

Bringing a Government Tort Action: A Practice Guide Written Materials

December 18th, 2025

12:00 – 1:00 PM

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Topics Covered Today

- Is a Government Tort Claim Required
 - When to present
 - How to present
 - What if the Action is more than a tort
- Is the Tort a negligence action
 - If so, what is the law of the case
- Is the Tort a dangerous condition of public property case
 - If so, what is the law of the case
- What if the Action if both a negligence and dangerous condition matter, or more

Is a Government Tort Claim Required?

a. Any action for “money or damages” requires a claim: GC 905 provides: “There shall be presented ... all claims for money or damages against local public entities (whether your action is based on negligence or a dangerous condition of public property)” (but for specified exceptions).

b. GC 945.4 mandates: “ ... no suit for money or damages may be brought ... until a written claim has been presented ... [but for specific exceptions)”

c. To be timely. “A claim ... shall be presented ... not later than six months after accrual of the cause of action” GC 911.2

d. Gov’t Code section 912.4(a) requires the public entity to act on the claim within 45 days: “The Board shall act on a claim ... within 45 days after the claim has been presented” If the claim is amended, action is to be taken within 45 days of the amended claim.(The parties may extend the time to act on the claim. See, 912.4(b))

e. How to give notice of its action on the claim: GC 913(a) provides: “Written notice of the action taken ... shall be given ... [as set forth in section 915.4 in person or by mail] ... The notice may be in substantially the following form:

i. "Notice is hereby given that the claim that you presented ... [on 'x' date for 'y' dollars was rejected in whole or allowed in part for 'z' dollars on a specified date]"

ii. "WARNING ... Subject to certain exceptions, you have only six (6) months ... to file a court action on this claim." Section 913(b)

f. After notice of rejection of the claim "...any suit brought against a public entity ... must be commenced ... not later than six months after the date such notice is personally delivered or deposited in the mail." (Note: as explicitly stated in GC 913, the "mailbox rule" applies.)

g. NOTE: In brief summary and reflection on the claim process so far:

i. The claim must be presented within six (6) months of the accrual of the cause of action, the tort (not the two (2) years for a common law tort in CCP section 335.1).

ii. The rejection of the claim sets forth a new statute of limitations on when to file suit, within six (6) months of rejection of the claim (not the tort's two (2) year date in CCP section 335.1).

iii. CCP section 335.1 statute of limitations on tort actions for injury or death as two (2) years is circumvented by the Government Claims Act.

h. If the public entity fails to act on the claim, the claimant has two (2) years to file suit from the accrual of the cause of action. GC 945.6 provides: "If written notice is not given in accordance with Section 913 [any suit brought against a public entity ... must be commenced ... within two years from the accrual date of the cause of action.]"

What if your Claim is Late, Tolling, and Minors:

a. What if your claim is late, tolling, and minors:

i. If you do not file a claim within six (6) months, you must proceed by means of seeking late claim relief.

ii. GC 911.4(a) provides: "... a written application may be made to the public entity for leave to present the late claim."

iii. "The application shall be presented ... within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay The proposed claim shall be attached to the application." GC 911.4(b). (Note: The document to be presented is not a "late claim"; it is the "application for leave to present late claim." This means that that the Application has a process to follow. The Application contains the explanation for the lateness and attaches the proposed "Claim" (literally the Claim that is now late) to the application.)

iv. The public entity must act on the application for leave to present a late claim within 45 days. Gov't Code section 911.6(a).

i. The public entity must act on the application for leave to present a late claim within 45 days. Gov't Code section 911.6(a).

b. The public entity shall grant the application where one or more of the following is applicable:

i. Failure was through mistake, inadvertence, surprise, or excusable neglect and the public entity was not prejudiced (911.6(b)(1))

ii. The person was a minor during all of the Section 911.2 six months accrual period of time (911.6(b)(2)) (Note: this means that unless the minor turns to majority within six months of the accrual date, the minor has one year to file a claim (but no other tolling is provided for the status of being a minor)

iii. The person was physically or mentally incapacitated, or died during the six months presentation period of time. (911.6(b)(c) and (d))

c. "If an application for leave to present a claim is denied or deemed to be denied ... a petition may be made to the court for an order relieving the petitioner from Section 945.4" GC 946.6.

