S267453

IN THE SUPREME COURT OF CALIFORNIA

BETTY TANSAVATDI,
Plaintiff and Respondent,

v.

CITY OF RANCHO PALOS VERDES,
Defendant and Petitioner.

Review of a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B293670
Los Angeles Superior Court Case No. BC633651 c/w BC652435

PLAINTIFF'S MOTION FOR JUDICIAL NOTICE; [PROPOSED] ORDER

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ATTORNEYS FOR PLAINTIFF AND RESPONDENT

MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 459, 451 and 452, and California Rules of Court, rule 8.252(a)(1), Plaintiff and Respondent requests that this Court take judicial notice of the following documents:

Exhibit 1: Excerpt regarding government liability from Series 1978 Staff Report, prepared by the Joint Committee on Tort Liability to the Governor and Legislature, January 1979.

Exhibit 2: Correspondence dated September 12, 1978 from Robert L. Bergman, Assistant Attorney General, Office of the Attorney General, State of California, to William L. Barry, Jr., County Supervisors Association of California, enclosing a draft for the Design Immunity Portion of the report submitted by Gordon W. Baca, Deputy Attorney, Cal-Trans, and Robert L. Bergman, Assistant Attorney General, regarding the Government Tort Liability Project.

Exhibit 3: Appellant's Petition for a Hearing by the Supreme Court, filed by Appellants and Petitioners on January 10, 1972, in the matter of *Barbara Cameron, et al. v. State of California*, California Supreme Court Case No. S.F. 22866.

This Motion for Judicial Notice is based on the attached Memorandum of Points and Authorities, Declaration of Anna Maria Bereczky-Anderson, and Declaration of Armen Akaragian.

Dated: August 10, 2021 **MARDIROSSIAN AKARAGIAN LLP**

By: 

Garo Mardirossian
Armen Akaragian
Adam Feit
Attorneys for Plaintiff and Respondent

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to California Rules of Court, rule 8.252, Evidence Code sections 459, 451 and 452, Plaintiff and Respondent Betty Tansavatdi hereby requests that this Court take judicial notice of the documents relevant to the legislative intent behind the design immunity statute (Gov. Code, § 830.6) and the warning statute (Gov. Code, § 830.8). The authenticity of Exhibits 1 and 2 is established through the Declaration of Anna Maria Bereczky-Anderson, which is attached hereto as Exhibit 4. The authenticity of Exhibit 3 is established through the Declaration of Armen Akaragian, which is attached hereto as Exhibit 5.

Exhibits 1 to 3 are relevant to the legislative intent behind the design immunity statute (Gov. Code, § 830.6) and the warning statute (Gov. Code, § 830.8). Among other things, the Joint Committee on Tort Liability and the California Attorney General in the late 1970s invited the legislature to revise the design immunity statute to legislatively eliminate the holding in *Cameron v. State of California* (1972) 7 Cal.3d 318. The legislature refused. *Cameron* already decided the very issue to be decided here by the Court

These documents were not presented to the trial court because the pure legal issue of whether a public entity could be held liable under Government Code section 830.8 for failure to warn of an allegedly dangerous design of public property that is subject to Government Code section 830.6 design immunity was not before the trial court. Thus, Plaintiff did not have reason to

provide the trial court with information relevant to the legislative intent or the validity of *Cameron*.

Plaintiff/Respondent seeks judicial notice of the following three documents:

Exhibit 1: Excerpt regarding government liability from *Series 1978 Staff Report*, prepared by the Joint Committee on Tort Liability to the Governor and Legislature, January 1979. Judicial notice of this document is appropriate for numerous reasons:

(1) Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. (Cal. Law Revision Com. com., Evid. Code, § 450.) That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. (Id.) In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. (*Cf. People v. Sterling Refining Co.* (1927) 86 Cal.App. 558, 564 [statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts].) (*See also Perez v. Sharp* (1948) 32 Cal.2d 711 [texts and authorities used by

court in opinions determining constitutionality of statute prohibiting interracial marriages].)

(2) The Supreme Court takes judicial notice of the legislative history of an assembly bill. (*Martin v. Szeto* (2004) 32 Cal.4th 445.) Courts can also take judicial notice of the legislative history of the statutes and constitutional sections that were at issue in case. (*People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque* (2003) 105 Cal.App.4th 259, review den.) The Supreme Court also takes judicial notice of certain legislative committee reports underlying enactment of statutory amendments. (*People v. Ansell* (2001) 25 Cal.4th 868.)

(3) Judicial notice may be taken of the "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Cal. Evid. Code, § 452(c).)

Exhibit 2: Correspondence dated September 12, 1978 from Robert L. Bergman, Assistant Attorney General, Office of the Attorney General, State of California, to William L. Barry, Jr., County Supervisors Association of California, enclosing a draft for the Design Immunity Portion of the report submitted by Gordon W. Baca, Deputy Attorney, Cal-Trans, and Robert L. Bergman, Assistant Attorney General, regarding the Government Tort Liability Project. Judicial notice of this document is appropriate for numerous reasons:

(1) Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and

formulating rules of law. (Cal. Law Revision Com. com., Evid. Code, § 450.) That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. (Id.) In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. (*Cf. People v. Sterling Refining Co.* (1927) 86 Cal.App. 558, 564 [statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts].) (*See also Perez v. Sharp* (1948) 32 Cal.2d 711 [texts and authorities used by court in opinions determining constitutionality of statute prohibiting interracial marriages].)

(2) The Supreme Court takes judicial notice of the legislative history of an assembly bill. (*Martin v. Szeto* (2004) 32 Cal.4th 445.) Courts can also take judicial notice of the legislative history of the statutes and constitutional sections that were at issue in case. (*People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque* (2003) 105 Cal.App.4th 259, review den.) The Supreme Court also takes judicial notice of certain legislative committee reports underlying enactment of statutory amendments. (*People v. Ansell* (2001) 25 Cal.4th 868.)

(3) Judicial notice may be taken of the "[o]fficial acts of the legislative, executive, and judicial departments of the United

States and of any state of the United States." (Cal. Evid. Code, § 452(c).)

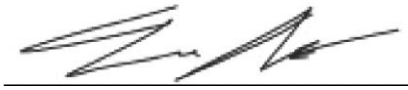
(4) The Court can take judicial notice of official publications from the State Attorney General's office. (*People v. Crusilla* (1999) 77 Cal.App.4th 141, review den.)

Exhibit 3: Appellant's Petition for a Hearing by the Supreme Court, filed by Appellants and Petitioners on January 10, 1972, in the matter of *Barbara Cameron, et al. v. State of California*, California Supreme Court Case No. S.F. 22866. Judicial notice of this document is appropriate under Evidence Code Section 452(d) because it is a record of a court from this state.

Thus, each of the aforementioned exhibits are proper subjects of judicial notice.

Plaintiff requests the Court grant this Motion.

Dated: August 10, 2021 **MARDIROSSIAN AKARAGIAN LLP**

By: 

Garo Mardirossian
Armen Akaragian
Adam Feit
Attorneys for Plaintiff and Respondent

EXHIBIT 1

California Legislature

Joint Committee on Tort Liability

ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

SERIES 1978 STAFF REPORT

OF THE

JOINT COMMITTEE ON TORT LIABILITY

TO

THE GOVERNOR AND LEGISLATURE

JANUARY 1979

ASSEMBLY MEMBERS	SENATE MEMBERS
John T. Knox, Chairman	Bob Beverly, Vice Chairman
Richard Hayden	Alfred Alquist
Alister McAlister	Robert Nimmo
Bill McVittie	Newton Russell
Floyd Mori	Alfred Song
Bruce Nestande	Bob Wilson

STAFF

William C. George
Committee Counsel

Cathy E. Craft
Committee Analyst

Joyce Faber & Darlene Fridley
Committee Secretaries

JOINT COMMITTEE
ON
TORT LIABILITY

Series 1978 Staff Report

SERIES 1978 STAFF REPORT

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(NOTE: All page numbers of Staff Report are numbered beginning with 78 [which stands for Series 1978], i.e., 78-1, 78-2, 78-3, etc.).

California Legislature

Joint Committee on Tort Liability

COMMITTEE ADDRESS:
11TH & L BUILDING
SUITE 950
SACRAMENTO, CA 95814
(916) 445-0118

COUNSEL:
WILLIAM C. GEORGE

COMMITTEE ANALYST:
CATHY E. CRAFT

SECRETARY:
JOYCE FABER

ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

January 2, 1979

Hon. Edmund G. Brown, Jr., and
Members of the Legislature
State Capitol
Sacramento, CA 95814

Dear Governor and Members:

Joint Committee on Tort Liability
Series 1978 Staff Report

Attached is the Joint Committee on Tort Liability Staff Report for 1978. After several committee meetings, it became apparent that we would be unable to achieve a committee consensus on a variety of issues. For that reason, I am submitting the staff report as such and not as the report of a majority. Each member of the Committee has the opportunity to author or sponsor those legislative recommendations which are soon to be drafted in bill form.

I have requested that our citizen advisory committees to continue and provide critical comment on proposed legislation. In addition, the advisory committees will be submitting their own reports and recommendations in early 1979. The staff reports are not the reports of the advisory committees, and the members of the advisory committees are unable to establish majorities for approval of each of the staff recommendations. The separate advisory committee reports will probably reflect the majority opinions of each such committee.

This Committee was established by the Legislature in response to an alleged tort system "crisis." Problems were manifested in the form of ever increasing liability insurance premiums. In response to questions about such premium increases, insurers blamed the uncertainty of a tort litigation system which allows non-meritorious suits and outrageous verdicts or awards. The recom-

mended solution was to bring certainty to the law so that liability exposure could be better anticipated. Premium rates could then be a more accurate reflection of this anticipated exposure.

Although we have found deficiencies in the litigation system which, if remedied, will result in a reduction in transaction costs, such deficiencies alone do not justify the alleged significant increases in liability premiums. We believe that further examination of the litigation system and the liability insurance process is warranted.

At times the work of the staff was unrewarding. Correspondents to the Committee made allegations concerning various problems. When asked for substantiation, however, much of the supporting material was apocryphal. Many state appellate and Supreme Court decisions receiving notoriety were based upon pleadings (e.g., sustaining of a demurrer or granting of summary judgment) with the factual issues not yet tried. Many critics of the legal system base their disapproval upon these decisions and apocryphal materials.

Other times, the staff received factual materials, encouragement and thoughtful comment from interested persons, including judges, lawyers, physicians, manufacturers and consumers. Some of these persons assisted by providing practical analyses of staff proposals.

The final supervision of this Report and the ongoing work of the Committee were done by William C. George, Esq., Counsel to the Committee. He brought to the work broad experience as a deputy county counsel and an inquiring mind. This report is in large part due to his tenacity and energy.

I would like to thank all of the staff who have thus far participated in this study. They are:

Harriet Bearman
Elizabeth Bleile
Mitchell Coffey
Cathy Craft
Joyce A. Faber
Prof. John Fleming
Darlene E. Fridley
William C. George
Martha C. Gorman
Fred J. Hiestand
Denise Jarman
Joan Manee
Gayle L. Phillips
Brian Regan
Estelle Schleicher
Prof. Gary Schwartz
Charles Spann

Because of their extra effort, I wish to especially thank the following persons who contributed their skills as this project progressed: secretaries Joyce Faber and Darlene Fridley who under pressure of getting out the 1978 report gave up weekends and holidays, and Denise Jarman and Gayle Phillips, staff interns who provided imagination and interest in approaching their tasks.

