

# Holding public entities liable for dangerous conditions

*The rules are somewhat different than for privately owned premises, but proving the case is very similar*

BY MARK ZANOBINI

When someone enters a property, they have a reasonable expectation of not getting injured. This means that the owner of the property (or non-owner resident/tenant) is responsible for maintaining a relatively safe environment. This is known as “premises liability.”

The legal theory of premises liability holds property owners and residents liable for accidents and injuries that occur on that property. Premises liability has also been described as the liability for a landowner for certain torts that occur on the real property. This can range from injuries caused by a variety of hazardous conditions, including open excavations, uneven pavement, standing water,

crumbling curbs, wet floors, snow-covered walkways, icy sidewalks, falling objects, inadequate security, insufficient lighting, concealed holes, improperly secured mats, or defects in chairs or benches. For example, a courier delivering a package may sue a landowner or occupier for injuries if he slips and falls on an oil slick in the driveway. But if that same courier happened to be intoxicated or otherwise



acted in an unsafe way, then he may not have a valid claim or his claim could be compromised.

In California, liability is determined by the condition of the property and the activities of both the owner and visitor. It is important to remember that an occupier of land, such as an apartment tenant, is treated in the same manner as a landowner in most situations.

For premises liability to apply:

- The defendant must possess the land or premises
- The plaintiff must be an invitee or, in certain cases, a licensee. Traditionally, trespassers were not protected under premises liability law. However, in 1968, the California Supreme Court issued a vastly influential opinion, *Rowland v. Christian* (1968) 69 Cal.2d 108, which abolished the significance of legal distinctions such as invitee, licensee, or trespasser in determining whether one could hold the possessor of a premises liable for harm. The Supreme Court of California replaced the old classifications with a general duty of care to all persons on one's land, regardless of their status. The test is whether "the owner acted as a reasonable person in view of the probability of injury to others."
- There must be negligence — a breach of the duty of care — or some other wrongful act. In recent years, the law of premises liability has evolved to include cases where a person is injured on the premises of another by a third person's wrongful act, such as an assault. These cases are sometimes referred to as "third party premises liability" cases and they represent a highly complex and dynamic area of tort law. They pose especially complex legal issues of duty and causation

because the injured party is seeking to hold a possessor or owner of property directly or vicariously liable when the immediate injury-producing act was, arguably, not caused by the possessor or owner.

### **Public entities can also be held liable for a dangerous condition on public property**

California Government Code section 835 allows plaintiffs to hold a public entity liable for injuries caused by a dangerous condition of its property. To prevail under this section, a plaintiff must show the following six elements:

- (1) That [defendant] owned or controlled the property;
- (2) That the property was in a *dangerous condition* at the time of the incident;
- (3) That the dangerous condition created a *reasonably foreseeable risk* of the kind of accident that occurred;
- (4) That negligent or wrongful conduct of [defendant]'s employee acting within the scope of his or her employment created the dangerous condition; or That [defendant] had notice of the dangerous condition for a long enough time to have protected against it;
- (5) That [plaintiff] was harmed; and
- (6) That the dangerous condition was a substantial factor in causing [plaintiff]'s harm. (*Judicial Council of California, Civil Jury Instructions (CACI) § 1100 (Dec. 2008 Edition).*)

While the language used for establishing liability against a private entity versus a public entity is different, the practical application of proving the case is substantially similar.

As a good rule of thumb there are ten critical inquiries in every premises case, whether public or private.

- Is the condition or place dangerous?
- Have there been other accidents at or near the location?
- Who owns the property and is there insurance, or in the case of a public entity, funding?
- Who are all the possible defendants?
- Who owns it?
- Who controls it?
- Who maintains it?
- Who's working on it?
- Knowledge of the condition, is it obvious or hidden?
- What about the client?
  - Accident prone?
  - Clumsy?
  - Impairment involved?
  - Prior accident history?
- Invitee, guest or trespasser?
- Were the premises being used properly?
- Are there witnesses that need to be located and interviewed?
- How serious is the injury?



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See **Case in Point** on following page



Case in Point — Dangerous Condition of Public Property

# Accident near a BART station

*Thousands of CCSF students and their instructors used this dangerous walkway daily, until a serious accident focused attention on it*

BY MARK ZANOBINI

On October 14, 2008, at approximately 9:30p.m., Scott Mandeville began his journey home to Daly City after teaching an evening business class at the City College of San Francisco, where he is an adjunct professor. It was a clear and cool night as Mr. Mandeville headed from City College to the Balboa Park BART station, his usual method of transportation home. Mr. Mandeville started out by walking through the Wellness Center at City College and exiting out to Howard Street. He then crossed the light at Howard Street and turned left onto Ocean Avenue. From there, he walked along Ocean Avenue towards the BART station. Once reaching the station, he walked down a flight of stairs and turned left, walking along a retaining wall towards the MUNI tracks. He then walked through an open gate and turned right, continuing down an informal walkway towards the BART station entrance. (The term “informal walkway” is being used to refer to the area where the MUNI Green Yard meets the BART station. This area is characterized by a curved concrete wall that supports the BART station and the asphalt adjacent to the MUNI tracks. The informal walkway encompasses both the asphalt and concrete, as people routinely walk on both.)

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These two photos show the location of the trip-and-fall accident near a BART station.



The photo shows the location after repairs had been made to improve safety.

