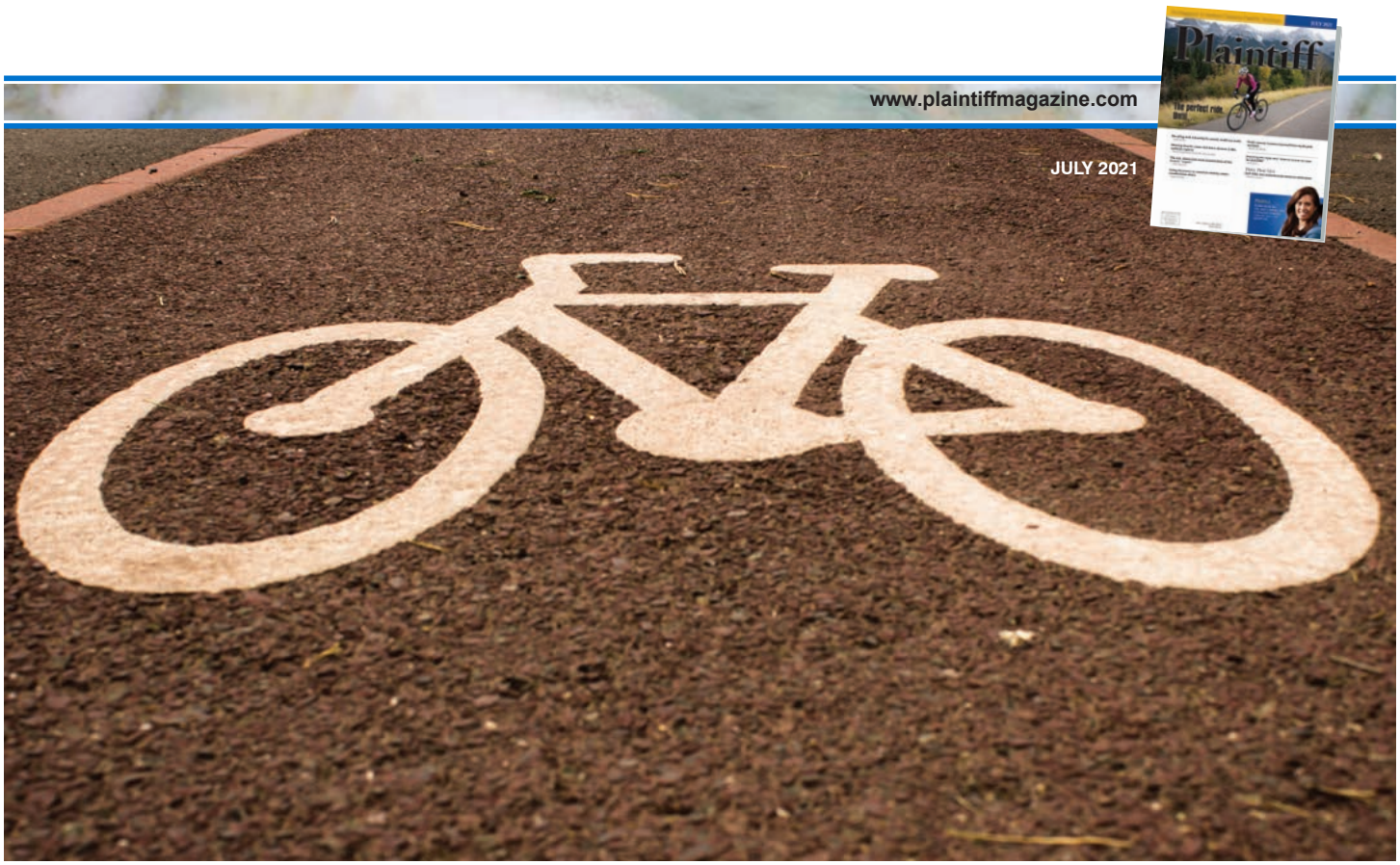

Derailing trail immunity on the paved, multi-use trail

Public entities were never supposed to enjoy absolute immunity for dangerous conditions of paved multi-use trails

By Scott Sumner

The purpose of this review of the so-called "Trail Immunity" of Government Code section 831.4 is not simply to inveigh against statutory immunities generally – I can acknowledge that there are sound, logical public policy reasons for limiting the liability or even immunizing public entities against liability for natural conditions of public lands and properties, and acknowledge the logic supporting the doctrine of assumption of risk. Yet in extending absolute (or nearly so) immunity to constructed public facilities, the logic breaks down.