Ms. Jarman, a legal purist, furnished critical perspective to staff proposals. I would also like to thank Justice Robert S. Thompson of the Second District Court of Appeal and Professor Gary Schwartz, who gave of their time beyond official committee duties by offering thoughtful suggestions and criticisms.

The following is the 1978 Staff Report of the Joint Committee on Tort Liability.

Very truly yours,

JOHN T. KNOX, Chairman
Joint Committee on Tort Liability

JTK:df

Attachment

California Legislature

Joint Committee on Tort Liability

COMMITTEE ADDRESS:
11TH & L BUILDING
SUITE 950
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COUNSEL:
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COMMITTEE ANALYST:
CATHY E. CRAFT

SECRETARY:
JOYCE FABER

ASSEMBLYMAN JOHN T. KNOX
CHAIRMAN

January 2, 1979

Hon. John T. Knox, Chairman
Joint Committee on Tort Liability
Room 2148, State Capitol
Sacramento, CA 95814

Dear Chairman Knox:

Attached is the 1978 Staff Report of the Joint Committee on Tort Liability. The Report consists of sections concerning liability for automobile, government, medical malpractice, procedure, products and restaurant and bar owners. We have attempted to ascertain what should be the reasonable expectations of litigants and based our recommendations thereon. Ideally, liability should follow responsibility (Li v. Yellow Cab Co., [1975] 13 Cal. 3d 804). We believe in the concept of comparative fault and think that logically it should be extended.

The sections of the Report need no amplification, but comments upon some special areas are warranted. In government liability, the Legislature should consider the application of the Li v. Yellow Cab Co., supra., principles to inverse condemnation. Although this is not specifically a tort area, it is related. There appears to be manifest injustice to public entities as a result of holdings such as: Albers v. County of Los Angeles, (1965) 62 C.2d 250, Sheffet v. County of Los Angeles, (1970) 3 Cal. App. 3d 720, and Blau v. City of Los Angeles, (1973) 32 Cal. App. 3d 77. In each of these cases, there were two parties whose conduct gave rise to the damage, but only the public entity shouldered the loss. It would seem appropriate that the Li concept of liability following responsibility be extended to inverse condemnation.

Proposition 13 may compound an already poor situation for public entities by decreasing maintenance and increasing potential liability. This should be watched.

Assuming any proposed legislation is not unconstitutional, the Legislature should clearly manifest its intent to the judiciary by appropriate comment accompanying statutes. It appears that the principle of separation of powers itself has been eroded by recent decisions, especially those which have limited or abolished statutory immunities. Some of these changes have a direct financial impact on public entities.

We have referred to our Report as Series 1978 because further work must be done in the insurance and professional liability areas. Also, there will be additions to product liability and procedure. These new materials will be Series 1979.

When our recommendations have been reduced to bill form, we intend to present them to our advisory committees for review and comment. When the recommendations are in final bill form, they will be available for introduction.

Very truly yours,

WILLIAM C. GEORGE, Counsel
Joint Committee on Tort Liability

WCG:df

Attachment

I

HISTORICAL AND PHILOSOPHICAL BASIS OF GOVERNMENT LIABILITY

Historically, no suit was allowed against federal or state governments without their consent (Cohens v. Virginia, 50 U. S. 386, 389 [1821]). This rule was based on the English common law precept that "the kind can do no wrong" (Prosser, Law of Torts, [1971] 4th Ed., at 971). This precept in turn was based on the metaphysical notion that the kind was the fountain and head of justice and equity could not presume him to be defective in either.[1]

The divine right of kings' rationale was obviously outmoded when the colonies formed a union to be governed by and for the people, but reassessment of the rule came slowly. It was not until 1946 that the federal government eliminated the general rule of governmental immunity by enacting the Federal Government Tort Claims Act.[2]

In California, the rule was first scrutinized when in 1961 the courts decided Muskopf v. Corning Hospital, (1961) 55 Cal.2d 211. That decision stated what was then probably a growing view that "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia" (Id. at 216).

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[1] Pawlett v. Attorney General, (1668) Hadres 465, 468, 145 Eng. Rep. 550, 552; Dyson v. Attorney General, (1912) 1 K.B. 410, 415.

[2] 28 U.S.C.A. Sections 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680.

The California Legislature in 1963 enacted the California Tort Claims Act (see, Cal. Stats. 1963, ch. 1681, §1). That Act cuts from the immunity rule seven bases for liability: 1) liability for torts of employees (Calif. Government Code §815.2); 2) liability for acts of independent contractors (Calif. Government Code §815.4); 3) liability for breach of mandatory duty (Calif. Government Code §815.6); 4) liability for dangerous conditions of public property (Calif. Government Code §835); 5) liability for negligent operation of motor vehicles (Calif. Vehicle Code §17001); 6) liability for creation or maintenance of a nuisance (Civil Code §3479, and 7) liability for taking or damaging private property for public use (Art. I, §19, California Constitution).

The enactment of the California Tort Claims Act, however, did not end the debate of immunity versus liability or, even if it were agreed that liability should exist, the scope of that liability remains in dispute.[3] Those in favor of immunity argue that governmental funding and decision making needs protection and they add that with the passing of Proposition 13, there is even greater need to protect government's limited resources.[4] Those against immunity and in favor of government liability advocate the need for deterrence

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[3]G. Schwartz, "Report to the California Commission on Tort Reform," (unpublished paper on file with the Joint Committee on Tort Liability office).

[4]Joint Committee on Tort Liability, "Government Liability Transcript of Hearing," October 31, 1977; Advisory Committee on Government Liability "Minutes and Materials from July 31, 1978, meeting" (on file in Committee office).

Thus, from a philosophical standpoint, the controversy can be characterized as a question of who should bear the burden for injuries caused by a governmental entity and, if it is decided the government should, then the question becomes one of the scope of that burden.

What follows is an attempt to find an answer to the question through analyses of the presently available risk management procedures, the existing substantive rules of liability and immunity and also the existing procedural rules, the damages available, the problems arising when multiple parties are involved, and finally, the funding available to the governmental entities to compensate for government tort losses.

II

RISK MANAGEMENT

A. Definition. Risk management may be defined as the logical and deliberate analysis of exposure to risk in order to identify those risks of operations, and to reduce the following to eliminate, diminish and manage those risks: 1) risk avoidance; 2) risk transfer; 3) loss prevention; 4) loss management, and 5) risk funding.

B. Standards. Presently, there are several entities and private agencies which have risk management programs. These agencies have formed the Public Agency Risk Managers Association. The Joint Committee on Tort Liability requests authorization to ask these entities and agencies to present model standards for risk management for development and implementation by the public

entity. It is the opinion of the staff of the Joint Committee on Tort Liability that no such program should be mandated because of the limitation of public financial resources due to Proposition 13.

C. Effective Implementation of a Risk Management Program. Instead of mandating any risk management program, the staff of the Joint Committee feels that implementation of such a system should be entirely optional. However, to encourage the implementation of such a program, it is suggested that the following procedural benefits be given. Under Government Code Section 946.6, in order to file a late claim, a plaintiff must not only show due diligence in pursuit of the claim but also must show prejudice on the governmental entity. It is the recommendation of the Committee staff that those entities that adopt a risk management program be entitled to the late claims statute as it is exists in current law. For those entities which do not implement a risk management program, a claims statute based merely on the showing of prejudice to the entity, and not due diligence on the part of plaintiff, should be required. Case authority in California requires only substantial compliance with the claims procedure. It is suggested that strict compliance be required where a risk management program is ongoing, and merely substantial compliance where there is no such program.

The reason supporting such benefits with regard to a risk management program is that such a program provides early notice of an accident. If a risk management program involves prevention as well as control of the loss, the link between the risk management program and the claims statute is obvious.

D. Reporting Requirements. Under Insurance Code Sections 12389 and 12958, the local government section of the Insurance Commissioner's office shall collect loss data from insurers of public entities and each insurer shall report the following information:

1. The total number of insureds written during the immediately preceding calendar year;

2. The total amount of premiums received from insureds, both written and earned, during the immediately preceding calendar year;

3. The number of claims reported to the insurer for the first time, separately by the year the claim occurred, and the number of claims reported closed during the previous calendar year which were reopened separately by the year claim occurred;

4. The total number of claims outstanding, together with the monetary amount reserved for loss and allocated loss expense, in the annual statement as of December 31 of the calendar year next preceding, separately stated by the year the claim occurred;

5. (a) The number of claims closed with payment to the claimant during the calendar year next preceding, to be reported by the year the claim occurred;

(b) The total monetary amount paid thereon, reported by the year the claim occurred, and

(c) The total allocated loss expense paid therein, reported by the year the claim occurred;

6. The monetary amount paid on claims during the calendar year next preceding, to be reported separately by the year the claim occurred, with allocated loss expense paid to be reported separately by the year the claim occurred;

7. The number of claims closed without payment to the claimant during the calendar year next preceding, by the year the claim occurred, and the allocated loss expense paid thereon separately by the year the claim occurred;

8. The monetary amount reserved in the annual statement for the calendar year next preceding on claims incurred but not reported to the insurer;

9. The number of lawsuits filed against the insureds during the calendar year next preceding, to be separately reported by the year the claim occurred;

10. A distribution by size of payment from those claims closed during the calendar year next preceding, showing the number of claims and total amount paid for each monetary category as determined by the Commissioner.

A check with the Commissioner's office reveals that these reports are on file as of July 1 of each year. However, they are merely available for perusal in the office and not for copying (except at a cost of $1.00 per page). There are approximately 1,000 insurers of public entities.

These reporting requirements do not apply to self-insured entities.

The most significant impact of a reporting system is [illegible] notice to the entities of the kinds of dangers resulting in harm [illegible]

and thus hopefully inducing the entities to remove these dangers. Under the present reporting system, there is no indication of the kind of exposures.

THEREFORE, IT IS RECOMMENDED BY THE STAFF OF THE JOINT COMMITTEE THAT PARAGRAPH NUMBER 11 BE ADDED TO INSURANCE CODE SECTION 12958 AS FOLLOWS:

> "(11) The kind of loss occurring--workers' compensation, automobile liability, and a general liability, personal injury, or property damage. The frequency of loss in each of these categories should be reported.

It is also staff's opinion that this section be extended to include self-insured entities. In this way, the reporting system should more adequately serve the significant preventative function.

III

SUBSTANTIVE RULES OF LIABILITY AND IMMUNITY

A. Discretionary Immunity.

1. Existing Law. Government Code Section 820.2 provides that a public employe e is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

As explained in Litman v. Brisbane Elementary School District, (1961) 55 Cal.2d 224, the purposes of such immunity are to prevent officials from having their decisions subjected to the second-guessing of a jury and to avoid diminishing their zeal in the performance of their functions. Discretionary immunity is not a favored concept in that courts generally dislike immunity and favor liability. To determine what are discretionary versus ministerial, the courts often make ad hoc decisions which are

disadvantageous to the governmental entity.[5] For example, the police decision to stop a car is discretionary. However. the policeman's conduct in making the stop is ministerial. Such distinctions are more subtle than obvious.

The staff of the Joint Committee believes it would be difficult to legislatively categorize all of the situations in which an act could be discretionary rather than ministerial.

IT IS STAFF'S RECOMMENDATION THAT THE LEGISLATURE SHOW ITS INTENT CONCERNING GOVERNMENT CODE SECTION 820.2 BY INCLUDING WITHIN THE COMMENTS TO THAT SECTION THAT THE BURDEN OF PROOF SHOULD BE PLACED UPON THE PLAINTIFF TO SHOW THAT THE GOVERNMENT ENTITY WAS NOT IMMUNE IF DISCRETIONARY IMMUNITY IS RAISED AS A DEFENSE.

