1-1-1991

California Sidewalks: A Comprehensive Scheme for Determining Municipal and Abutter Liabilities

Leonora M. Bova

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
 Available at: http://digitalcommons.law.scu.edu/lawreview/vol31/iss2/5
CALIFORNIA SIDEWALKS: A COMPREHENSIVE SCHEME FOR DETERMINING MUNICIPAL AND ABUTTER LIABILITIES

I. INTRODUCTION

Americans take sidewalk\(^1\) travel for granted. People travel along sidewalks while on their way to school, to work and in the course of countless other pursuits. The widespread use of sidewalks in this country raises the question of sidewalk safety. Imagine the following scenario. Plaintiff Ann Pedestrian, ten years of age, walks down the street to her piano lesson, as she has been doing every week for the past year. As she reaches the house of Piano Teacher, the abutting landowner,\(^2\) Plaintiff Ann trips on an uneven slab of concrete sidewalk in front of Piano Teacher's house. The slab has been elevated ten inches above the rest of the sidewalk by the roots of a tree growing in the parkway.\(^3\) This sidewalk condition has existed for two years. Both Piano Teacher and city workers have maintained the tree. Plaintiff Ann suffers severe head injuries as a result of her fall.

---

\(^1\) "Sidewalk" is defined as including "a park or parking strip maintained in the area between the property line and the street line and also . . . curbing, bulk-heads, retaining walls or other works for the protection of any sidewalk or of any such park or parking strip." CAL. STS. & HIGH. CODE § 5600 (Deering 1978). See infra note 3.

\(^2\) The terms "abutting landowner," "adjoining landowner" and "abutter" refer to an owner of land actually touching or terminating on a sidewalk. BLACK'S LAW DICTIONARY 11, 12, 39 (6th ed. 1990). See United States v. Great Am. Indem. Co. of N.Y., 214 F.2d 17, 19 (9th Cir. 1954) (court held that "the words 'ways immediately adjoining' embrace that portion of the sidewalk abutting or touching the grocery store"). See infra notes 5-8 and accompanying text.

The scenarios are limitless. There are many causes of unsafe sidewalk conditions, which can lead to accidents occurring on sidewalks adjoining a variety of locations, including residential property, commercial property, property held open to the public and "mixed use" property. The example above, however, illustrates a more difficult case because the residential abutter runs a business from her home. This may impose upon Piano Teacher a higher duty of care with respect to her student-customers. Also, although the roots originate from a parkway tree, Piano Teacher's maintenance of it may increase her duty. Finally, city maintenance creates the possibility of city liability.

An injured pedestrian will usually sue the city, the abut-
ting property owner, and anyone else that can be held responsible for an injury which can be attributed to the condition of the sidewalk. In seeking relief from the city, the plaintiff must follow preliminary administrative procedures and must meet a rather stringent burden of proof. As a result, lawsuits against public entities are frequently unsuccessful, leaving the abutting landowner as one of the remaining par-

1979). Municipalities include cities, boroughs, towns, townships, villages, counties and districts (such as a unified school district). Id. Public entities, however, include the state, the Regents of the University of California, counties, cities, districts, the public authorities and other political subdivisions, including municipalities. CAL. GOV'T CODE § 811.2 (Deering 1982 & Supp. 1991). As used in this comment, the term "public entity" includes municipalities. See infra notes 22-58 for a discussion of public entity (or municipal) liability.

12. In rural neighborhoods, most abutters are residential landowners or renters. In other areas, particularly in cities, property abutting sidewalks is often commercial in nature, occupied by stores and businesses. See infra notes 59-152 and accompanying text for a discussion of abutter liability.

13. An injured pedestrian can, for example, sue a litterer or the owner of the goods over which he tripped. He can also sue a tenant in addition to the owner of the abutting property. See, e.g., Peterson v. San Francisco Community College Dist., 36 Cal. 3d. 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (female college student, assaulted by a male who jumped from behind untrimmed foliage adjoining a campus stairway, sued the community college district for maintenance of a dangerous condition which, together with a criminal attack by a third party, injured her); Jackson v. K-Mart Corp., 442 A.2d 1087, 182 N.J. Super. 645 (1981) (store patron injured in slip and fall accident on sidewalk connecting store to parking lot sued property owner, commercial tenant and property manager); Matter of Schreiber v. Revlon Prod. Corp., 5 A.D.2d 207, 171 N.Y.S.2d 122 (1958) (claimant sued employer for injuries sustained during a business trip when, returning to her hotel room, she slipped on an icy sidewalk).


15. See infra notes 33-57 and accompanying text discussing the elements necessary to satisfy the plaintiff's burden of proof.

16. See, e.g., Nicholson v. City of Los Angeles, 5 Cal. 2d 361, 54 P.2d 725 (1936) (court reversed previous judgment for plaintiff, stating that city had fulfilled its duty of reasonable inspection and supervision of city streets); Ness v. City of San Diego, 144 Cal. App. 2d 668, 301 P.2d 410 (1956) (court affirmed judgment for defendant city notwithstanding a verdict for plaintiff, holding that a seven-eighths inch variation in height between adjoining sidewalk slabs is a trivial defect of no danger to pedestrians using due care).

But see Acosta v. County of Los Angeles, 56 Cal. 2d 208, 363 P.2d 473, 14 Cal. Rptr. 433 (1961) (court found that a minor's violation of a city ordinance prohibiting bicycle riding on sidewalks did not relieve county of its duty to maintain safe sidewalks for public in general, including plaintiff, whose use of sidewalk was neither extraordinary nor unusual).
This comment addresses and examines the current state of California law with regard to municipal and abutter liability for sidewalk accidents. Part II provides a state statutory background and examines the history of cases against public entities and abutters. It also describes the means by which a city can modify or completely invalidate general rules governing city and abutter responsibility for sidewalk injuries. Part III identifies the problems created by the uncertain sidewalk laws. In part IV, the comment analyzes the convoluted state of current sidewalk law and the misleading, sometimes contradictory, statutory and judicial approaches. In addition, the comment examines the threat that city legislation poses to the uniform statewide application of standards governing municipal and abutter liability for sidewalk accidents. Finally, in part V, comprehensive legislation that modifies and clarifies the current law is proposed. The result is an analytical scheme that allocates fault in accordance with clear, rational standards.

II. BACKGROUND

A. Municipal Liability: The California Tort Claims Act

The first defendant named in sidewalk accident cases is the public entity responsible for the sidewalk, usually the city. Suits against public entities or municipalities typically result from the public nature of sidewalks and the likely

17. See infra notes 22-152 and accompanying text.
18. See infra notes 153-203 and accompanying text.
19. See infra notes 204-07 and accompanying text.
20. See infra notes 208-55 and accompanying text.
21. See infra notes 256-63 and accompanying text.
22. See supra note 11.
23. The plaintiff will initially name as defendants both the city and the county to determine who controls street maintenance. This comment focuses on cities, entities separate from the state. 45 CAL. JUR. 3D, Municipalities § 2 (1978). Thus, since counties are legal subdivisions of the state, they are not discussed. CAL. CONST. art. XI, § 1 (1970, amended 1988); CAL. GOVT CODE § 29002 (Deering 1973).
24. "[H]ighways and streets are constructed for the use of the public. All members of the public have an inalienable right to use make use of them . . . ." 37 CAL. JUR. 3D, Highways and Streets § 55 (1977). "A sidewalk is a part of the common highway." Bonnet v. City and County of San Francisco, 65 Cal. 231, 3 P. 815 (1884).
misconception that governmental units own all sidewalks.\textsuperscript{25}

1. Government Code Section 815\textsuperscript{26} and the General Rule: No Government Liability

In California, government tort liability at the state and local level is controlled by a section of the California Government Code entitled "the California Tort Claims Act,"\textsuperscript{27} rather than by the general rule of vicarious tort liability.\textsuperscript{28} Section 815 of the Government Code states that absent a statutory or constitutional provision providing otherwise,\textsuperscript{29} a public entity is not liable for injuries arising out of an act or omission of the

\textsuperscript{25} "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown." CAL. CIV. CODE § 831 (Deering 1990). Thus, in addition to his lot, an abutter is presumed to own the fronting sidewalk and half of the fronting street, unless evidence to the contrary is shown. The intent of the parties signing the deed to the lot is the determinative factor. Speer v. Blasker, 195 Cal. App. 2d 155, 15 Cal. Rptr. 528 (1961). Although the abutter holds a fee to the sidewalk and half the street, the fee is subject to a dedication (by the subdivider of streets) to the city. This dedication is "legally equivalent to the granting of an easement." Jones v. Decter, 152 Cal. App. 3d 798, 802, 199 Cal. Rptr. 825, 827 (1984) (citing Safwenberg v. Marquez, 50 Cal. App. 3d 301, 123 Cal. Rptr. 405 (1974)). Formal acceptance of the dedication results in the streets acceptance into the city street system. CAL. GOV'T CODE § 1806 (Deering 1978 & Supp. 1991).

The city may, however, hold actual title to the sidewalk. Like a private landowner, a city may itself be an abutter. For example, since the San Rafael Public Library is owned by the City of San Rafael, the City is an abutter and is presumed to own the fronting sidewalk and half of the fronting street. Alternatively, a city may take actual title to a street and its bordering sidewalks through eminent domain. Section 4090 of the Government Code grants cities the power to order the establishment of any public street and the power to acquire by eminent domain any property necessary for the establishment of such a street. CAL. GOV'T CODE § 4090 (Deering 1978 & Supp. 1991).

\textsuperscript{26} CAL. GOV'T CODE § 815 (Deering 1982 & Supp. 1991).

\textsuperscript{27} CAL. GOV'T CODE §§ 810-996.6 (Deering 1982 & Supp. 1991). The California Tort Claims Act is sometimes referred to as "the Government(al) Tort Claims Act." See, e.g., infra note 246. All code sections discussed in this comment are California code sections.


\textsuperscript{29} "Statute is . . . defined [in Government Code section 811.8] to include only those enactments that are adopted by Congress, the Legislature of California, or the people of California (by initiative act)." CAL. GOV'T CODE § 811.8 comment (Deering 1982). California "statutes," therefore, include the federal and state constitutions and enactments, but not local ordinances enacted by city legislatures. Although government tort liability must be based on statute, the statute need not be part of the California Tort Claims Act or of any other section of the Government Code.
public entity, its employees\textsuperscript{30} or third parties.\textsuperscript{31} Furthermore, the liability of a public entity is subject to statutory immunities and to regular tort defenses available to private parties.\textsuperscript{32}

2. Government Code Section 835\textsuperscript{33} and the Exception: Liability for Dangerous Conditions of Public Property

A major statutory exception to the general rule above is provided by Government Code section 835, which governs liability for injury caused by dangerous conditions of public property. Section 835 requires: (1) a dangerous condition of public property; (2) proximate causation and a reasonably foreseeable risk of injury; and (3) an act or omission by a public employee that created the dangerous condition, or the public entity's actual or constructive notice of the dangerous condition.\textsuperscript{34} This statute can best be understood by examining each requirement.

\textsuperscript{30} Public employee liability is beyond the scope of this comment. See generally CAL. GOV'T CODE §§ 810-996.6 (Deering 1982 & Supp. 1991).

\textsuperscript{31} CAL. GOV'T CODE § 815(a) (Deering 1982).

\textsuperscript{32} CAL. GOV'T CODE § 815(b) (Deering 1982). Examples include comparative negligence and assumption of risk. See infra notes 150-52 and accompanying text.

\textsuperscript{33} CAL. GOV'T CODE § 835 (Deering 1982).

\textsuperscript{34} Section 835 of the Government Code states:

Except as as provided by statute, a public entity is liable for injury caused by a dangerous condition of [public] property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

CAL. GOV'T CODE § 835 (Deering 1982) (emphasis added).

Another exception to the section 815 general rule is Government Code section 814 which states that the California Tort Claims Act does not affect liability based on contract nor does it affect the right to obtain non-monetary relief against the public entity. CAL. GOV'T CODE § 841 (Deering 1982). Thus, a claim by a county employee for compensation performed while under an employment contract is not barred by the California Tort Claims Act, nor is an action for specific performance. Longshore v. Ventura County, 25 Cal. 3d 14, 598 P.2d 866, 157 Cal. Rptr. 706 (1979); CAL. GOV'T CODE § 814 comment (Deering 1982).
a. Dangerous Condition of Public Property

The plaintiff must first establish that the property upon which the dangerous condition existed at the time of injury was in fact "public property" or "property of a public entity." Such property is defined to mean "real or personal property owned or controlled by the public entity . . . ." In determining ownership, a court may look to the nature of the city's ownership, that is, whether the city owns a fee or an easement over the fee. In determining control, a court may look to the public entity's power to prevent or fix the dangerous property condition. Finally, the court may examine whether responsibility for the safe condition of the property would be imposed under the same circumstances, had the public entity been a private defendant.

Specifically excluded from the definition of "public property" are "easements, encroachments and other property that are located on the [public property] but are not owned or controlled by [the public entity]." This exclusion emphasizes that the dominant estate owner, not the servient estate owner (the city), bears the duty to inspect the easement for dangerous conditions. Additionally, public entities are not liable for injuries resulting from the performance of maintenance on

35. CAL. GOV'T CODE § 835 (Deering 1982).
36. CAL. GOV'T CODE § 830(c) (Deering 1982) (emphasis added). The court may also look to see whether title is coupled with control. Low v. City of Sacramento, 7 Cal. App. 3d 826, 833-34, 87 Cal. Rptr. 173, 177 (1970).
38. Id. See generally infra notes 59-152 and accompanying text.
39. CAL. GOV'T CODE § 830(c) (Deering 1982).
40. A dominant estate is "[t]he estate in which the benefits from easement on another . . . property." BLACK'S LAW DICTIONARY 485-86 (6th ed. 1990) (emphasis added). The dominant estate possessor is entitled to the "benefit of uses authorized by [the] easement." Id.
41. The servient estate owner is "[t]he person whose land is subject to an easement" benefitting the dominant estate owner. Id. at 1368-69 (emphasis added).
42. Generally, the owner of an easement bears the responsibility for its maintenance. Rose v. Peters, 59 Cal. App. 2d 833, 835, 159 P.2d 983, 984 (1943). Thus, if a city grants a business an easement across city-owned property to allow access to the business and its customers, the business, as owner of the dominant easement, is responsible for maintaining the easement. But see infra notes 59-73 and accompanying text which discuss a different rule in the case where the city, holding a street easement, is the dominant easement owner.
“any road which has not officially been accepted as a part of the road system . . . if the [work] is performed with reasonable care . . . .”