And in reviewing the Division, Part and Chapters of the Government Code concerning claims and actions against, and liability of public entities – specifically those sections making up Chapter 2, "Dangerous Conditions of Public Property" – it quickly becomes transparent that the form of "trail immunity" that has grown up as a result of court decisions (*mis*)interpreting section 831.4 is *not* what the legislature intended.

Public entities were never supposed to enjoy absolute immunity for dangerous conditions of planned, constructed, paved multiuse trails.

Paved multiuse trails are not supposed to enjoy absolute immunity

Public entities enjoy a degree of immunity for public roads and sidewalks – design immunity (absolute with a sort of sunset provision) and the protections afforded by reasonable notice requirements – which would, in the absence of court decisions (*mis*)interpreting section 831.4, provide the same protections to public entities regarding planned, constructed, paved multiuse trails.

While roads, sidewalks and recreational trails are all different forms of paved public facilities, they all share common users. Roads have automobiles and bicycles (and pedestrians absent sidewalks or restrictions), sidewalks have pedestrians and bicycles (Veh. Code, § 21206 permits bikes, but devolves who, when and where rules to localities), and recreational trails, though called Class 1

Bikeways, are expressly for both pedestrians and bicycles. These facilities are all planned, designed, constructed and maintained. All these facilities are used for a combination of recreational and commuting activities. Yet only paved multiuse trails are afforded the (near) absolute immunity courts have granted, while the public perception is generally that it is reasonable to expect a publicly provided paved recreational trail to be in generally good maintenance and repair and reasonably free from dangerous conditions, just as we expect that of roads and sidewalks.

Indeed, in practice, most municipalities *do* seek to maintain such facilities in good repair, and public policy would be served by providing reasonable encouragement to do so, rather than imposing a rule that effectively encourages public entities to ignore such facilities once they are installed – particularly when California as a whole is seeking ways to reduce reliance on combustion engine transportation.

Government Code sections 831.2 and 831.4 are only intended to immunize *unpaved* roads and trails

The legislative history of section 831.4 amply and readily demonstrates that the intent of the legislature in enacting section 831.4 ("Unpaved access roads to recreational or scenic areas; trails; paved paths on easements of way granted to public entities"), along with section 831.2 ("Natural condition of unimproved public property") – which are linked by their legislative comments – was *not* for the absolute immunity of those sections to be applied to *paved* recreational trails.

When both sections 831.2 and 831.4 were enacted in 1963, the plain language of the statutes applied exclusively to unimproved property – unpaved roads and trails.

But wait, subdivision (c) specifically refers to paved paths. While true, that subdivision was not added until sixteen years later in 1979. And even that subdivision *is not absolute* (as with section 831.2 and section 831.4, subds. (a) and (b)). (See, *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, 1342 ("subdivision (c) of section 831.4 … grants only qualified immunity.")

Most importantly, subdivision (c) does not apply to paved multiuse recreational trails.

Subdivision (c) only concerns paved facilities ("trail, walkway, path, or sidewalk") specifically situated "on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property." And no, that simply does not describe or apply to multiuse recreational trails. As explained by the *Prokop* Court in its prominent 2007 "trail immunity" case, *an "easement of way" is not the same thing as a recreational easement*.

Though *Prokop* improperly applied subdivision (b) absolute immunity to a paved trail, the court correctly noted that an "'easement of way'" as identified in subdivision (c) is "granted to a public entity to provide access to unimproved property," *only* concerns "'easements over private property'" and does so with an "exclusive emphasis" on access to unimproved property. (*Prokop*, *supra*, 150 Cal.App.4th at1342.)[1]

In contrast, "the bikeway[2] along the Los Angeles River … was constructed 'on a City of Los Angeles recreational easement.'" (*Ibid*.)

Prokop thus explicitly held that "[a] 'recreational easement' is not the same thing as an 'easement of way,' which has been granted to a public entity to provide access to unimproved property." (*Ibid*.) And since Los Angeles's paved bikeway along the river was not an "easement of way," the city had no duty to warn as a predicate to immunity from liability. (*Ibid*.)

Ultimately, though, *Prokop* – and all other section 831.4 bicycle/bikeway cases – have simply decided (in contravention of legislative history and logic) that subdivision (b)'s "any trail" encompasses both unpaved *and* paved trails.

