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Pedestrians: Walking the line of dangerous-condition claims

MISSING TRAFFIC SIGNALS, INADEQUATE CROSSWALKS, AND IMPROPER SIGNAGE

A woman named Alice

A young woman named Alice is crossing a busy street in a marked mid-block crosswalk. An approaching car in the slow lane sees her crossing and stops for her. The car obscures her view from a driver approaching in the fast lane.

There is no stop sign; there is no traffic signal. The driver in the fast lane is only required to stop if he sees someone in the crosswalk. The driver in the fast lane does not register that the driver in the slow lane has stopped for a pedestrian. He thinks the driver in the slow lane has stopped to pull into a nearby busy strip mall parking lot. The driver in the fast lane continues driving. He strikes and kills Alice.

The crosswalk has had two potentially similar prior incidents. The crosswalk also has an observed history of near misses. A traffic engineer is willing to state that the crosswalk is in a dangerous condition and that the City should have put up a traffic signal or a stop sign to protect pedestrians using the crosswalk. Alice's family wants you to bring a dangerous condition claim against the City.

Not so fast. Government Code section 830.4 states that a City is not liable for a dangerous condition created *solely* from the failure to provide traffic control signals, stop signs, or other traffic control signs. Section 830.8 states a City is not liable for a dangerous condition created *solely* from the failure to provide traffic warning signals, signs, or markings.

Now here is where things get a little convoluted. If the plaintiff identifies a dangerous condition that is independent of merely failing to provide traffic control signals/signs/devices, the immunities under 830.4 and 830.8 are defeated. (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534-35.) Once the immunities of section 830.4 and 830.8 are lifted, the plaintiff may introduce allegations of the missing traffic control signals/signs/devices to show that the City is at fault for failing to eliminate or mitigate the harm created by the independent dangerous condition.

This article is going to walk you through the basics of asserting an independent dangerous condition to avoid immunity under sections 830.4 and 830.8.

Dangerous condition of public property

A "dangerous condition" of property creates a substantial risk of injury when such property is used with due care in a manner which it is reasonably foreseeable that it will be used. (Gov. Code, § 830, subd. (a).) Public property can be in a dangerous condition because of the design or location of the improvement, the interrelationship of its structural or natural features, or the presence of latent hazards associated with its normal use. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148-49.) A dangerous condition of public property may be based on an 'amalgam' of factors. (*Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466.) "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts." (*Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, 206.)

Sight obstruction

In cases involving pedestrians struck in crosswalks, one potential avenue of attack is visibility and sight obstruction. Courts throughout the State of California have repeatedly held that a dangerous condition exists when a driver's vision is obstructed by conditions surrounding and approaching public property. In *Erfurt v. California* (1983) 141 Cal.App.3d 837, the plaintiff was driving east on a freeway at dawn. The driver went over a hill that had been shielding her from the rising sun. Sudden blinding light hit the driver. Unable to see and with no proper traffic channeling to guide her, the driver collided with another vehicle. The Court of Appeals upheld the dangerous-condition claim, explaining that the sudden blast of sunlight combined with the lack of adequate traffic channelization created a dangerous condition. (*Id.* at pp. 843-45.)

In *Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, the plaintiffs claimed that a dangerous condition existed because a shadow from a nearby freeway and pillars obscured the view of the driver approaching the intersection. The defendant argued it could not be held liable simply for failing to put a traffic signal/control at the intersection. The Court held that a government entity is liable for a dangerous condition when conditions near and approaching the intersection obscure the view of the driver approaching the intersection. The court found that the visual obstruction caused by shadows and pillars from the nearby highway created a dangerous condition. (*Id.* at pp.1534-1538.)

In *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, a motorist was killed at an intersection because trees and signs near the intersection obstructed the view of a driver approaching the intersection. The City argued it was not liable since it did not erect the sign that obstructed the driver's view. The Court rejected this argument, stating that visual obstructions adjacent to intersections that interfere with a driver's vision constitute a dangerous condition. It was immaterial that the City did not own the sign that obstructed the view.

The cases the City will rely on

The City will rely on cases such as *Mixon v. State of California* (2012) 207 Cal.App.4th 124. However, *Mixon* does not alter the basic landscape of the law regarding independent dangerous conditions and the failure to mitigate them. In *Mixon*, the plaintiffs argued that a crosswalk was dangerous because the State had not installed traffic signals and overhead lights. The Court noted that the State had no duty to install traffic signals/street lights, and the mere failure to install such signals/lighting *by itself* was not enough to create a dangerous condition. The Court found nothing about the crosswalk that independently created a dangerous condition.

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The Court held: [A] public entity may be liable where a dangerous condition “exists for reasons *other than or in addition* to the ‘mere’ failure to provide such controls or markings.” (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1536, original italics.) Sight restrictions caused by metal pillars in the street and an overhead freeway may combine with the absence of regulatory traffic devices to create a dangerous condition, for example.