If the plaintiff establishes that the property is public property, he must then show that the condition causing injury is a “dangerous condition,” that is, one which creates a substantial risk of injury when the property is used with due care in a reasonably foreseeable manner.

b. Proximate Causation and a Reasonably Foreseeable Risk of Injury

Section 835 also requires that the injury have been proximately caused by the dangerous condition. Proximate cause is causation unbroken by any intervening force. However, nothing in section 835 precludes a finding that a public entity may be under duty to protect against harmful criminal conduct on its property.

Not only must the plaintiff show that the dangerous condition proximately caused the injury, but he must also show that “the dangerous condition created a reasonably foreseeable risk of the kind of injury . . . incurred . . . .” A motorist, for ex-

43. CAL. GOV'T CODE § 831.3 (Deering 1982 & Supp. 1991). Conversely, if the road has been dedicated to the city (if the city owns an easement) or if the road has been taken by the city through eminent domain, the government can be held liable for negligent maintenance if the road has been accepted as part of the road system. See supra note 25. See also CAL. STS. & HIGI. CODE § 1806 (Deering 1978).

44. CAL. GOV'T CODE § 835 (Deering 1982); Davis v. Cordova Recreation and Park Dist., 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 (1972).

45. CAL. GOV'T CODE § 830(a) (Deering 1982). A condition is not dangerous if the court determines that the risk created by the condition is so minor or insignificant, in view of all the circumstances, that no reasonable person would conclude that a substantial risk of injury was created. CAL. GOV'T CODE § 830(a) (Deering 1982 & Supp. 1991). For example, a sidewalk slab elevated seven-eighths of an inch above an adjacent slab creates an arguably insignificant risk. See, e.g., Ness v. City of San Diego, 144 Cal. App. 2d 668, 301 P.2d 410 (1956).

46. “Proximate cause” is “[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred" and "[t]hat which is nearest in the order of responsible causation." BLACK'S LAW DICTIONARY 1125 (6th ed. 1990).

47. Peterson v. San Francisco Community College Dist., 36 Cal. 3d 799, 811, 685 P.2d 1193, 1199, 205 Cal. Rptr. 842, 848 (1984). "Cases have recognized that a public entity may be liable for permitting dangerous but not necessarily criminal conduct to occur on its property." Id. at 811 n.10, 685 P.2d at 1199 n.10, 205 Cal. Rptr. at 848 n.10.

48. CAL. GOV'T CODE § 835 (Deering 1982). See generally 6 B. E. WITKIN,
ample, might be able to recover for injuries resulting from driving over a pothole in the street, whereas an airplane pilot making an emergency landing on the same public street may not be able to recover for injuries resulting from striking the same pothole.\textsuperscript{49}

c. Negligent Act or Omission, or Actual or Constructive Notice

If the above elements are satisfied, the plaintiff must show that a negligent or wrongful act or omission by a public employee\textsuperscript{50} created the dangerous condition. If established, the public entity may be held liable.\textsuperscript{51} Alternatively, if the plaintiff can show that the public entity had actual or constructive notice of the dangerous condition, he need not show that an employee negligently acted or failed to act.\textsuperscript{52}

Actual notice is satisfied when the plaintiff can establish that the public entity "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."\textsuperscript{53} To prove that the public entity had constructive notice, the plaintiff must present evidence indicating that "the condition existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and realized its dangerous character."\textsuperscript{54}

\textsuperscript{49} CAL. GOV'T CODE § 835 comment (Deering 1982). It is foreseeable that a car would hit a pothole, but extremely unlikely that a plane would hit the same pothole.

\textsuperscript{50} This assumes that the public employee is acting within the scope of his employment. CAL. GOV'T CODE § 835 (Deering 1982). Public employees are employees of a public entity. CAL. GOV'T CODE § 811.4 (Deering 1982).

\textsuperscript{51} CAL. GOV'T CODE § 835 (Deering 1982 & Supp. 1991). Liability is not automatic. Public entities have many defenses and immunities available to them. See infra notes 55-57 and accompanying text. Public employees may also be held liable for dangerous conditions of public property. As previously noted, the liability of public employees is beyond the scope of this comment. See generally CAL. GOV'T CODE §§ 840-840.6 (Deering 1982 & Supp. 1991).

\textsuperscript{52} CAL. GOV'T CODE § 835(b) (Deering 1982).

\textsuperscript{53} CAL. GOV'T CODE § 835.2(a) (Deering 1982).

\textsuperscript{54} CAL. GOV'T CODE § 835.2(b) (Deering 1982). Evidence admissible to show due care includes: (1) whether the existence of the condition would have been discovered by a reasonably adequate inspection system; (2) whether the public entity had such an inspection system; and (3) whether the public entity, operating
3. **Public Entity's Defenses and Immunities**

Even if the party makes a prima facie showing by satisfying the requisites above, the public entity may avoid liability if it can show that it acted reasonably under the circumstances.\(^5\) In addition to the defense of reasonableness, the public entity may claim any immunities granted to it by statute\(^6\) and any defenses, such as comparative negligence and assumption of risk, which are available to private parties.\(^7\)

4. **Summary of Municipal Liability**

Thus, although public entities are generally immune from liability, to maintain a successful action against a city,\(^5\) Gov-

---

55. **CAL. GOV'T CODE § 835.4** (Deering 1982). With respect to an act or omission of a public employee, the public entity is not liable if it shows that the act or omission was reasonable. **CAL. GOV'T CODE § 835.4(a)** (Deering 1982). Reasonableness is determined by balancing the likelihood and gravity of the harm against the practicality and expense of taking actions to guard against such injury. **CAL. GOV'T CODE § 835.4(b)** (Deering 1982).

In addition, a public entity's showing of reasonableness will absolve it from liability even though it had actual or constructive knowledge of the dangerous condition. Reasonableness in this context is determined by considering the time and opportunity the public entity had to take action, and by balancing the likelihood and gravity of injury to those foreseeably exposed to the condition against the cost and practicality of protecting against such injury. **CAL. GOV'T CODE § 835.4(b)** (Deering 1982).

56. Many of these public entity immunities are also located in the Government Code. See, e.g., **CAL. GOV'T CODE §§ 815.2(b), 818.2, 818.4, 830.8, 831.2, 831.3, 955.1** (Deering 1982 & Supp. 1991). The Government Code sections include: immunity for injury caused by a public entity for an act or omission where the public employee is immune (section 815.2(b)); immunity for injuries caused by failure to adopt a statute (section 818.2); immunity for injury caused by failure to issue, deny, or suspend a license (section 818.4); immunity for injury caused by effect of weather conditions on use of streets (section 830.8); immunity for injury caused by a natural condition of any unimproved public property (section 831.2); immunity for injury caused by maintenance of a road not officially accepted as part of the road system (section 831.3); and immunity for failure to predict earthquakes (section 955.1). See generally **CAL. GOV'T CODE §§ 810-996.6** (Deering 1982 & Supp. 1991).

Additional immunities are located in codes other than the Government Code. For example, Streets and Highways Code section 1806 provides immunity for failure to maintain any road unless it has been accepted into the county road system. **CAL. STS. & HIGH. CODE § 1806** (Deering 1978 & Supp. 1991).

57. **See infra** notes 150-52 and accompanying text.

58. The plaintiff may only proceed against the city if the city has accepted the claim. **See supra** note 14.
ernment Code section 835 mandates that a plaintiff successfully show that a dangerous condition of public property proximately caused him injury and that the risk of such injury was reasonably foreseeable. In addition, the plaintiff must show either (a) that a negligent or wrongful act or omission of a public employee created the dangerous condition, or (b) that the public entity had actual or constructive notice of the dangerous condition. Finally, the plaintiff must hope that the public entity is unsuccessful in defending itself, failing to show that it acted reasonably given the circumstances.

B. Abutter Landowner Liability

In addition to the city, a private party, normally the abutting landowner, may also be named as a defendant in a sidewalk accident case.

1. General Rule: Streets and Highways Code Section 5610

In 1941, the California Legislature enacted Streets and Highways Code sections 5600 through 5630. Section 5610 of the Code imposes upon abutters the duty to maintain and repair sidewalks. The code sections, however, limit

59. CAL. STS. & HIGH. CODE § 5610 (Deering 1978).

60. These code sections were added to the Improvement Act of 1911 [the Improvement Act], a division of the California Streets and Highways Code that provides a system for doing street work. Sections 5600 through 5630 constitute Part 3, Chapter 22 of the Improvement Act.

61. California Streets and Highways Code section 5610 states:

The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under a like duty in relation thereto.

CAL. STS. & HIGH. CODE § 5610 (Deering 1978).

62. Prior to the twentieth century, abutters had no affirmative duty to maintain or repair public sidewalks and could not be held liable for injuries resulting from mere failure to maintain. Eustace v. Jahns, 38 Cal. 3 (1869). The California Supreme Court stated that any duty to repair would have to be found in the stat-
their purpose and intended application to, simply, providing an alternate method for performance and payment of sidewalk maintenance and repair.

In 1944, the landmark case of Schaefer v. Lenahan interpreted language virtually identical to that found in section 5610. In Schaefer, the plaintiff was injured when she stepped into a hole in the sidewalk abutting the defendant’s property. The sole issue was whether an abutter was liable to travelers for injuries caused by defects in the sidewalk fronting the abutter’s property. The court, upon reviewing inter-
pretations of similar statutes by other state courts, held that the Improvement Act did not expressly impose liability on abutters for injuries resulting from sidewalk defects, nor did it provide that an abutter's duty to repair was owed to travelers or to the city. The court concluded:

[Section 31 of the Improvement Act of 1911] was not passed for the purpose of transferring the primary duty to repair sidewalks to the property owners, and to relieve the city of that primary duty and responsibility. The obvious purpose of the statute was to provide a means of reimbursing the city for the cost of the repairs. To impose a wholly new duty upon the property owner in favor of third persons would require clear and unambiguous language.

This holding gave rise to the "Sidewalk Accident Decisions Doctrine," which specifically limited an abutter's duty to maintain and repair sidewalks as one owed to the city, not as a duty of care (with resulting liability for injuries) owed to pedestrians or the city.

2. Exception: Civil Code Section 1714(a)

a. Liability of Landowner for Harm Caused by Lack of Care in the Management of His Property

Although Schaefer held that a landowner's duty to maintain and repair the abutting sidewalk did not impose a duty of care to the public, injured pedestrians could still sue under the tort theory of negligence provided by California Civil Code sec-

---

Lenahan created the defect in the sidewalk. Id.

69. The similar statutes also called for work by the municipality and payment by the abutter. Id. at 327-31, 146 P.2d at 930-32.

70. The court examined law from New York, Missouri and Kansas, among others, and acknowledged examples of states which established a contrary rule. Id.

71. Id. at 326-32, 146 P.2d at 930-33.

72. Id. at 331-32, 146 P.2d at 932 (emphasis added).


75. In California, actionable negligence involves: "(a) a legal duty to use
Section 1714(a) states:

Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. 77

Therefore, if the sidewalk defect was somehow attributable to the abutting property owner, that is, if the defect was created by him or due to his negligence, the Sidewalk Accident Decisions Doctrine did not apply, 78 and the abutter could be held liable. 79

b. Factors Affecting Abutter’s Potential Liability Under Civil Code Section 1714(a)

During the 1960s, cases interpreting section 1714(a) ex-
panded potential abutter liability for sidewalk accidents. Among the factors the courts considered were: (1) the status of the plaintiff and the defendant, (2) the exact origin and location of the hazardous condition and whether it was under the defendant's control, and (3) the cause of the dangerous condition.

1) Status of Plaintiff and Defendant

One area affecting the possibility of landowner liability is classification of the plaintiff based on the circumstances under which he has entered the defendant's land. This classification of the plaintiff as a trespasser, licensee or invitee depends upon whether the defendant's property is private or

80. A trespasser is a person who enters or remains upon land in the possession of another without privilege or consent to do so. 6 B. E. Witkin, Summary of California Law § 904 (9th ed. 1988).

81. A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent or permission. A licensee enters the land of another for his own benefit rather than for the benefit of the owner-occupant. Id. § 909(a). For example, although a social guest has been invited, he is not an invitee in the business visitor sense, but rather only a licensee. Id. § 909(b). Other examples of licensees include those entering a store solely to get out of bad weather, those taking short cuts across another's property, spectators and sightseers, and salesmen soliciting at the doors of private homes.

82. Originally, California followed "the limited test of potential economic benefit, adopted by the [First Restatement] which stated that an invitee enters [land] at the 'express or implied invitation' of the occupant, for a purpose of . . . mutual benefit to the owner or occupant and himself, or in connection with the business of the occupant." 6 B. E. Witkin, Summary of California Law § 918 (9th ed. 1988). This theory that invitees are "business visitors" has been applied to "store customers, hotel guests, passengers in common carriers, deliverymen, repairmen, and others of similar character." Id. § 921.

An invitee generally serves some purpose of the possessor. However, the modern (Second Restatement) view held by California broadens the class to cover "public invitees," that is, "persons invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." Id. If land is held open to the public, the fact that the visitor does not pay for admission, or the fact that the purpose of opening the land is not a business purpose is immaterial. Thus, economic gain to the invitor is no longer required for status as an invitee. Although no longer required, economic benefit of the invitor is still a factor among many to be considered.

Common invitor/invitee relationships include: a customer entering a grocery store to buy goods, a customer entering a restaurant, a salesman delivering goods to a retail store, a plumber rendering plumbing services in a customer's home, and a person entering a church. The invitors are the grocery store, the restaurant, the retail store, the customer's home and the church, respectively. Id. § 922.
whether it is held open to the public. Traditionally, a landowner owed different duties to trespassers, licensees and invitees.