While (as you will see), that holding is incorrect, and while a sufficiently serious case – one that otherwise clearly establishes a dangerous condition, compelling notice to the responsible public entity, and one which compellingly circumvents design immunity – could provide a vehicle for challenging the appellate courts' error, for now, we as advocates need to be able to identify cases that fall outside the misapplication in order to secure appropriate compensation for victims of dangerous conditions.

Legislative history and statutory context

In 1963, when sections 831.2 and 831.4 were enacted (and coincidentally the year I was born), they were part of and fit within the context of the chapter of the Government Code concerning "Dangerous Conditions of Public Property," which encompasses sections 830 to 840.6.

In 1963, California did not possess any "system" of recreational trails. There were no "bikeways," and no designated "bike lanes" or "bike routes" on roadways. (Sts. & Hy. Code, § 890.4.)

The original California Recreational Trails Plan was completed in 1978 – *fifteen years after* Chapter 2 was enacted, and statutory "bikeways" were thirty years in the future. So, it is not in the least surprising that Chapter 2 made no express reference to paved trails.

And when the Legislature first used the phrase "paved trail, walkway, path, or sidewalk" in 1979 with the addition of subdivision (c) to section 831.4, that reference was not to recreational trails. (See, *Prokop* discussion, *supra*.)

Indeed, when subdivision (c) was added, the inclusion of *qualified* rather than absolute immunity for "'easements over private property'" with an "exclusive emphasis" on access to unimproved property (*Prokop*) recognized that even such utilitarian paved surfaces merited imposition of a higher standard for paved surfaces than for unpaved surfaces. The subdivision explicitly states that

the "[w]arnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads."

So clearly, the 1979 legislators' understanding of subdivisions (a) and (b) was that those subdivisions concerned only *unpaved* roads and trails, and they did not wish to see Courts extend the subdivision (c) qualifications for immunity into the unqualified and absolute immunity of subdivisions (a) and (b) *for unpaved and unimproved roads and trails* in public lands.

The original language of section 831.4 quite clearly concerned only unpaved and unimproved roads and trails:

> Neither a public entity nor a public employee is liable for an injury caused by a condition of:
> (a) Any unpaved road which provides access to fishing, hunting, or primitive camping, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.
> (b) Any hiking, riding, fishing or hunting trail.

The earliest published opinion dealing with section 831.4 appeared in 1967 and involved a fatal accident on an unpaved maintenance road under control of an irrigation district. (*Hernandez v. Imperial Irr. Dist*. (1967) 248 Cal.App.2d 625.) In that case, "[t]he road adjoined a drainage ditch both of which were constructed and maintained by [the irrigation district] upon an easement owned by it." (*Id*., at 626.) Although the maintenance road was unpaved, section 831.4 immunity did not apply, because the statutory "immunity is limited to liability caused by the condition of a specific type of road 'which provides access to fishing, hunting' and other designated areas," and the maintenance road provided no such access.

The words "hiking, riding, water sports" were not added to subdivision (a) until 1970, when the words "or primitive" preceding "camping" were deleted, and subdivision (b) was changed from "Any hiking, riding, fishing or hunting trail." to "Any trail used for the above purposes" – that is, any trail used providing access to the same things *unpaved* roads in subdivision (a) provide access to: namely "fishing, hunting, camping, hiking, riding, water sports, recreational or scenic areas."

The addition of "including animal and all types of vehicular riding" to the list followed in 1972, but did not change the unpaved and unimproved nature of the facilities so immunized.

As noted above, the legislative committee comments to sections 831.2 and 831.4 cross-reference one another, and quite clearly provide that their application is restricted to unimproved roads and trails. The comment to section 831.2 notes that the two sections "continue and extend an existing policy adopted by the Legislature in former Government Code Section 54002," which "referred to accidents on bridle paths." (*Milligan v. City of Laguna Beach* (1983) 34 Cal.3d 829, 833, fn. 3.)

The comment to section 831.4 says simply: "See Comment to Section 831.2. This section will provide, for example, an absolute immunity from liability for injuries resulting from the condition of such roads as fire protection roads in timbered areas and irrigation district maintenance roads" – all unpaved and unimproved.

The comment to section 831.2 specifically refers only to "natural" and "unimproved" "access roads and hiking, riding, fishing and hunting trails":

> This section provides an absolute immunity from liability for injuries resulting from a natural condition of any unimproved public property. Thus, for example, under this section and section 831.4, the State has an absolute immunity from liability for injuries resulting from natural conditions of a state park area where the only improvements are recreational access roads (as defined in section 831.4) and hiking, riding, fishing and hunting trails.

