

APRIL 2020

The "concealed trap" exception to governmental immunities

This exception can be a useful tool to hew a path through the thicket of immunities thrown up by California's Government Code

By Daniel B. Pleasant

"It's a trap!"

Rarely has any character been rendered as memorable by a single line as good old Admiral Ackbar in *Return of the Jedi*. But whereas the admiral's cry was one of fear and consternation, plaintiffs' attorneys may make the same exclamation when working up a dangerous-roadway case against a public entity – but this time with hope and promise. This is because the so-called "concealed trap exception" to governmental immunities provides a rare opportunity to breach the wall of immunities protecting entities in these cases.

The trap exception is a creature of statute

The trap exception comes into play when there has been a collision or other mishap on public roadways. Oftentimes private insurance is insufficient to cover the damage wrought. Then we look to see if some defect in the roadway itself – whether physical or design – is a contributing factor.

Government Code section 835 sets forth the elements a plaintiff must prove when alleging a dangerous condition of public property: (1) the entity's ownership or control of the property; (2) the existence of a dangerous condition; (3) risk was reasonably foreseeable; (4) negligence or wrongful conduct of government employee created the condition *or* government had notice of the condition; (5) harm; and (6) causation.

And Government Code section 830 defines a dangerous condition as "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 determination as to whether a dangerous condition is in existence is typically a question of fact for the jury to decide. (See *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 569-570.)

Even if a plaintiff clears each of these hurdles, public entities have a (seemingly endless) number of immunities that shield them from liability notwithstanding the existence of a dangerous condition. Among these are design immunity (§ 830.6), sign immunity (§ 830.4), and traffic-control device immunity (§ 830.8.)

Section 830.6 (design immunity) requires the entity to plead and prove three elements: "(1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id*., at pp. 74-75.) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id*., at pp. 66-67.)

This immunity can be devilish. As far as causation, defendants often need look no further than the plaintiff's complaint. The preapproval element is basically an inquiry into the sufficiency of the government's recordkeeping abilities.

And note that the third element is not "reasonableness," but "*substantial evidence of* reasonableness.":

> The third element of design immunity, substantial evidence of reasonableness of design, requires only substantial evidence. '[A]s long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. The statute does not require that property be perfectly designed, only that it be given a design which is reasonable under the circumstances.' (Citation.) Generally, a civil engineer's opinion regarding reasonableness is substantial evidence sufficient to satisfy this element. (Citation.) Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness. (Citation.) *That a plaintiff's expert may disagree does not create a triable issue of fact.*

(*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 941.)

A discussion of strategies to overcome the design immunity is beyond the scope of this article. But for an excellent and helpful discussion of the topic, see Sara Peters, "The Dangerous Roadway Case" (November 2016), at www.plaintiffmagazine.com.

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The genesis for the concealed trap exception

In addition to design immunity, section 830.4 provides absolute immunity for a public 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 (lane markings). That immunity is further buttressed by the qualified immunity in section 830.8:

> Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. *Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.*

It is this second, emphasized sentence which provides the genesis for the concealed trap exception, which is, in essence, a failure-to-warn claim. As the Law Revision Commission Comments to this section explain, "This section prevents the imposition of liability based on the failure to provide traffic regulatory or warning signals or devices of a type not listed in Section 830.4, but liability may exist for failure to provide such a signal or device where the condition constitutes a trap to a person using the street or highway with due care."

California cases explain the trap exception

Most importantly, this exception imposes a duty upon a public entity to warn of a dangerous condition even where that condition arises from a design or plan for which the public entity enjoys design immunity. (*Cameron v. State* (1972) 7 Cal.3d 318, 329.) In *Cameron*, the Supreme Court rejected the state's argument that it was protected by design immunity against liability for the uneven super-elevation of the highway. (*Id*., at p. 326.) The court, however, went on to hold that even if design immunity applied, the plaintiff was entitled to go to the jury on a concealed trap theory under section 830.8. (*Id*., at pp. 328-329.) The court said:

> [W]e conclude that where the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident.

(*Cameron*, 7 Cal.3d at 329.)