In 1968, the California Supreme Court, in Rowland v. Christian, repudiated the traditional trespasser-licensee-invitee classifications which limited the duties owed to licensees and trespassers and substituted the basic approach of foreseeability of injury to others. The court stated that in determining liability, the inquiry was "whether, in the management of his property, [a possessor of land had] acted as a reasonable man in view of the probability of injury to others ...." Further, the court stated, "[A]lthough the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative." Thus, the plaintiff's status became but one consideration in a list of many used in determining liability. This divergence from

83. See supra notes 5-8 discussing various types of property.
84. With respect to undiscovered trespassers, the landowner owed no duty; to known or anticipated trespassers, he owed a duty of ordinary care as well as a duty to warn of nonobvious dangerous conditions known to him. B. E. Witkin, SUMMARY OF CALIFORNIA LAW § 905 (9th ed. 1988). To licensees, a possessor of land owed the same duty as that owed to known trespassers, except that he could also be found liable if he knew of the dangerous condition undiscoverable by the licensee, and failed to remedy it or to warn the licensee of it. Id. § 910. The duties owed to an invitee included the lesser duty of due care owed to licensees as well as an obligation to correct or warn against known dangers and to inspect the premises to discover unknown defects. Id. § 923.
87. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104 (emphasis added).
88. The list included: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." Rowland v. Christian, 69 Cal. 2d at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

Another factor courts consider in determining a landowner's duty to another is the age of the plaintiff. California courts have held that in dealing with a young child, a party must exercise greater care than he would in dealing with an adult. See generally 6 B. E. Witkin, SUMMARY OF CALIFORNIA LAW §§ 809, 810 (9th ed. 1988). This requirement also applies when a party knows, or should have known, that children are customarily around or on the property in question.
the traditional classifications was based upon the premise that every person's life, irrespective of how he has entered another's property, is equally worthy of protection. Since people do not usually mold their conduct in contemplation of their status, the court stated that it would be contrary to public policy to make their ability to obtain compensation dependant on such a distinction.

While *Rowland* greatly enlarged the duties owed to licensees and trespassers, it had less of an effect upon the broad scope of duties already owed to invitees. Since *Rowland*, a possessor's duty of care extends to trespassers, licensees and invitees alike. The likelihood of the presence of others, however, continues to affect the foreseeability of injury to others and consequently, the duty owed to them. Normally, this likelihood is far greater for invitees than for trespassers.

2) "Premises" Includes Means of Ingress and Egress and Other Areas Under Defendant's Control

Another factor affecting landowner liability is the meaning of the term "premises." Cases have steadily expanded the term to include more and more types of land.

a) *Ingress and Egress, Street and Sidewalk*

In 1967, the California Supreme Court, in *Schwartz v.*
Helms Bakery Limited,92 expanded the term "premises" to include property beyond the boundaries of a possessor's title or lease. The court stated, "[An invitor's] 'premises' may be less or greater than [his] property93 [and] may include such means of ingress and egress as a customer may reasonably be expected to use."94

In Schwartz, a four-year old boy was struck by a car as he crossed the street to buy a doughnut from the driver of a retail truck owned by the defendant. The court held the defendant liable for the boy's injuries, finding that in undertaking to direct the child to an assigned rendezvous with the bakery truck, the defendants assumed a duty to exercise due care for his safety. Thus, the case held that "[a]n invitor bears a duty to warn an invitee of a dangerous condition existing on a public street or sidewalk adjoining his business which, because of the invitor's special benefit, convenience, or use of the public way, creates a danger."95 Further, a defendant need not hold title or a lease to the dangerous property to be found liable. In this case, the defendant simply parked his truck along a public street. Because Schwartz specifically addressed the invitor/invitee relationship, the case is especially applicable to businesses and other places held open to the public.

b) Areas Under Defendant's Control

In 1970, a California court of appeals held that a landowner may be liable not only for a dangerous condition existing in a means of ingress or egress, or on a street or sidewalk over which he had control, but also over any other areas over which he exerted control, namely the sidewalk parkway.

In Low v. City of Sacramento,96 the plaintiff fell into a water-filled depression in a parkway outside a county-owned hospital.97 The trial court concluded that the sidewalk and

92. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).
93. See supra note 82.
95. Id. at 239-40, 430 P.2d at 73, 60 Cal. Rptr. at 515.
97. Low v. City of Sacramento, 7 Cal. App. 3d 826, 829, 87 Cal. Rptr. 173, 174 (1970). Because the Low defendants were the city and the county (public entities), the case was decided under the Government Code. Analogy was made, however, to cases involving private abutters as defendants. Id. at 831-35, 87 Cal.
parking strip were owned by the city and controlled by the county. As a result, a judgment was returned against both defendants, and both appealed.

In affirming the lower court, the court of appeal held that a possessor of land is responsible for the safe condition of the land, possession being equated with "occupancy plus control." Thus, in determining liability, occupancy and control dominate over title. In examining control, the court stated that inquiry may be made as to "whether the particular defendant had control, in the sense of power to prevent or remedy the dangerous condition; whether his ownership was a naked title or whether it was coupled with control; and whether a private defendant, having a similar relationship to the property, would be responsible for its safe condition."

In applying this rule to the facts of Low, Judge Friedman found that Sacramento property owners, not the municipalities, maintained the parkways abutting their parcels of land. However, each municipality possessed an ownership interest: the county owned the fee and the city owned an easement over it. More importantly, each possessed the power to control: the city as easement holder and the county as abutter. The county, in undertaking to maintain the grassy strip like a private abutter, exerted control over the parkway. In so doing, the county allowed ruts and holes to form, thereby permitting deterioration and the formation of a dangerous condition.

A public entity is, thus, "liable when [its] failure to maintain [the parkway] in a reasonably safe condition causes injury


98. A parking strip is the same as a parkway. See supra note 3.

99. Low v. City of Sacramento, 7 Cal. App. 3d at 829, 87 Cal. Rptr. at 174. The city sought affirmance, the county reversal. Id.

100. Id. at 831, 87 Cal. Rptr. at 175.

101. For a finding of liability, California Government Code section 830(c) requires that the public entity controlled the property. See supra notes 35-43 and accompanying text.

102. Low v. City of Sacramento, 7 Cal. App. 3d at 833-34, 87 Cal. Rptr. at 177.

103. The court does not discuss how it arrived at this conclusion.

104. Deterioration was caused by seasonal rain and by drivers maneuvering their cars over the rolled curb, permitting their wheels to rest on the grassy parking strip. Low v. City of Sacramento, 7 Cal. App. 3d at 830, 87 Cal. Rptr. at 174.
to a pedestrian.” Although section 830(c) of the Government Code eliminates liability of a public entity when it surrenders control to the easement holder, the county in this instance, “retained control, in the sense that it retained power to prevent or remedy the danger.” Thus, the prior judgment against the county (as fee owner with power to remedy) and the city (as easement owner) was upheld.

3) Cause of Dangerous Condition

The third factor to be considered in determining the duties and liabilities of landowners is the cause of the dangerous condition. As previously stated, Civil Code section 1714(a) has traditionally been applied when a residential or commercial landowner created a hazard by leaving a dangerous material on the sidewalk or by altering the sidewalk for his own benefit.

a) Not Created By Owner Nor Due to His Negligence: Actual or Constructive Knowledge

Subsequent cases have expanded a landowner’s potential liability to include those hazardous conditions created by outside forces such as acts of third parties, acts of God, or everyday wear and tear. In these instances, a landowner will be held liable if he had actual or constructive knowledge of the dangerous condition.

In determining whether the defendant had actual or constructive knowledge, the court examines whether the condition had existed long enough for the owner, in the exercise of

105. Low v. City of Sacramento, 7 Cal. App. at 833, 87 Cal. Rptr. at 176.
106. The county surrendered an easement to the city. Id. at 829-30, 87 Cal. Rptr. at 174-75.
107. Id. at 834, 87 Cal. Rptr. at 177.
108. Id. at 834, 87 Cal. Rptr. at 177-78.
109. See supra note 79.
110. See supra note 79.
111. An example would be a pedestrian littering in front of an abutter’s home.
112. Acts of God include rainstorms, snowstorms, and earthquakes. See, e.g., In re Schreiber v. Revlon Prods. Corp., 5 A.D.2d 207, 171 N.Y.S.2d 122 (1958), where the claimant was injured when she slipped on an icy sidewalk. In this instance the culprit was the weather.
113. See supra note 104.
114. Mere existence of the dangerous condition at the time of injury is not
reasonable care, to have discovered and remedied it.\textsuperscript{115}

b) \textit{Created by Natural Conditions}

The doctrine that a party controlling property is liable for dangerous conditions on it was expanded in \textit{Sprecher v. Adamson Companies}\textsuperscript{116} to include situations in which "natural conditions"\textsuperscript{117} on one's property caused sidewalk injuries.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{115} Girvetz v. Boys' Mkt., 91 Cal. App. 2d 827, 206 P.2d 6 (1949); Louie v. Hagstrom's Food Stores, 81 Cal. App. 2d 601, 184 P.2d 708 (1947); Owen v. Beauchamp, 66 Cal. App. 2d 750, 152 P.2d 756 (1944). See, e.g., Oldenburg v. Sears, Roebuck & Co., 152 Cal. App. 2d 733, 314 P.2d 33 (1957), where the plaintiff stepped on a piece of chalk while walking on a sidewalk adjacent to a Sears store and exclusively under Sears' control. The plaintiff did not contend that the defendant was responsible for the chalk's existence on the sidewalk, but rather that the dangerous condition had existed for such a length of time so as to charge Sears with constructive knowledge. The court ruled in favor of Sears since its employees inspected the sidewalks three or four times daily and had done so the morning of the accident at 9:00 a.m. Since the plaintiff slipped at approximately 9:30 a.m., a mere half hour later, the defendant did not have the requisite constructive knowledge for the imposition of liability. \textit{Id.}

\item \textsuperscript{116} 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783, (1981).

\item \textsuperscript{117} "Natural conditions" are similar to acts of God, but are not exactly the same. As explained above, the latter relates to the weather or natural disasters. The term "natural conditions," although used to indicate conditions of land which have not been changed by acts of humans, "is . . . used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them." Sprecher v. Adamson Cos., 30 Cal. 3d 358, 362 n.3, 636 P.2d 1121, 1122 n.3, 178 Cal. Rptr. 783, 784, n.3 (1981) (citing \textit{Restatement (Second) of Torts} § 363 (1964) (emphasis added)).

In contrast "[a] structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation . . . irrespective of whether [the changes] are harmful in themselves or become so only because of the subsequent operation of natural forces." \textit{Id.} at 362, 636 P.2d at 1123, 178 Cal. Rptr. at 785.

\item \textsuperscript{118} "[A] possessor's liability for harm caused by artificial conditions was determined in accord with ordinary principles of negligence . . . ." \textit{Id.} at 362, 636 P.2d at 1122-23, 178 Cal. Rptr. at 784-85 (citing \textit{Restatement (Second) of Torts} §§ 364-370 (1964)). At common law, a possessor of land was absolutely immune from liability for harm caused by conditions considered natural in origin. \textit{Id.} at 362, 636 P.2d at 1123, 178 Cal. Rptr. at 785 (citing \textit{Prosser, Law of Torts} § 368 (4th ed. 1971)). A landowner did not have a duty to correct conditions that were natural in origin "[n]o matter how great the harm threatened to his neighbor, or to one passing by, and no matter how small the effort needed to eliminate it . . . ." \textit{Id.} at 362, 636 P.2d at 1124, 178 Cal. Rptr. at 785 (citing \textit{Restatement (Second) of Torts} §§ 364-370 (1964)); \textit{Prosser, Law of Torts} § 57 (4th ed. 1971)).

\end{itemize}
The California Supreme Court noted in *Sprecher* that the major factors used to determine reasonableness of a landowner's actions had little, if any, relationship to the natural origin of the dangerous condition. The court, therefore, held that a landowner is not immunized from liability caused by the natural condition of his land to persons outside his premises by virtue of the fact that he did not cause the dangerous condition to arise. Since California holds an individual responsible for any injuries caused by a failure to exercise reasonable care in the management of his property, the question in cases involving dangerous natural conditions is whether the individual has exercised reasonable care with respect to the natural condition originating from or on his property, or from or on the parkway fronting his property.

(1) Origin of Defect: Defendant's Property

*Moeller v. Fleming* applied the *Sprecher* rule to dangerous conditions originating from a defendant's property, from his front yard for example. In *Moeller*, the plaintiff tripped on a break in the sidewalk created by the roots of a tree growing on defendant's adjacent property. Citing *Sprecher*, the court

---

119. See supra note 88 and accompanying text.
120. Sprecher v. Adamson Cos., 30 Cal. 3d at 370-71, 636 P.2d at 1128, 178 Cal. Rptr. at 790.
123. Hence, based on the examination of the common law rule, the Supreme Court concluded that a departure from the fundamental concept that a person is liable for the harm caused by his want of ordinary care in managing his property is clearly unwarranted with respect to natural conditions of land. *Sprecher*, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1971).
125. Although the case dealt solely with the reversal of a prior summary judgment favoring the defendant, it stated that a defendant is not immunized from liability for an injury caused by a natural condition of his land to people outside his land. *Moeller v. Fleming*, 136 Cal. App.241, 241, 186 Cal. Rptr. 24, 24 (1982).

The plaintiff claimed that the defendant was guilty of maintaining a natural condition that created a hazard. The trial court granted the defendant's motion for summary judgment, but the court of appeal reversed, holding that the defendant, as a possessor of land, was not immunized from liability to persons not on his land for injury caused by a condition on his land. *Id.*
stated that a jury could find a landowner liable for maintaining a natural condition on his property (a tree), known to him to have created a dangerous condition outside his property (an irregular break in the adjacent public sidewalk). The question in determining liability however, is whether the defendant has acted reasonably in the management of his property under the circumstances.

(2) Origin of Defect: Parkway in Sidewalk

"Natural condition" questions have continued to arise since Moeller. In more recent cases, however, courts have examined liability for dangerous sidewalk conditions created by natural conditions originating in the sidewalk parkway as opposed to the defendant's property. In one such case, the issue arose as to whether abutters could be found liable for harm caused by a natural condition outside his property. The courts, in applying the exercise of control standard expressed in Rowland and Low, answered affirmatively. Although courts have held that in theory, liability can attach, recent cases have not held abutters liable for natural conditions on land which was arguably within their control. Two such cases, Jones v. Deeter and Williams v. Foster, illustrate the trend, but the two appellate courts employ divergent rationales.

126. The court used the phrase "suffering the roots of his tree to cause ... a dangerous condition." Id. at 245, 186 Cal. Rptr. at 26. Since the plaintiff listed three theories of liability, the third of which was "maintenance of a natural condition known to have created a hazard on the sidewalk," and since the court reversed the summary judgment in favor of the defendant on the grounds that he had not negated this third theory, it can be inferred that the court used the word "suffer" to mean "maintain." Also, since the pleading charged that the plaintiff knew the natural condition created a hazard, the court may have used the term "suffer" to mean "allow" or "permit" the dangerous condition to arise. In any case, the court infers some sort of responsibility on the part of the landowner, simply by virtue of the tree's existence on his land.


128. Thus, the court does not examine whether the abutter planted the tree, but whether he knew that the roots created a danger and whether he acted reasonably given the circumstances.