As the *Milligan* Court correctly observed, the comment to section 831.2 goes on to describe that the policy underlying section 831.4 was "to permit the members of the public to use *public property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the State*." (Gov. Code, § 831.2, Legislative Committee Comments; *Milligan*, *supra*, 34 Cal.3d at 833. (emphasis added).)

"[N]atural condition … trails … and roads." Not paved trails. And it was recognized as a justification for immunity that "it is not unreasonable to expect persons who voluntarily use *unimproved* public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received." (Gov. Code, § 831.2, Legislative Committee Comments; *Milligan*, *supra*, 34 Cal.3d at 833 (again, emphasis added).)

That the legislature never intended section 831.4 immunity to extend to paved trails, and did not believe it did so, was further confirmed in the same year that the *Milligan* decision was published. That same year, the legislature returned to the topic of dangerous condition of public property liability, adding section 831.7 "Hazardous recreational activities; failure to guard or warn; negligence; duty of care."

Regardless of whether a dangerous condition existed, a public entity had notice, or whether design immunity was a factor, section 831.7 provided a new immunity for public entities and employees from "any person who participates," assists participants in, or is a spectator at "a hazardous recreational activity," provided such persons "knew or reasonably should have known that the hazard-

ous recreational activity created a substantial risk of injury … and was voluntarily in the place of risk." (Gov. Code, § 831.7, subd. (a).)

A "hazardous recreational activity" was defined as "a recreational activity … that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator." (Gov. Code, § 831.7, subd. (b).)

To be sure that certain recreational activities were unquestionably "hazardous," the legislature enumerated literally dozens of specific recreational activities, including "bicycle racing or jumping, bicycle motocross, [and] mountain bicycling." (Gov. Code, § 831.7, subd. (b)(3).)

Importantly, however, the legislature expressly clarified that "For the purposes of this subdivision, 'mountain bicycling' *does not include riding a bicycle on paved pathways*, roadways, or sidewalks." (Gov. Code, § 831.7, subd. (b)(3) (emphasis added).)

It simply is not plausible that section 831.4 "trail immunity" was meant to encompass paved trails if the 1983 legislature enacting hazardous recreational activity immunity expressly exempted bicycling on "paved … pathways" from immunity.

Still not convinced? That same legislature also expressly exempted from immunity an "injury … caused by the negligent failure of the public entity … to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose." (Gov. Code, § 831.7, subd. (c)(1)(C).) That is, even hazardous recreational activity immunity is waived where a planned, constructed public work is negligently constructed or maintained.

The appellate decisions extending section 831.4 immunity to paved trails did not arise until the *Armenio* decision in 1994, which is the first of a half-dozen cases perpetuating that mistake.

None of the cases extending trail immunity to paved improvements have examined the legislative comments, the history of amendments, nor the context of the section within Chapter 2 and other statutes (including 1983's addition of Gov. Code, § 831.7) that clearly define section 831.4 as applying to unimproved trails and roads, while expressly exempting from absolute immunity any negligently constructed or maintained *paved* structures.

It is a fight worth having to return the law around paved multiuse trails to the meaning intended by the legislature. It is a fight that should take place in the courts, but one also worth considering as a legislative priority.

But in the meantime, what sort of cases fall outside of trail immunity?

What factors take a case outside of trail immunity and return it to plain dangerous condition analysis?

When one understands that the legislature only ever intended to immunize public entities from liability for paved trails/facilities in the same manner that they qualifiedly immunize them in the contexts of other paved public facilities like roads and sidewalks, it can be frustrating to have to analyze an injury victim's rights within the narrow and false confines of present-day "trail immunity" case law. And yet, even under this narrow framework, the fact that your client was *on* a trail when injured does not mean conclusively that trail immunity attaches if the actual instrument of their harm was not the trail.

The remainder of this article is about recognizing the limits of trail immunity under the current case law for trails on, around or near which bicyclists and pedestrians may be injured.

Under current decisional law, the essential question is not whether your client was using a paved recreational trail when they were injured, but rather whether the dangerous condition that caused their harm is itself a defect or condition of, on or integral to a trail, or a condition integral to trail placement or trail design.

If so, then absolute immunity is the rule of caselaw, and you either must confront that frankly gross decisional error or identify a defendant not covered by the statute – such as an adjacent property owner, private entity that maintains or controls the trail or some causative aspect or fixture on or of the trail. For instance, a gate to or along a recreational trail is positioned incorrectly, broken, etc. Was that the result of activities of a public employee, or was the trail being used to perform maintenance on adjacent property – whether by a utility company, a landscaper, or an adjacent private property owner? While the public entity would be immune under existing case law, these other entities would not be immunized.