B. Design Immunity. Government Code Section 830.6 provides that:

> "Neither a public entity nor a public employee is liable . . . for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved . . ."

This is the administrative law test, i.e., if there is a rational basis for the design, and there is authority to adopt such design, there shall be no liability. Subsequent to the enactment of this section, case law carved out several exceptions. In Baldwin v.

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[5] See, Advisory Committee on Government Liability "Minutes of Meeting," (Dec. 6, 1978). (On file in Committee office).

State of California, (1972) 6 Cal.3d 424, the Court held that the design immunity does not remain intact where changed circumstances clearly reveal the defects of the plan. The basis for the holding was the legislative intent as found in the Law Revision Commission Report and the purpose of the design immunity. The Court felt design immunity was support to discretionary immunity. Thus, the immunity should be considered to have terminated when the Court finds: 1) the plan or design if effectuated has actually resulted in a dangerous condition at the time of injury; 2) prior injuries have occurred that demonstrated that fact, and 3) the public entity has knowledge of these prior injuries and a reasonable time to protect against the dangerous condition. The second exception to the immunity came in Cameron v. State of California, (1972) 7 Cal. 3d 318, which held that a public entity may be liable for failure to provide warning signs if such were necessary to warn of a dangerous condition not reasonably apparent nor anticipated by a person using the highway with due care. Liability was found even though design immunity may have been applicable, since the failure to warn was an independent basis for recovery.

It is the recommendation of the staff of the Joint Committee that Government Code Section 830.6 be reenacted, affirming the legislative intent to provide immunity for design. A statement in the legislation should provide that its purpose is to reenact Section 830.6, obviating the holding in Cameron.

A governmental entity does not always have the foresight to know when a plan becomes outdated. Even upon later knowledge

of the dangerous condition, the government entity may not have the resources to redesign and reconstruct the condition. Furthermore, there may be cases, such as the Golden Gate Bridge, where the entity knows of a dangerous condition and an entity knows and may have the money to change the design, but it is not feasible to correct.

C. Dangerous Conditions of Public Property. An entity may be liable for dangerous conditions of public property or adjacent property which create a substantial risk of injury, when the property is used with due care and in a foreseeable manner, if the condition proximately caused the injury and created a reasonably foreseeable risk of harm (Government Code Sections 830 and 835).

It is generally felt that liability for dangerous conditions is an important deterrent function to make public property safe. However, much of the concern with the liability in this area stems from the problem of constructive notice, i.e., notice which imputes to the entity based upon a showing of circumstantial facts. Government Code Section 835.2(b) provides a public entity has constructive notice of a dangerous condition if plaintiff establishes the condition was obvious and existed for a period of time.

Staff recommends that constructive notice be eliminated as a basis for liability under the dangerous condition of public property liability.

In addition to the practical problem and cost of inspection, there are many circumstances where a government entity has no way to know of the condition. A court or jury may find liability out

In addition to the practical problem and the cost of inspection, there are many circumstances where a government entity has no way to know of the condition. A court or jury may find liability out of sympathy for the plaintiff's damages. When there is such an inspection, an anomalous result may occur. For entities having an inspection procedure, the jury may find that they should have known within the meaning of section 835.2(b). Where there is no inspection program, however, the jury may find that they reasonably would not have known and thus there would be no liability. Thus, Government Code Section 835.2 should provide a further immunity that where an entity adopts a system for inspecting public property that no liability should stem therefrom.

D. Emergency Vehicle Liability. Vehicle Code Section 17001 provides that a public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

As a result, when vehicles in emergency situations cause death or injury to personal property, there is liability except within a limited set of circumstances where they are responding to a fire.

Section 17004 provides an immunity for all vehicles responding to an emergency call, but case law has eviscerated much of this section.

Since the emergency services provided by public entities are provided by them exclusively and not as a proprietary function, staff recommends the immunity be reaffirmed and reenacted.

E. Nuisance Liability. Civil Code Section 3479 defines a nuisance as anything which is injurious to health or is indecent or offensive or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property or unlawfully obstructing the free passage or use in the customary manner of any navigable lake or river, bay, stream, canal or basin or any public park, square, street or highway.

In Phillips v. Pasadena, (1945) 27 Cal.2d 104, and in Granone v. Los Angeles County, (1965) 231 Cal. App. 2d 629, it was held that a municipality may be held liable for creating and maintaining a nuisance notwithstanding the fact that governmental activity is involved. Thus, both before and after the enactment of the Government Tort Claims Act, public entities have been liable for creating a nuisance. This was not a problem until Nestle v. City of Santa Monica, (1973) 6 Cal.3d 920, which involved injuries alleged to have been suffered by the plaintiffs by virtue of defendant's operation of an airport near plaintiffs' property. The problem was not so much that there was liability for nuisance, but it seemed the opinion held that even though there was immunity for a design or plan, there could still be liability on the basis of another statutory section. It would appear that where there are overlapping liabilities and immunities, liability prevails.

Therefore, it is staff's recommendation that nuisance liability be retained, but that where there are overlapping theories of liability and immunity, a dominant purpose test be applied. In other words, after analyzing the facts and the theories of immunity and liability, the theory that predominates should prevail.

F. Inspection. Government Code Section 818.6 provides that a public entity is not liable for injury caused by its failure to make an inspection or by reason of making an inadequate or negligent inspection of any property other than its property for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

As indicated, while there is no liability for inspection, it may be a basis for imputing constructive notice. Staff recommends that Section 818.6 be amended to provide that making or failing to make an inspection should not be a basis for constructive notice and that constructive notice no longer be a basis for liability.

G. Misrepresentation. Government Code Section 818.8 provides that a public entity is not liable for an injury caused by misrepresentation by an employee of the public entity whether or not such misrepresentation be negligent or intentional.

In Johnson v. State, (1968) 69 Cal.2d 782, the Supreme Court held that the Legislature intended to exempt the entity from liability arising out of misrepresentation by a public employee. In Connelly v. State, (1970) 3 Cal. App. 3d 744, the Court of Appeal took the Johnson decision one step further in finding that a public entity might be liable for a negligent forecase of river height. The Court held that the claim for commercial loss suffered by the owner of three marinas located near the confluence of two rivers and based on the State's negligence in disseminating inaccurate

river height forecasts did not come within the immunity provided by Section 818.8.

According to the legislative committee comment, the misrepresentation immunity was that public entities should be provided with an absolute immunity from liability for negligent or intentional misrepresentation with no limitation that it be required to be in financial matters versus other areas.

It is the recommendation of the staff of the Joint Committee on Tort Liability that Section 818.8 be reenacted with the stated intent that the holdings in the Johnson and Connelly decisions are to be nullified.

IV

CLAIMS STATUTES

Under existing law, a plaintiff must file a claim with the public entity within 100 days from the date of injury. Failure to do so may bar the claim unless plaintiff can show due diligence and no prejudice to the public entity. The denial of a claim must come within 45 days from the filing of the claim and if no formal denial, it is deemed denied. Denial is a condition precedent to filing suit (see, Government Code Sections 905, 910, 911.6, 915 and 945.6).

It is staff's recommendation that the Claims Statute be retained, but that it be modified as described above. Furthermore, staff recommends that the benefit of the Claims Statute and risk management be implemented as discussed above.

V

EARTHQUAKE HAZARDS AND LIABILITIES

Although the staff would prefer to avoid immunities directed very specific areas and instead deal with principles applicable to a variety of situations, recent concern with earthquakes, their increase and government's role require some consideration.

A recent meeting of public entity representatives revealed great uncertainty and concern over potential liability in moderate earthquake circumstances. Entities desire to undertake preventive measures, but are fearful that such undertaking may increase potential liability. Therefore, they hesitate to act. Representatives generally agreed that liability for a catastrophic occurrence was not the issue. The moderate earthquake which may cause isolated deaths or injuries is the matter of concern. Substandard buildings may collapse in a moderate quake which poses little or no threat to buildings constructed in recent years. A legitimate object is to attempt to upgrade such deficient structures. The following recommendations seek to achieve: 1) reduction in the uncertainty about potential liability as the result of certain actions; 2) elimination of the safety disincentives in the current system, and 3) reduction of earthquake hazards without increasing local government liability.

A. Dangerous Conditions of Public Property. In order to promote reduction of earthquake hazards, staff recommends the legislative establishment of a program wherein:

1. The State, through the state geologist, within a specified period determine areas of significant seismic risk in

the state;

2. Upon determination of the seismic risk areas, the state geologist shall notify all entities wholly or partially located within seismic risk areas that they are so located;

3. Local government wholly or partially within seismic risk areas would be immune from liability at the time of notice and would retain immunity upon satisfaction of the following conditions:

a. Within a period of time commensurate with the size of the entity, inspect all publicly owned properties to ascertain if such property constitutes a potential hazard to life or other property in the event of a moderate earthquake;

b. Within one year of completion of the inspection described above, adopt a plan and establish a time period for mitigation of the hazards discovered;

c. Reasonably comply with the inspection, plan formulation and plan execution.

If liability should be found against a public entity for damages arising from adjacent private property, such liability would be limited to the percent of fault of the public entity.

B. Dangerous Conditions of Private Property. In order to encourage voluntary rehabilitation of those buildings constructed prior to practical earthquake standards, local entities should be authorized to adopt structural earthquake life-safety standards less rigorous than applicable building code. The object of the legislation is to promote life safety rather than minimize property

damage. The local entity would be immune from liability for any damage of any kind allegedly caused by the adoption and/or enforcement of such legislation. This legislation is to assure that 'notice' does not create liability.

Actual or constructive notice of a dangerous condition of private property cannot be a basis of liability for any damage caused by an earthquake unless:

1. The entity failed to comply with a mandatory duty, assuming all other elements of a cause of action are satisfied; or

2. The loss occurred on public property because of the defective condition of adjacent private property; and

3. The public entity had actual notice of the defect and sufficient time and resources to abate the hazard. Notice alone does not create liability. All other elements of a cause of action must be satisfied.

If liability should be found against an entity, such liability would be limited to the percent of the public entity's fault or responsibility.

C. Immunity for Earthquake Prediction or Warning. Legislation should be adopted immunizing any public entity, having a significant population and acceptable seismic activity prediction capacity, from any liability which might arise as a result of any earthquake warning or prediction; acts or omissions in inspection or fact gathering; evaluation or any other activity done for the purpose of predicting or warning.

The entity would be immunized from liability for prediction or warning in the same manner as provided in Government Code

Sections 8550, et. seq., and Civil Code Section 1714.5.

D. Other. Staff recommends that the Attorney General be requested to render opinions on 1) whether a local government's enactments can impose a mandatory duty upon such entity or other entity's within its jurisdiction, and 2) whether information received concerning hazards constitutes changed conditions within the holding of Baldwin v. State of California, (1972) 6 C.3d 424.

78-267

EXHIBIT A

78-268

GOVERNMENT LIABILITY ADVISORY COMMITTEE

The Advisory Committee on Government Liability held its last meeting in Los Angeles on December 6, 1978.

I

ATTENDANCE

In attendance at the meeting were:

Robert G. Walters
County of San Diego

Roy Pederson
City of Montebello

Gordon Baca
State Dept. of Transportation

Jerry Roberts
County of Fresno

Ben C. Francis
Public Agency Risk Managers Assn.

Lloyd C. Fowler
Santa Clara Valley Water District

William L. Berry, Jr.
County Supervisors Assn. of Calif.