d. The petition must be filed within six months of the denial or deemed denied application for late claim. GC 946.6(b)(3).

e. Tolling :

i. No tolling of the 6 months claim presentation requirement for minors. Tolling for minors is limited to when the action is filed, not when the claim is presented to the public entity. (Moyer v. Huck 10 CA 3rd 491.)

ii. GC 911.4(c)(1): If the claim is based on a lack of mental capacity, the claim period is tolled up the one-year limit for timely presentation of a late claim.

Exceptions to the Requirement to Present a Claim on a Claim/Tort:

a. GC 905.1 Suits based on inverse condemnation. (This is a constitutional right; no claim is required.)

b. GC 905.5: Suits against an employee of an/or a school district for claims arising from asbestos for exposure after 1/1/1989.

c. 905.6: Suits against the Regents of the University of California. (Note: no exception for suits against California State University. GC 905.9)

- d. Federal civil rights actions, aka Section 1983.
- e. FEHA actions. (Note: the exception is limited to those causes of action arising out of FEHA, GC 12900, et. seq (No exception for any contract or tort cause of action concurrently filed.)
- f. The list of exceptions is exhaustive. (The above is not complete. See, GC 905(a)).

Miscellaneous: i.e., Med-Mal Actions Involving a Public Entity:

a. What is the interplay between CCP section 364 (requirement to serve Notice of Intent to Sue for med-mal before suit) and Gov't Code section 945.4 (requirement to present claim before suit)?

b. "No action based on ... professional negligence may commence unless the defendant has been given at least 90 days' prior notice of the intention to commence an action." CCP section 364 (a).

c. "If the notice is served within 90 days ... of the applicable statute of limitations ... the action shall be extended 90 days [to timely file suit]..." CCP section 364(d).

d. The Notice of Intent To Sue is different from a Claim for money or damages.

1. Phillips v. Desert Hospital (1989) 49 Cal 3rd 699: A notice of intent served under CCP section 364(a) may not be sufficient to constitute a claim for damages. If the contents of the notice of intent are sufficient to meet the claim contents requirements under Section 910, then it is dealt with by the public entity as a claim. If the contents of the notice of intent to sue are insufficient, then it is the obligation of the public entity to proceed as if it received an insufficient claim: give notice of insufficiency or be bound to having waived any defense that the claim defective. Gov't Code sections 910.8 and 911.

2. Wurts v. County of Fresno (1996) 44 Cal App 4th 380: A claim for damages does not equate to a notice of intent to sue letter. Unless the claim for damages is intended to be the CCP 364(a) notice of intent to sue, it is not. A timely claim rejected, with a separate notice of intent sue letter served within the last 90 days of when a suit must be filed extends the time to file by the 90 days under CCP 364(d)

3. Note: CCP section 411.35 Certificate of Merit vis a vis professional negligence. Unrelated to the Gov't Code and claims filing requirements. Must be filed at or before service of the complaint.

A Comment on a Non-Tort Matter: Suits on Contracts

- a. A breach of contract action is for “money or damages” and is governed by by GC 905.
- b. However, GC 911.2 provides up to one year (not just 6 months) to present this claim.
- c. Consider, however, the unique status of a contract with a public entity for a public works project:
- d. Effective 1/1/2017 through 1/1/2027 (unless otherwise extended), California Public Contract Code section 9204 is a new mechanism to force mediation and seemingly provide contractors and subcontractors with swift resolution of an entity’s failure to pay (primarily for change orders).
- e. Section 9204 sets up an exhaustive set of rules and procedures to “present a claim” for money – separate from and not exclusively in lieu of a Section 910 Claim.
- f. Not all public entities are covered by this Code.
- g. Nothing in Section 9204 specifically abrogates PCC section 20104.2 which requires any contractor to timely present any claim for damages and in doing so to comply with GC 910 and 911.2 presentation of a claim.