(*Id.* at p. 1535.) *Here, there are no additional features to combine with the lack of a traffic control signal to make the 3rd and R Streets intersection dangerous, as further discussion reveals.*

(*Id.*, at p. 835, emphasis added.)

Another case likely to be relied upon by the City is *Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177. Again, *Sun* does not change the basic premise of *Washington v. City and County of San Francisco*. In *Sun*, the crosswalk had been previously marked but the City removed the markings. The *Sun* Court explained that the City had no duty to provide a crosswalk, let alone a marked crosswalk. The Court noted that the absence of a marked crosswalk by itself is not enough to create a danger. Citing *Washington supra*, the Court noted that the plaintiffs had failed to allege any unusual characteristics or visual obstructions at the crosswalk that concealed the presence of pedestrians or the crosswalk itself.

Alice: The independent dangerous condition

After identifying an independent dangerous condition, Alice’s family brought a wrongful death lawsuit. The City filed a motion for summary judgment claiming that Alice’s claim was barred under sections 830.4 and 830.8. The motion was denied and the case ultimately settled. The arguments below, which were used to defeat the motion, provide a road map for defeating immunity under sections 830.4 and 830.8.

If pedestrians are not visible, they are in danger.

1. A midblock crosswalk: The subject crosswalk is a midblock crosswalk, which is not typical or normally expected by drivers. Drivers are trained to expect crosswalks and pedestrians at intersections, and are generally able to identify approaching intersections. Midblock crosswalks, on the other hand, appear randomly and potentially cause confusion or surprise to drivers. At intersections, unlike midblock crosswalks, drivers are naturally trained to be on the lookout for cross traffic which is to the benefit of a pedestrian. Yet with midblock crosswalks, drivers need adequate warning and time to identify the crosswalk, make a determination that a pedestrian is in the crosswalk, and come to a halt if they see a pedestrian.

Traffic engineers typically disfavor midblock crosswalks due to inherent and well-documented dangers. The California Manual on Uniform Traffic Control Devices (“MUTCD”) explains that “[m]id-block pedestrian crossings are generally unexpected by the motorist and *should be discouraged*,” and “[p]articu- lar attention should be given to roadways with *two or more traffic lanes in one direction as a pedestrian may be hidden from view by a vehicle yielding the right-of-way to a pedestrian*.” (Emphasis added.)

Studies have shown that midblock crosswalks have a higher rate of accidents involving pedestrians than crosswalks at intersections. The higher accident rate can be attributed to the fact that drivers need more time to perceive and react to pedestrians in midblock crosswalks. The unexpected appearance of midblock crosswalks and pedestrians disrupt the driver’s normal driving pattern. The fact that the subject crosswalk is a midblock crosswalk contributes to the dangers created by the conditions surrounding the crosswalk.

2. Unless the driver sees a pedestrian, he is not required to stop: In our scenario, normally drivers traveling westbound would not be required to stop at the subject crosswalk. The only time a driver is required to stop at a crosswalk is if the driver actually sees a pedestrian in the crosswalk. If the driver does not see anyone in

the crosswalk, he is always permitted to drive through it. There is *nothing* in the area around the subject crosswalk that required our driver in the fast lane to stop, because he never observed Alice in the crosswalk.

Pedestrian safety inside the subject crosswalk depends on approaching drivers having the ability to see pedestrians with enough time to bring their vehicles to a halt. Anything that interferes with pedestrian visibility poses a threat to pedestrians because drivers are not required to stop at the crosswalk for unseen pedestrians.

3. The speed of the road: A driver approaching a midblock crosswalk needs more time to identify and stop to avoid pedestrians than a driver approaching a crosswalk at a traditional intersection. (DF 31) Unfortunately, in our scenario, the speed limit in the area leading up to the crosswalk is 35 mph. At that speed, a car travels approximately 51 feet per second.

4. High amount of pedestrian travel: A 2006 City study revealed that the subject crosswalk was the most used midblock crosswalk in the City. (DF 39)

Given that the subject crosswalk is midblock, is in a 35 mph zone, and that drivers are not required to stop unless they actually see a pedestrian, drivers and pedestrians already start out at a disadvantage as they approach the subject crosswalk. The driver needs extra time to see the pedestrians, and pedestrians are more vulnerable to the dangers of drivers not being able to stop in time. These factors mean that anything that interferes with pedestrian visibility creates an especially dangerous condition for pedestrians.