129. See supra notes 85-91 and accompanying text.

130. See supra notes 96-108 and accompanying text.
(a) *Jones v. Deeter*\(^{131}\)

In *Jones v. Deeter*, the issue was whether an abutter could be held liable to pedestrians injured when trees in the fronting parkway created a dangerous condition on the sidewalk.\(^{132}\) The Court of Appeals for the Second District found for Deeter. In its analysis,\(^{133}\) the court noted that abutters are liable to pedestrians for defects in the sidewalk attributable to their own negligence.\(^{134}\) The *Jones* court also distinguished the *Moeller* case\(^{135}\) by recognizing that *Moeller* involved disruptive roots extending from a tree on the defendant's adjacent property rather than from a tree in the sidewalk parkway, as was the case in *Jones*. *Jones*, the court said, turned on this distinction.\(^{136}\)

The court stated that abutters can be found liable in tort where the injury is due to a sidewalk defect with its origin in the parkway, but only if the dangerous condition is somehow attributable to the abutter.\(^{137}\) The court noted that in *Low*, it

---


\(^{132}\) Plaintiff Jones sustained injuries when she tripped on a break in the sidewalk created by the roots of trees pressing up from under the concrete. The trees grew in a parkway situated between the sidewalk and the street running in front of the defendant's house. Deeter allegedly maintained this parkway by cutting the grass and trees. Jones appealed the lower court's summary judgment for Deeter. *Jones v. Deeter*, 152 Cal. App. 3d 798, 801, 199 Cal. Rptr. 825, 826 (1984).

\(^{133}\) The court first determined that Deeter owned the sidewalk and parkway, relying on the unrebutted presumption that an abutter owns to the center of the way. After examining the surveyor's report, the court determined that the sidewalk and parkway were included in the area dedicated to the city as Second Street. The relevant area was, therefore, owned by Deeter, but dedicated to the city. *Id.* at 801-02, 199 Cal. Rptr. at 826-27. See *supra* note 25.

Then court turned its attention to Deeter's statutory duty to maintain. The court noted that a dedication is the legal equivalent of the granting of an easement. In distinguishing a city's easement (with regard to sidewalks, parkways, and streets) from easements in general, the court cited California Streets and Highways Code section 5610, stating that in the case of sidewalks, parkways, and streets, the duty of maintenance rests upon the abutter, not the easement owner, the city. Thus, Deeter bore the duty to maintain the easement. Citing *Schaefter*, the court stated that Deeter owed no duty of care toward pedestrians by virtue of his duty to maintain. *Id.* at 802-03, 199 Cal. Rptr. at 827.

\(^{134}\) *Id.* at 803, 199 Cal. Rptr. at 828. The court cited *Kopfinger* and *Sexton* as examples of cases in which sidewalk defects were found to be attributable to the abutter. See *supra* note 79.

\(^{135}\) See *supra* notes 124-28 and accompanying text.

\(^{136}\) *Id.* at 804, 199 Cal. Rptr. at 828.

\(^{137}\) *Id.*
was shown that Sacramento property owners and not the municipality, maintained the fronting parkways. In so doing, however, the defendant in Low allowed holes to form in the parkway and as a result, the plaintiff fell into one of the holes and sustained injuries. The Jones court stated that the Low holding was based on the conclusion that the dangerous condition was directly attributable to the abutting owner (the County of Sacramento) because the county-owned hospital had exercised control over the strip and had permitted it to deteriorate.138

Citing Low, the court stated that in some localities the abutters bear a duty of maintenance, neglect of which can give rise to liability. In localities where the city has habitually maintained the surface of the parkway, however, it is solely the city's duty to maintain the area safe for pedestrians,139 and abutters failing to maintain cannot be held liable.140

---

138. The Jones court stated, "[T]he analysis in Low provides a basis for determining when a dangerous parkway condition is attributable to an abutting owner so as to impose a duty on that owner to alleviate the danger. This determination turns upon the historical patterns of care with regard to local parkways." Id. at 805, 199 Cal. Rptr. at 829.
139. Id. at 804, 199 Cal. Rptr. at 828-29.
140. The Jones court specifically applied this rule to trees growing in the parkway. The court stated:

We hold that a similar but separate rule applies with regard to the trees planted on the parkway. In settings where the abutting owners have . . . habitually trimmed or cared for them, these abutting owners have the duty to maintain the trees in a safe condition toward pedestrians. The contrary situation exists when the city has planted the trees on the parkway and has performed all necessary maintenance on them. Under these latter circumstances, the duty to maintain the trees in safe condition rests with the city; dangerous conditions caused by the trees are attributable to the city, not to abutting owners.

Id. at 805, 199 Cal. Rptr. at 829 (emphasis added).

Finally, in applying its rule to the case facts, the court determined that defendant Deeter only mowed, edged and watered the parkway, while city employees performed all the maintenance. Since the City of Long Beach habitually maintained the trees, only the City bore the duty to keep the trees reasonably safe for pedestrians, and Deeter's simple maintenance did not imply a duty to make major repairs such as removing roots from beneath the sidewalk. This was solely the responsibility of the City. Id. at 805-06, 199 Cal. Rptr. at 829.

The court stated that the resulting duty placed on the City does not necessarily carry with it a fiscal impact because "[s]hould [the City] tire of its responsibility to care for the [trees] at issue here, this task may be passed on to abutting owners under the the procedure established by Streets and Highways Code, section[s] 5600 [through 5630]." Unless this was done, however, the court found it unfair to hold an abutter liable to pedestrians for injuries caused by defects in the sidewalk and parkway, when "past practice [had] given that owner every rea-
Five years after *Jones*, the Court of Appeals for the Sixth District decided *Williams v. Foster*. In its analysis, *Williams* examined many previous cases including *Jones*. The *Williams* court declared the *Jones* historical pattern of care approach unfounded in the instance where an abutter did not undertake maintenance and no statute required him to do so. *Williams* also criticized *Jones* for falsely indicating that the son to believe that the City [had] undertaken responsibility to repair these defects." *Id.*


142. In *Williams*, the plaintiff filed a negligence action against Calvin Foster and the City of San Jose for damages resulting from an accident that occurred on the surface of a sidewalk that had been made uneven by the roots of a tree planted on the parkway fronting Foster's property. *Williams v. Foster*, 216 Cal. App. 3d 510, 512-13, 265 Cal. Rptr. 15, 16 (1989). By special verdict, the jury found Williams thirty percent at fault, and Foster and the City each thirty-five percent at fault. Williams obtained a judgment making the City and Foster, jointly and severally liable for economic damages of $15,928.98, San Jose severally liable for noneconomic damages of $16,590.00 and Foster severally liable for noneconomic damages of $16,590.00. Neither the City nor Foster obtained a judgment for indemnity. *Id.* Foster appealed the judgment, claiming that the duty of abutters to maintain the sidewalk fronting their property established by Streets and Highways Code section 5610 or by San Jose City ordinances, was owed solely to the city and not to members of the public.

As the court stated, the language of San Jose Municipal Code sections 13.28.190 and 14.16.220 was substantially similar to that contained in section 31 of the Improvement Act of 1911 as amended in 1935, and the court's analysis was equally applicable to both. *Id.* at 521-22, 265 Cal. Rptr. at 22. See *supra* notes 61 and 66. Thus, Foster argued that California Streets and Highways Code section 5610 and by analogy, the San Jose ordinances, imposed a duty that was owed solely to the city, not to third party pedestrians. He further contended that if the ordinances did impose liability on abutters, they would be invalid as conflicting with "the Governmental Tort Claims Act which concerns liability of governmental entities, an area of statewide concern upon which charter cities may not legislate." *Id.* at 514, 265 Cal. Rptr. at 17.

Respondents Williams and the City of San Jose, however, argued that Foster was liable to third party pedestrians for failure to maintain. Williams said that because San Jose ordinances established a duty and because the City did not undertake maintenance, the City had placed ultimate responsibility on the abutter. *Id.* at 517, 265 Cal. Rptr. at 19.


144. *Id.* at 521, 265 Cal. Rptr. at 22. It further criticized the statement in *Jones* that a city could alter a historical pattern of care approach by enacting an ordinance. The *Williams* court stated that *Jones* failed to consider the language necessary to do so. *Id.*
CALIFORNIA SIDEWALK LIABILITY

Streets and Highways Code sections 5000 through 5630 provided a procedure by which a city could pass the duty and liability to the abutters. "[I]n the absence of a statute or ordinance, a person has no affirmative duty to keep premises he does not own or possess in a safe condition." But, a possessor or owner does owe a duty to others by virtue of that possession or ownership, to act reasonably to keep the premises safe. So, under Williams, where an abutter does not own or possess the street easement, and does not undertake maintenance of it, he is not liable for failure to maintain the sidewalk or parkway in the absence of a statute or ordinance.

The Williams court, like the Schaefer court, was unwilling to find that the duty to maintain as established by the Improvement Act was owed to the public in the absence of clear and unambiguous language from the legislature, especially in view of the traditional rule that abutters owed no such duty. The court found the interpretation equally applicable to the San Jose ordinances, since they were written in language "substantially similar" to that of the Improvement Act. The court noted that the city could have enacted ordinances explicitly making abutters liable to third parties for injuries due to a failure to maintain, but did not.

145. Id.
147. Williams v. Foster, 216 Cal. App. 3d at 521, 265 Cal. Rptr. at 22.
148. Further, Judge Capaccioli stated that the fact that Schaefer has been in existence since 1944 without legislative counteraction buttressed the court's conclusion. "It is a rule of statutory construction that the Legislature is presumed to have been aware of long-standing judicial construction of a statute and approve it where that construction is not altered by subsequent legislation." Id.


149. The court dismissed the question of whether such ordinances would be valid, that is, "whether the intrinsic responsibilities of easement or dominant tenement owners and servient tenement owners is a matter of statewide concern upon which charter cities may not legislate." Id. at 522 n.9, 265 Cal. Rptr. at 25 n.9. See infra notes 243-55 and accompanying text for an analysis of this question. Since the abutter's duty to maintain was owed to the city and not to the public, and since it was not shown that Foster planted the tree, acted negligently with respect to his property, or did anything other than fail to maintain the sidewalk and parkway, the court reversed, and found in favor of Foster.
3. Defenses Available to Abutters

If negligence is found, both private and commercial abutters may assert any of the typical defenses available in private tort litigation to avoid or decrease liability.\textsuperscript{150} These defenses include comparative negligence\textsuperscript{151} and assumption of risk.\textsuperscript{152}

4. Summary of Abutter Liability

Although Streets and Highways Code section 5610 has not been interpreted to impose liability on abutters for failure to maintain the sidewalks, Civil Code section 1714(a) provides an alternative route for imposing liability. A large body of case law interpreting section 1714(a) has accumulated. Ultimately, these cases have increased the likelihood of abutter liability since there is a broader range of circumstances under which the abutter can be found liable. Thus, the exception provided by Civil Code section 1714(a) effectively swallows the general rule provided by Streets and Highways Code section 5610.

C. California Constitution Article XI, Section 5\textsuperscript{153} and Its Potential Effect on Municipal and Abutter Liability

In addition to the rules and exceptions regarding public entity and abutter liability described above, article XI, section 5 of the California Constitution exists. If section 5 is implemented by a California city, it can render these rules totally inapplicable within that city.

1. Charter Cities: Exclusive Power Over Municipal Affairs

In article XI, section 5, the California Legislature grants directly to cities\textsuperscript{154} and counties\textsuperscript{155} the power to "make and

\textsuperscript{150} See generally 6 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 1082-1113 (9th ed. 1988), for a discussion of tort defenses.
\textsuperscript{151} See generally id. §§ 1082-1109, for a discussion of comparative negligence.
\textsuperscript{152} See generally id. §§ 1104-1113, for a discussion of assumption of risk.
\textsuperscript{153} CAL. CONST. art. XI, § 5.
\textsuperscript{154} The two types of cities classified by the state legislature, "general law cities" and "charter cities," are to be distinguished. CAL. GOV'T CODE §§ 34100-34102 (Deering 1974). With regard to creation, general law cities are organized under the general law, as enacted by the California Legislature. CAL. GOV'T
enforce within [their] limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.\textsuperscript{156} In addition, section 5 provides that charter cities\textsuperscript{157} may, in their charters, give themselves the power to enact and enforce ordinances addressing municipal affairs,\textsuperscript{158} subject only to the limitations provided in their charters. With respect to other matters, charter cities are subject to general laws.\textsuperscript{159} Under section 5, often known as the theory of "municipal home rule,"\textsuperscript{160} charter cities have supreme authority over general laws in "municipal affairs."\textsuperscript{161} Thus, with respect

\textsuperscript{156} CODE \S 34102 (Deering 1974). General law cities are generally limited to "those powers expressly conferred upon it by the Legislature, together with such powers as are necessarily incident to those expressly granted or essential to the declared purposes of the [city]." Irwin v. Manhattan Beach, 65 Cal. 2d 13, 20, 415 P.2d 769, 773, 51 Cal. Rptr. 881, 885 (1966). See infra note 157 and accompanying text for a discussion of charter cities.

\textsuperscript{157} Again, counties are not discussed in this comment. \textit{But see infra} note 157, discussing consolidation of a city and county under one charter.

\textsuperscript{158} \textbf{CAL. CONST.} art. XI, \S 6. Any reference to "a city" in part II, section C of this comment is intended to include a consolidated city and county, as described in article XI, section 6.

\textsuperscript{159} \textbf{CAL. CONST.} art. XI, \S 5(a). The full text of article XI, section 5(a) provides:

\begin{quote}
It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.
\end{quote}

Id. (emphasis added).

\textsuperscript{160} 45 \textbf{CAL. JUR 3D}, \textit{Municipalities} \S 95 (1978). Section 5 also specifically grants charter cities the power to provide for (1) regulation of its police force; (2) subgovernment; (3) conduct of city elections; and (4) methods for which and the terms for which municipal officers are elected. \textbf{CAL. CONST.} art. XI, \S 5(b).

\textsuperscript{161} \textbf{CAL. CONST.} art. XI, \S 5(a). Section 5(a) allows a charter city to adopt the home rule privilege by charter provision authorizing it to make and enforce all ordinances with respect to municipal affairs, except as therein provided. A
to these municipal affairs, city charters supersede all inconsistent laws of the Legislature, subject only to limitations provided in the city charters themselves. With respect to all other matters, charter cities are subject to general laws.