Is the Tort a Negligence Action?

- 1. GC 815: “Except as otherwise provided by statute:
 - a. “(a) A public entity is not liable for an injury ...
 - b. “(b) The liability of the public entity ... is subject to any immunity”
- 2. GC 815.2: Injuries by an employee in the course and scope:
 - a. “(a) A public entity is liable for any injury proximately caused by an act or omission of an employee ...
 - b. “(b) Except as otherwise provided, a public entity if not liable ... where the employee is immune”
- 3. GC 820: Liability of public employee:
 - a. “(a) ... a public employee is liable for injury caused by his act or omission to the same extent as a private person.

b. “(b) The liability ... is subject to any defenses that would be available ... if he were a private person.”

4. GC 815.4: Injuries caused by Independent Contractors:

a. “(a) A public entity is liable for injury proximately caused by a tortious act or omission of [its] independent contractor ... to the same extent ... if it were a private person.... (except if it would have been immune if it had been an act of a public employee).

5. GC 818: Exemplary Damages:

a. “(a) ... a public entity is not liable for damages under [CC 3294] ... for the sake of example and by way of punishing a defendant.”

6 .The law of the case:

a. CACI’s 400, et seq (General Common Law Negligence) and 1000, et seq (Premises Liability)

b. See also – as applicable additional CACI’s: E.g., 500 et seq (medical negligence), 700 et seq (Motor Vehicles and Highway Safety), and 900 et seq. (Common Carriers).

Case Studies Examples of When Conduct Creates a Negligence Case Against a Public Entity:

- A city garbage truck operator, police officer, or a city/county bus operator causes an auto accident: these are all “negligence” torts by an employee in the course and scope of employment; the public entity is 100% responsible to defend and indemnify for the tort of its employee. (Note: procedurally because the employer is liable for the torts of its employee (GC 820), the employee is not a necessary party to the litigation.)
- A city contracts with an independent contractor/vendor to repave a street, a school hires a magician for elementary school graduation, or the county contracts with a tree trimming service to inspect and cut trees. If the repaved street creates a sink hole due to poor workmanship causing an accident, if the magician’s rabbit jumps out of his hat and bites a child, or if the tree was not trimmed correctly and fails injuring a pedestrian, in each instance the public entity is liable for the tort caused by its contractors (GC 815.4). (Note: (1) in most cases the contractor must necessarily be found liable in order for the public entity to be liable for the contractor’s tort, (2) the contractor will (certainly should and likely must) have commercial general liability insurance naming the public entity as an additional insured “for the torts arising out of its work”), and (3) the public entity should be tendering its defense to both independent contractor per the terms of the Public Services Agreement and to the CGL carrier due to the public entity being a named additional insured.)

- Professional negligence (e.g. medical malpractice against a County medical doctor/facility): a county obstetrician at a county hospital allegedly causes harm to the baby and/or mother during delivery. Per above, regardless of the doctor being employed or an independent contractor, Gov't Code sections 815.2, 815.4 and 820 expose the doctor, facility and County to liability for professional negligence, aka malpractice. Note: CCP section's 364 obligation to timely present a Notice of Intent Sue is separate from obligation to timely present a Gov't Tort Claim before suit can be filed.

Is the Tort a Dangerous Condition of Public Property Case?

a. GC 835: "Except as provided by statute, a public entity is liable for injury proximately caused by a dangerous condition of its property if ... "

i. "the property was in a dangerous condition at the time of the injury,

ii. "that the injury was proximately caused by the dangerous condition,

iii. "that the dangerous condition was a reasonably foreseeable risk of injury, and ..."

iv. The negligence of an employee caused the dangerous condition or the public entity had sufficient notice of the dangerous condition to have prevented the injury.

