

An overview of government tort liability and immunities

By Jonathan Bakhsheshian and Anthony Ellis

Government tort liability

Different standards and requirements apply depending on the claim of action your client is asserting against a government entity or employee. For example, causes of action for negligence in dealing with foster care, injuries during a legal riot, adoption care, etc. have different rules to follow compared to injury actions asserted against a government employee, government vehicle, or an injury on public property. The general principle of liability applies to causes of action based on a public employee's acts or omissions and claims based on defective conditions on public property.

A. Liability for dangerous conditions on public property

Rather than the ordinary standard of an *unsafe condition* required against private entities, governmental agencies are held under a more lenient standard, the *dangerous condition* standard. Governed by Government Code § 830(a), when proving whether the public property was in a

dangerous condition at the time of the injury, the moderate standard requires more; specifically, you must allege additional evidence beyond the allegations of just an insignificant or minor risk of injury. Furthermore, whether a condition creates a substantial risk of harm depends on how the general public would use the property while exercising due care, including children who are held to a lower standard of care. The dangerous condition must have also been created by the public entity's negligence and the entity must have had adequate prior notice of the dangerous condition; actual or constructive notice is sufficient. Evidence of prior accidents is often offered to show a dangerous condition on public property. The previous accidents must be connected to the physical condition alleged to be dangerous.

The dangerous condition standard is objective. (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462.) Liability attaches only if the injury is attributable to a use of the property in a reasonably foreseeable manner; there is no liability if the condition becomes dangerous through

misuse. The negligence of a plaintiff in using public property is not determinative of whether a dangerous condition exists. Rather, the plaintiff's negligence is used only to determine comparative fault. (*Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122.) Dangerous condition liability only applies to a physical condition and not the conduct of a third party who caused the dangerous condition. However, public entities are immune from natural conditions on public property. This includes the effects of fog, wind, rain, ice, snow or other weather conditions on streets and highways.

B. Liability for failure to perform mandatory duty

Public entities are immune from liability for injury caused by the failure to enforce any law or adopt an enactment. If a public entity fails to reasonably and diligently perform a mandatory duty imposed by a statute or law that is designed to protect against the kind of injury that the plaintiff suffered from, then the public entity is liable for the injuries that were proximately caused by the public entity's failure to perform the mandatory duty. (Gov. Code § 815.6.) If, however, the enactment was not created to protect against a specific harm, but the mandatory duty could have prevented the specific harm, the public entity is not liable. For example, in *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, a federal regulation that required the county medical examiner's office to prevent theft of controlled substances did not quid pro quo impose a mandatory obligation to guarantee that no such materials would ever be stolen.



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Government immunities

Any governmental immunity from liability is jurisdictional and is not waived by their failure to assert it in the answer. This is not the rule when dealing with a government claim pursuant to the Federal Tort Claims Act.

A. Ordinary common immunities and affirmative defenses

Government entities are entitled to the same ordinary common immunities and affirmative defenses, including recreational use, third-party conduct as superseding cause, statute of limitations, comparative fault, etc. For example, proof of the plaintiff's comparative negligence would not necessarily exonerate a public entity from all liability; instead, it might serve only to reduce the public entity's liability exposure in proportion to the negligence of the plaintiff. Another example is that third party conduct unrelated to the condition of the public property does not constitute a "dangerous condition" for which a public entity may be held liable. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058.) However, nothing in the Government Code precludes a public entity's duty to protect against harmful criminal conduct on its property.

B. Design immunity

If a public entity can prove that it had discretionary approval of the plan or design by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval before construction and evidence supporting the reasonableness of the plan or design, then the government entity is absolved from liability. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63; Gov. Code § 830.6.) Testimony by professional registered traffic engineers can be used to establish whether the design criteria was proper and safe, based on common engineering practices, and whether the evidence is sufficiently substantial to justify the design.

Design immunity is often brought up on demurrer or summary judgment because the existence of design immunity is a question of law for the court to determine. (*Morfin v. State of California*

In this context, statutory language is narrowly construed. Courts have held that statutory language that includes the word "shall" does not necessarily create liability for a public entity's failure to discharge a mandatory duty imposed by an enactment. (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809 [finding that "shall investigate" did not require the county to conduct investigations into a firefighter's grievances regarding coworkers' and that any investigation was discretionary].) An enactment creates a mandatory duty only when the mandatory duty does not lend itself to a normative or qualitative debate over whether that mandatory duty was adequately fulfilled. This requires the connection between the mandatory duty and the injury to be closely linked and directly related. (See, e.g., *Braman v. State of California* (1994) 28 Cal.App.4th 244 [Department of Justice was liable when it failed to perform its mandatory duty of investigating prospective handgun buyers when the buyer's medical history was the proximate cause of the murder].)

C. Vicarious liability for employees' common law negligence

All public entity liability is statutory. Public entities cannot be held directly liable for common law negligence. However, under Government Code § 815.2, public entities are vicariously liable for their employees' conduct, even for common

law negligence. To establish liability, you must allege liability for failing to perform a mandatory duty which requires an analysis of the employee, not the entity. By way of example, in *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, in determining whether a public entity was vicariously liable for the emergency services' dispatchers' negligence, the court first examined whether the individual dispatcher entered into a special relationship with the individual, creating a duty of care, which would impose liability.