2. Municipal Affairs, Statewide Concerns and Preemption By the State

Neither the California Constitution nor the cases interpreting section 5 have provided a test for determining whether a subject is a “municipal affair” (over which the municipality has full authority) or a matter of “statewide” or “general” concern (as to which the legislative authority controls). Judicial interpretation is necessary in each case. Generally, municipal affairs are matters of strictly local concern, having charter city generally has complete power over municipal affairs, except that it is subject to clear limitations contained in the charter. A city’s charter operates not as a grant of power, but as an instrument of limitation on the exercise of powers which the city is assumed to have under its own rule. It is unnecessary for the city to enumerate all its powers with respect to municipal affairs in order to remove itself from the operation of general law as to such municipal matters. 45 CAL. JUR. 3D, Municipalities § 95 (1978).

162. See Butterworth v. Boyd, 12 Cal. 2d 140, 82 P.2d 434 (1938); Bishop v. San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); Fresno v. Pinedale County Water Dist., 184 Cal. App. 3d 840, 229 Cal. Rptr. 275 (1986). If the matter is one of exclusive “statewide concern” or if the legislature has manifested an intent to completely “occupy the field,” the municipal legislation is preempted by the general state laws. See infra notes 170-77 and accompanying text.

163. These other matters include: (1) those municipal matters for which the city did not (in its charter) grant itself the authority to legislate, and (2) all non-municipal affairs.

164. In sum, charter cities may legislate on any affairs that are municipal in nature (if their charters so provide), but must follow the general law as to all other affairs. General law cities, in contrast, must follow the general law in all their affairs, including those deemed to be municipal. The Legislature has more power over the affairs of general law cities than it has over charter cities.

165. See infra notes 170-77 and accompanying text which discuss statewide concerns. 45 CAL. JUR. 3D, Municipalities § 99 (1978).

166. 45 CAL. JUR 3D, Municipalities § 99 (1978). Municipal affairs vary from city to city. Id.

167. Sometimes an affair relating to property within a city may be of such general concern that it may not be considered a municipal affair. For example, if a city street has been declared by the Legislature to be a secondary highway, the improvement of the street is not a municipal affair. Southern Cal. Roads Co. v. McGuire, 2 Cal. 2d 115, 39 P.2d 412 (1934).

Cf. Perez v. San Jose, 107 Cal. App. 2d 562, 237 P.2d 548 (1951), which held that city tax funds (expendable only for municipal purposes) could be spent
Typical subjects of municipal regulation include the use of land, the use of streets, and the regulation of occupations and businesses within a city. A problem arises, however, where a municipal ordinance conflicts with a matter of exclusive statewide concern or a field which the Legislature intends to fully occupy. In these cases, state law preempts the necessarily inconsistent local regulations. In determining whether the Legislature intended to occupy a particular field to the exclusion of all local regulation, the courts must look to the whole purpose and scope of the legislative scheme as well as to the language of the particular enactment.

Preemption by state law occurs when the matter has been completely covered or when the Legislature has clearly indicated that it will not accept additional legislation on the matter. Preemption also occurs if the matter is such that the adverse

on the improvement of a street within the city, The Alameda, that was also part of the state highway system. The court found that even though highways are state projects, the improvement of a city street or state highway within its borders is a city affair. Further, San Jose and its inhabitants received a special benefit as compared with the rest of the state. Id.


169. 8 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW § 793 (9th ed. 1988). Other examples of matters held to be municipal in nature include local parking, local public employees, local revenue and taxation, local utilities and municipal elections. Id. § 803. In contrast, matters found to be of statewide concern include assessment of county property, cable television, charter amendment procedures, criminal records, franchise for telephone or power service lines, government subsidized rental housing, intercity sewage systems, licencing of a member of trade, milk industry regulation, school system, statutory liability, traffic and veterans. Id. § 804.

In general, municipal action which affects people outside the municipality becomes, to that extent, a matter upon which the state can regulate. Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 505, 754 P.2d 708, 716, 247 Cal. Rptr. 362, 370 (1988) (citing Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 879, 610 P.2d 407, 425, 164 Cal. Rptr. 510, 528 (1980)).

170. In this context, a conflict exists if a local ordinance expressly or impliedly duplicates, contradicts or enters an area fully occupied by general law. California Water & Tel. Co. v. County of Los Angeles, 253 Cal. App. 2d 16, 61 Cal. Rptr. 618 (1967).

171. If the state's preemption is not complete, local supplements are not deemed conflicting to the extent that they cover phases that have not been covered by state law. 45 CAL. JUR. 3D, Municipalities § 93 (1978).

172. Id. Sometimes state laws declare that their provisions are not exclusive and that cities may also regulate the subject. 8 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW § 798 (9th ed. 1988).
effect on transient citizens outweighs the benefit to the city. Any reasonable doubt as to whether a matter is a municipal or statewide concern will be resolved by the courts in favor of the state. An example of an area held preempted by state law is government tort liability. Specifically, liability of a city or other municipality to one injured as a result of a defective condition of its property is solely a matter of general state concern and not within the sphere of municipal affairs.

173. More specifically, preemption by state law as to municipal affairs occurs when:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;

(2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or

(3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local charter provision or ordinance on the transient citizens of the state outweighs the possible benefit to the city.


174. Examples of areas in which local regulations have been held to be valid include: municipal elections; public improvements having special concern to city inhabitants; street opening, maintenance and improvement; building permit issuance; animal impounding; municipal property leasing; taxation for revenue for municipal purposes; rent control; water supplying and waste removal; parks and recreational facilities; and local transportation. 8 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 795-796 (9th ed. 1988). See also supra note 167.

175. Id. § 99. The Legislature does not have the power to determine what constitutes a municipal affair. In addition, the Legislature cannot change a municipal affair into a matter of statewide concern. Sometimes, a subject is both a municipal affair as well as a matter of statewide concern. City of Redwood City v. Moore, 231 Cal. App. 2d 563, 42 Cal. Rptr. 72 (1965).

176. In California, government tort liability at the state and local level is governed exclusively by the California Tort Claims Act. See generally CAL. GOV'T CODE §§ 810-996.6 (Deering 1982 & Supp. 1991).

177. 45 CAL. JUR. 3D, Municipalities § 112 (1978).

The state may, for example, enact a statute imposing on citizens public liability for injuries resulting from defective public buildings and a city cannot by adoption of a charter exclude itself from the operation of this general law. Also, a charter or ordinance prescribing a period different than that prescribed by state statute for presentation of a claim for injuries sustained from a dangerous condition of [the building] does not control.

Id. (emphasis added).

Additional examples of areas which have been preempted by the state include: public improvements transcending city boundaries, railroad crossings, city traffic regulation, building contractor licensing, telephone line construction, criminal activities, land development, trade and professions licensing, and telephone
Having examined how article XI, section 5 of the California Constitution enables charter cities to make and enforce laws regarding municipal affairs, it is also important to understand how attorneys and courts have employed these charter city ordinances and how they operate in conjunction with state statutes.

3. **Current Judicial Utilization of Local Ordinances**

If a sidewalk accident case involves a general law city as a defendant, the court looks to the general state laws, that is, to California Streets and Highways Code section 5610, Civil Code section 1714(a), Government Code section 835, and to the relevant case law for rules regarding sidewalk maintenance and liability for accidents. If one of the defendants is a charter city, the court looks to local legislation (such as municipal regulations and other ordinances authorized by the city charter) for any rules regarding sidewalks. Thus, if local ordinances exist and if they are specifically pleaded, the court considers the standards provided by the city code. In addition to the local legislation, the court refers to the general state laws. Parties and courts utilize state laws even when local sidewalk ordinances exist.

Finally, a court *must* consult state rules, that is the California Tort Claims Act, in addition to city ordinances when the city, in addition to the abutter, is called as a defendant. In this instance, the court is examining municipal liability, an area of statewide concern upon which no city (general law or charter) may legislate.

The above approach is demonstrated in *City of Sacramento communications.*

---

178. *Id.* § 797.

179. The defendant may also be a county, or a consolidated city and county. See, e.g., *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 260 P.2d 55 (1953), where plaintiffs sued both the city and county.

180. The local regulations must be specifically pleaded.

181. Consulting state laws is especially helpful or necessary when the city code and the state statutes are similar; when the city code is ambiguous; when the facts in a particular case indicate a necessity for law beyond the scope provided by the local city legislation; when the party has not pleaded the local ordinance; or when the city code is void because it has been preempted.

182. *See supra* notes 22-58 and accompanying text.

183. *See supra* notes 173-77 and accompanying text.
v. Gemsch Investment Co., Jones v. Deeter, Williams v. Foster, and Selger v. Steven Brothers, Inc.\textsuperscript{184}

a. City of Sacramento v. Gemsch Investment Co.\textsuperscript{185}

In City of Sacramento v. Gemsch Investment Company,\textsuperscript{186} a pedestrian slipped on seeds on a sidewalk that had not been cleaned in five years.\textsuperscript{187} The Court of Appeals for the Third District found that the local Sacramento ordinances requiring abutters to repair sidewalks, requiring abutters to notify the city of sidewalk defects, and allowing actions against abutters for failure to repair the sidewalks,\textsuperscript{188} did not create a con-

\textsuperscript{184} See also Moeller v. Fleming, 136 Cal. App. 3d 241, 186 Cal. Rptr. 24 (1982). In Moeller, the court assumed (without ruling) that under the Schaefer analysis the San Jose ordinances did not make the abutter liable to a plaintiff for injury due to abutter’s failure to maintain. Id.


\textsuperscript{186} The lower court granted summary judgment for the settling defendants on the City’s cross-complaint for indemnity. Although the case was primarily a contribution and indemnity case, it exemplifies the use of local ordinances by the court.


\textsuperscript{188} The Gemsch court, quoting the Sacramento ordinances in effect on the accident date, stated:

The City [of Sacramento] had certain ordinances in effect on the accident date . . . which we quote as follows:

"Sec. 38.71: Owners to repair defective sidewalks. Any person owning real property in the city shall repair any defective sidewalk lying in front of or along the side of his property. (Ord. No. 428, § 1.)"

"Sec. 38.72: Tenants to notify city engineer of defective sidewalk. Any tenant of real property in the city shall report to the city engineer in writing the fact that any defective sidewalk exists in front of or along the side of the property occupied by him. (Ord. No. 428, § 2.)"

"Sec. 38.74: Liabilities for injuries where repair or report not made. If, in consequence of any sidewalk being defective and in condition to endanger persons passing thereon, any person, while exercising ordinary care to avoid the danger, who . . . suffers damage to his person . . . through any defect of a sidewalk may have recourse for damages thus suffered against the person failing to repair such defect or the person failing to report the defect. (Ord. No. 428, § 5.)"

"Sec. 38.75: Purpose of article. It is not the intent of any of the provisions of this article to change the procedure concerning sidewalk repairs set forth in the Improvement Act of 1911, but to provide alternative and supplementary procedure. (Ord. No. 428, § 6.)"

City of Sacramento v. Gemsch Investment Co., 115 Cal. App. 3d at 872, 171 Cal. Rptr. at 765-66 (emphasis added) (the case cited sections of the Sacramento ordi-
tract of indemnity between the City and Sacramento abutters. Indemnity was therefore barred. 189

b. Jones and Williams Compared

The Jones court did not look to a code or ordinance of the City of Long Beach. 190 Instead, it relied heavily on Low in reaching its decision. Although the defendants in Low were public entities and were therefore subject to Government Code section 835, the Low court likened the county to an abutter. Since section 5610 does not impose liability upon abutters for failure to maintain, and since a city code imposing such liability did not exist, the court examined the historical maintenance of Long Beach sidewalks. The court stated that the City of Long Beach, as the traditional maintainer of sidewalks, was liable for injuries caused by a dangerous sidewalk condition created by parkway trees. Conversely, had the City's abutters historically maintained the parkway, then the abutter could have been held liable for injuries caused by his failure to so maintain. 191

In applying this historical approach to the facts, the court found that the abutter was not liable because the City had historically cared for the parkway, and it would be unfair to impose liability when past practice indicated that the City would maintain the parkway. 192

The Williams court examined both section 5610 of the Streets and Highways Code as well as the nearly identical San Jose Municipal Code sections. 193 Noting the previous Schaefer determination that the duty to maintain imposed by section 5610 was not a duty of care, and noting that the relevant portions of the San Jose Code were written in language "substan-

---

189. See also Moeller v. Fleming, 136 Cal. App. 3d 241, 186 Cal. App. Rptr. 24 (1982). In Moeller, the court assumed, without ruling, that under the Schaefer analysis, the San Jose ordinances did not make the abutter liable to an injured plaintiff for injury due to abutter's failure to maintain. Id. at 244, 186 Cal. Rptr. at 25.

190. It is possible that the parties failed to plead any Long Beach ordinances. It is also possible that Long Beach was not under charter or that its charter did not address sidewalk maintenance or liability.


192. Id.

ially similar" to section 5610, the court found that the state statute and the local ordinances imposing upon abutters a duty to maintain was not owed to the public, but solely to the city.\footnote{194. \textit{Id.}}

The court, rejecting the \textit{Jones} historical pattern of care approach, stated:

\begin{quote}
[I]n the absence of a \textit{statute or ordinance}, a person has no affirmative duty to keep premises he does not own or possess in a safe condition. Thus, where a particular abutter does not possess or own the street easement, and does not undertake maintenance of it, \textit{he is not liable} for failure to properly maintain the sidewalk or planting strip \textit{in the absence of statute or ordinance}.\footnote{195. \textit{Id. at 521, 265 Cal. Rptr. at 23-24 (emphasis added).}}
\end{quote}

Unlike \textit{Jones}, the \textit{Williams} court was unwilling to find liability absent clear and unambiguous language from the state or local legislature. Since neither the Improvement Act nor the San Jose Code provided such language, the abutter was not held liable.