The trap exception has been part of California law since 1963, so there are myriad cases discussing it, pro and con. The following non-exhaustive selection of positive cases may ring a bell with your facts, or at least jump-start your research:

- *Anderson v. City of Thousand Oaks* (1976) 65 Cal.App.3d 82

A passenger died when the driver failed to negotiate a curve in the road. The court found the unwarned-of curve to potentially be a trap, precluding summary judgement. "Appellants' averments in their counteraffidavit as to the speed parameters of the … curve seem to illustrate the kind of trap contemplated by section 830.8. … Without any warnings prior to the curve, even a cautious driver might well commit himself to the curve at a speed ten miles per hour in excess of the maximum safe speed, posing the grave danger of either losing control of his automobile or of leaving the roadway." (*Id*., at p. 93.)

- *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 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. "[I]t 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.)

- *Briggs v. State of California* (1971) 14 Cal.App.3d 489

Once the state undertakes to sign an area, which in that case involved a location where there had been prior rock slides, it could be held liable for creating a dangerous condition for inadequate or deceptive signs. "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, … 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." (*Id*., at p. 497.)

- *Bunker v. City of Glendale* (1980) 111 Cal.App.3d 325

The plaintiff was riding a motorcycle up a steep hill. 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

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the hill, he was traveling 25 to 30 mph and unable to stop before colliding with the backing vehicle. While the posted speed limit 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 the City negligent under section 830.8 for the failure to warn. The Court of Appeal affirmed.

"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.)

Recent uses of the trap exception

So, to use the concealed trap exception, you have to answer two questions:

- What exactly was the concealed dangerous condition?
- What warning devices – other than those specifically delineated in section 830.4 0 – could have been employed to warn unsuspecting users of the roadway?

Our firm has advanced the trap exception in three recent cases, summarized below to provide real-life examples of how we answered those questions.

In *Harter v. City of Santa Rosa*, our firm represented the family of a motorcyclist who was killed when he collided with a car entering the major road he was riding on from a side street. We alleged that the motorcyclist could not see the intersection as he approached the side street because the cars parked on the major road went right up to the intersection. In addition, the intersection came immediately after a curve in the major road, limiting the distance ahead both the motorcyclist and the driver could see. We claimed the signage in place at the time of the collision – a basic right curve warning sign that did not warn of the impending intersection – was inadequate because it did not advise drivers on the main road that they were approaching a blind intersection.

In *Beach v. Contra Costa County*, the plaintiff was severely injured when she was struck by a car while crossing a major road in a marked, but uncontrolled, crosswalk. She had just alit from a bus, which was still stopped at a bus stop located immediately before the crosswalk. The gravamen of her complaint is that the interplay between the bus stop location and the crosswalk created a dangerous condition of public property because westbound drivers on Willow Pass and pedestrians in the crosswalk could not see one another when a bus was stopped at the bus stop.

The County's improvement plans for the area called for two signs on the main road warning of the impending crosswalk. Neither was in place on the day of the collision. Nor was the pavement before the crosswalk painted with a "PED XING" warning, which was also called for in the plans. We alleged that the trap was the confluence of the marked crosswalk at an uncontrolled intersection and the bus stop with a stopped bus, which blocked southbound pedestrians and westbound drivers' views of each other, combined with the three missing pedestrian-crossing-ahead signs and markings. We claimed the visual obstruction hazard and missing signs created a classic "trap."

A recent bicycle case

Finally, in a case still pending, we represent the family of a bicyclist killed when he was struck by a motorist as he attempted to cross a major artery to reach a bicycle lane. The "weave" maneuver that bicyclists had to execute was unfamiliar and unexpected for motorists. The unexpected bicycle movement, paired with the high motor-vehicle speeds in the area, made appropriate warnings a critical necessity for the roadway.

Discovery revealed an email authored by the project's bicycle-safety expert discussing signage. "I think XING [sign] is needed and more too." He advised that the area called for a sign or signs that indicated to motorists "Thru bicycles crossing all exit lanes, next 2000 feet." He commented: "I know that's not in the MUTCD but [the interchange] is so important for popular 'Loop' circuit ride that is a major part of [local] cycling that we need to think 'out of the box' regarding striping, signage and speed control."