If not, then your client's damages should be recoverable from the responsible public entity despite even their active use of a recreational trail at the time they were injured, provided you otherwise satisfy the statutory demands of dangerous condition of public property liability and do not fall under other enumerated immunities. This of course does not relieve you from considering what other entities might also share responsibility.

Review: Dangerous condition of public property liability

Let's not forget the basic premise of public property liability: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if" (1) you can prove "the property was in a dangerous condition at the time of the injury," (2) establish proximate causation, (3) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and (4) either (a) a public employee in the scope of their employment "created the dangerous condition" through "[a] negligent or wrongful act or omission" *ur* (b) you can establish "[t]he public entity had actual or

constructive notice of the dangerous condition… a sufficient time prior to the injury to have taken measures to protect against" it. (Gov. Code, § 835.)

That basic framework is subject to some very substantial statutory exceptions:

(1) Judicial-determined triviality (§ 830.2 – trial or appellate judge determines risk created was so "minor, trivial or insignificant nature" under the circumstances that no reasonable person would conclude risk was substantial when used with due care and as intended);
(2) Design immunity (§ 830.6 – reasonable design approval in advance of construction provides immunity until notice of deficiency, and for a reasonable period thereafter to effect redesign/change);
(3) Natural condition of unimproved property (§ 831.2, with specific provisions for beaches (§ 831.21) and land failures (§ 831.25);
(4) Unpaved roads and trails (§ 831.4, as intended by the legislature);
(5) Hazardous recreational activities (§ 831.7 – expressly not applicable to bicycling on paved facilities);
(6) Dog-caused injury in dog parks (§ 831.7.5);
(7) Reservoir facilities not being used as intended (think conduits, canals and basins § 831.8); and
(8) Reasonableness of act or omission creating the dangerous condition (§§ 835.4 and 840.6).

And don't forget you must establish actual or constructive notice.

Stated briefly, actual notice is wonderful if you can find it: a posted complaint to the entity, a prior incident, a condition created by the entity or its employee(s). Constructive notice is a "should have known" standard, and factors around the existence/non-existence of, or reasonableness of, an inspection system can establish constructive notice. In this connection, what the entity finds when (if) they visit the site following your client's incident can be solid evidence of what they would have found had they looked sooner. The nature of the dangerous condition itself can infer that it should have been inspected, inspected more often, or that it was reasonably foreseeable a dangerous condition would develop in the absence of inspections and maintenance. Subsequent remedial measures may be admissible as to the feasibility of warning against or eliminating the dangerous condition as well.

That framework – without the judicially created false immunity for paved recreational trails – is the framework applicable to dangerous conditions which are *not* defects of, conditions of, conditions on, or conditions integral to a trail, *nor* conditions integral to trail placement or trail design.

Trail immunity is for trails

Trail immunity applies to all manner of defects *in the trail's condition*. (*Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, 1084.) "It is ... clear that the state is absolutely immune from liability for injuries caused by *a physical defect of a trail*." (*State of California v. Superior Court* (1995) 32 Cal.App.4th 325, 328 (emphasis added).)

There is no question that section 831.4 trail immunity applies to conditions on or of a trail. This is true even if the physical defect is an object that is not supposed to be on the trail, such as "a rope tied to a badminton net that had been left stretched *across*" a paved pathway. So if (as you will see) your client was struck by a falling branch while on a trail, liability can attach, but if your client struck a branch that had already fallen there, trail immunity would apply.

It is true as well if the cause of your client's injury was falling off a trail due to a drop off or lack of a fence or barrier, or where a structure is a part of a trail or path, such as a staircase, gate or fenceposts on a path or trail.

Trail immunity is *only* for trails (It does not immunize conditions of adjacent public properties)

If your client was injured by a dangerous condition off a trial which condition could be reached by means *other* than the trail, liability should attach without regard to the fact your client used the trail to reach it, and without regard to section 831.4 analysis.

"The plain language of section 831.4 provides immunity for injuries caused by dangerous conditions of trails, but it does not provide immunity for injuries caused by dangerous conditions of adjacent public properties. We perceive no ambiguity in section 831.4 on this point." (*Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532, 543.)