The \textit{Williams} approach was used in \textit{Selger v. Steven Brothers, Incorporated}. In \textit{Selger}, a pedestrian slipped and fell on dog droppings on a sidewalk abutting defendant's Los Angeles nursery and hardware business.\footnote{197. \textit{Selger v. Steven Brothers, Inc.}, 222 Cal. App. 3d 1585, 1588, 272 Cal. Rptr. 544, 545 (1990).} At trial, the judge instructed the jury that violation of the local Los Angeles ordinances requiring abutters to clean sidewalks\footnote{198. \textit{Selger}, quoting the ordinances, stated: \begin{quote}
Los Angeles Municipal Code section 41.46 provides: "No person shall fail, refuse or neglect to keep the sidewalk in front of his house, place of business or premises in a clear and wholesome condition."
\end{quote}

\begin{quote}
Los Angeles Municipal Code section 56.08, subdivision (c) provides: "No person having charge or control of any lot or premises shall allow any soil, rubbish, trash, garden refuse, tree trimmings, ashes, tin cans or other waste or refuse to remain upon any sidewalk, parkway, or in or upon any street abutting on or adjacent to such lot or premises, or which will interfere with or obstruct the free passage of pedestrians or vehicles along any such street, sidewalk or parkway."
\end{quote}} constituted negligi-
gence per se. The jury found for the plaintiff and awarded him damages.\textsuperscript{199}

The Court of Appeals for the Second District reversed. Citing \textit{Schaefer}, \textit{Williams}, and Streets and Highways Code section 5610, the court stated that statutes and ordinances requiring abutters to maintain have "almost uniformly" been interpreted to create solely a duty owed to the city, and not a standard of care owed to the traveling public.\textsuperscript{200} Further, any such duty owed to the public could be imposed "only if the ordinance clearly and unambiguously so provided."\textsuperscript{201}

The court found that the Los Angeles ordinances at hand "[d]id not clearly so provide." It stated that since the duty to clean was enforceable through criminal punishment or nuisance abatement under the Los Angeles Municipal Code, or through the assessment procedures provided by sections 5600 through 5630 of the Streets and Highways Code,\textsuperscript{202} these local ordinances did not "expressly or unambiguously create a standard of care for liability in civil damages to pedestrians injured by a condition of the sidewalks not caused by defendant."\textsuperscript{203}

4. Summary of Local Legislation

In sum, while charter cities have the power to self-legislate with respect to municipal affairs, they cannot enact legislation that penetrates any area of exclusive statewide concern. Preemption by state law occurs if a charter city enacts an ordinance that expressly or impliedly duplicates, contradicts, or in any way enters an area fully occupied by general state law. Recent cases demonstrate the use (or the lack of use) of local ordinances made by courts in determining municipal and abutter liabilities.

\textit{Id.} at 1589, 272 Cal. Rptr. at 546.

\textsuperscript{199} \textit{Id.} By special verdict, "[t]he jury found total damages of $473,000, and rendered verdict for plaintiff for $402,050 based on 15 percent comparative negligence of plaintiff." \textit{Id.}

\textsuperscript{200} \textit{Id.} at 1589-90, 272 Cal. Rptr. at 546-47.

\textsuperscript{201} \textit{Id.} at 1590, 272 Cal. Rptr. at 547.

\textsuperscript{202} "California Streets and Highways Code sections 5600 through 5630 provide a procedure for giving notice to [abutters] requiring [them] to repair the sidewalk or be liable for the cost of repairs made by the city." \textit{Id.} at 1591, 272 Cal. Rptr. at 547.

\textsuperscript{203} \textit{Id.} at 1590-01, 272 Cal. Rptr. at 547-48.
III. PROBLEM

There are a number of obstacles facing sidewalk accident victims and defendants, and their attorneys. As evidenced above, California sidewalk accident law is scattered among several state statutes, various city codes, and the many cases interpreting them. California, therefore, lacks a single, comprehensive scheme with respect to analysis of liability for sidewalk injuries.

Second, the existing law is deceptive and misleading. With respect to abutters, the statutory exception, California Civil Code section 1714(a), swallows the general rule, Streets and Highways Code section 5610. Furthermore, the relevant case law, although most often finding for the defendant abutter, incorrectly interprets statutes and other cases, thereby creating conflicting theories of analysis within the same area of liability. Jones uses a historical pattern of care approach for imposing liability, while Williams mandates the existence of a state statute or a city ordinance clearly giving notice that liability may be imposed. While Jones incorrectly interpreted Low, Williams intruded on statewide concerns by allowing city ordinances to dictate local standards of liability.

Third, the California Government Code seems to absolve public entities from liability where they own the fee underlying the sidewalk as well as where their sole ownership is an easement over the land. Fourth, although government tort liability is a statewide concern, the California Constitution provides a means by which charter cities can increase abutters’ duties or impose liability upon them for failure to maintain. The looming possibility of local alteration of statewide standards creates constant uncertainty.

Finally, it is evident that the present statutes and their recent judicial interpretations are insufficient. Since the state of sidewalk law in California is so uncertain, complete revision of the current statutes is necessary to ensure equal application

204. The exception is provided by CAL. CIV. CODE § 1714(a) (Deering 1978 & Supp. 1991).
205. The general rule is provided by CAL. STS. & HIGHS. CODE § 5610 (1978).
206. See supra notes 131-49 and accompanying text.
207. See generally supra notes 153-203 and accompanying text.
of standards governing this area of law.

IV. ANALYSIS

A. Lack of a Comprehensive Scheme

The major defect in current sidewalk liability law in California is its lack of cohesiveness. Any plaintiff's attorney who is cautious enough to name the city, the abutter, and any third parties as defendants must search diverse sources for the applicable law. In making his legal arguments, a lawyer must consult the Streets and Highways Code, the Civil Code and, assuming the city accepts the claim, the Government Code. Additionally, the attorney must check the city code to determine the effect, if any, that it has on state statutes. Finally, he must consult extensive and inconsistent case law to interpret these state statutes and city ordinances. The result is a timely, costly hunt for the law. The widespread existence of sidewalks not only in California but also throughout the entire United States, in addition to the likely occurrence of sidewalk accidents, mandates cohesive legislation devoted to the analysis of liability for sidewalk accidents.

California needs a single article, located in the logical place, the Streets and Highways Code, that addresses liability for sidewalk accidents. The article's provisions must require that in any sidewalk accident action, the city, the abutter, and third parties be automatically named as defendants, effectively eliminating the current prerequisite of claim acceptance by the city in sidewalk accident cases. This scheme fosters judicial economy.

208. Specifically, he must consult Streets and Highways Code section 5610.
209. Specifically, he must consult Civil Code section 1714(a).
211. The Streets and Highways Code is the best location for the revised chapter and its articles since sidewalks are a part of the street, and since substantial legislation pertaining to the subject of sidewalks already exists within this Code.
212. In addition, the plaintiff should name any public employees which may be responsible.
213. In naming the abutter, the plaintiff should name the landowner as well as any lessees.
214. This scheme prevents the multiplicity of suits that could arise if a plaintiff mistakenly believes that sidewalks are solely the city's responsibility.
B. Misleading, Ambiguous Laws

A second problem with the current California sidewalk laws is their lack of clarity. In some instances, the laws simply contradict each other.

1. Laws Regulating Liability of Abutters

   a. Deficient State Statutes

   The primary section employed in abutter liability cases is Streets and Highways Code section 5610. Although the section has been interpreted to provide a general rule of non-liability of abutters for their failure to maintain, the section fails to identify any possible exceptions. However, an exception entirely outside the Streets and Highways Code does exist. The exception appears in Civil Code section 1714(a). The Streets and Highways Code is silent on exceptions to the general rule of non-liability because section 5610, and the entire Improvement Act, was intended to provide for repair and maintenance, not for liability for accidents. Thus, at first glance, the law seems to indicate that an abutter cannot be held liable, but a significant exception does exist.

   To alleviate this uncertainty, the Legislature must add a provision to the Streets and Highways Code addressing the issue of liability, or it must add provisions to the existing statutes, clearly stating the nature and purpose of the sections and identifying the exception to the general rule.

   b. Conflicting Case Approaches

   Case law interpreting abutter liability is also problematic. It is generally accepted that a property owner is liable for any willful or negligent act or omission in the care of his property which caused harm to another outside his land. However, the cases conflict in their analysis for determining liability for dangerous conditions originating in the parkway or parking strip.

   215. See supra notes 63, 64, 72 and accompanying text.

   216. The abutter, for example, failed to notice his son's toys on the sidewalk or, having noticed the toys, failed to remove the toys from the sidewalk.
1) Jones: Historical Pattern of Care

The Jones case stands for the rule that section 5610 does not impose abutter liability. If a local code on point does not exist, the court, in determining whether the defect is somehow attributable to the abutter, must look to the historical pattern of care with respect to sidewalks within the city. If the city has traditionally maintained the sidewalks, inaction or simple maintenance by an abutter will not result in the requisite amount of control necessary to support a finding of liability. Conversely, if abutters have traditionally maintained the area, a failure to do so or a negligent undertaking on the part of a particular abutter will result in liability for any accident created therefrom. Thus, the historical pattern of care approach employed by Jones relies on the undertaking of a certain activity by others around a particular abutter to determine whether he must maintain, and thus control, the sidewalk.217 This is an illogical, inefficient way to determine control. Courts cannot depend on such arbitrary standards.

Although not specifically addressed by Jones, the court seems to indicate218 that the undertaking of simple maintenance in a city where abutters have historically performed

---

217. Not only does the case state that the city's conduct in undertaking (or not undertaking) maintenance determines the abutter's duty, but the action of other abutters, in undertaking maintenance, would also impose such a duty. The court's decision implies that had the City of Long Beach not undertaken maintenance, the abutter would be liable. This is not logical. With thousands of leaves partially covering the fronting sidewalk, an abutter would be well-advised to sweep only if the city in which his property is located habitually maintains because in this instance, the City of Long Beach, having undertaken maintenance of the parkway, bears the duty. In this example, however, there would actually be less of a need for the abutter to maintain because the City has done so.

If an abutter sweeps the leaves when the city has not undertaken maintenance and therefore sidewalk care is especially necessary, the abutter risks establishing an affirmative duty upon himself. Thus, the court's logic and reasoning are faulty.

218. Under Jones, liability may be imposed only if the malignant parkway defect is "somehow attributable to the abutter." Technically, straying tree roots that press up beneath the sidewalk creating a dangerous change in the level of a sidewalk slab are attributable to the abutter if he so much as waters the fronting parkway. The abutter's simple maintenance contributes to the growth of the tree roots, causing them to stray. According to the court's logic, this simple action by the abutter contributes, at least in part, to the creation of a dangerous parkway condition.
maintenance could be enough to constitute control, and therefore, liability. The rule penalizes abutters for keeping the sidewalk clear, for keeping nature alive, for maintaining an aesthetically pleasing neighborhood, and for assisting the city.\textsuperscript{219} It is poor public policy to punish abutters for performing such tasks. Thus, the Jones approach is ultimately a hindrance to efficient sidewalk care. The lack of incentives created by the Jones approach with respect to voluntary abutter assistance in cleaning the sidewalks results in unkept, unsafe sidewalks, and inefficient use of the city's time, money and labor.

The Jones court relied heavily on Low,\textsuperscript{220} stating that Low provided the basis for premising liability on the historical pattern of care. Jones completely misinterpreted the Low case, which simply noted that the county hospital, like other Sacramento property owners, maintained the sidewalk and parkways and, in doing so, allowed water-filled depressions to form. Low mentioned Sacramento abutters as a group in order to arrive at the main issue in Low, control. The Low court never stated that Sacramento abutters' traditional maintenance of the parkways was the reason for imposing liability.\textsuperscript{221} Further, the Low court never stated that, had abutters not undertaken maintenance or had the city traditionally maintained city sidewalks, the county hospital abutter would have been absolved of its previously allotted thirty percent share of liability.

Jones, in addition to misinterpreting Low, failed to distinguish the facts of Low. First, the court did not consider the fact that both of the Low defendants, the city easement owner and

\textsuperscript{219} The abutter not only helps save the city's money, but more importantly, he also helps save the city's time, which can be better spent elsewhere.

\textsuperscript{220} See supra notes 96-108 and accompanying text for a discussion of Low. Stating that Low found the abutter to be liable in tort for injuries occurring in the parkway, an area of foreseeable misuse, the Jones court logically extended liability to the case where a pedestrian is injured by a defect, originating in the parkway but affecting the sidewalk, built primarily for accommodation of foot traffic. Jones v. Deeter, 152 Cal. App. 3d 798, 804-05, 199 Cal. Rptr. 825, 828-29 (1984).

\textsuperscript{221} In Low, "undisputed evidence" showed that Sacramento property owners, not the municipality, maintained parking strips. Low v. City of Sacramento, 7 Cal. App. 3d 826, 830, 87 Cal. Rptr. 173, 175 (1970). Thus, neither Jones nor Low, upon which the Jones "historical pattern of care" approach was based, discussed how a court is to determine a city's "traditional" or "historical" pattern of care. A truly accurate determination of this would call for a survey of the property owners in all of Long Beach.
the county abutter, were public entities with excellent cost-spreading abilities. Thus, contrary to the typical abutter case, both potentially liable parties in *Low* were public entities.

Second, the county hospital abutter was open to the public, inviting injured people as well as family and friends to use the facilities. As such, the hospital bore greater duties toward the plaintiff due to the special invitor/invitee relationship. Third, the dangerous condition in *Low* was unnatural in origin and was a recurring, obvious problem of which the county had knowledge. Given the large amount of foot traffic entering and exiting the hospital, the fact that members of the public were invitees and that the misuse of the parking strip was foreseeable, the County had a duty higher than a private abutter would have had. The County's power to remedy the condition and its ownership of the underlying fee were the bases for the court's finding that the County controlled the parkway.

In addition, the case involved a dispute between two public entities, one wanting the other to be completely liable. Thus, in this case, the Government Code was applicable because a public entity would ultimately pay. The court decided to divide responsibility evenly.

Finally, as later noted by Williams, *Jones* falsely stated that a city could pass on the duty of care owed to pedestrians via the procedure established in the Streets and Highways Code. Not only have state statutes requiring maintenance been interpreted not to impose a duty of care, but a transfer of such liability would also tread on an area preempted by the state, that is, government tort liability.

2) Williams: State Statute or City Ordinance as a Prerequisite to the Imposition of Liability

In contrast to the *Jones* case, *Williams* stands for the proposition that where an abutter does not possess or own the

---

222. "The county asked the city to prohibit parking along the hospital frontage, but the city declined. The county suggested the possibility of paving the parking strip but without success." *Id.* at 830, 87 Cal. Rptr. at 174-75.

223. This logic is also faulty because in theory, *all Sacramento abutters* as well as the City have the power to prevent or remedy a dangerous condition.

224. Had the abutter (the County) been a private residential landowner, it would have probably been successful in its claim.

225. See infra notes 243-55 and accompanying text.
street easement and where he does not undertake to maintain it, there exists no legal basis for the imposition of liability for failure to maintain absent a statute or ordinance. Although Williams is more logical than Jones, its reasoning is not entirely satisfactory.