5. Interference with visibility of pedestrians caused by the surrounding area: Strip malls flank the subject crosswalk. It is located extremely close to the entrance to one of the malls. A car traveling westbound must enter the mall by turning right from the slow lane. The mall is often very congested. Cars are often required to stop and wait in the slow lane before entering the mall. Because the mall is located so close to the subject crosswalk, cars in the slow lane waiting to enter will often be

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stopped in front of the crosswalk. This congestion creates an ambiguous signal to drivers in the fast lane. Drivers in the fast lane may reasonably believe that a car stopped in the slow lane is stopped because of congestion at the mall. Furthermore, cars stopped in the slow lane will block a driver traveling westbound in the fast lane's view of pedestrians.

The crosswalk is also located near a heavily congested intersection. The traffic light at the intersection frequently causes traffic to back up as far back as the mall. Combined with the mall traffic, traffic frequently backs up to and beyond the subject crosswalk. As such, a car stopped in the slow westbound lane in front of the subject crosswalk can be stopped as a result of traffic from the mall, the traffic from the intersection, or a combination of the two. The same level of traffic congestion does not exist in the westbound fast lane. As such, a car stopped in front of the crosswalk in the slow lane does not necessarily mean that a pedestrian is in the crosswalk.

6. Prior incidents: There were at least two prior collisions between vehicles and pedestrians in the crosswalk. Moreover, as set out in the declaration of a security guard working at the mall there were numerous near misses between pedestrians and drivers at the subject crosswalk. Sometimes cars would come to a screeching halt at the last minute to narrowly miss striking a pedestrian in the crosswalk. The security guard felt that the drivers were having such a difficult time seeing pedestrians in the crosswalk that at times he would try to stand in or near the crosswalk in order to get the attention of approaching drivers. Conditions at the crosswalk are so difficult for pedestrians that the City police department received complaints about pedestrian safety, prompting them to run "sting operations" at the crosswalk. The goal of the sting operations was to try to catch drivers who were failing to see pedestrians in the crosswalk. The sting operations were running in the years before Alice's death.

7. A sudden blast of glaring sunlight interferes with pedestrian visibility: Because of the configuration of the area, just before they reach the crosswalk,

westbound vehicles at sunset are suddenly hit with a blast of glaring sunlight. This sudden and unexpected blast of sunlight makes it extremely difficult for drivers to see pedestrians in the crosswalk and creates a dangerous condition. The City's own accident investigation team admitted that the glare from the sunlight is so intense that it can obscure visibility of pedestrians in the crosswalk, and even cars stopped in the slow lane. The City's own investigating officers even admitted that they believe that the intense glare from the setting sun poses a visibility hazard to all drivers approaching the crosswalk. Several witnesses in deposition also indicated that they also frequently have had problems with visibility at the crosswalk due to the intense glare from the setting sun.

Reconstructing the accident scene

In one recent case, plaintiff's accident reconstruction expert visited the subject crosswalk and took measurements and shot photos of the area approaching the crosswalk. A series of photos was taken from the perspective of a driver traveling westbound in the fast lane under similar lighting conditions as those in effect on the date of Alice's death.

The first photo was taken approximately 510 feet away from the subject crosswalk. If a driver is traveling westbound at 35 miles per hour/51 feet per second, this picture shows what the driver would see approximately 10 seconds before reaching the crosswalk. At 510 feet away from the crosswalk, both sides of the road are lined with trees and buildings. The trees and buildings shield the driver's eyes from the effects of the setting sun. The same is true for second photo (approximately 460 feet/9 seconds away), the third photo (approximately 410 feet/8 seconds away) and the fourth photo (approximately 360 feet/7 seconds away.)

In the fifth photo, however, taken approximately 308 feet/6 seconds away from the subject crosswalk, the shading from the trees and buildings suddenly disappears. The driver is suddenly hit by an unexpected blast of glaring sunlight. The angle of the sun, the direction of the light, the intensity of the light, and the

sudden appearance of the light from a previously shaded area all combine to interfere with the driver's ability to see pedestrians in the subject crosswalk. The same intense blast of glaring sunlight also is seen in the sixth photo (approximately 256 feet/5 seconds away).

While it is true that westbound drivers generally have to deal with the sun at sunset, the situation at the subject crosswalk is dramatically different than on roads in general. Drivers approaching this crosswalk are protected from the setting sun by shade. The shade unexpectedly and suddenly disappears just before the driver reaches the crosswalk, exposing him to a sudden and unexpected blast of glaring sunlight that he is not accustomed to or expecting. The sunlight interferes with the driver's ability to see pedestrians. The driver needs time to adjust to the burst of sunlight, which he does not have.

Human factors

According to plaintiff's human factors expert, the timing of this sudden blast of setting sunlight could not be worse. Approximately three hundred feet before the crosswalk, the driver needs to be able to start identifying the crosswalk, assessing whether there are pedestrians in the crosswalk, and taking the time to bring his vehicle to a halt. The sudden burst of setting sunlight interferes with the driver's timing, compromises the ability of the driver to see pedestrians, and compromises warnings that pedestrians might be in the crosswalk. The driver needs extra time to adjust to the new lighting conditions. It is hard enough to see a pedestrian at this crosswalk under the best of conditions. The sudden blast of glaring setting sunlight turns a bad situation into something very dangerous – a trap for the driver and a trap for the pedestrian.