In *Garcia*, a child was stuck by an errant golf ball while being pushed in a stroller by his mother as they were traveling along a recreational trail, yet trail immunity did not attach because the injury to the pedestrian on the trail was not caused by a condition of, on or integral to the trail. Rather, the plaintiff there was injured by an errant golf ball from an adjacent public golf course.

In *Toeppe v. City of San Diego* (2017) 13 Cal.App.5th 921, a visitor to a park was injured when a branch from a City-planted tree fell on her while she was walking on a trail through the park. Although the plaintiff in *Toeppe* was injured on a trail, she was not injured by any condition on, of, or integral to the trail, design or location of the trail, so trail immunity did not apply.

So facilities adjacent to a trail, but not integral to the trail, such as storm drains, channels, park facilities, trees and landscaping, etc., all potentially can be or become dangerous conditions, and so long as use of the trail was not the only way to encounter the dangerous condition (*Lee*, *Arvizu*, *Amberger-Warren*, *Nealy* and *Prokop*), liability should attach under straight dangerous condition analysis.

For *off*-trail dangerous conditions – even if they result in injury *on* a trial – existing case law can essentially be thought of as employing the equivalent of a causal nexus or substantial factor analysis (even though the published authorities do not employ such terminology).

Sumner

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Endnotes:

1 Citing *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413, 417 and *Giannuzzi v. State of California* (1993) 17 Cal.App.4th 462, 466.

2 A "bikeway" is the 1993 statutory terminology for a planned, constructed and paved multiuse pathway. (Str. & H. Code, § 890.4.)

3 Really, if someone encounters an appropriate case, as this article reveals, this is an area for a serious challenge to "absolute trail immunity" for paved trails/bikeways, and I would love to be involved in such a project.

4 Gov. Code, Title 1, Div. 3.6, Part 2, Chapter 2.

5 "California Recreational Trails Plan, Phase 1 June 2002." Prepared by: State of California Department of Parks and Recreation Planning Division, Statewide Trails Office. Ruth Coleman, Interim Director; Keith Demetrak, Chief, Planning Division; Ken McKowen, Manager, Statewide Trails Office. Published as an element of the California Outdoor Recreation Planning Program prepared under the provisions of the Land and Water Conservation Act of 1965 (Public Law 88-578, as amended). https://www.parks.ca.gov/pages/1324/files/ca%20rec%20trails%20plan.pdf

6 (1) *Armenio v. County of San Mateo* (1994) 28 Cal.App.4th 413; (2) *Carroll v. County of Los Angeles* (1997) 60 Cal.App.4th 606 70; (3) *Farnham v. City of Los Angeles* (1998) 68 Cal.App.4th 1097; (4) *Amberger-Warren v. City of Piedmont* (2006 143 Cal.App.4th 1074; (5) *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332; and (6) *Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052.

The earliest decision specifically dealing with a "bikeway" (named and defined in 1993's Street & Highway Code § 890.4) was the *Farnham* case, in 1998, while the earliest decision concerning a bicyclist on a paved trail was the 1994 *Armenio* decision.

7 Not a pun.

8 There are other minor details – always check the code – but these are the substantial concerns.

9 *Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109.

10 *Burgueno v. Regents of the University of California* (2015) 243 Cal.App.4th 1052 bicycle collision on a bikeway, due to the dangerous condition of bikeway; *Lee v. Department of Parks & Recreation* (2019) 38 Cal.App.5th 206, a staircase in a state park "constituted a pathway" under § 831.4; *Loeb v. County of San Diego* (2019) 43 Cal.App.5th 421, pedestrian tripped on an uneven concrete pathway in a park.

11 *Reed v. City of Los Angeles* (2020) 45 Cal.App.5th 979.

12 In *Arvizu v. City of Pasadena* (2018) 21 Cal.App.5th 760, a park user fell and tumbled across a trail before falling off the concrete retaining wall on one side of trail – the user, had to cross the trail to get to the retaining wall and would not have suffered his injuries had he not crossed over the trail.

In *Amberger-Warren v. City of Piedmont* (2006) 143 Cal.App.4th 1074, a woman fell from a trail that had no guardrail and was injured on the steep slope on which the trail was built, and which could only be reached from the trail.

13 *Lee* (fn. 10); *Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, bicyclist injured riding between fenceposts on a trail as fenceposts were "a part of the trail itself"; *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, bicyclist exiting path striking gateway providing ingress/egress to bikeway that "is patently an integral part of the bike path."

14 See endnotes 10, 12 and 13, above.