Robert C. Lynch
L. A. County Counsel Office

Robert K. Booth, Jr.
League of California Cities

Robert S. Thompson, Assoc. Justice
Court of Appeal

William C. George, Counsel
Joint Committee on Tort Liability

Marie Gibson Myll
Citizen, Long Beach

Michael M. Berger
Radems, Berger & Norton

Richard Pucci
City of Temple City

Gordon R. Lindeen
Rancho Simi Recreation and Park District

II

OPENING COMMENTS

Justice Robert S. Thompson, Committee Chairman, opened the meeting with a general statement of the purpose of the meeting to include all relevant topics and exclude the irrelevant ones. For this purpose, an outline for discussion was presented. The agenda of the meeting followed this outline. Justice Thompson then asked

any topics were omitted from the heading of Broad Categories the Outline. Bob Walters from the County of San Diego sponded that Proposition 13 should be included, to which response ere was no disagreement.

III

CATEGORIES OF ISSUES

A. Philosophical Bases of Government Liability and mmunity. Justice Thompson opened this issue for discussion with ıe following remarks: The philosophical bases of government .ability and immunity are a necessary topic of consideration in :der to understand the legislative scheme underlying existing ıw. This scheme balances two conflicting policies: 1) the rotection of the governmental funding and decision-making process, ıd 2) the compensation and deterrence of injury-causing conduct. ıstice Thompson pointed out that historically the policy of rotecting government was first in time.

The discussion of the issue ensued with comments as follows: YNCH: Prior to the enactment in 1963 of the Government Tort laims Act, the Legislature debated whether the scheme should be pen or close-ended. An open-end scheme is one in which the overnment is to be held liable like a private citizen with immuni- ies provided in only special areas. A close-end scheme makes overnment entities immune from suit in absence of statutory uthority creating liability. Mr. Lynch believes the 1963 scheme dopted the open-end approach and thus government is liable like n individual. He commented that the fact government is different han a private citizen should be pointed out.

BACA: Mr. Baca disagrees with the purpose of liability as a deterrent. He uses the Ford Pinto case as an example. He feels, further, that the compensatory aspect of liability is speculative and mentioned the alternative of a government fund from which injured victims could recover.

THOMPSON: Responding to Mr. Baca's comments, Justice Thompson pointed out the problems which arise when a non-government tort-feasor is involved.

MYLL: Concerning the discussion of the philosophical bases of tort law, Mrs. Myll felt the following quote from John Sturat Mills was appropriate:

> "Not the violent conflicts between parts of the truth, but the quiet suppression of half of it is the formidable end; there is always hope when people are forced to listen to both sides: it is when they tend only to one that error hardens into prejudice and truth itself ceases to have the effect of truth by being exaggerated into falsehood."

A discussion of the government orientation of the Advisory Committee ensued. Some members felt this was planned. However, it was pointed out that any weighting of the Committee in favor of government was unintentional.

BERRY: Mr. Berry was confused as to the purpose of the Advisory Committee.

GEORGE: Committee Counsel, Bill George, explained that the purpose of the Advisory Committee was to obtain practical alternatives to resolve problem areas in government liability. He explained that since each member has his own representation with a disparate interest that no consensus should be reached. On the government

side, the impact of Proposition 13 on the ability of government to respond to damages should be considered. On the victim's side, the need for compensation for his injuries should be considered. Upon review of the considerations made by the Advisory Committee, the Joint Committee on Tort Liability will be more in a position to recommend how a balance between competing considerations can be struck.

B. Risk Management.

1. Defined: The following definition of risk management was agreed upon by the members:

> "The logical and deliberate analysis of exposure to risk in order to identify those risks of operations, and to apply the following disciplines to eliminate, reduce and manage those risks: 1) risk avoidance; 2) risk transfer; 3) loss prevention; 4) loss management, and 5) risk funding.

The discussion of risk management included the following comments:

ROBERTS: In his job, the definition of risk management encompasses not only loss prevention, but also includes claims management. Roberts agrees that the above definition is a good classical and practical one. He also commented that such practice is also called "safety prevention" and that this latter term is not as comprehensive as risk management programs.

FRANCIS: Is funding part of risk management?

ROBERTS & FRANCIS: Both gentlemen would include in risk management financing of the loss.

PEDERSON: Mr. Pederson is against state control of risk management programs. He believes an immunity for negligent operation of a risk management program would be desirable.

THOMPSON: Asked if rather than a state-mandated program for risk management if a procedural benefit to agencies having such programs would be satisfactory.

LINDEEN: At a meeting with an insurer, Mr. Lindeen discovered that the insurer was against the use of a risk manager, at least in name, since having inspections is another basis for liability which can cause an increase in premium rates.

PEDERSON: Mr. Pederson's insurer encourages risk management.

BOOTH: A risk manager is a prerequisite to obtaining insurance with his insurer.

THOMPSON: The problem under existing law is that those not having inspectors will not be charged with constructive notice, whereas those that do can be held for negligence in not preventing the injury (See, Morris v. County of Marin; Elson v. P.U.C.).

BERRY: If the inducement to implementation of a risk management program is in the form of a procedural benefit, does this mean the state will set the standards for risk management?

THOMPSON: Yes, but these can be borrowed from standards already in use, perhaps from P.A.R.M.A. (Public Agency Risk Managers Association).

WALTERS: The cities would prefer this approach.

THOMPSON: Is there an issue of illegal delegation there?

BERGER: Mr. Berger commented that if the purpose of risk management is loss prevention, then risk management should be its own benefit. He would disagree with giving additional benefits.

THOMPSON: Justice Thompson suggested the following benefits: use of the California Claims Statute for late claims for those entities having risk management and the New York Claims Statute for those not having risk management. He feels such legislation would withstand equal protection challenge on a rational basis test since a claims statute is directly related to risk management.

WALTERS: With regard to a state program, Bob Walters felt it was feasible but probably would be more bureaucratic.

2. Impact of Proposition 13 on Risk Management. There has been a reluctance to spend money to hire new people now in order to save money down the line.

PEDERSON: Mr. Pederson said that if entities are given state aid for risk management, that may be an inducement.

WALTERS: Every dollar you invest would save $8.00. But still he could not sell the program to San Diego county.

BERRY: He said that smaller, rural counties might not be able to afford this; they might have to share. In setting standards, the financial ability of the entity may have to be considered.

PUCCI: He has had a professional risk manager for 30 cities and it has worked out fairly simply.

THOMPSON: Under the JUA pooling, problems are now solved.

3. Statutory Reporting Requirements.

BOOTH: He feels they are onerous and costly. They should have an SB 90 reimbursement.

THOMPSON: There is a tendency to require more in reporting than is worthwhile. One of the problems of loss prevention management is for a category of losses to become known in general.

PEDERSON: Mr. Pederson anticipates compilation by P.A.R.M.A.

WALTERS: In the areas of workers' compensation, automobile liability, general liability, personal injury and security, there are requirements of reporting for the City of San Diego.

THOMPSON: Can this be standardized? Could this be part of the reporting requirements?

WALTERS: Yes, yes.

BOOTH: Another model could be that used by R. L. Couts.

THOMPSON: To serve the purposes of risk management, while preserving confidentiality, all we need to know is the class frequency, i.e., identification of the cause of injury and the number of accidents in that group.

LINDEEN: Clerical expense could be reduced by use of a simplified form, especially in view of Proposition 13.

(Recommendation: Give to P.A.R.M.A. to come up with a plan and estimate of cost.)

WALTERS: On state reporting, Mr. Walters believes that is the first step to state control.

THOMPSON: Could P.A.R.M.A. standards for risk management require extra communication regarding loss frequency between entities' risk managers?

WALTERS: This is being done by telephone now.

MYLL: That's haphazard.

PEDERSON: Should publicity be a part of risk management programs when the entity is so small that statistics won't preserve confidentiality?

BACA: Gave an example of when publicity could prevent further injury and loss: bicycles with thin tires in drainage grates. Cal-Trans is disseminating this information, but is unsure if county/city entities got the word. There is a need for dissemination of loss frequency at modest cost.

WALTERS: The League of Cities articles are helpful. Another advantage of risk management statistics is proof to insurers that risk is less than they say, so premiums should be less.

THOMPSON: Summarising reporting requirements problems: 1) avoidance of superfluous reporting and onerous expense; 2) should not interfere with confidentiality of entity; 3) should serve purpose of disseminating information.

BERRY: He commented that there were two kinds of reporting: 1) accident frequency and class: proper subject of reporting through P.A.R.M.A., and 2) claims losses: the value of this kind of reporting is for insurance. This is a regulatory kind of reporting. It should come under the wing of the insurance commissioner.

THOMPSON: In government liability, one specific area which is important as to the control on premiums is the loss experience of the self-insured. He uses this as a basis for showing the management deficiency of mutual companies. And he wondered whether reporting by self-insurers is cost-effective and, if so, should others benefit therefrom.

A suggested further work-up is to prepare standards for risk management, reporting and cost-effectiveness.

C. Substantive Rules of Liability and Immunity. Justice Thompson introduced this area by outlining the major areas of liability under the 1963 Tort Claims Act. He stated that the large general group which gave rise to government liability was for employees' torts.

1. Discretionary Immunity: Justice Thompson stated that government is not liable for discretionary acts of its employees. Discretionary means policy matters. Case law reaching the appellate courts in this area concern mainly the definition of a policy versus a ministerial matter. For example, a policeman's decision to stop is a policy decision, but if he does stop, the conduct in stopping is ministerial. One issue under this heading is whether or not a legislative definition of "discretionary" versus "ministerial" is necessary or desirable.

Comments:

WALTERS: He is satisfied with the status quo with the exception of a few aberrant decisions.

PUCCI: He is in accord with Walters. He feels it would be difficult to draft legislation defining discretionary versus ministerial.

BOOTH: He doesn't feel discretionary immunity is a useful immunity any more. The courts have vitiated this immunity.

LYNCH: There is a problem under existing law with law enforcement officers. There should be more immunity in emergency situations. This is a high-risk area for which government is mandated to provide service and there should be immunity.

BOOTH: In the outline for discussion under "Discretionary Immunity" Mr. Booth is against numbers 2 and 4; he feels that the proprietary versus governmental distinction is worse than what we have now, but would be for an immunity for carrying out inherently dangerous services in hot pursuit.

WALTERS: From a risk-management standpoint, San Diego is trying to get away from hot pursuit situations. Both Mr. Lynch and Mr. Booth disagree.

BOOTH: He feels there is a discrepancy with the existing law between the immunity afforded fire departments and lack of immunity for acts of police officers.

GEORGE: Mr. George pointed out that the availability charges may expand liability for failure to provide water to fight fires.

BOOTH: Is immunity needed to cover that?

2. Design Immunity: Justice Thompson began the discussion of this area by stating that the Code provides government immunity for damage for injury due to defective design if 1) approved by specified level of government, and 2) if there was a rational basis for the executive decision. He states that, basically, this is the administrative law test. If it is met, the judiciary won't review the decision. The initial litigation in this area dealt with the presence or absence of rational basis. Litigation since then has dealt with the continuity of immunity once it attached; that is, changed conditions. Where there are changed conditions, the immunity is vitiated. The failure to warn of defect is also a basis to abrogate the immunity. The first issue discussed under the subheading is what are the options and problems.

Comments:

LYNCH: Mr. Lynch feels the use of constructive notice is unfair. There should be actual notice before immunity is abrogated. Also, there are some conditions which, if they become unsafe, still cannot be corrected. He gave the example of the Golden Gate Bridge and wondered that if it were determined that the bridge subsequently became unsafe, what could be done about that, and should liability therefore attach because of changed conditions.