Williams criticized Jones, failing to see any legal foundation for the application of a historical pattern of care theory where an abutter had not undertaken maintenance and was not required to do so by statute. However, this point is irrelevant because a statute requiring maintenance does exist. Streets and Highways Code section 5610 places a duty of repair on "[t]he owners of lots . . . fronting on any . . . public street . . ." Thus, a maintenance requirement is applicable to all abutters, not just to those who own the street fee or hold title to the sidewalk. Similarly, the San Jose City Code mentions nothing about technical ownership of the sidewalk in its imposition of a duty to maintain.

Section 5610's disregard of technical ownership of the sidewalk and the requirement of "clear and unambiguous legislative language" as a prerequisite for the imposition of liability are in accord with public policy. Section 5610 imposes a duty to maintain on every abutter regardless of how far into the street each actually owns. Thus, the duty is imposed on every abutter, not just on those which own to the middle of the street. Furthermore, the statute gives abutters notice of liability they might incur if they fail to maintain. Unfortunately, Williams assumed for purposes of the case that any such municipal legislation would be valid, that is, that it would not conflict with the California Tort Claims Act and that it would not be considered legislation on a statewide concern. Thus, the Wil-

226. The court based its third statement on its upholding of Schaefer (section 5610 does not impose liability on abutters), Schwartz (absent a special relationship or statute giving rise to a duty, a person has no duty to protect others from perils he did not create), and Rowland (a possessor or owner is under duty to act reasonably to keep him premises in a safe condition). Williams v. Foster, 216 Cal. App. 3d 510, 265 Cal. Rptr. 15 (1989).


228. Simply adding the words "[f]ailure to maintain may result in abutter's liability for injuries suffered thereby" would make all abutters, irrespective of technical ownership, liable for failure to maintain.

229. An example of clear and unambiguous language is in the Sacramento ordinances cited in Gemsch. See supra note 188.

230. See infra notes 243-55 and accompanying text for an argument that such
liams approach left unanswered the vital question of the validity of local legislation affecting the rules provided by the Government Tort Claims Act.

2. Laws Regarding Liability of Public Entities
   a. Incomplete State Statute

   With respect to public entities, state law involving liability is ambiguous. Government Code section 830(c) states that public property does not include easements over the public property which are not owned or controlled by the public entity. This section completely conflicts with the Low holding. In Low, the public entity abutter, a county hospital, owned the fee and the city owned an easement over it. Section 830(c) seems to indicate that if the county had not exerted any control over the sidewalk, it would have been absolved of liability, thereby leaving the city to pay the entire seventy percent judgment. Clearly, section 830, as written, fails to consider the special circumstances that arise when the abutter happens to be a public entity.

   b. Conflicting State Statutes

   Section 831.3 of the Government Code and section 5610 of the Streets and Highways Code are in conflict. Section 831.3 states that a public entity is not liable for any injury due to "maintenance or repair on any road which has not officially been accepted as a part of the road system under the jurisdiction of the public entity." Thus, under section 831.3, a public entity can only be held liable if it has accepted the street easement.

   In contrast to section 831.3, Streets and Highways Code section 5610 states that all owners of property fronting public streets must maintain the sidewalks and parkways. The section, legislation is not valid.

231. Streets and Highways Code section 1806 effectively states the same: [No city shall] be held liable for failure to maintain any road unless any until it has been accepted into the city street system by resolution of the governing body.

232. This would indicate liability if the public entity owned the fee under the street as well.
making no reference to ownership of the underlying fee, holds abutters responsible for maintenance. As Schaefer has interpreted, this responsibility for maintenance does not create liability for injuries.

Section 5610 implies that because the abutter cannot be held liable, the sole recourse available is with the city. Section 831.3, however, absolves the city of liability when the sidewalk has not formally been accepted as part of the city road system. Thus, the city is not liable when an abutter owns the fee and the city fails to formally accept the sidewalk. Section 831.3 effectively limits city liability to those instances where the city owns the fee or where an abutter owns the fee and the city has formally accepted it into the city street system. This resulting limitation is inconsistent with section 5610.

C. Looming Possibility of Local Legislation

Another problem with government liability for sidewalk defects is the possible effect of California Constitution article XI, section 5. Under section 5, a charter city can enact laws regarding sidewalk care within its city limits. A city code can effectively impose liability upon an abutter for failure to maintain. This situation creates great uncertainty. The possibility of change within certain cities, and along with these changes the probability of unequal imposition of duties and liabilities among California residents, poses a continuous threat. The probability of unequal imposition of liability brings into question the validity of local legislation altering sidewalk care and liability for sidewalk accidents.

1. Sidewalk Maintenance and Repair
   a. Nature and Application of Section 5610

Problems do not exist with respect to a charter city increasing or decreasing the duties of an abutter for sidewalk care. Section 5601 of the Streets and Highways Code indicates that the chapter only applies to maintenance and repair proceedings, and section 5602 of the same code states that "[The] chapter constitutes a separate and alternate procedure for per-

233. See, e.g., supra note 188.
forming the work specified therein. The statute indicates that the procedure therein provided is solely an alternative method for getting the work completed and that other procedures for street maintenance and repair may exist within a city. These can include informal procedures or formally enacted procedures. Formally adopted procedures are, of course, preferred because they give clear notice to the residents as to their duties. Conceivably, the Streets and Highways Code could require charter cities to formally adopt either section 5610 or a procedure of their own.

Hence, a city could provide for street maintenance and repair in its charter by increasing or decreasing the duties placed upon abutters by section 5610. If the city is a general law city with no charter, section 5610 would govern as the applicable law. Similarly, if the city is a charter city, but silent with respect to the performance of street work, the charter would imply adoption of general laws (i.e. the procedure provided by sections 5600 through 5630). Alternatively, a charter city may state that the city is exclusively responsible for performing repairs, but that abutters must bear the cost. This would effectively reduce the abutters' duties to one of reimbursement.

Finally, a city charter could impose additional duties on abutters. For example, a charter could require abutters to notify the city of sidewalk defects or any other problems. Such a duty is logical where cities are large and it would be difficult for the city to continuously inspect every inch of sidewalk. Property owners are generally in the best position to become aware of disrepair and to correct conditions. Moreover, the property owner has a specific interest in keeping the sidewalk in good condition, and the additional duty of notification

235. CAL. STS. & HIGH. CODE § 5602 (Deering 1978)(emphasis added).
236. Jones adopted an informal historical pattern of care approach.
237. The Sacramento ordinance cited in Gemsch is an example of formally enacted procedures. See supra note 188.
238. The Sacramento City Code discussed in Gemsch placed upon abutters the additional duty of notifying the city of problems. See supra note 188.
239. "[T]he city would have to have inspectors circulating throughout the area, day and night, . . . to discover and remove . . . material from the sidewalks." Selger v. Steven Brothers, Inc., 222 Cal. App. 3d 1585, 1591, 272 Cal. Rptr. 544, 548 (1990) (citing Kotronakis v. City and County of San Francisco, 192 Cal. App. 2d 624, 629-30, 13 Cal. Rptr. 709, 712 (1961)).
would, therefore, be only a minor inconvenience. It is in a business owner's own interest to have a safe means of ingress and egress for employees, customers and other invitees. A residential owner's concern focuses upon the safety of his family and invitees such as friends.

The procedure provided by sections 5600 through 5630 is available to all cities that have failed to adopt an alternative system for performance of and payment for street work. Allowing for alternate procedures may be advantageous given the different sizes and budgets of various cities. Procedures utilized by one city may not be practical for another. This holds especially true for a city where other, more pressing needs exist.

b. Sidewalk Maintenance and Repair Is a Municipal Affair

The fact that the general subject of sidewalks is a municipal affair lends additional support to the validation of local legislation addressing solely sidewalk maintenance and payment for sidewalk repairs. Regulation of streets in this manner is directly related to the internal business affairs of a city. Performance of and payment for work is directly related to the economic affairs of a city as well as to public safety. The use of land and the use of streets are historically subjects of municipal regulation. Clearly, maintenance and repair of streets, sidewalks and parkways affect their use.

More specifically, local regulations regarding street opening, maintenance and improvement have been held valid. Maintenance and repair fall into this category of valid municipal action. The fact that maintenance must be financed gives the municipality further grounds for action with respect to maintenance. In addition, local sidewalks are of a special concern to city inhabitants who make the most use of them and derive special benefits from them.

240. The procedure is available to both general law cities and charter cities.
241. Obviously, improvements cannot be made unless funds exist to pay for them.
242. See supra note 167.
2. Abutter Liability for Sidewalk Injuries Due to Failure to Maintain or Repair

Although local legislation affecting the duty to maintain is valid, local legislation imposing liability upon the abutter for failure to maintain is invalid. The Williams court noted this possible invalidity, but failed to address the question.

a. Government Tort Liability Is a Statewide Concern

The question of liability of a city to someone injured as a result of a defective condition of property owned or controlled by the city is a matter of general statewide concern not within the sphere of municipal affairs. Thus, any time a city charter provides a mechanism whereby it excludes itself from state-proscribed liability, it is void.


An example of a local provision that transfers liability can be seen in the Sacramento City Code cited in Gemsch. One of the Sacramento ordinances entitled “Liability for injuries

---

243. Jones had incorrectly suggested this could be done through the Streets and Highways Code sections.

244. The analysis assumed municipal ordinances imposing liability for failure to maintain were valid.

245. When municipal codes or ordinances conflict with the general law, and if the general law occupies the field with respect to the particular subject, the state laws preempt the municipal rules. Of the three tests that can be used to determine whether a subject has been preempted, the first is easily satisfied. Preemption occurs when “the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern.” Since the Government Code defines different government entities, allocates powers and duties, governs liability of public entities and provides the procedure for filing claims against them, and since there is a mass of case law interpreting these code sections, charter cities cannot adopt themselves out of liability. 45 CAL. JUR 3D, Municipalities § 112 (1978).

246. As the defendant in Williams, Foster clearly claimed in his defense: [If the [local] ordinances do create . . . a duty to members of the public, they are invalid because they in effect “pass on” liability to the abutting owners for unsafe sidewalk conditions and, therefore, conflict with the Governmental Tort Claims Act, which concerns government liability, an area of statewide concern upon which charter cities may not legislate.

where repair or report not made" stated, "If, in consequence of any sidewalk being defective... any person... who... suffers damage... through any defect of a sidewalk may have recourse for damages thus suffered against the person failing to repair such defect... . . . ." Thus, a city ordinance can specifically impose liability for failure to maintain.

Such a simple statement of liability, however, is not the only way local legislatures can attempt to pass on their liability. If a city code provides for indemnification by abutters, it has effectively passed liability on to the abutter.

Finally, a city ordinance proscribing a period shorter or longer than that proscribed by state statute, is void. By changing the statute of limitations, a city can increase its chance of being excluded from liability. A shortened time period may not be enough time for a plaintiff to find an attorney and put a case together. Although a longer statute could also work to the detriment of a plaintiff (it may cause him to put off the suit, for example), a shorter statute is, obviously, more dangerous for the abutter. Either change, however, would bring the city ordinance within the scope of the general law on the subject of government liability, an area of statewide concern.

c. Abutter Liability Is a Statewide Concern

Any method described above would make an abutter liable for failure to maintain. This type of local legislation clearly impacts upon the issue of government tort liability. Abutter liability for sidewalk accidents is also however, a statewide concern.

1) Occupation of the Field

State legislative intent to occupy a field to the exclusion of all local legislation can be determined by examining the purpose, scope and language of the "legislative scheme." With


248. See, e.g., Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 177 P.2d 558 (1947) (charter period was shorter); Helback v. City of Long Beach, 50 Cal. App. 2d 242, 123 P.2d 62 (1942) (charter period was longer).
respect to Streets and Highways Code section 5610, the purpose and intent of the legislature is clear. The Improvement Act has been interpreted by Schaefer not to impose a duty for failure to maintain. Further, in later amendments, the Legislature clearly states that the chapter is only applicable to maintenance and repair proceedings of sidewalks and is only an alternative procedure for this maintenance. Thus, the sections do not impose any sort of liability.

Many cases after Schaefer (interpreting the 1935 version of the Improvement Act), and the passage of Streets and Highways Code section 5610 (the 1941 virtually exact version of the Improvement Act as amended in 1935), have upheld the principle of non-liability.249 As stated in Williams:

This conclusion is buttressed by the fact that... Schaefer... has been in existence since 1944 and the Legislature ha[s] never counteracted its holding... [T]he Legislature is presumed to have been aware of long-standing judicial construction of a statute and approve it where that construction is not altered by subsequent legislation.250

Thus, the Legislature could have enacted a statute that provides for abutter liability. Alternatively, it could have provided that public entities may enact ordinances (1) making abutters expressly liable for failure to maintain or (2) providing for indemnification of the city by abutters. The Legislature has failed, however, to do either.

2) Preemption by the State

Preemption by the state with respect to abutter liability is required under each of the three alternative tests.251 Under the first test, it is fair to say that liability of abutters has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern. Not only is passing liability from the city to the abutter a

251. See supra notes 173-77 and accompanying text.
clear violation of the California Tort Claims Act, but imposition of liability on the abutter may also violate section 5610, which has been held to impose solely a duty to maintain, not liability for defective maintenance.

Under the second test, an assumption can be made that abutter liability has been partially covered by the general law. Not only do the codes exist, but the case law interpreting them at least partially covers abutter liability. Furthermore, although the Legislature has not necessarily couched abutter liability "in such terms so as to indicate clearly that a paramount state concern will not tolerate . . . additional local action," statewide application of tort laws to ensure uniform treatment of everyone is a paramount state concern.

The strongest argument can be made under the third test. If "[a] subject . . . has been partially covered by general law, and . . . is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state [would] outweigh the possible benefit to the city," then the subject is preempted by state laws. Again, abutter liability has been partially covered by the general law, in statutes and in the case law interpreting them. The second portion of the third alternative test is also satisfied. Allowing cities to determine standards for holding parties liable for sidewalk accidents is fundamentally unfair to all transient citizens in the state of California. A plaintiff's right to indemnification by the city for an injury due to an unreasonably dangerous condition would be contingent upon the city in which he was "lucky" enough to fall. Furthermore, city alteration of standards for liability would create unequal application of general California tort principles within the state.

3) **Comparison of Abutter Liability to Typical Municipal Affairs**

Finally, whereas local legislation deals with practical aspects of running a city, statewide legislation deals with pervasive practical and theoretical concerns throughout the state. Practical statewide concerns include the licensing of profes-

252. See supra note 177 and accompanying text.
253. See supra note 173 and accompanying text.
254. See supra notes 167-69, 174 and accompanying text.
sionals; the compensation of state employees; standards for
phone communication; the licensing of building contractors;
and other areas demanding statewide consensus. In these
areas, it would be bad policy to allow the application of differ-
et standards within different cities. It would also be bad pub-
lic policy to allow charter cities to dictate the standards for tort
liability (of abutters and themselves) to be applied within their
boundaries. Tort liability has nothing to do with the practical
aspects of running a city. It is not, therefore, a municipal af-
fair. The public nature of sidewalks and their accessibility to all
California residents demands a statewide consensus, that is,
uniform standards for imposing liability throughout the several
California cities. Prohibition of local legislation on the subject
would ensure consistent application of statutes and case law
throughout the state of California.