b. Note: the first element is that the public entity must own and/or control the condition (which we presume as this discussion is all about the public entity)

c. GC 830: Definitions:

i. "(a) 'Dangerous condition' means the condition creates a substantial risk of injury when "such property or adjacent property" is used with due care

ii. "Property of a public entity" means real or personal property "owned or controlled" by the public entity.

d. GC 835.2: Notice is actual or constructive:

i. "(a)" Actual notice is actually knowing or should have known of the dangerous character of the property.

ii. "(b) "Constructive notice is when the condition existed for a sufficient amount of time that and was of such an obvious nature that the public entity should have discovered the condition.

iii. Note: If the dangerous condition of the public property was created by the negligence of a public employee, this "is" the notice element. (See, B(1)(d) above)

e. Note: The public property and/or the adjacent property can be owned and/or controlled by more than one entity. (County of Ventura v. City of Camarillo (1978) 80 Cal App 3rd 1019)

The Laws of the Case

CACI's 1100 et seq (Dangerous Condition of Public Property)

Case Study: Examples of matters that trigger dangerous condition liability

- a. City trash truck knocks down a stop sign resulting in a vehicle proceeding into the intersection without stopping and causing an accident. (As to the matter against the City, the absence of the stop sign is a question of a dangerous condition of public property. That the City employee was negligent in knocking it over will likely meet the notice element but does not trigger an action for negligence.)
- b. A tree in a City park or in the parkway (owned and/or controlled by the City) that falls and causes injury or damage is a question of whether the tree was a dangerous condition of public property and whether the City had notice. (That an independent contractor/vendor may also be sued for its negligence does not preclude a meritorious action for dangerous condition liability against the City.)
- c. A City contracts for the resurfacing of City streets. Irrespective of the contractor's negligence for workmanship that resulted in a sink hole at a later date, the City can be sued for roadway hazard.
- d. The City stripes lanes, stop limit lines or causes any other roadway condition that allegedly results in an accident. This is a question of whether the condition constitutes a dangerous condition.
- e. Leaving the shoe store in new shoes, a pedestrian slip and/or falls allegedly due to the sidewalk surface (slippery or offset or otherwise). The City will be sued for a dangerous condition of the sidewalk.
- f. A County fire truck runs a red light because the signal's timing malfunctioned and failed to provide the fire truck with a green light. The County can be sued for the negligence of its employee/truck driver and for a dangerous condition of public property the malfunctioning signals. Perhaps the signal manufacturer and others may also be sued on such theories as negligence and/or product liability.

A Footnote on Immunities in Both Dangerous Condition and Negligence Matters:

- a. The Gov't Code provides numerous immunities – we address just a few by example.

b. These immunities, however, can apply to either or both negligence and dangerous conditions matters. E.g. No punitive damages for gross negligence (Section 818) and design immunity even if the property is in a dangerous condition (Section 830.6).

c. That immunities may insulate personal liability for public employees, and/or that fire, police and emergency services/responders, the public entity is often not immune for the actions of its employees.

d. Vehicle Code 17004: police officers personally immune for responding “negligently” but not the P.E. employer.

e. Health and Safety 1799.017: emergency responders are immune as well as P.E. provided the actions were not in bad faith nor grossly negligent.

What if the Matter Involved Negligence, Dangerous Condition Theories and/or More?

a. It is not unusual for an employment action to include breach of contract and/or any number of tort matters. (E.g, wrongful termination, defamation, breach of contract, conversion, etc.)

b. An inverse condemnation action may include one for dangerous condition of public property as well as trespass and nuisance.

c. Those causes of action for money or damages that mandate a claim to be filed before suit can be filed can simultaneously be ultimately filed with those causes of action that do not require a claim.

d. Note: combining multiple causes of action that all arise out of the same underlying incident are commonly filed at one time. That the filing of a lawsuit includes all causes of action, the statute of limitations as each such cause of action may have its own timeline. (E.g. Claim requirements, rejections and notices may shorten the time to file suit on those claims, as well as notices of intent to sue may extend a statute if served in the last 90 days. Proceed with caution, and examine each statute of limitation for each separate cause of action.)