WALTERS: He feels the case of Baldwin does a public service by requiring the entity to be responsive to public dangers.

BERRY: He feels if carried to a logical conclusion and in view of Prop. 13, the Baldwin decision imposes too great of a burden upon a public agency to inspect and reconstruct. There must be a reasonable limitation.

PUCCI: The administrative law test is too great a burden for the plaintiff to meet. It would be more honest to say let's just give the government an absolute immunity.

The consensus seems to be that Baldwin, Li and AMA are a problem for public entities taken as a whole.

LYNCH: He feels constructive notice is a problem. For example, a branch fell off a tree and made a paraplegic of a little girl. There was a rotting on the tree, but only on the inside. The burden to inspect the inside to every tree is just too onerous to place on a public entity.

LINDEEN: Prop. 13 makes this a dramatic issue, especially for entities which didn't get any bail out money.

THOMPSON: He wonders if it is an appropriate inquiry if, because of Prop. 13, certain government services will be cut off.

BOOTH: Mr. Booth suggests a limitation on changed conditions by the assertion of an absolute bar if plaintiff is at fault in misusing the public property. Also, he believes they should expand private design--for example, approval through building codes for design of private builder (this is really discretionary and also involves an inverse condemnation situation).

3. Nuisance Liability: Justice Thompson asked, is it a problem? Nuisance liability is defined as a catch-all tort. There is a Civil Code definition existing. Justice Thompson stated that generally nuisance liability is misuse of public property to the harm of a third person. The leading case in the area is the case of Nestle. This is an airport noise case in Santa Monica. It is a good inverse condemnation case. He asked whether or not nuisance covers personal injury, whereas inverse condemnation covers property? It is the understanding of Justice Thompson that there is a new appellate court case on whether assumption of the risk can be applied by moving to a nuisance.

PEDERSON: He feels the problem of stray golf balls to an abutting land owner built subsequent to the golf course should be covered by assumption of the risk.

LYNCH: To the extent that liability for nuisance is allowed, the logical result is to limit or close down the service creating the nuisance. In view of Prop. 13, Lynch feels this is more and more likely.

The consensus of the group was that nuisance liability is not too great a problem.

LINDEEN: As to governmental versus proprietary, Prop. 13 may cause many entities to become more and more proprietary in order to finance services. He thinks that makes this alternative less attractive.

4. Emergency Immunity: Emergency immunity is particularly important with vehicular activity. However, it would also include misuse of firearms. The test could be, "was the emergency such as to justify the action?"

BOOTH: With the Pasadena case, the felony-pursuit case, emergency liability may be a problem.

LYNCH: He felt the Pasadena case was a misdemeanor and not a felony case. He points out this is a problem with police cases. If an officer is grossly negligent, liability may be conceded. But, government should not be liable for harm caused by the criminal.

THOMPSON: This is a problem under existing law. Justice Thompson points out if you are a traditionalist when it comes to the theory of proximate cuase, criminal conduct is a supervening cause only if it is unforeseeable.

BOOTH: Perhaps an injured third party should be considered as the victim of a crime. There are presently statutes which provide recovery for victims of crimes. Both Mr. Booth and Berger are concerned that the "Harley Cowboys" (over zealous police officers) should be kept under control.

BOOTH: He is against the concept of gross negligence being thrown back into the law. He feels this concept is no longer extant.

5. Dangerous Conditions of Public Property: Justice Thompson explained that dangerous conditions of public property is the basis for liability when it is being used properly and the danger is not apparent to the user and the entity has actual or constructive notice.

WALTERS: He gave the example of San Diego where there are 57 miles of cliffs. Some of these cliffs are on county property and they are inherently dangerous and it is a recognized fact. Since it is a natural condition, San Diego will not touch the cliffs to make them safer because if they do, they will abrogate the immunity.

BOOTH: He notes the problem of growth of vegetation. He feels this is an unfair burden to be cast on the public entity. The second area of liability is for lack of lighting--public parking lots are an example. It is also an example of criminal acts. The Santa Barbara case held no liability, but there is an L.A. airport case going contra.

THOMPSON: Justice Thompson summarized the discussion of the problem as one involving government responsibility and the limitation on government by Prop. 13.

BOOTH: He said to look to the notice provision in the dangerous condition of public property. By requiring actual notice, it would eliminate many problems. It would eliminate constructive notice and as a trade-off, there could be the requirement of periodic inspections. The issue would then boil down to one of adequacy of inspection.

A discussion regarding a no-fault system ensued.

BOOTH: The Morris case is in its infancy now. The mandatory duty cases may generate many cases and perhaps an immunity in this area would be appropriate.

6. Overlapping Causes of Action:

THOMPSON: One of the problems of the Morris case was the implication that specific immunity always yields where there is another basis for liability. He believes another test could be the dominant purpose which would put the case law back to where it was.

7. Miscellaneous:

LYNCH: Concerning forecasting, he feels one of the miscellaneous problems is the Sacramento River case which is illustrative of the misrepresentation-forecasting problem. There is an immunity for misrepresentation, but none for negligent forecasting.

BOOTH: He recommends perhaps a waiver of liability for services provided.

LYNCH: He cites the Law Revision Commission report for the purpose of a misrepresentation immunity. The purpose was that they did not want to create ostensible authority on an employee's part to bind the government.

D. Procedure.

1. Claims Statute:

BOOTH: An alternative not mentioned in the outline is to eliminate the claims statute. The late claim defense has virtually been wiped out by the recent Kern County case. If you admit that the purpose of the claim statute is to settle without the need for litigation,

it would serve a meritorious purpose. However, most entities deny claims perfunctorily. He recommends that as part of the claims statute, contact with the claimant be required.

WALTERS: He does not feel that 45 days is sufficient time to satisfy discovery in a serious case. Thus, many claims are denied on that basis. The purpose of the claims statute is the effort to make the whole procedure timely. He thinks the statute of limitations should go to one year from the date of loss, rather than nine months.

LYNCH: The difference in the 100-day statute is the ability to obtain discovery in a timely manner. This is seen in federal cases.

BOOTH: He suggested the penalty for perfunctorily rejecting claims would be a bad faith administration case analogous to the bad faith insurance case.

PUCCI: He does not feel 45 days is enough time to relay to the adjuster, get back and settle the claim.

THOMPSON: If the entity does not act within 45 days, suit can be brought. A rejection of the claim is superfluous and an additional administrative hassle lengthening the statute. Why not have the statute of limitations for one year from date of loss? Usually the 100-day period can be waived. His recommendation is thus to eliminate rejection as part of the claims statute, the penalty merely being that suit is then permissible. The test for barring suit due to a failure to file a timely claim is one of prejudice, the burden being on the entity to show that it wasn't prejudiced.

BOOTH: One argument against claims statutes is that shorter claims statutes causes a plaintiff's attorney to avoid malpractice by suing the entity prior to the opportunity of discovery disclosing entity's liability. Thus there is potential for needlessly claiming against the entity.

BACA: He would rather have a claims statute come in with a few cases that are specious because of the opportunity to investigate. He believes an entity would most often lose on a test of prejudice with the impact that the entity would have to defend the suit. The dislocation of the entity would be the fact of no notice until eight to ten months later, with the ensuing loss of evidence and danger that the injury-causing conduct will continue to exist.

ROBERTS: He believes that plaintiff's bar would use prejudice to their advantage, not to file until the last moment to prevent an entity as a tactical matter from collecting data.

WALTERS: Five percent of all claims go to litigation. One-fifth of the cases are settled. Other claims are not pursued.

ROBERTS: Claims denials are rather routine because of strategy. Even if the entity believes the case is worth the amount claimed, for tactical considerations, the claim is rejected.

BACA: The duty of cooperation under an entity's insurance policy may be another reason why entities deny claims perfunctorily. He would rather see an open-ended period for rejection of the claim. Forty-five days is inadequate to gather information and to evaluate it. They should allow a lawsuit after forty-five days, regardless of rejection. An alternative would be to extend the period for rejection to 100 days.

2. Statute of Limitations: The consensus on the statute of limitations was one year from the date of loss. The six months from the date of denial usually isn't a problem, according to Mr. Baca.

3. Bifurcation: The consensus was that bifurcation is not needed, nor desired.

ROBERTS: He believes sympathy makes bad case law and doesn't understand the reason for not bifurcating.

BOOTH: He believes bifurcation is too expensive, too time-consuming and is a good defense tactic because he has nothing to lose. It costs plaintiff lots of money.

LYNCH: He doesn't believe there is any problem getting bifurcation if it is desired under existing law.

ROBERTS, BOOTH, THOMPSON: They are contra to the last comment by Mr. Lynch. They believe that only in cases where there are special defenses is bifurcation permitted.

BACA: He does not believe bifurcation solves the problem. This is because plaintiff will sit through the trial in his wheelchair.

4. Cost-shifting: Justice Thompson defined cost-shifting as a British concept of assessing the costs of trial. The loser pays witness fees, expert fees and counsel fees according to the discretion of the court. The options under this device would be 1) to retain the current rule, each party bearing their own expense; 2) adopt the British rule; 3) use the model of AB 1XX enacted in Civil Code 1362; 4) expense-shifting--parties brought into the suit if additional party prevails--this is the Calabresi concept of transactional costs theory due to AMA. One of the concerns is

that government is the deep pocket. The way to avoid additional parties being brought into the suit would be that plaintiff gets one free defendant. Every defendant thereafter is entitled to cost-shifting unless liability is found. A defendant under AMA assumes the same risk. The policy is to decrease multiple party litigation especially now if the Supreme Court reverses the appellate decision in Jess v. Hermann. A question was posited as to the Calabresi method whether the costs are imposed against the party or the attorney. Justice Thompson responded that it would be against the party.

# # #

78-287

OUTLINE FOR DISCUSSION AT

December 6, 1978 MEETING

OF GOVERNMENT LIABILITY ADVISORY COMMITTEE

I. Purpose of Meeting -- As at the first meeting, no effort will be made to reach consensus or to record votes on positions on the items discussed. The purpose is to illuminate the options available to the Legislature in dealing with perceived problems in the various areas of government tort liability. Those will be reported with the request that the Joint Committee inform the Advisory Committee of those options which should be eliminated and those which should be explored further.

II. Broad Categories of Issues:

A. Definition of the philosophical basis for Governmental liability or immunity.

B. Risk Management.

C. Substantive rules of liability and immunity.

D. Procedural rules.

E. Damages.

F. Multiple parties.

G. Funding.

III. Philosophical Basis:

A. Protection of governmental funding and budgeting and governmental decision making.

B. Deterrence of injury causing conduct and compensation to the injured.

IV. Risk Management:

A. Definition.

B. Determination and administration of standards for risk management plans.

C. Risk management at the state level:

1. Adequacy of current risk management programs.

2. Need, if any, to examine those programs for adequacy and possibility of improvement.

D. Risk management at local level:

1. Adequacy of current risk management programs.

2. Encouragement to local entities to adopt effective risk management practices:

a. By means of amendment of the presentation of claims statute to give greater protection to entities with adequate risk management plans than to those without?

b. By specific substantive law protection (for example, some limitation on some types of liability to entities with effective risk management)?

c. By statutory reporting requirements:

i. Are current requirements for reporting of claim potentials against governmental entities adequate?

ii. Requiring only insurance companies to report?

iii. Requiring reports by insurance companies to be sent or disseminated to public entities?

iv. Making reports available to the public?

v. Requiring self-insurers to report also?