D. Judicial Interpretation Is Not Enough

Although statutes do exist, a bulk of the interpretation has
been left to the courts. The Legislature has not done an effi-
cient job in explaining the laws in the area of California side-
walk accident liability nor in enumerating the goals of these
laws. The Legislature has also failed to state in a statute that
city charters are not to alter state rules with regard to liability.
Improvement by way of a complete revision of the current
statutes is necessary to ensure equal application of these laws.

V. PROPOSAL

In order to ensure this equal application throughout the
state, California must enact legislation that specifically ad-
dresses liability of cities and abutters for sidewalk accidents.
California Streets and Highways Code sections 5600 through
5630 should be reorganized and amended to read as fol-
lows:

255. See supra notes 170-77 and accompanying text.
256. Currently, the Improvement Act of 1911 constitutes Division 7 of the
California Streets and Highways Code. Sections 5600-5630 constitute Article 1,
General Provisions; Article 2, Repairs; and Article 3, Collection of Cost of Repair.
These articles, in turn, constitute Chapter 22 which is entitled "Maintenance of
Sidewalks." Chapter 22 is located in Division 7, Part 3 entitled "Performing the
Work."
CHAPTER 22: SIDEWALKS

ARTICLE 1: GENERAL PROVISIONS

SECTION 5600: "SIDEWALK"; "PARKWAY" OR "PARKING STRIP"; "ABUTTER," "ABUTTING LANDOWNER" OR "ADJOINING LANDOWNER"; "OWNERSHIP"; "POSSESSION"; "PUBLIC ENTITY"

As used in this chapter:

(a) A "sidewalk" is the part of a public street designed for use by pedestrians. Sidewalks are usually constructed differently than the rest of the street, and may include parkways or parking strips. Although open for public use, sidewalks are neither public nor private property. They constitute, rather, a unique type of property with unique standards for care and determination of liability for accidents thereon.

(b) A "parkway" or "parking strip" is the usually landscaped strip located on that part of the sidewalk most adjacent to the street.

(c) An "abutter" or "abutting landowner" or "adjoining landowner" refers to an owner or possessor of land immediately abutting or adjoining the fronting sidewalk and parkway. Abutters can be private parties, commercial enterprises, public entities or municipalities such as the city, or any other party owning or possessing property abutting a sidewalk.

(d) "Ownership" refers to a fee title in property, or title to an easement over the property.

(e) "Possession" is equated with occupancy and control (as determined by section 5611).

(f) "Public Entity" includes cities, towns, counties, districts, the state, the Regents of the University of California, the public authorities, and other political subdivisions, including municipalities.

SECTION 5601: APPLICATION OF CHAPTER

This chapter shall only apply to:

(a) maintenance and repair proceedings, whether upon work originally done under this division or otherwise; and to

(b) the determination of abutter and municipal liability for sidewalk accidents.

This chapter shall not be used for the construction of
new improvements. The "Special Assessment Investigation, Limitation and Majority Protest Act of 1931" shall not apply to proceedings taken under this chapter.

SECTION 5602: NATURE AND PURPOSE OF CHAPTER
(a) This chapter constitutes a separate and alternate procedure for performing the work specified herein and, except for the provisions of Part 5 of this division, no other provisions of this division shall apply to proceedings instituted hereunder.
(b) This chapter constitutes the sole method of determining abutter and city liability for sidewalk accidents.

ARTICLE 2:
DUTY TO MAINTAIN AND REPAIR

SECTION 5610: DUTY TO MAINTAIN SIDEWALKS; LIABILITY FOR CONDITIONS CREATED BY GRANTEES OF CITY PERMITS; DUTY TO REPAIR SIDEWALKS
(a) All abutters shall maintain the sidewalks and parkways fronting their property in such condition so that the sidewalks and parkways will not endanger persons or property or interfere with the public convenience in the use of those areas.

Abutters are excepted from this duty when those conditions have been created or maintained in, upon, along, or in connection with such sidewalk by any person other than the abutter, under and by virtue of any permit or right granted to him by law or by the city authorities, and such persons shall be under a like duty in relation thereto.

(b) When any portion of the sidewalk is out of repair and in condition to endanger persons or property or to interfere with the public convenience in the use of such sidewalk, the superintendent of streets shall notify the abutter to repair the sidewalk by the procedure provided in Article 4 of this chapter. Payment for such repairs shall be in accordance with Article 5.

SECTION 5610.2: MAINTENANCE AND REPAIR ARE MUNICIPAL AFFAIRS
Performance of and payment for sidewalk maintenance and repair are municipal affairs upon which charter cities can legislate. As stated in Section 5602(a), the purpose of this chapter is to provide a separate and alternate
procedure for sidewalk work. Charter cities can, therefore, alter these duties of maintenance and repair by increasing or decreasing abutter responsibilities. For example, a charter city can additionally require abutters to report any defects.

All charter cities are required to formally state in their charters the duties the cities impose on their inhabitants. They can either adopt the duties proscribed by this chapter or they can create their own. They cannot, however, rely on patterns of care informally adopted by the city and its inhabitants.

General law cities must follow the procedure for maintenance and repair provided by this chapter and cannot rely on any historical or traditional patterns of care within the city.

ARTICLE 3:
LIABILITY FOR SIDEWALK ACCIDENTS

SECTION 5611: LIABILITY FOR SIDEWALK ACCIDENTS

(a) Abutters cannot be held liable for their failure to maintain or repair sidewalks or parkways. Where an abutter has failed to maintain or repair, a plaintiff's sole recourse is with the city and any third parties (other than the abutter) that may be involved.

Abutters can, however, be held liable if they acted willfully or negligently with respect to their property and these acts or omissions created a dangerous sidewalk or parkway condition which caused injury to another. The test to be used in determination of liability is provided by California Civil Code section 1714(a). In general, simple acts of maintenance are not enough to impose liability.

(b) A public entity, specifically the city, can be held liable for an abutter's failure to maintain or repair. Liability of a public entity is to be determined by the California Tort Claims Act (California Government Code sections 810 through 996.6) and specifically by California Government Code section 835.

SECTION 5611.2: LIABILITY FOR SIDEWALK ACCIDENTS IS A STATEWIDE CONCERN

Liability for sidewalk injuries is a matter of exclusive statewide concern upon which charter cities cannot legislate. As stated in Section 5602(b), this chapter constitutes the sole method of determining abutter and municipal
liability for sidewalk accidents. It is the intent of the Legislature to fully occupy the field of liability for sidewalk injuries and to preempt all local municipal legislation on the subject. Charter cities cannot, therefore, adopt any charter provisions which effectively transfer the city's liability. For example, a charter city cannot state that abutters will be held liable for injuries due to their failure to maintain the sidewalks.

General law cities must also adhere to the method provided in this chapter for determining abutter and municipal liability.

SECTION 5611.4: AUTOMATIC NAMING OF DEFENDANTS; ALLOCATION OF FAULT

In any sidewalk accident case, the abutter, the city and any relevant third parties shall automatically be named as defendants. There is no preliminary requirement that the city first accept the claim. The court shall, under Section 5611, determine whether the abutter and city are in any way liable for the sidewalk defect. It will also determine, under ordinary principles of negligence (which, like abutter liability, is covered by California Civil Code Section 1714(a)), whether any third parties are responsible.

The court shall then allot fault among the plaintiff, the abutter, the city, and any third parties, and shall render a special verdict, ordering payment by each in proportion to such fault.

The current sections 5612 through 5630 should remain intact, but sections 5612 through 5618 should be placed in Article 4, entitled "Method of Giving Notice to Repair," and sections 5625 through 5630, the former Article 3, should be placed in Article 5, entitled "Collection of Cost of Repair."

This legislation, a combination of brand new provisions and revised former provisions, solves the problems previously discussed in this comment. First, the proposed chapter provides one legislative scheme that deals specifically with Cali-

257. Compare CAL. STS. & HIGH. CODE §§ 5600-5630 (Deering 1978) with the Chapter 22 sections proposed in this comment. The proposed version of Chapter 22 contains five rather than three articles. They include: Article 1, General Provisions; Article 2, Duty to Maintain and Repair; Article 3, Liability for Sidewalk Accidents; Article 4, Method of Giving Notice to Repair; and Article 5, Collection of Cost of Repair.
fornia sidewalks. It provides a structured framework for analysis. The beginning of the chapter clearly states its purpose and defines all applicable language.

Second, the statute clarifies all misleading and ambiguous laws. With respect to abutters, the provisions clearly state that abutters have a duty to maintain and repair. In accordance with Williams, the statute states that there is no liability for any failure to perform these duties absent a statute clearly stating such an imposition. This statute specifically states that there is a lack of liability.

However, these statutes also clearly indicate that abutters can be held liable in certain circumstances. The Jones holding indicates that in those instances where liability can be found under Civil Code section 1714(a), something more than simple maintenance is necessary for a finding of liability.258

With respect to governmental entities, the statute clearly states that technical ownership of the fee or easement is irrelevant. The statute holds open the possibility of public entity liability where an abutter owns the fee, where the city owns an easement or where the city owns the fee.

Third, the statute addresses the problem created by charter city legislation. With respect to sidewalk maintenance and repair, charter cities can adopt the procedure provided in the codes above or they can legislate for themselves, tailoring this procedure for sidewalk work within their own city limits. Whichever they chose, charter cities are required to formally recite in their respective charters, exactly what is expected of abutters. These declarations act as notice to the abutters.

With respect to liability for sidewalk accidents, the proposed code declares that liability for these accidents is a statewide concern over which the Legislature expressly intends to occupy the field. As such, the state regulations totally preempt any and all local legislation on the subject of liability, rendering any further legislation void.

Fourth, the sections requiring automatic naming of certain enumerated defendants promotes a fair allocation of fault as well as judicial efficiency. Finally, this singular legislative scheme, as opposed to ad hoc judicial interpretations, allows for uniform application of sidewalk abutter and municipal laws

CALIFORNIA SIDEWALK LIABILITY

throughout the state of California.

Applying this proposed legislation to the hypothetical case stated in the Introduction, Plaintiff Ann Pedestrian would name Piano Teacher and the city as defendants. In allotting fault between Ann, Piano, and the city, the court would look to each party's liability under section 5611. With respect to Plaintiff Ann, the court would look at the reasonableness of her actions. The court would consider the fact that a ten-inch difference in height between two sidewalk slabs is likely to cause harm to a pedestrian. It may also, however, consider Plaintiff Ann's familiarity with the sidewalk, having traveled down it every week for a year on the way to her lesson. At the very least, the court might state that a ten-inch difference in height between slabs is such a visible defect that Ann would have seen it had she been exercising due care. Finally, the court would consider Plaintiff Ann's youth and the fact that she is an invitee of the teacher, that is, a business customer. Thus, they would allot Ann approximately ten percent fault.

The court would then examine the reasonableness of Piano Teacher's actions. The court would consider the fact that she ran a business out of her home. In giving lessons there, Piano holds her home open to her customers, thereby imposing upon herself a higher duty to those customers to see that the means of ingress and egress are safe. If the court found that the piano teacher performed simple maintenance on the parkway, it would state that this did not cause or aggravate the dangerous condition. The court would find Piano Teacher approximately thirty percent liable because, in running a business from her home, she owed a higher duty to her customers.

Finally, the court would examine the city's liability. If the city in which Ann fell is a charter city, the court would study its charter. The court would then determine whether the

259. There is no indication any third parties are at fault.
260. See supra notes 87-90 and accompanying text for a discussion of public policy considerations and other factors courts examine in determining reasonableness.
261. The court could just as easily allot Piano Teacher fifteen, twenty, forty or even fifty percent fault. The main point is that the court would allot more fault to Piano, an adult invitee, than it would to Plaintiff Ann, a child invitee.
262. The reason for examination of the charter is not to locate laws imposing liability or passing liability on to abutters, but rather to see if the city has in-
requisite elements necessary for a finding of city liability have been met. Establishing that the city either owned the sidewalk easement or the fee underneath it, and noting that the city performed maintenance on the parkway, the court would find that the city both owned and exerted control over the sidewalk. The sidewalk and parkway would, therefore, be public property. The court would obviously find the ten-inch difference to be a dangerous condition.

Assuming the court finds that the injury was proximately caused by the dangerous condition and that the risk of injury was reasonably foreseeable, the court would next look to see if the dangerous condition was created by a public employee’s negligent act or omission, or if the city had actual or constructive knowledge of the dangerous condition. In this case, constructive knowledge would be easy to show since the condition has been in existence for two years. If the abutter reported the condition to the city, actual knowledge would be found. Either way, the court would probably find that the city has been negligent in failing to discover and repair the dangerous condition during the entire two years of its existence. If the city’s acts or omissions are found to be unreasonable, it would be liable for Ann’s injury. A majority of the liability, for example sixty percent, would be allotted to the city.

Costs would be tallied and each party would pay in proportion to the degree of fault allocated by the court.

VI. CONCLUSION

Duties and liabilities regarding sidewalks are unclear, disorganized and misleading at best. Consequently, a plethora of case law has developed attempting to interpret these disjointed statutes. In addition to this problem, California Constitution article XI, section 5 allows for possible alteration of abutter liability standards, thereby creating great uncertainty. Thus, uniform application in this area of law is severely compromised. While much sidewalk law does exist, the decisions are not guided by specific legislation precisely describing abutter and municipal duties and liabilities. Further, the laws do not
describe whether or not local legislation on the subject is permitted.

To ensure uniform application of sidewalk laws within the state of California, a simple, comprehensive scheme of legislation is needed to define terms, clarify previous vague laws and state the duties and possible liabilities of abutters and municipalities alike. By indicating that duties are municipal affairs and liabilities are statewide concerns, the Legislature would allow for local tailoring of practical aspects of running a city such as the cleaning of sidewalks. At the same time, it would protect against the looming possibility of cities altering statewide standards. The continuous threat of inconsistency in the application of sidewalk liability laws would effectively be eliminated. These laws based on negligence principles must protect all California citizens regardless of the city in which they live. For these reasons, the California Legislature must adopt the proposed legislation.

Leonora M. Bova