider using this lack of action to argue that the entity failed to repair the dangerous condition even after it had actual notice.

Social media

Search for videos and images of the area on forums and video sites like YouTube. You might just find a video from a bicyclist's or motorcyclist's GoPro that depicts the roadway conditions before your incident occurred.

Pound the pavement

While it is great to let your fingers do the walking, consider hiring an investigator to canvass nearby businesses and homes for security camera footage (and to interview witnesses). Don't ignore reaching out to biking advocacy groups, who may know others who can testify about the condition of the road.

Experts, need several

Dangerous condition bikeway cases can be expert-intensive. Regarding liability, you will likely need to consult with specialists in many fields: biking standard of care, human factors, traffic or pavement engineering, municipal budgeting, accident reconstruction, and biomechanics. If your client's bike was equipped with a GPS device, you may need someone to address concerns with speed and location.

Discovery plan

Count on defendant filing a motion for summary judgment. (Given the statutory and decisional authorities that make proving liablity much more difficult than against a private litigant, why wouldn't they?) Conduct discovery with an eye toward demonstrating triable issues of material fact (at a minimum).

Review CACI instructions, the Government Code, and decisional authorities regarding the essential elements of proving a dangerous condition. Some key issues include proving that the condition was "dangerous," notice (actual or constructive), trap liability, and affirmative defenses of assumption of the risk, waiver, reasonableness, and various immunities.

Is the condition "dangerous?"

There is no bright-line rule about what constitutes a dangerous condition, and each case depends upon its facts. (*Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, 206.) A dangerous condition of public property is (1) a condition that creates a "substantial" (not a minor, trivial or insignificant) risk of injury when (2) the property or adjacent property is used with due care (3) in a manner in which it is reasonably foreseeable that it will be used. (Gov. Code, § 830, subd. a).)

Even if the defendant contends that the defect is small or "trivial," your experts may be able to help you identify triable issues of material fact. Did the lighting or weather at the time of the incident obscure the defect, so that one could not take steps to go around it? How long would a person require to perceive, react to, and avoid the danger?

Notice: What did they know, and when did they know it?

A public entity is liable for injury caused by a dangerous condition of its property when a plaintiff proves, inter alia, that a negligent/wrongful act of an entity's employee within the scope of employment created the dangerous condition or the entity had actual or constructive notice under Government Code section 835.2, a sufficient time before injury to have taken measures to protect against the dangerous condition. (Gov. Code, § 835.)

This means that you must prove that the entity either created the condition or had notice of it. Notice can be actual or constructive.

Actual notice

A public entity has actual notice of a dangerous condition if it (1) has actual knowledge the condition exists and (2) knew or should have known of its dangerous character. (Gov. Code, § 835.2, subd. (a).) CPRA requests may produce evidence of prior accidents, which are admissible to prove a dangerous condition if the conditions under which the previous accidents occurred were the same or substantially similar to the one at issue. (*Mixon v. Pac. Gas & Elec.* (2012) 207 Cal.App.4th 124, 137-138.) However, *the absence of* other similar accidents is not dispositive of whether a condition is dangerous or not and does not establish a finding of non-dangerousness absent other evidence. (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346.)

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Constructive notice

A public entity had constructive notice of a dangerous condition when plaintiff proves "[1] the condition had existed for such a period of time and [2] was of such an obvious nature that the public entity, [3] *in the exercise of due care,* [4] *should have discovered the condition and* [5] *its dangerous character*." (Gov. Code, § 835.2(b) [emphasis added].)

Evidence of "due care" can include determining whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was "reasonably adequate" by balancing several factors – practicability and cost of inspection weigh against the likelihood and magnitude of the potential danger to which failure to inspect would give rise. (Gov. Code, §§ 835.2(b).) And did the entity actually conduct proactive inspections, or did it just wait for public complaints about hazards? (*Ibid*.)

Also consider whether the inspection would inform the entity whether the property was safe for its intended uses. (*Ibid*.) If the entity designated a road *as a bikeway* (which you can discover by searching for bike routes and requesting copies of biking maps), then the entity likely needs to comply with the Caltrans Highway Design Manual ("HDM") criteria for bikeway maintenance – taking actions "*to assure that the routes are suitable as shared routes and will be maintained in a manner consistent with the needs of bicyclists*." (HDM, § 1002.1(4) [emphasis added].)

A recurring condition supports existence of constructive notice

Courts have rejected a public entity's claim that it lacked notice of a dangerous condition *where it knew the condition would recur*, like mudslides on a highway. (*Briggs v. State of California* (1971) 14 Cal.App.3d 489, 492.) Even though molecules of mud can only slide once, the court rejected the state's argument that it did not have notice of the slide at issue, because mudslides were a *recurring* condition of which the state had constructive notice. (*Id*. at pp. 497-498.)

Public entities may also claim that they had notice of defects close to the area at issue, but not of the hazard that caused your incident. However, if an entity has notice of a recurring hazard in the general area, then you may be able to raise a triable issue of material fact regarding constructive notice. (*Straughter v. State of California* (1976) 89 Cal.App.3d 102, 1111 [finding that the state had constructive notice of ice sheets repeatedly forming during cold spells on a mile-long stretch of road].)