IV. Substantive Rules of Liability and Immunity:

A. Discretionary Immunity:

1. Is statutory clarification necessary or desirable?

2. Should the administrative review test (abuse of discretion for lack of a rational basis for the action) be adopted?

3. Should a codification of areas where discretionary immunity applies be substituted for the current case law categories of "policy" decisions (immune) and "ministerial" decisions (not immune)?
4. Should the former "governmental" vs. "proprietary" dichotomy be revived with a specific statutory definition of "governmental functions" to which discretionary immunity is applicable?

B. Design Immunity:

1. Should the present form of design immunity be retained without change?
2. Should liability for changed conditions be subjected to the same test as original design immunity -- i.e., no liability unless it is first determined as a matter of law that there is not a rational basis for failing to accommodate the original design to changed conditions?
3. Should there be a return to the "governmental-proprietary" dichotomy with respect to design immunity?
4. Should the scope of design immunity be expanded?

C. Nuisance Liability:

1. Should governmental liability for "nuisance" be retained per Nestle v. City of Santa Monica?
2. Should it be eliminated?
3. Should the "governmental-proprietary" dichotomy be applied?

D. Emergency/Emergency Vehicle Liability:

1. Retain rules of current case law?
2. Absolute immunity?
3. Liability only for gross negligence?

E. Liability for Dangerous Condition of Public Property:

1. Is the current distinction between liability for natural and artificial conditions adequate?
2. Should "minor" modifications in property be treated as not changing the "natural" condition? If so, what is the definition of "minor"?

F. Overlapping Causes of Action -- where immunity applies to one or more theories of liability but not to all:

1. Retention of current case law - no immunity if governmental conduct falls within a non-immune theory?
2. Absolute immunity if conduct falls within an immune category?

3. Immunity determined by "dominant purpose" of the governmental activity?

4. Application of the "governmental-proprietary" dichotomy.

V. Procedure.

A. Claims Statutes:

1. Retain current law?

2. Shorten the 100-day period?

3. Lengthen the period? How long?

4. Change test of bar for failure to file a timely claim so that burden is on the entity to establish that it was prejudiced by the failure to file? Presumption of prejudice if failure to file a timely claim affects operation of a risk management program meeting established standards?

B. Statute of Limitations:

1. Retain current statute of limitations?

2. Shorten it? Extend it?

C. Bifurcation of Liability and Damage Phases of Trial:

1. Retain present rule bifurcation the exception?

2. Modify so that bifurcation is the rule and trial of damages and liability at the same time the exception?

D. Cost Shifting:

1. Retain present rule that winner bears his own expenses of litigation except for "costs"?

2. Adopt British system of shifting the winner's expenses of litigation to the losing party?

Note the historical difference between suits against governmental entities and ordinary lawsuits. At one time, a bond was required as a prelude to suits against the government.

3. Expense shifting if on pretrial motion the court determines that a party's probability of success is "X" and the party does not better "X" at trial?

VI. Damages.

A. Retain present rules?

B. Expand authority for periodic payments? Who is entitled to undisbursed sum upon the death of the recovering plaintiff?

C. Limit or deny recovery for pain and suffering? Combine with expense shifting?

VII. Joint Liability of Concurrent Tortfeasors:

A. Retain present rule of American Motorcycle Assn.?

B. Adopt several liability in general? Several liability only if plaintiff not also at fault?

C. Retain rule of joint liability and liberal joinder of parties at option of both plaintiff and named defendants but impose expense shifting against party who brings additional parties into the lawsuit if the additional party who is brought into it prevails? i.e., Plaintiff can sue one defendant without risk of expense shifting; if he sues multiple defendants, he runs the risk. Defendant who seeks "equitable indemnity" by bringing in cross-defendants runs risk of expense shifting.

VIII. Funding:

A. Are current provisions for funding adequate?

B. Is additional legislation for joint powers agreements needed?

C. Legislative authority for governmentally owned mutual or reciprocal insurance companies?

D. State owned public entity insurer? State fund?

6

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EXHIBIT 2

EVELLE J. YOUNGER
ATTORNEY GENERAL

STATE OF CALIFORNIA

SEP 14 REC'D

OFFICE OF THE ATTORNEY GENERAL
Department of Justice
STATE BUILDING, SAN FRANCISCO 94102
(415) 557-2544

(415) 557-2076

September 12, 1978

William L. Barry, Jr.
County Supervisors Association
of California (CSAC)
11th & L Building
Sacramento, CA 95814

Re: "Design Immunity" draft - Government
Tort Liability Project

Dear Mr. Barry:

Enclosed is a draft for the Design Immunity Portion of the report submitted by Gordon S. Baca, Deputy Attorney, Cal-Trans and Robert L. Bergman, Assistant Attorney General.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

ROBERT L. BERGMAN
Assistant Attorney General

RLB:jm

Enclosure

cc: Gordon S. Baca
(with attachment)

BM-159

DESIGN IMMUNITY
(Gov. Code Sec. 830.6)

California Government Code section 830.6 establishes an immunity from liability for a dangerous condition attributable to "design". In two decisions of the California Supreme Court in 1967 the design immunity was upheld without regard to passage of time or changed conditions. Cabell v. State, 67 Cal.2d 150 (injury at state college due to use of nonsafety glass in lavatory door; immunity upheld on basis of reasonableness at time of original approval); Becker v. Johnston, 67 Cal.2d 163 (1927 highway design; immunity upheld despite changes in land use and traffic increases).

In Baldwin v. State, 6 Cal.3d 424 (1972) the court refused to follow the reasoning applied in the earlier decisions and held that the design immunity does not apply if the design has become inadequate due to passage of time, changed physical conditions or other changed circumstances. Although the Baldwin decision is commonly thought of as a liability creating case for public entities, this view of Baldwin is probably inaccurate. The Baldwin decision simply makes the immunity from liability for so called "design defects" inapplicable where there have been changed circumstances or changed physical conditions following the initial design and construction of the public facility.

The only such change referred to in the Baldwin decision was an increase in traffic. Thus, it appears that the

BM-160

immunity can be lost if a hazard can be alleged to have been created by an increase in traffic volume after the design. Of course, such increases are almost universal on California roadways.

The court in Baldwin was obviously concerned with the problem of a highway which was adequate for its purpose when originally designed and built in the early 1940's, but which became inadequate for traffic needs years later. What the Supreme Court perhaps failed to appreciate is the problem of limited resources to meet all highway needs. To the extent resources were allocated to improving one highway, another highway would have to continue in existence without any improvement. The fact that there are myriad state highway and local road deficiencies was apparently not considered significant by the court in assessing the liability problems.

The impact of the Baldwin decision is also felt in the procedural way in which tort cases are defended by public entities. The application of Government Code section 830.6 is an issue for the court to decide rather than the jury. Prior to Baldwin, a fairly conventional way of resolving the design immunity issue was through the mechanism of a motion for summary judgment with accompanying affidavits. Because the design immunity has been substantially elimiated through the Baldwin decision, this procedure is no longer available. This, in turn, means that many cases must now be pursued through lengthy and time-consuming litigation processes prior to a final resolution.

Although the design immunity is perhaps most significant in its impact on the street and highway activities of cities and

counties, virtually all local public entities including school and special districts would benefit from an immunity for "design defects" which nullifies the Baldwin case result. Changing technology is a reality which should not be the basis of public entity liability.

From a legislative standpoint, the single most significant way to assist public entities in the area of design problems would be to modify Government Code section 830.6 in a way that clearly indicates the immunity is not impaired "by passage of time, changed physical conditions or other changed circumstances". In other words, if the public entity is able to establish that the facility when designed and built was reasonable under the standards and criteria then applicable, then the public entity should remain immune from liability even though changes in technology or changed physical conditions indicate that the facility possibly has become dangerous.

A further inroad to design immunity is contained in the concept of liability for failing to warn of a dangerous condition. Thus, it has been held that an injury caused by a defect in a road for which the public entity qualified for the plan or design immunity (Government Code section 830.6) could be the basis of public liability for failing to warn of the dangerous condition. Cameron v. State of California (1972) 7 Cal.3d 318; Flournoy v. State of California (1969) 275 Cal.App.2d 806. While an entity may be immune for the existence of a dangerous condition of property, a court may still hold the entity liable for failure to post warning signs regarding that condition. This result seems contrary to the

legislative history of the dangerous condition sections and the design immunity.

It is recommended that the "design immunity" of governmental entities be restored to conform to the original Legislative intent as described in Cabell and Becker, supra. This would overcome the errosion of Baldwin and Cameron. This might be accomplished by adding the following language to existing statutes:

> "The immunity created by Government Code section 830.6 shall not be made inapplicable by the passage of time, changed physical conditions, or other changed circumstances. If it is established that the public entity is immune from liability for a dangerous condition, there shall be no liability imposed on a public entity for the failure to warn of that dangerous condition."

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EXHIBIT 3

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Date: Thursday, August 5, 2021 4:06:05 PM
Attachments: Adam Feit - Answer to Petition for Hearing.pdf
Adam Feit - Appellant's Petition for a Hearing by the Supreme Court.pdf

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Adam Feit,

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1 Civil No. ~~29,078~~

In the Supreme Court

OF THE

State of California

BARBARA CAMERON, by her Guardian ad Litem Charles B. Cameron,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA,
Defendant and Respondent.

STEVEN TICKES, by his Guardian ad Litem Bert Tickes,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA,
Defendant and Respondent.

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT,

After Decision by the Court of Appeal, State of California, First Appellate District, Division Three, and Numbered Therein 1 Civil No. 29,078

County of Santa Cruz

Honorable Gilbert B. Perry, Judge

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Subject Index

Table of Authorities Cited

Cases

Codes

1 Civil No. 29,078

In the Supreme Court

OF THE

State of California

BARBARA CAMERON, by her Guardian ad Litem Charles B. Cameron,
Plaintiff and Appellant,

vs.

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vs.

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Defendant and Respondent.

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT,

After Decision by the Court of Appeal, State of California, First Appellate District, Division Three, and Numbered Therein 1 Civil No. 29,078

County of Santa Cruz

Honorable Gilbert B. Perry, Judge

To the Honorable Donald R. Wright, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Barbara Cameron and Steven Tickes petition for a hearing to consider the decision filed in the Court

of Appeal, First Appellate District, Division Three, in this action on December 3, 1971 on the following grounds:

1. The Court of Appeal decision conflicts with the decisions of other Courts of Appeal with regard to the elements to be established by a public entity in asserting the Government Code Section 830.6 design immunity; and

2. The settlement of the important question of law revolving about the scope and application of Government Code Section 830.6 in light of the "trap exception" of Government Code Section 830.8.

INTRODUCTION

The instant case involved an action by Appellants-Petitioners for damages for personal injuries which arose out of an automobile accident. The Petitioners were passengers in an automobile which crashed after failing to negotiate a curve on Highway 9 in Santa Cruz County. The duty to maintain and keep Highway 9 in safe condition rests with the State of California.

The State of California moved, after both sides rested at trial, for a nonsuit for insufficiency of Petitioners' proof and for application of governmental immunity pursuant to Government Code Section 830.6. The motion for nonsuit in favor of the State was granted and that judgment entered.

Petitioners had presented evidence that super-elevation changes are usually constructed to assist a

driver making a curve; however, at the curve in question, the super-elevation was not consistent across the roadway and changed very abruptly (R.T. 147:25-148:8). The significance of this abrupt change would be to shift the weight of a car so that it would tend to throw the car in another direction and might cause one wheel to lift off the ground tending to make the car roll (R.T. 151:22-152:10).

The design plans for Highway 9 which were approved by the Board of Supervisors of Santa Cruz County in 1926 contain nothing more than the proposed 60 foot right-of-way route and the elevation of the center line of the right-of-way (R.T. 141:10-24, 323:2-9, 331:3-5).

