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Identifying, Evaluating & Proving Dangerous Public Road Cases



By Albert G. Stoll, Jr.
Walter A. Haynes, IV
& Sharon J. Arkin

www.stoll-law.com

55 Francisco Street, Suite 403

San Francisco, California 94133

Telephone: 415.576.1500

Introduction:

This paper discusses government tort liability arising from dangerous public roads and intersections. These cases are often difficult to spot and frequently first appear as a case of driver negligence. A prospective new case may be described as an illegal left turn, pedestrian negligence, vehicle rollover, or out of control driver. Hidden beneath each of these scenarios may be an unnecessarily dangerous road or intersection, which contributed to the accident. This paper analyses the legal and factual foundation needed for proof of a dangerous road or intersection case against a public entity.

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B. The Scope of Design Immunity is Not Unlimited:

- 1. Active Versus Passive Negligence**
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C. Design Immunity Is An Affirmative Defense:

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A. Where did Government Design Immunity come from?

The rationale for government design immunity is to prevent jurors from second-guessing identical questions or risk previously weighed by government officers who approved the design. See *Cornett* at 69. To permit re-examination in tort litigation by juries of decisions where reasonable traffic engineers may differ was seen as too great an interference with public official decision-making. See, *Cameron* at 326.

The current version of California Government Code section 830.6 arose out of *Jesse Baldwin v. The State of California*, (1972) 6 Cal.3d 424. *Baldwin* decided whether the pre 1979 version of Government Code 830.6 granted public entities design immunity with perpetual life. A unanimous Supreme Court overruled itself and decided that once a public entity has notice that a design has undergone changed physical conditions; which resulted in a dangerous condition; the public entity must act reasonably to correct or warn of the hazard, see *Baldwin* at 434.

In 1979, the State Legislature acknowledging *Baldwin*, amended section 830.6 and articulated when a public entity retains design immunity despite notice that the plan or design has become dangerous because of changed physical conditions. See, *Stacy Cornett v. Department of Transportation (Caltrans)* (July 12, 2001) 26 Cal. 4th 63, 71, discussing the issue of the availability of government funds and adequacy of time to fix the dangerous condition.



B. The Scope of Design Immunity is Not Unlimited:

1. Active Versus Passive Negligence

By force of its terms the design immunity of section 830.6 is limited to a design-caused accident. It does not immunize the government from negligence independent of design. *Barbara Cameron v. The State of California* (1972) 7 Cal. 3d 318, at 329. This means that failure to warn of a dangerous condition is an independent basis for recovery, even if the dangerous condition itself was created as a result of an approved plan. *Cameron* at 327. This means, the active negligence of approving and designing a bridge that turned out to be a dangerous condition may enjoy design immunity, but the passive negligence of the State's failure to warn of ice on the bridge surface, that would form prior to ice forming on an approaching highway, is not immunized. When drafting your complaint be careful to distinguish between both the passive and active negligence, meaning both the creation of a dangerous condition, and independently the failure to post warning of the dangerous condition. *Cameron* at 328.

In *Cameron* at page 328 the California Supreme court described the active negligence of creating a road with a dangerous uneven superelevation (A crown in the road dividing opposing traffic) and the passive negligence of the State's failure to warn approaching drivers of the dangerous uneven superelevation. "The state's failure to warn was an independent, separate concurring cause of the accident." See, *Cameron* at 329.

2. Design Immunity Not Applicable To Construction Zones

The design immunity of § 830.6 does not apply to construction zones. The case of *Henry Winig v. State of California* (1995) 37 Cal. App. 4th 1772, involved an injured motorist who fell asleep at the wheel, crossed over a paved shoulder and into an 18 inch drop-off at the left road edge of interstate 80 near Colfax. The 18 inch drop-off was part of an excavation for an ongoing construction project to widen the shoulder of the Interstate. The State argued § 830.6 applied even though the plan was not completed. The court of appeal disagreed and stated, "The plan or design of an improvement to public property is the plan or design of the finished product and not the plan or design for constructing the improvement," see *Winig* at page 1777. "The risks inherent in the static design alternatives of a finished fixed installation are different in kind and generally more limited and foreseeable than those which arise in the fluid process of construction." As an example, the notoriously dangerous San Francisco Oakland Bay Bridge S-Curve would not be immunized by § 830.6. The S-Curve is a temporary structure and not the design of a finished product; therefore design immunity would not apply.



C. Design Immunity Is An Affirmative Defense:

The immunity of § 830.6 is an affirmative defense which must be included in the public entities answer. The elements of the defense of design immunity must be proven by the public entity. (*Hilts v. County of Solano* (1968) 265 Cal. App. 2d 161, 175.)

