THE TRIVIAL DEFECT DEFENSE IS NOT TRIVIAL WHEN IT COMES TO DEFENDING AGAINST TRIP-AND-FALL AND OTHER PREMISES LIABILITY CLAIMS

© Rosaline S. Ayoub
Attorney, Kramer deBoer & Keane, LLP

Life seems to be going well until – all of a sudden – our feet fly up, and down we fall, unexpectedly during a routine stroll somewhere outside. We might think that someone is clumsy if they trip and fall accidentally over a small sidewalk crack, or if they misstep over two concrete pavers which are not completely level and symmetrical with each other. But California courts have adjudicated numerous lawsuits over the years where someone has been injured seriously due to a walkway condition that is less than perfect. Because their injuries are significant and they arguably did nothing that caused or contributed to the fall, these claimants look for someone to compensate them.

Such cases can be problematic for a defendant, such as a school, retail business, or homeowner, who is legally responsible for maintaining safe walkway conditions. If a defective condition is apparent enough for a claimant to have seen it beforehand, arguably the property owner was on notice of it too. If the defective condition is so trivial that a claimant likely would not have seen it, arguably the property owner should not have had notice of it either. The issue is really what would have been reasonable under the circumstances.

Legally, there is no dispute that "persons who maintain walkways, whether public or private, are not required to maintain them in an absolutely perfect condition."[1] As a matter of law, a condition is not dangerous if the court determines that the risk was minor, trivial, or insignificant.[2] This so-called "trivial defect defense" is available to private, nongovernmental landowners.[3]

It is not as simple as merely measuring the crack in the pavement, although some courts have done so. Courts have ruled that sidewalk defects greater than one-half inch are trivial as a matter of law:[4] ranging from three-quarters of an inch,[5] to one inch,[6] and up to one and a half inches.[7]

California courts have made clear, however, that we need to consider a totality of various factors when determining whether or not a condition is in fact "trivial." In *Barone v. San Jose,* 79 Cal.App.3d 284 (1978), the Court explained that the concept of triviality has two facets:

> (a) The court must first determine whether the defect is too trivial to be dangerous as a matter of law; and

[1] *Caloroso v. Hathaway*, 122 Cal.App.4th 922, 927 (2004), citing *Ursino v. Big Boy Restaurants,* 192 Cal.App.3d 394, 398-399 (1987).

[2] California Government Code § 830.2.

[3] *Caloroso v. Hathaway,* supra 122 Cal.App.4th at 927*,* citing *Ursino v. Big Boy Restaurants,* supra 192 Cal.App.3d at 398-399.

[4] *Barrett v. City of Claremont*, 41 Cal.2d 70, 74 (1953).

[5] *Whiting v. City of National City*, 9 Cal.2d 163, 166 (1937); *Fielder v. Glendale*, 71 Cal.App.3d 719, 734 (1977).

[6] *Dunn v. Wagner*, 22 Cal.App.2d 51, 54 (1937); *Balmer v. City of Beverly Hills*, 22 Cal.App.2d 529, 531 (1937).

[7] *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 363 (1936).

> (b) "The larger question of whether the nature of the defect, along with other circumstances, is sufficient to raise a jury question concerning notice. This initial inquiry into the question of 'dangerousness' would involve consideration of such matters as the size and location of the defect with respect to the surrounding area and lighting conditions and whether it has been the cause of other accidents; while the question of notice would necessarily involve not only the factors which are primarily related to "dangerousness," but also such matters as the visibility of the condition, the frequency of travel in the area and the probability, if any, that a reasonable inspection by the appropriate [person, landowner, public official, etc.] would have discovered its existence and its dangerous character.[8]

To illustrate this point, a plaintiff fell at 9:30 p.m. after tripping over two adjoining edges of a public sidewalk that measured between one-half and five-eighths an inch in differential. The Court acknowledged that such height differentials have been held as trivial conditions as a matter of law. However, the Court ruled against the defense after considering the other factors present at that specific location, including the facts that the accident happened at night, the sidewalk had a shadow because of overhead trees, Plaintiff was walking slowly, and he did not contribute to accident in any way.[9]

In conclusion, while a condition may be trivial or minor, and can form a defense that allows for a possible Motion for Summary Judgment, it is not always as straightforward a defense as we would like. We must take into account the other conditions and circumstances surrounding the alleged condition, including prior accidents at the site, visibility, lighting, other obstructions, prior repairs, whether or not the area is frequently navigated, and Plaintiff's actions, to name but a few.

[8] *Barone v. San Jose,* 79 Cal.App.3d 284, 291 (1978).
[9] *Johnson v. City of Palo Alto,* 199 Cal.App.2d 148, 150-152 (1962).