Petitioners further showed that there were no warning or speed regulation signs prior to entering this curve (R.T. 256:20-23), although there were such signs for drivers travelling in the opposite direction (R.T. 243:12-20). A civil engineer formerly employed by the Design Department of the California Division of Highways testified that he was familiar with the roadway and that it was his belief that a driver became committed to the roadway before he could realize the nature of the curve and what would be the prudent speed (R.T. 135:21-136:4). "It (the roadway and the super-elevation change) tends to trap them into believing that the curve continues to the left" while it actually curves to the right (R.T. 136:5-6, 148:11-13).

The Court of Appeal held that the design immunity of Government Code Section 830.6 (hereinafter all

code section citations refer to the Government Code) was established and that failure to warn of a dangerous condition is not an exception to the design immunity statute.

DISCUSSION

ELEMENTS OF THE DESIGN IMMUNITY

The Court of Appeal decision conflicts with prior Court of Appeal decisions. Prior decisions wisely required the government to establish the existence of three statutory elements in order to assert the governmental immunity defense. The decision in the instant case failed to require a showing of one of those elements.

The most succinct statement of the rule was set out in *Johnston v. County of Yolo,* 274 C.A.2d 46 at pages 51-52:

> "The defense held out by section 830.6 rests upon a combination of three statutory elements: first, a causal relationship between the plan or design and the accident; second, the design's approval in advance of construction by a legislative body or officer exercising discretionary authority; third, a court finding of substantial evidence of the design's reasonableness."

The *Johnston* rule was applied by another Court of Appeal in *De La Rosa v. City of San Bernardino,* 16 C.A.3d 739 at page 748. Other Courts of Appeal have required that the government at least make a showing that the alleged dangerous condition was encompassed by the approved design in order to avail

themselves of the section 830.6 immunity. *Hilts v. County of Solano,* 265 C.A.2d 161 at page 285; *Flournoy v. State of California,* 275 C.A.2d 806, at page 812.

In the instant case the Petitioners contended at trial and on appeal that the combination of a sharp "S" curve and inconsistent super-elevation across the roadway, with or without considering the absence of warning signs, created a dangerous condition of government property. Petitioners' affirmative showing of the existence of a dangerous condition and its being the proximate cause of the accident was uncontroverted. The Court of Appeal concluded that sufficient evidence was presented by Petitioners

> "to resist a non-suit relative to the existence of a 'dangerous condition' under Government Code Section 830, sub-division (a)." (Decision page iii)

This was essentially an unplanned road. The design plans for the road contain nothing more than the proposed right-of-way and the elevation of the central line of the right-of-way. The location of the roadway within the right-of-way was not indicated on the plan. The center of the right-of-way did not correspond with the center of the roadway and the road took a sharper curve than the plans indicated for the right-of-way. The Court of Appeal placed reliance on testimony that the roadway generally conformed with the approved design (Decision page iv-v); however, the design specifications were very general.

The properly approved design plans were not directed to and did not encompass those road charac-

teristics which constituted a dangerous condition. Four other Courts of Appeal, as described in the cases cited above, have held that in order to establish the immunity of section 830.6, the dangerous condition must be encompassed by the design plans. Those decisions best reflect the intended immunity scope of section 830.6 as reflected in its terms "neither a public entity nor a public employee is liable under this chapter for an injury *caused by the plan or design* . . ." (emphasis added). The decision in the instant case conflicts with other Courts of Appeal decisions and seemingly the very terms of the statute in not requiring the government to establish a causal relationship between the design plans and the accident in order to assert governmental immunity.

In order to assert the governmental immunity of section 830.6, must the elements listed in *Johnston* and *De La Rosa* be established, or the element found necessary in *Hilts* and *Flournoy* be established? Or, *as the Court of Appeal in the instant case held,* is the establishment of the element of the design plans encompassing the dangerous condition characteristics *unnecessary????*

As the Supreme Court recently recognized in *Baldwin v. State of California,* decided January 4, 1972, the design of unity can no longer be used by the state as an invulnerable shield against claims such as those of the Petitioners. The decision in the instant case should be reversed for the reasons so clearly set forth in the Baldwin opinion.

THE BROADNESS OF THE "TRAP" EXCEPTION

Government Code Section 830.8 states that a public entity could be held liable for failure

> "to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care." (Section 830.8)

This is the so called "trap" exception to the governmental immunity statute.

The Court of Appeal decision holds that the "trap" exception of section 830.8 cannot be used to defeat the immunity of section 830.6. It relies for this holding on the Supreme Court case of *Becker v. Johnston,* 67 C.2d 163 at page 173. (Decision, page vi). The Court of Appeal considers that the Supreme Court in *Becker*

> "considered and rejected the contention that failure to warn of a 'dangerous condition' could constitute a basis for liability in the face of design immunity applicable to that particular 'dangerous condition.'" (Decision, page vi)

The *Becker* decision dealt with the scope of the "trap" exception in a rather oblique manner. Section 830.8 was mentioned once and its scope never discussed. Whether the Supreme Court "considered" the scope of the "trap" exception, as the Court of Appeal characterized it, is unclear. A more definitive statement of the Supreme Court's conclusion in this regard would be helpful to the lower courts and litigants.

It would seem the only practical and consistent reading of sections 830.6 and 830.8 would be to interpret the general immunity of 830.6 to apply only where the presence or absence of signs was a considered element of the plan or design. The language of 830.6 limits its immunity to injuries caused by a plan or design. To extend the section to grant a general immunity would require going beyond the scope of immunity intended by the legislature and result in a gross unfairness to those individuals injured by the condition of government property. The legislative scheme of governmental immunity is an integrated plan for distributing and allocating risks and costs caused by the condition of government property. To alter one element of that plan would cause the disruption of the entire plan. Reading the governmental immunity statutes as a whole, the "trap" exception of section 830.8 cannot be overcome by the immunity granted by section 830.6.

In more particular application to the instant case, the *Becker* decision cannot be used as precedent if the court finds that the dangerous characteristics of the roadway were not part of an approved plan. The *Becker* case involved an intersection whose dangerous characteristics were shown to have been part of an approved plan. The dangerous characteristics of the roadway in the instant case were not part of an approved plan. At least in the *Becker* case section 830.6 could conceivably have some application. Furthermore, there were already two signs depicting the intersection for traffic going in the direction of the

plaintiff in the *Becker* case. There were no signs depicting the curve in the instant case.

The application of the *Becker* decision is highly questionable with regard to the scope of the "trap" exception, and its application is certainly erroneous in the instant case. A clarification of the *Becker* decision is required in order to determine what holding, if any, was made as to the interpretation of the scope of sections 830.6 and 830.8. A clarification of the *Becker* decision's applicability to a case such as the instant one is also required.

CONCLUSION

For these reasons, Petitioners request that a hearing be granted and that this court reverse the judgment below with appropriate instructions.

Dated, San Jose, California,
January 7, 1972.

Respectfully submitted,
MORGAN, BEAUZAY & HAMMER,
By W. ROBERT MORGAN,
Attorneys for Appellants and Petitioners.

(Appendix Follows)

Appendix

Appendix

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 29,078
(Sup. Ct. No. 42,524)

BARBARA CAMERON, by her Guardian ad Litem Charles B. Cameron,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA,
Defendant and Respondent.

STEVEN TICKES, by his Guardian ad Litem Bert Tickes,
Plaintiff and Appellant,
vs.
STATE OF CALIFORNIA,
Defendant and Respondent.

OPINION

This is an appeal from a judgment of nonsuit granted in favor of the State of California in an action wherein the plaintiff sought to prove that the

state failed to properly grade a highway so that a curve could be negotiated by a vehicle traveling within the speed limits. It was also claimed that the state failed to warn of the dangerous condition.

Appellants claim (1) that animosity existed on the part of the trial judge; (2) that the government design immunity had not been established; (3) that there was a failure to warn; and (4) that there was evidence of liability on grounds other than design of the highway to allow jury consideration.

We have examined appellants claim that the judge displayed such animosity as to preclude proper consideration of the motion for nonsuit. This contention is without merit. The trial judge did interrupt a lay witness who was describing injuries on the ground that such evidence would be more authoritative from specialists. This was a proper exercise of the court's power to prevent unnecessary consumption of time. Interruption of another witness was well justified for the reason that the witness was unnecessarily elaborating on his answers to questions. Other similar specifications of animosity on the part of the trial judge are equally meritless.

Finally, appellants assert that the judge revealed bias by his failure to draw the same inference from certain pictures as was drawn by counsel. Nothing in the remarks which were made in an in-chambers discussion on the motion for nonsuit revealed anything other than a difference in opinion as to the significance of the pictures. A decision unfavorable to one

side is not the bias which is misconduct but is the inevitable result of submitting the case to a court of law. The validity of the court's decision on the nonsuit is the subject of the discussion of the remaining issues.

Appellants next contend that the elements of design immunity of the state were not established.

A public entity may be held liable under Government Code section 835 for injuries caused by a "dangerous condition" of its property. If the injury is caused by the plan or design of public property, however, the public entity may be immune from such liability if the conditions of Government Code section 830.6 are fulfilled. "Section 830.6 declares in pertinent part that a public entity is not liable for an injury caused by the plan or design of a construction of public property which has been approved in advance by a public body or employee exercising discretionary authority, if the trial or appellate court determines that *there is any substantial evidence* upon the basis of which a reasonable public employee or body could have adopted or approved the plan or design. The reasonableness is to be judged as of the time of the adoption or approval. [Citation.]" (*Becker v. Johnston,* 67 Cal.2d 163, 172.)

The appellants presented sufficient evidence to resist a nonsuit relative to the existence of a "dangerous condition" under Government Code section 830, subdivision (a). It is clear, however, that the elements of the immunity of Government Code section 830.6 were established.

The record in this case contains a copy of the plans for the section of the highway in question. These plans were identified as being prepared by the then county surveyor in the performance of his duties by the declaration of Frank B. Lewis, the present county surveyor. Copies of the minutes of the Board of Supervisors of Santa Cruz County were presented to show that the board had approved the design plans before construction. The authority of the board to approve the plans is not disputed. There is also in the record, a declaration of C. F. Greene, a civil engineer, stating that the design of this section of Highway 9 ". . . including the width of the highway, the curves necessary to carry the highway from the higher to lower elevations at a safe and acceptable grade, and the banking and super-elevation of the various curves, . . . were and are reasonable design features." This declaration is not a part of the present record on appeal. It was not offered on the motion for nonsuit but is an exhibit to the motion for summary judgment and has been forwarded to this court in the superior court file. Since Government Code section 830.6 provides that either the trial court or the appellate court may make the determination that there is substantial evidence of the reasonableness of approval of the design, the fact that the declaration was not before the trial court on the motion for nonsuit does not preclude us from considering it.

Finally, the testimony of James F. Drake established that the presently existing road conformed to

the design adopted in the late 1920's with a slight variation to be expected after 40 years.

We believe that the deficiencies in the design immunity defense which existed in cases cited by the appellants are not present in the case before us. In *Hilts v. County of Solano,* 265 Cal.App.2d 161, the defense of design immunity was not pleaded nor was any evidence of design approval presented. In *Gardner v. City of San Jose,* 248 Cal.App.2d 798, the defense was not raised. In *Johnston v. County of Yolo,* 274 Cal.App.2d 46, it was established that the road was built despite disapproval of the government engineer.

Appellants next argue in effect that the design immunity is not available in this case because the state's failure to warn of the dangerous condition of the curve constituted a trap. This contention is not borne out by the statutes in question or the case law.