A reminder that § 830.6 is an affirmative defense is illustrated in the case of *Johnston v. County of Yolo* (1969) 274 Cal. App. 2d 46. In *Johnston*, Yolo County did not plead design immunity as a defense in their answer. Yolo County did not move to amend their answer until after the taking of testimony at trial. The trial court refused to permit an amendment and the court of appeal agreed.

D. The Elements of Design Immunity:

The text of § 830.6 itself is a series of difficult to read, run-on sentences. The best description of the elements of this defense are articulated by the California Supreme Court in the case of *Stacy Cornett v. Department of Transportation* (Caltrans), (July 12, 2001) 26 Cal. 4th 63 at page 66 as follows:

“A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. (Gov.Code, § 835, subd. (b))

However, a public entity may avoid such liability by raising the affirmative defense of design immunity. (§ 830.6.) A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.

Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings. (§ 830.6).” *Cornett* at 66.



E. Investigation and Proof of a Dangerous Road or Intersection

1. First, Get The Plans (If Any)

The public entity has the burden of initially establishing that design immunity applies. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 69.) In order to meet that burden, a public entity must demonstrate that there was a plan or design of the roadway at issue and that the plan was reasonably approved. (Id.) The approval must have been “by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval.” (§ 830.6).

The first step in discovery is to see if there are any plans or “As Builts”. Many roads and intersections are very old. Producing a complete written record of what was approved can be difficult for some public entities. If the government does not have a written record of what was approved, it may be impossible for a government entity to establish the affirmative defense of design immunity. Without plans the government entity cannot show what questions of risk were previously weighed by a public employee. Therefore the rationale for design immunity; the prevention of second guessing of public employees, is defeated.

2. Second, Compare The Approved Plans To What Was Built. If The Plans Differ From What Was Built or Are Incomplete, Design Immunity May Be Defeated

The second element of design immunity, the discretionary approval of the plan or design prior to construction, may be defeated if you find in discovery that there is a material difference between the approved plans and what was actually built. If the plans materially differ from what was built, the rationale of the defense, preventing the second guessing of public officials, is again thwarted. If one set of plans was approved; but the contractors built something materially different, the public entity cannot show a government employee’s decision is being challenged or second guessed in litigation. See, *Mirzada v. Department of Transportation* (2003) 111 Cal App. 4th 802. *1

As the court explained in *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939-940, the discretionary approval element of the initial design immunity analysis may only be resolved as an issue of law “if the facts are undisputed.” In other words, if there is a dispute in the facts as to whether there was, in fact, an approved plan or design that included the dangerous condition at issue, summary judgment must be denied.

The case of incomplete plans is illustrated in *Barbara Cameron v. The State of California* (1972) 7 Cal. 3d 318. In *Cameron* at 329 the plaintiff’s attorney discovered that the design plan approved by the Santa Cruz Board of Supervisors in 1926 were incomplete. The dangerous condition in *Cameron* was a roadways inconsistent or abnormal crown in the roadway - superelevation. The superelevation, or banking of the ‘S’ curve where the accident occurred was “...not consistent across the roadway, but changed abruptly...” (*Cameron* at 323). The abrupt change in superelevation was a contributing factor causing the cars of unsuspecting drivers to rollover. Drivers entering the curve were not able to ascertain the existence



of the change in superelevation until it was too late, they were trapped. The 1926 plans did not contain any mention or design drawings for superelevation. Meaning, no grades or elevations were included in the plans. Therefore there was no showing "...that the uneven superelevation was the result of a design or plan approved by the Santa Cruz Board of Supervisors." (*Cameron* at 325) The California Supreme Court held "...there was no basis for concluding that any liability for injuries caused by this uneven superelevation was immunized by § 830.6.

In practice we have come across this issue in two San Francisco cases. One case involved a crosswalk hidden to oncoming drivers because it was placed beyond the crest of a hill in the road. The City of San Francisco was only able to find a paint striping diagram. Similar to *Cameron*, The City was not able to produce plans that showed the crest in the intersection, which obscured the cross-walk.

Similarly, in the second case, the City of San Francisco was not able to produce "as builts" or design plans that showed the angle or direction of a stop light at Geary and Fillmore Streets. The traffic lights as installed were difficult to see by approaching pedestrians. Hence, the City could not show that a duly authorized public employee put thought into the direction the stop light faced; therefore no public employee was being second guessed by our factual theory of the case; and design immunity was defeated.