This was Mr. Mandeville's typical route home, which he took twice per week after his evening classes. As Mr. Mandeville was walking along the concrete informal walkway and reached about the mid-point distance, he suddenly felt his legs slip out from under him. He fell off of the concrete curb and onto the asphalt several inches below, falling hard to his right.

The photo (above) with drawing overlay was done by plaintiff's expert to show how a simple repair would remedy the dangerous condition.

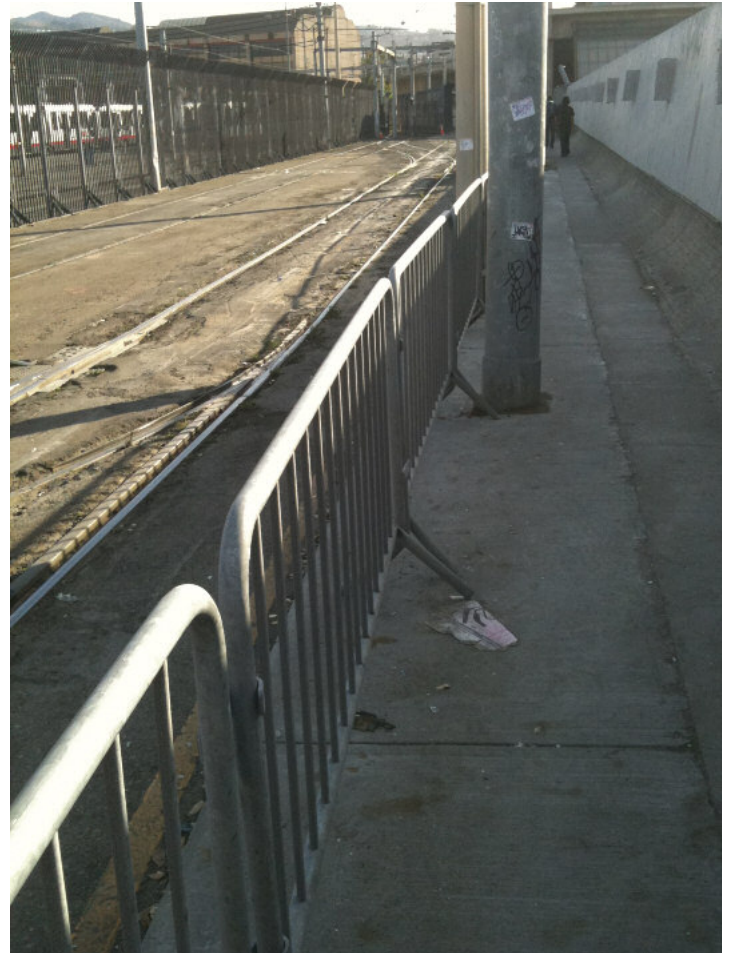
As the middle of his right thigh landed harshly against the edge of the concrete, Mr. Mandeville heard a

crack and felt excruciating pain in his right leg. He fractured his femur just above the knee.

In inspecting the premises we found that the condition appeared hazardous. We took multiple photos and determined that a number of hazards existed. The elevated portion of the concrete was too narrow to be a sidewalk; it was elevated to almost 12 inches at one section; the beveled edge of the concrete wall was a hazard and it was located too close to active tracks. A search of the Internet located numerous studies that were commissioned by both BART and CCSF indicating that this very place was considered hazardous to pedestrians.

There was a plan for improvements at Balboa Park Station, yet no short-term improvements were put into place for over nine years.

While we were unable to locate any similar accidents, the numerous studies and funding applications that we did locate were just as good, if not better. Additionally, neither BART nor CCSF



had any records of our client's incident despite the fact that security arrived prior to Mr. Mandeville being transported to the hospital. We argued that the lack of an incident report in this case was likely not an isolated event.

The wall was owned by BART. The ground next to it was owned by CCSF/MTA. Discovery showed that plenty of funding was available. Our expert concluded that the walkway could have been made safe for \$5,000. In fact, after the deposition of plaintiff's expert, the City got permission from BART to add concrete to the walkway and put up a railing.

In terms of ownership and control, we found, first informally and then through discovery thereafter, that the wall was part of the Balboa Park BART Station wall and it was located right next to a MUNI light rail yard. Both entities had control and maintenance responsibilities.

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The condition was obvious. The entities' own studies showed that they had been aware of it for over nine years. BART had signs that actually encouraged people to use this informal walkway rather than use the proper one on the other side of the station.

The client was a professor at CCSF who made a very good witness. He was wearing good shoes and his cell phone records showed a gap in usage until after the fall when he called his sister.

The walkway was open to the public and was used every day by many people.

The client was walking in a normal fashion, was not distracted and was able to be bodied.

There were no witnesses to the actual fall. However, a search of 911 records located the person who reported the fall. Additionally, multiple engineers from both BART and CCSF were deposed about the dangerous condition.

Plaintiff sustained a serious femur fracture requiring open reduction and internal fixation. He fell while recuperating and fractured it again.

Plaintiff had no health insurance because he was only a part-time professor at CCSF. His injuries and circumstances warranted pursuing the case. As a result of thorough investigation, including formal and informal discovery, we were able to establish liability against both governmental entities. The jury determined that BART was 40 percent at fault, CCSF was 40 percent at fault and plaintiff was 20 percent at fault. The result was a very good one for plaintiff.