Government Code section 830.8 provides that the mere failure to provide various traffic signs does not create a "dangerous condition" in itself. (Pfeifer v. County of San Joaquin, 67 Cal.2d 177, 184.) Government Code section 830.8 provides that a public entity is not liable for an injury caused by the failure to provide such warnings. The section goes on to state, however, that if there is a "dangerous condition," the public entity could be liable for a failure to warn of the condition.

Appellants argue without citation to authority that this is an exception to the design immunity statute.

To the contrary, the California Supreme Court in *Becker v. Johnston, supra,* 67 Cal.2d 163, 173, considered and rejected the contention that a failure to warn of a "dangerous condition" could constitute a basis for liability in the face of design immunity applicable to that particular "dangerous condition."

It is also contended that there was sufficient evidence of liability on grounds other than design of the highway which should have been left to the jury.

Section 830.6 does not immunize the public entity "from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident." (Flournoy v. State of California, 275 Cal.App.2d 806, 811.) The appellants attempted at trial to produce evidence of independent negligence in maintaining the road. They now contend that the jury should have been allowed to decide whether or not a "rut" existed on the shoulder of the road which might have caused the accident. The court, however, was justified in concluding that there was no substantial evidence of the existence of such a rut.

During the argument on the motion for nonsuit, the appellants' attorney produced a group of five pictures taken by the highway patrol. Two of the pictures show a "road work ahead" sign in the vicinity of the accident. Appellants now argue that from this it can be inferred that a defect in the road caused the accident. As the court pointed out, however, the pictures also show that there was no defect in the road or rut beside the road in the immediate vicinity of the accident.

When after viewing the evidence in the light most favorable to the appellant, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff, the granting of a motion for nonsuit is warranted. O'Keefe v. South End Rowing Club, 64 Cal.2d 729, 746.)

The judgment is affirmed.

Brown (H. C.), J.

We concur:
Draper, P. J.
Caldecott, J.

Filed December 3, 1971,
Clifford C. Porter, Clerk.

EXHIBIT 4

LEGISLATIVE
INTENT SERVICE, INC.

712 Main Street, Suite 200, Woodland, CA 95695
(800) 666-1917 • Fax (530) 668-5866 • www.legintent.com

DECLARATION OF ANNA MARIA BERECZKY-ANDERSON

I, Anna Maria Bereczky-Anderson, declare:

I am an attorney licensed to practice in California, State Bar No. 227794, and am employed by Legislative Intent Service, Inc., a company specializing in researching the history and intent of legislation.

Under my direction and the direction of other attorneys on staff, the research staff of Legislative Intent Service, Inc. undertook to locate and obtain all documents relevant to the enactment of Assembly Bill 893 of 1979. Assembly Bill 893 was approved by the Legislature and was enacted as Chapter 481 of the Statutes of 1979.

The following list identifies all documents obtained by the staff of Legislative Intent Service, Inc. on Assembly Bill 893 of 1979. All listed documents have been forwarded with this Declaration except as otherwise noted in this Declaration. All documents gathered by Legislative Intent Service, Inc. and all copies forwarded with this Declaration are true and correct copies of the originals located by Legislative Intent Service, Inc. In compiling this collection, the staff of Legislative Intent Service, Inc. operated under directions to locate and obtain all available material on the bill.

EXHIBIT A - ASSEMBLY BILL 893 OF 1979:

1. All versions of Assembly Bill 893 (Knox-1979);
2. Procedural history of Assembly Bill 893 from the 1979-80 *Assembly Final History*;
3. Analysis of Assembly Bill 893 prepared for the Assembly Committee on Judiciary;
4. Material from the legislative bill file of the Assembly Committee on Judiciary on Assembly Bill 893 as follows:
   a. Previously Obtained Material,
   + b. Updated Collection of Material;

5. Analysis of Assembly Bill 893 prepared for the Assembly Committee on Ways and Means;
6. Material from the legislative bill file of the Assembly Committee on Ways and Means on Assembly Bill 893;
7. Third Reading analysis of Assembly Bill 893 prepared by the Assembly Office of Research;
8. Analysis of Assembly Bill 893 prepared for the Senate Committee on Judiciary;
9. Material from the legislative bill file of the Senate Committee on Judiciary on Assembly Bill 893 as follows:
   a. Previously Obtained Material,
+ b. Updated Collection of Material;
10. Analysis of Assembly Bill 893 prepared by the Legislative Analyst;
11. Third Reading analysis of Assembly Bill 893 prepared by the Senate Republican Caucus;
12. Third Reading analysis of Assembly Bill 893 prepared by the Senate Democratic Caucus;
13. Material from the legislative bill file of Assemblymember John T. Knox on Assembly Bill 893;
14. Post-enrollment documents regarding Assembly Bill 893;
15. Material from the legislative bill file of the Department of Finance on Assembly Bill 893;
16. Excerpt regarding Assembly Bill 893 from the 1979 *Summary Digest of Statutes Enacted and Resolutions Adopted*, prepared by Legislative Counsel.

EXHIBIT B - BACKGROUND MATERIAL:

1. Excerpt regarding government liability from *Series 1978 Staff Report,* prepared by the Joint Committee on Tort Liability to the Governor and Legislature, January 1979;
2. Transcript of Hearing on Government Liability of the Joint Committee on Tort Liability, October 31, 1977;
3. Miscellaneous background material of the Joint Committee on Tort Liability, 1977-79;
4. Papers submitted to the Joint Committee on Tort Liability, 1977-79;
5. Excerpt regarding Government Code section 830.6 from *Recommendation relating to Sovereign Immunity*, prepared by the California Law Revision Commission, September 1969;

6. *Tentative Recommendation relating to Sovereign Immunity*: "Number 11--Immunity for Plan or Design of Public Improvement," prepared by the California Law Revision Commission, revised May 14, 1969.

\+ Because it is not unusual for more materials to become publicly available after our earlier research of legislation, we re-gathered these file materials, denoting them as "updated collection of material."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of June, 2021 at Woodland, California.

Anna Maria Bereczky-Anderson

ANNA MARIA BERECZKY-ANDERSON

EXHIBIT 5

Exhibit 5

I, Armen Akaragian, declare as follows:

1. I am a member of the State Bar of California and am a partner with the law firm of Mardirossian Akaragian LLP, attorneys for Plaintiff and Respondent Betty Tansavatdi. I make this declaration in support of Plaintiff and Respondent's Motion for Judicial Notice filed concurrently.

2. I have personal knowledge of the matters set forth in this declaration, and if called upon to testify to those matters, I could and would competently testify thereto.

3. Plaintiff's counsel obtained Exhibits 1 and 2 from Legislative Intent Service, Inc. Attached hereto as Exhibit 4 is the Declaration of Anna Maria Bereczky-Anderson, an attorney with Legislative Intent Services, Inc., detailing the documents compiled.

4. Exhibit 3 is a true and correct copy of Appellant's Petition for a Hearing by the Supreme Court, filed by Appellants and Petitioners on January 10, 1972, in the matter of *Barbara Cameron, et al. v. State of California*, California Supreme Court Case No. S.F. 22866. The Petition brief was sent to Adam Feit, Esq. of my office via electronic mail from the Los Angeles Law Library. A true and correct copy of the email with the attachment is attached as Exhibit 3.

5. Plaintiff and Respondent requests that this Court take judicial notice of the following:

   a. Exhibit 1: Excerpt regarding government liability from Series 1978 Staff Report,

prepared by the Joint Committee on Tort Liability to the Governor and Legislature, January 1979.

b. Exhibit 2: Correspondence dated September 12, 1978 from Robert L. Bergman, Assistant Attorney General, Office of the Attorney General, State of California, to William L. Barry, Jr., County Supervisors Association of California, enclosing a draft for the Design Immunity Portion of the report submitted by Gordon W. Baca, Deputy Attorney, Cal-Trans, and Robert L. Bergman, Assistant Attorney General, regarding the Government Tort Liability Project.

c. Appellant's Petition for a Hearing by the Supreme Court, filed by Appellants and Petitioners on January 10, 1972, in the matter of *Barbara Cameron, et al. v. State of California*, California Supreme Court Case No. S.F. 22866.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of August, 2021, at Los Angeles, California.

Armen Akaragian

S267453

IN THE SUPREME COURT OF CALIFORNIA

BETTY TANSAVATDI,
Plaintiff and Respondent,

v.

CITY OF RANCHO PALOS VERDES,
Defendant and Petitioner.

Review of a Decision by the Court of Appeal,
Second Appellate District, Division Four, Case No. B293670
Los Angeles Superior Court Case No. BC633651 c/w BC652435

[PROPOSED] ORDER

IT IS ORDERED that Plaintiff and Respondent Betty Tansavatdi's Motion for Judicial Notice is granted. The Court takes judicial notice of the following materials:

Exhibit 1: Excerpt regarding government liability from Series 1978 Staff Report, prepared by the Joint Committee on Tort Liability to the Governor and Legislature, January 1979.

Exhibit 2: Correspondence dated September 12, 1978 from Robert L. Bergman, Assistant Attorney General, Office of the Attorney General, State

of California, to William L. Barry, Jr., County Supervisors Association of California, enclosing a draft for the Design Immunity Portion of the report submitted by Gordon W. Baca, Deputy Attorney, Cal-Trans, and Robert L. Bergman, Assistant Attorney General, regarding the Government Tort Liability Project.

Exhibit 3: Appellant's Petition for a Hearing by the Supreme Court, filed by Appellants and Petitioners on January 10, 1972, in the matter of *Barbara Cameron, et al. v. State of California*, California Supreme Court Case No. S.F. 22866.

IT IS SO ORDERED.

Dated: _____ _____
Presiding Justice

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6311 Wilshire Boulevard, Los Angeles, CA 90048-5001.

On the date set forth below, I served the foregoing document described as follows: **PLAINTIFF'S MOTION FOR JUDICIAL NOTICE; [PROPOSED] ORDER**, on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

(X) BY ELECTRONIC SERVICE VIA TRUEFILING: Based on a court order, I caused the above-entitled document(s) to be served through TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office. Pursuant to the Court's website, submission through TrueFiling that is accepted for filing by the Supreme Court constitutes service on the Court of Appeal.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 10, 2021, at Los Angeles, California.

Ma. Lourdes V. Malam

Ma. Lourdes V. Malam

SERVICE LIST

Tansavatdi v. City of Rancho Palos Verdes
Supreme Court Case No. S267453
Court of Appeal Case No. B293670
Los Angeles Superior Court Case No. BC633651 c/w BC652435

Frank J. D'Oro, Esq. David M. Ferrante-Alan, Esq. Wesierski & Zurek LLP 100 Corson Street Suite 300 Pasadena, CA 91103 Telephone (213) 627-2300 Facsimile (213) 629-2725 Email fdoro@wzllp.com Email DFerrante-Alan@WZLLP.COM Email sfennell@wzllp.com	Attorneys for Defendant and Petitioner CITY OF RANCHO PALOS VERDES
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Attorneys for Plaintiff and Respondent
BETTY TANSAVATDI

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **TANSAVATDI v. CITY OF RANCHO PALOS VERDES**
Case Number: **S267453**
Lower Court Case Number: **B293670**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **aakaragian@garolaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Plaintiff and Respondent's Answer Brief on the Merits
MOTION	Plaintiff and Respondent's Motion for Judicial Notice

Service Recipients:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/10/2021

Date

/s/Armen Akaragian

Signature

Akaragian, Armen (242303)

Last Name, First Name (PNum)

Mardirossian & Associates, Inc.

Law Firm