3. Proving a Change in Physical Conditions

The affirmative defense of §830.6 can be rebutted by showing a plan or design has become dangerous because of a change in physical conditions. Increased accidents and traffic standing alone may not be a change in physical conditions. "Without more, an increase in traffic proves nothing." *Mirzada v. Department of Transportation*, (2003) 111 Cal. App. 4th 802 at 808, citing to *Higgins v. State of California* (1997) 54 Cal. App. 4th 177, 188. A roads accident history should be shown to be unusual, excessive or aberrant to put a public entity on notice of a dangerous condition. Attention should be given to the location and comparability of the prior accidents to prove notice. *Richard Crawford Wyckoff v. The State of California* (June 4, 2001) 90 Cal. App. 4th 45.

Proof of a change in physical conditions comes from the following sources. The Statewide Integrated Traffic Records System (S.W.I.T.R.S.) has information on accidents which resulted in the filing of a formal police report. Go to www.chp.ca.gov/switrs/ to see some of this data.

There is a sea of information beyond formalized accident reports. For example non-injury producing accidents, and citizen complaints are relevant evidence of a dangerous condition. This evidence may be discovered by searching the jurisdictions 911 call database for all calls related to a specific intersection or address. As an example, check out <http://cad.chp.ca.gov/>. Almost all law enforcement agencies in California are working with some form of C.A.D. (Computer Aided Dispatch) that integrates the 911 log-system by documenting the call from its source, time, date, nature of the call and priority. All have a notation system for how the call was handled including what emergency services were dispatched



and a general notation section that documents the subsequent call updates.

California Government Code 26202.6 and 34090.6 states audio recordings generated from 911 calls may be destroyed after 100 days. Section 34090.6 of the Government Code appears to be interpreted by local law enforcement as authority to destroy 911 logs after 2 years.

Some counties and agencies keep the records for longer period of time than required by law. As of March of 2005, San Francisco Police Department keeps both recorded voice calls and the call log for three years.

Individual highway patrol officers, local law enforcement officers who patrol the area in question, public transportation investigation records; public transit drivers, citizen complaints to the county or traffic engineering department; and local residents and business owners who may have familiarity with a particular dangerous road or intersection. Potential sources of evidence to prove a dangerous road or intersection are as follows:

S.W.I.T.R.S. records, accident histories from the 911 call system, public transit accident investigations, local government traffic engineering records, and citizen complaints may be obtained by subpoena or by using The California Public Records Act, at Government Code §6250. However, see 23 U.S.C §§ 148, 152 and 409 regarding documents compiled to obtain federal funds from the highway safety improvement program.

4. Proving Actual or Constructive Notice of the Dangerous Condition

Before getting to the affirmative defense of § 830.6, a plaintiff must be able to show both evidence of a dangerous condition and notice of the condition to the public entity, see Gov.Code, § 835, subd. (b).

Notice may take many forms; such as express citizen complaints or knowledge of an abnormal accident history. The existence of prior traffic accidents of any type – whether injury or non-injury, and whether auto vs. auto or auto vs. pedestrian – provides constructive knowledge to a government entity about a given road or intersection.

If a public entity has some kind of notice that there is a problem, the public entity should be held to a duty to promptly and timely investigate that problem. The failure to do so properly imposes constructive notice of the danger.

Use of an expert to give an opinion on the significance of the evidence you have collected is important. What do the prior similar incidents, citizen complaints, and “close calls” mean to a reasonably trained traffic engineer employed by a government entity? An expert in traffic engineering may need to apply the evidence to the standards of traffic engineering to show notice of the dangerous condition. Was the accident rate normal or abnormal? Was the traffic volume excessive for the design? Did the configuration of the intersection require pedestrian safety enhancements? Each of these questions needs to be analyzed by a traffic engineer.



5. Proving a Public Entity had The Time and Resources to Fix the Dangerous Condition

A plaintiff has a right to a jury trial as to the issues involved in loss of design immunity, see *Stacy Cornett v. Department of Transportation*, (July 12, 2001) 26 Cal.4th 63. In *Cornett*, the parties agreed that by the time of plaintiff's injury the location of the accident had become dangerous due to the lack of a median barrier. The issue presented was did the State have enough time to fix the problem before the accident happened?

Here are the facts from *Cornett*. On August 21, 1990 Caltrans decided to install a median barrier along a five-mile stretch of freeway that included the location where the accident would later occur. On July 27, 1991, Caltrans put a high priority on the median barrier project because five more cross-median accidents, three with injuries and two resulting fatalities, had occurred in late 1990. Then serious injury occurs to *Stacy and Rodney Cornett* on May 23, 1992. The median barrier project was not completed until January 18, 1996, long after the May 23, 1992 accident.

Cornett held that the trial court, had improperly denied plaintiffs their right to a jury trial of the disputed issues pertaining to the question of whether Caltrans had lost its design immunity. There were questions of fact as to the date of notice of the dangerous condition and whether or not the State had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan before the accident happened, (§ 830.6).