Ultimately, only a 'bike' and accompanying 'Bike XING' sign were placed in the area. These were the only warning signs installed in the area. These signs did nothing to warn motorists that bicyclists weave across both lanes of traffic or where they could expect to see bicyclists making this maneuver. It did not alert or advise motorists to expect right-to-left merging movements from bicyclists or that there was a left-sided bike refuge and bike lane that bicyclists would have to access in a short distance. It did not remind motorists to slow down for bicyclists and certainly did not alert motorists to when bicyclists were actually present in the area. We alleged this signage was wholly inadequate to alert and warn motorists of the dangerous condition at the major artery.

Lessons learned and techniques tried

When claiming liability for a dangerous condition of property, the plaintiff must set forth detailed and specific facts supporting each element of liability; general allegations are inadequate. (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5.) This requirement of pleading specificity extends to claims about the existence of a trap. "The limited and statutory nature of governmental liability mandates that claims against public entities be specifically pleaded. (Citation) Accordingly, a claim alleging a dangerous condition may not rely on general allegations (Citation) but must specify in

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what manner the condition constituted a dangerous condition." (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439-440.)

But when drafting complaints, especially in a dangerous-condition case, we often lack details other than those that can be gleaned from traffic collision reports and informal site inspections. So when our opponents file a motion for summary judgment, it is a good idea to take stock of the evidence and beef up the complaint accordingly.

Opposing summary judgment

In fact, California courts require parties opposing summary judgment to amend their complaints to conform to proof. "The pleadings delimit the issues to be considered on a motion for summary judgment. [Citation.]" (*Turner v. State of California* (1991) 232 Cal.App.3d 883, 891.) Thus, a "defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party's evidence would show *some factual assertion*, legal theory, defense or claim *not yet pleaded*, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. [Citations.]" (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265, emphasis added.) "[T]he pleadings 'delimit the scope of the issues' to be determined and '[t]he complaint measures the materiality of the facts tendered in a defendant's challenge to the plaintiff's cause of action.' [Citation.] [Plaintiff's] separate statement of material facts is not a substitute for an amendment of the complaint. [Citation.]" (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1201-1202, fn. 5, see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253, as modified on denial of reh'g (July 7, 2008).)

Thus, the law requires that if a party opposing a motion for summary judgment intends to allege new facts in its opposition, it must amend the complaint to include those new factual allegations. This is doubly true for an affirmative allegation like the trap exception. If it's not in the complaint, the trial court is unlikely to allow you to argue it in opposition to a motion for summary judgment.

We used this tactic in both the *Harter* and *Beach* cases discussed above. In *Harter*, our new facts consisted of the facts alleged in our draft separate statement – all 38 of them. After the court granted our motion, the defense withdrew their motion, intending to refile to address our updated allegations. Before they did so, the case settled.

In *Beach*, our updates weren't as extensive, but again the defense opted to withdraw their pending motion and refile. In the interim, we filed our own proactive motion for summary adjudication of the defendant's design-immunity defense. We focused on the preapproval element because neither the County nor its proffered employees knew when the bus stop was sited or the subject crosswalk first striped and installed.

Although the court denied our motion, it found a triable issue as to preapproval, in effect pre-empting the County's subsequent MSJ argument. The exercise also provided us valuable insights into the defense and court's view of the evidence. And when the County did file its motion, it failed to address plaintiff's allegations of a concealed trap. We pointed out to the court that "a defendant moving for summary judgment has the burden of negating *every* alternative theory of liability presented by the pleadings...." (*Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268, 271, fn. 1, emphasis added.) "A defendant is not entitled to summary judgment unless that moving party negates *all theories of liability* pleaded by the plaintiff." (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 397, emphasis added and citing *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717.)

The court denied the defense motion, and the case settled on the eve of trial.

Conclusion

"It's a trap!" is not a magic incantation that will make a governmental entity's immunity arguments disappear. Nevertheless, the concealed trap exception can be a useful tool for the creative litigator attempting to hew a path through the thicket of immunities thrown up by California's Government Code.


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