Assumption of the risk

A person owes a duty of care to avoid injury to others. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315-316 ["*Knight*"].) However, this duty did not require a defendant to eliminate or protect a plaintiff against inherent risks. (*Ibid*.) Defendants simply owe a duty not to increase risks to a participant above those inherent in recreational activities, e.g., while a ski resort has no duty to remove naturally formed bumps or moguls from its runs, it cannot increase the risk of skiing by negligently maintaining its tow rope. (*Knight* at p. 316.) Courts review (1) the nature of an activity and (2) the parties' relationship to the activity and each other. (*Knight* at pp. 315-317.)

Regarding the nature of the activity, a public entity owes a duty to all reasonable and foreseeable road users. In *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, 68 ("*Childs*"), a child riding a scooter on a public sidewalk collided with a raised portion that caused her to fall. The Superior Court granted summary judgment under assumption of the risk, determining that the County's failure to maintain the sidewalk did not increase the inherent risk of riding a scooter. (*Ibid*.) The appellate court reversed summary judgment. (*Id*. at pp. 73-74.) The County may have failed to maintain the sidewalk for all reasonable and foreseeable users under Government Code section 835. (*Childs* at pp. 73-74.) Even if riding a scooter on a sidewalk was unlawful, the County's duty was not limited to pedestrians; it owed a duty to other sidewalk users that were "neither extraordinary nor unusual [citation]." (*Ibid*.)

Williams (2020) and recreational biking on public roads

The recent case of *Williams v. County of Sonoma* (2020) 55 Cal.App.5th 125 ("*Williams*") reached a similar result regarding recreational biking on a public road, "to the extent the County already owed a duty to other road users to repair the pothole, we see little risk that imposition of the same duty with respect to long-distance, recreational cyclists would lead the County to take steps that would fundamentally alter the nature of the activity." (*Williams* at *4; see Civ. Code, § 3511 ["Where the reason is the same, the rule should be the same"].)

So to bring your case within *Williams*, conduct discovery to determine, inter alia, whether the hazard was dangerous for multiple categories of road users, including commuter biking, not just "long-distance, recreational cyclists." (*Williams* at *4.) CPRA requests may produce evidence of complaints that the pavement defect damaged cars and other vehicles, and that it also affected commuter bicyclists, not just weekend warriors.

Regarding the relationship of the parties, *Williams* reasoned that the County "owes a duty to maintain safe roads for all foreseeable uses. (*Williams* at *4.) Accordingly, "to the extent the County already owed a duty to other road users to repair the pothole, we see little risk that imposition of the same duty with respect to long-distance, recreational cyclists would lead the County to take steps that would fundamentally alter the nature of the activity." (*Williams* at *4; see Civ. Code, § 3511 ["Where the reason is the same, the rule should be the same"].) Imposing a duty to fix this pothole did "not materially increase the County's burden." (*Ibid*.)

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The "reasonableness" affirmative defense

A public entity is not liable for injury caused by a dangerous condition of its property under Government Code section 835, subdivision (b), if it proves its action to protect against the risk of injury created by the condition or failure to take action was reasonable. (Gov. Code, § 835.4.) This is in an affirmative defense. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1137.)

The reasonableness of an entity's (in)action turns on many facts: (1) the time and (2) opportunity to take action, weighing the (3) probability and (4) gravity of potential injury and damage foreseeably exposed to the risk of injury against (5) the practicability and (6) cost of protecting against those risks. (Gov. Code, § 835.4, subd. (b).)

Although determining reasonableness requires weighing facts and is unlikely to be determined as a matter of law, do not take any chances. Your discovery plan should also include identifying facts to rebut this affirmative defense if the case proceeds to trial.

Did plaintiff sign a waiver?

If your client was riding on open, public streets with a group to, say, train for an event, then he or she may have signed a release that purports to bar liability against the event organizer as well as the public entity that owns the roads.

Is your case over before it starts? Not necessarily. Review "New Year's Resolution: Defeat A Liability Release" in the January 2010 Plaintiff magazine and consider whether the release may be void as contrary to public policy. As a general rule, an "exculpatory clause which affects the public interest cannot stand." (*Tunkl v. Regents of University of Cal*. (1963) 60 Cal.2d 92, 98.) Safe roads are an essential public service that are highly regulated under statutory authority, and the public has little choice but to rely on public entities to maintain the roads.

Kronenberg

Steven A. Kronenberg is an attorney with The Veen Firm, P.C., *and works on the Label Trial Team. His practice helps the catastrophically injured (particularly those who have suffered food-related injuries and damages), protects consumers (through class-action claims arising from food fraud, false advertising, and defective products) and safeguards employees' rights (including restaurant staff and food processing workers). He has more than a decade of experience litigating complex matters from their inception through trial and appeal. He founded the Food Law Practice Group at his former defense firm and publishes articles on these issues in trade journals and foodlawblog.com. For more information, visit www.veenfirm.com.*

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