F. Conclusion

A complete investigation of a dangerous road case is necessary to survive summary judgment and prevail at trial. The investigation starts by obtaining the approved design plans, along with any As-Built drawings. The approved design plans must then be assessed for completeness. Is the dangerous condition contained within the approved plans or not? Secondly, do the approved design plans match up to what was ultimately built? A complete factual investigation, includes obtaining all potential public records for a given road or intersection, with special attention being given to the discovery of non-injury producing accident reports documented by the local 911 computer assisted dispatch (CAD) reports, or local public transit records. Local law enforcement and citizen reports about a given area are critical to the investigation. Once the investigation is complete a thorough analysis and interpretation of the facts should be done by a traffic engineer for plaintiff to defeat government immunity in roadway defect litigation.

*1 Highway with 45 feet 5 inch center median did not depart materially from approved design calling for 46-foot-wide center median.





Albert G. Stoll, Jr.

Al dedicates his career to standing up for the rights of individuals in catastrophic personal injury, product liability, dangerous road and highway cases, insurance bad faith, nursing home neglect, medical malpractice and dangerous pharmaceutical drug cases.

In his more than 15 years of practice, Al has handled more than 40 jury trials. This experience, combined with a commitment to ethics and integrity, has earned Al an excellent reputation throughout the San Francisco Bay Area legal community. He is the recipient of Martindale-Hubbell's "AV" peer rating, which signifies preeminent legal ability and ethical standards, and has been named a Northern California Super Lawyer every year since 2006. In 2009, Al was awarded the prestigious 2009 Civil Justice Award by the San Francisco Trial Lawyers Association, given to attorneys who show integrity, grit, tenacity, ethics, and great advocacy skills, and who contribute to the betterment of consumers and/or injured victims and their families.

Al is often invited to speak to other attorneys on a variety of topics. He has been asked to share his ideas on personal injury cases by the National Institute for Trial Advocacy, Lorman Education, National Business Institute, the San Francisco Trial Lawyers Association, Consumer Attorneys of California, and the Bar Association of San Francisco. His book, *Plaintiffs' Lawyers Guide to Minor Impact Cervical and Lumbar Injury* (Thomson West 2008-2009), now in its fourth edition, is a strategic guide used by lawyers throughout America to fight back against the automobile insurance company tactics of deny, delay, and defend.

In addition to representing injury victims, Al is committed to informing people about accident prevention and safety. Outside his practice, he enjoys spending time with his family, golfing, exercise, travel, and the outdoors.





Walter A. Haynes IV

Walt joined Albert G. Stoll, Jr. A Professional Corporation in 2004, and focuses on representing plaintiffs in a wide variety of cases encompassing personal injury, motor vehicle, product liability and elder abuse matters. As a former California Highway Patrolman, accident reconstructionist, and licensed private investigator, Walt has unique expertise vital to ensuring that his clients obtain maximum recovery in a range of cases involving motor vehicle accidents.

While serving as a member of the California Highway Patrol, Walt was trained as an accident reconstructionist and investigated over 3,000 motor vehicle accidents for both the Highway Patrol and allied agencies. This extensive experience qualified him to testify in state courts as an expert in this specialized field. Later, Walt served as both an expert accident reconstructionist and a licensed private investigator, consulting on investigations and issues of case theory for lawyers specializing in personal injury litigation.

Walt's expertise in motor vehicle accidents and accident reconstruction has led to his being invited to speak by various professional organizations, including Lorman Education, the San Francisco Trial Lawyers Association (SFTLA), and the Northern California Defense Lawyers Association.

In his time away from the practice of law, Walt enjoys travel, cars, martial arts, weightlifting, running, skiing, scuba diving, mountain biking, and volleyball.





Sharon J. Arkin

Sharon is the principal of The Arkin Law Firm. She has been certified by the California State Bar, Board of Legal Specialization as appellate specialist since 2001.

She graduated as valedictorian from Western State University, School of Law in 1991 (Summa Cum Laude) after having served as a summer judicial extern in the Court of Appeal of the State of California, Fourth District, Division 3.

Ms. Arkin is a Former President of California’s state-wide trial lawyer’s association, Consumer Attorneys of California, and is a Fellow of the American Bar Association Foundation. Has been repeatedly selected as one of the Daily Journal’s Top Women Litigators in the State of California, was chosen as one of the “Top 100” litigators for 2005 and was selected as one of Southern California’s appellate “Super-Lawyers” by Los Angeles Magazine for 2004, 2006 and 2007-2009. She has also been selected as one of the Best Lawyers in America every year since 2005. In 2007, she received the American Bar Association’s “Pursuit of Justice” award.





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