If the individual employee of the public entity did not enter into a special relationship, then irrespective of whether there were any injuries, the public entity is not liable. (*Zelig v. County of Los Angeles* (2002) 47 Cal.4th 1112 [holding that a sheriff's duty to protect did not impose a mandatory duty to protect or warn the victim or control the attacker's conduct].) Note that the immunity does not apply to any person performing volunteer services for a public agency. An exception does apply for a peace officer working as a private security guard. (See Penal Code § 830.)

D. Liability for independent contractors

Unlike the Federal Tort Claims Act, under the California Tort Claims Act, if a public entity hires an independent contractor to perform work, the entity is liable for any injury proximately caused by their negligence. (See Gov. Code § 815.)

(1993) 12 Cal.App.4th 812.) For example, government agencies are immune from liability arising from the ownership or operation of a dog park and are not liable for any injury or death of a person resulting from the actions of a dog in a dog park. (See Gov. Code 831.7.5.)

C. Discretionary acts and omissions

A tort claim cannot be brought against a public employee when the basis of the tort is an act or omission of a public employee in the execution of a statute, regulation, performance, or failure to perform a discretionary function or duty. Public entities are also not liable for injuries caused by misrepresentation or by adopting or failing to enforce any law. Although a decision may be deemed discretionary and warrant governmental immunity, subsequent operational actions in implementing the decision can give rise to liability. This immunizes the policy-making decision but not the operational functions necessary in carrying out the decisions. For example, psychologists employed by the government are not immune from liability for failure to warn a third person of a risk of harm. The courts require public employees to exercise considerable judgment in making decisions regarding the type and extent of services necessary for the employee to perform their duty to their clients.

A public employee is liable for injuries proximately caused by their employee's negligence, unless the employee is immune from liability. For example, governmental employees such as deputy public defenders and other attorneys hired by government agencies cannot assert the immunity for any alleged negligent misrepresentation of a defendant in a criminal action. (*Wiley v. County of San Diego* (1986) 19 Cal. App.4th 532.) But adoption workers are immune from their decisions on whether a child is adoptable and foster care workers are immune from any alleged negligence following the placement of a dependent child in a foster home. Public officials are not vicariously liable for injuries caused by the entity's act or omission, but are personally liable for their own wrongful conduct.

Generally, public employees are liable for injuries caused by a negligent or wrongful act or omission in operating a vehicle as long as they are acting within the scope of their employment. Immunity

can be asserted for injuries from police pursuits. This precludes a cause of action against an authorized emergency vehicle that is in immediate pursuit of an actual or suspected violator of the law. This includes any injuries sustained in collisions caused by the pursuing public officer's ramming of a vehicle. Immunity also attaches for any injuries caused by persons escaping arrest or detention.

Immunity also extends to any investigations conducted by a public employee in preparation of formal proceedings. This includes any background investigations for a criminal, civil, or administrative matter. This often comes up in the context of a public entity's investigation of a worker and protects law enforcement officers and social workers. But the immunity does not extend to any malicious conduct or actions outside the scope of the investigation.

D. Hazardous recreational immunity

Public entities and employees are immune from any liability for any injuries to a claimant who participates in any hazardous recreational activity. The liability extends immunity to any person who assists the claimant to participate in the hazardous activity or reasonably should have known that the activity created a substantial risk of injury. For example, the immunity applies to tree rope swings, surfing, hiking, diving, boating, contact sports, and other recreational activities performed on public property.

Guidelines for filing a government claim

To sue a public entity for a claim relating to personal injuries, an administrative claim must be filed with the government office or agency within six months of the date of accrual of the cause of action. (Gov. Code § 911.2.) Other actions such as breach of contract, real property damage claims, and other claims must be filed within one year of the date of accrual of the cause of action. (*Id.*) Each government office or agency has its own specific form and information required in order to properly file the claim. Claims should be filed either online or by certified mail for delivery confirmation. Once the government office or agency receives the claim form, they have forty-five days to respond.

If the claim is denied prior to the forty-five day deadline, then a lawsuit must be filed within six months from the date of the denial. If there is no response prior to the deadline, then the claim is treated as a rejection and the deadline to file a lawsuit is two years from the accrual of the cause of action. (Gov. Code § 945.6(a)(2).) A request to file a late claim can be made and requires an application for permission, such as a showing of mistake, inadvertence, or a showing that claimant was medically incapacitated during the claims-filing period. Although late claims can be filed within a reasonable amount of time, they typically can be filed no later than one year after the accrual of the cause of action. (Gov. Code § 911.3.)

When filing the government claim, you must include the claimant's name, address to receive notice, date, place, circumstances giving rise to the claim, a description of the injury, damages, and whether or not the claim exceeds \$10,000. Other claims include a request for an injunction, enforcement of an order under the family code, or declaratory relief. (Gov. Code § 580.)

If a claim is being made against a public entity, start informal discovery right away. Do not forget to send out public records requests and informal discovery requests to all the entities that may have evidence to support your claim. Do not hesitate to send a spoliation letter to the government agency you anticipate suing for the injuries or damage. Check out the news and online articles for any headlines on the claim. Gather evidence quickly and be aware of any remedial measurements made following the filing of the claim. This includes any witness statements and any site inspections.

Know your adversary and maintain civility

Dealing with government agencies is a tough process. Most claims are rejected and require a lot of discovery. It is important to maintain civility throughout the process. Building rapport with opposing counsel is important. Chances are you will likely deal with them and their firm again. Do not hesitate to establish a professional relationship with your adversary. It is invaluable. ■