As explained by Plaintiff's accident reconstructionist, it took Alice approximately 4.9 seconds to enter the crosswalk and reach the point where she was hit. Alice entered the crosswalk when the driver in the fast lane was being hit with a sudden blast of glaring sunlight.

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This dangerous situation was compounded by the fact that a vehicle stopped in the slow lane in front of the crosswalk was blocking the other driver's view of Alice. (A danger of mid-block crosswalks warned about in the MUTCD). It took Alice approximately 2.6 seconds to clear the car stopped in the slow lane. The driver only had approximately 2.3 seconds (4.9 minus 2.6) to try to pick out Alice in the middle of a visually cluttered and confusing crosswalk while battling the glare from a sudden burst of sunlight.

The driver testified that the glare blocked his ability to see Alice in the crosswalk. As explained by Plaintiff's experts, the angle of the sun, plus the surprise blast of glare caused by the sudden disappearance of cover from trees and buildings, washed out the driver's ability to see pedestrians. As a result, the driver drove through the crosswalk and struck Alice.

The "additional features" to defeat immunity

Unlike *Mixon* and the other cases cited by the City, in this case there are "additional features" that make this crosswalk dangerous. There are a variety of features surrounding and approaching the crosswalk that obstruct a driver's view of pedestrians, especially at sunset. The visual obstruction caused by the sudden blast of sunlight approaching the subject crosswalk means this case is closer to *Washington v. City and County of San Francisco* and nearly identical to *Erfurt*. As explained by Plaintiff's traffic engineer and human factors expert, the City must take steps to eliminate the dangerous conditions surrounding the crosswalk. Those steps include the installation of a traffic signal.

Third-party negligence does not absolve the City

The City argues that the driver should have been paying closer attention and/or had a cleaner windshield. The driver disputes these contentions and disputes that his windshield interfered with

his ability to see. However, even if the driver was negligent, third-party negligence does not absolve the City from liability created by a dangerous condition.

In *Bonanno v. Central Contra Coast Transit Authority*, *supra*, 30 Cal.4th 139, a pedestrian was injured while trying to reach a public bus stop owned by the Authority. The plaintiff complained that the conditions of the area surrounding the bus stop created a danger for pedestrians trying to access the bus stop. At the time of the incident, the plaintiff was standing in a marked crosswalk that featured flashing warning lights. Driver Kimberly stopped her vehicle in front of plaintiff and the plaintiff began to cross the street. Driver McClain approached the intersection in his vehicle but had difficulty seeing because he had not cleaned the frost off his windshield and the frost and sunlight made it difficult for him to see the road ahead. Driver McClain slammed into Driver Kimberly who was then pushed into the Plaintiff.

After concluding that sufficient evidence existed to find CCCTA liable for dangerous condition, the California Supreme Court found that Driver McClain's misconduct did not absolve CCCTA of liability for creating a dangerous condition. The Court wrote, "Nor does the fact plaintiff's injury was immediately caused by a third party's negligent or illegal act (here, McClain's negligent driving) render the present case novel. No shortage exists of cases recognizing a dangerous condition of public property in some characteristic of the property that exposed its users to increased danger from third party negligence or criminality." (*Id.* at p.152.)

An open pit in the middle of a freeway is a dangerous condition to all approaching drivers, regardless of whether the driver who falls into the pit was speeding. So long as a plaintiff can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he successfully alleges a dangerous condition regardless of the plaintiff or a third party's lack of due care. (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799.)

Conclusion

It should be noted that getting past sections 830.4 and 830.8 does not automatically guarantee victory. For example, in Alice's case, the City also claimed design immunity. Alice's case survived design immunity because the City had not done anything from a design perspective connected to visibility obstruction issues or the sudden blast of sunlight. To assert design immunity there must be proof that an alleged design defect was responsible for the accident, as opposed to some other cause. (*Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-940.) The injury-producing feature must have been a part of an approved plan. (*Id.* at p. 941.)

In *Flournoy v. State* (1969) 275 Cal.App.2d 806, 813, a woman died in a collision after her car hit ice on a bridge. The Court held that the State failed to establish the "prime requisite" of design immunity, namely a design-caused accident. Physical surroundings (icing on the bridge) rather than bridge design caused the collision. Because ice formation was not a design choice, nothing inherent in the bridge design caused the accident. The bridge design worked in other drier locations.

Plaintiffs must walk a fine and complicated line in dangerous crosswalk cases. However, as with Alice, with the right facts and the right arguments, a path for victory exists.

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