Municipal Tort Immunity— the Rule or the Exception?

The California Supreme Court's decision in BALDWIN v. STATE OF CALIFORNIA has had a major impact on the continued viability of the doctrine of municipal tort immunity. This article sketches the development of municipal tort immunity, with an emphasis on BALDWIN, and analyzes the tensions created between the Legislature and the courts.

Suppose Lillian Thisselthwaite is driving 40 miles per hour on a winding mountain road in Yolo County.[1] The posted speed limit is 45 miles per hour. Road and weather conditions are good. As she rounds a curve her car skids out of control and runs into a ditch. She is severely injured. Subsequent investigation reveals no mechanical automobile difficulties. It does reveal that the superelevation[2] of the curve is unable to accommodate a car driven at the posted speed. Had this same incident occurred on private property, Thisselthwaite would be able to maintain a tort action against the owner for negligence. The private owner would have breached a duty of due care in failing to maintain the road in such a manner as not to create an unreasonable risk of injury to a foreseeable plaintiff. Thisselthwaite, driving at the posted speed, is such a foreseeable plaintiff. Because the scene of the accident is a county road,[3] however, the outcome is likely to be very different. What remedies, if any, does Thisselthwaite have against a public entity for the construction and maintenance of a dangerous condition?

In 1963 the California Legislature enacted the California Tort Claims Act[4] in an effort to provide an answer to that question. This

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[1] The fact pattern used in this hypothetical is similar to that of Cameron v. State, 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972).

[2] The superelevation or "banking" of a curve indicates the degree of the angle of its elevation. The ability of a car safely to execute a curve is a function of the speed at which the car is moving and the degree of the superelevation of the curve. Cameron v. State, 7 Cal. 3d at 323, 497 P.2d at 780, 101 Cal. Rptr. at 308.

[3] The same analysis would pertain if the road were a city or state road. If the road were a federal road, the Federal Tort Claims Act would govern all actions. 28 U.S.C. 2671-2680 (1970 & Supp. IV,1977).

[4] Ch. 1681, 1963 CAL. STATS. 3266, CAL. GOV'T CODE §§ 810-966.6 (West 1966 & Supp. 1977).

Act imposed liability upon public entities for dangerous conditions of public property, but also provided various immunities from such liability. Since 1963, courts have struggled to reconcile the competing policies behind the liability-imposing and the immunity-providing aspects of the Act. After fourteen years of vacillation, the judiciary now appears to favor imposing liability and construing narrowly any immunity.

This article will explore the state of the law of governmental tort immunity prior to the 1963 legislation, the policy shift which resulted in the 1963 legislation, and the subsequent policy development which has shaped the present status of the Act. Primary attention will be given to those sections of the Act covering dangerous conditions of public property and the applicable immunities. Finally, the article will discuss current trends in the decisional law which may be useful in predicting the future of the law in this area.

I. GOVERNMENTAL TORT LIABILITY BEFORE 1963

At common law, governments were immune from tort liability.[5] This followed from the English notion that the King could do no wrong,[6] which in the United States became governmental immunity from suit. Governmental immunity established a procedural block against suing the state: unless the state consented, a suit could not be brought against it. Consent to suit represented only permission to bring an action, not a concession of substantive vulnerability.[7]

In California, legislation prior to 1963 modified the common law. In 1929, statutes were enacted to provide a cause of action for injuries sustained as a result of the negligent operation of a motor vehicle by a public officer or employee.[8] In 1949,[9] the Legislature enacted statutes imposing liability on a "local agency"[10] for danger-

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[5] W. PROSSER, LAW OF TORTS § 131 (4th ed. 1971).

[6] In feudal England, the King was the highest lord. Since no feudal lord could be sued in his own court, but only in a higher court, the King could not be sued. Initially this was a strictly personal right belonging to the sovereign. Evolving notions of State eventually converted this personal immunity into a sovereign immunity of the state. The same bar did not exist in the Court of Exchecquer. There equitable relief against the crown could be obtained by use of a petition of right. Although early cases are susceptible of a construction that a king may be liable for the torts of his servants, later courts declined to so construe them and held that the king was insulated from liability arising out of the torts of his servants. Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 214 n.1, 359 P.2d 457, 458 n.1, 11 Cal. Rptr. 89, 90 n.1 (1961); Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1 (1924); Holdsworth, *Remedies Against the Crown*, 38 L. QUAR. REV. 141 (1922).

[7] Denning v. State, 123 Cal. 316, 319, 55 P. 1000, 1001 (1899).

[8] CAL. VEH. CODE §§ 17000-17001 (West 1971).

[9] Ch. 81, 1949 CAL. STATS. 284 §§ 53050-53056 (current version at CAL. GOV'T CODE §§ 810-996.6 (West 1966 & Supp. 1977).

[10] Within the definition of former Government Code section 53050 "local agency" meant "city, county or school district." *Id.*

ous conditions of public property.[11] These changes, however, were not cohesive, and the result was a disconnected series of statutes, enacted sporadically to deal with perceived needs. The general rule continued to be one of governmental immunity.

To avoid immunity when the statute was silent as to liability, the judiciary created exceptions to this general rule to broaden the scope of governmental liability. These exceptions took the form of a fictional distinction between "governmental" functions and "proprietary" functions.[12] A local entity was immune from liability for activities arising out of a "governmental" function[13] which was defined as a necessary operation of the entity.[14] There was no immunity from liability for activities arising out of "proprietary" functions,[15] i.e., those functions in which the local entity acted in a "corporate"[16] capacity for the benefit of the entity,[17] elective rather than duty-born activity. Ultimately, judicial application of this fiction resulted in such unreasonable distinctions as classifying a merry-go-round in a public park as "governmental," while a slum-clearance housing project was classified as "proprietary."[18] Such results flowed from courts' straining to find liability in situations in which a governmental entity would otherwise be immune. This result-oriented outlook gave rise to arbitrary distinctions and conflicting outcomes.[19]

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[11] Former Government Code section 53051 provided:

> A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
> (a) Had knowledge or notice of the defective or dangerous condition.
> (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or take action reasonably necessary to protect the public against the condition.

Id.

[12] California did not begin to make significant use of the distinction until early in the 1900's. The most important use was initiated in 1947 when the California Supreme Court decided that the state was vulnerable to tort liability when acting in a proprietary capacity. Previously only municipal corporations were capable of engaging in proprietary activities. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 16 (1964).

[13] W. PROSSER, LAW OF TORTS § 131 (4th ed. 1971).

[14] *E.g.*, "failure to make and enforce appropriate laws and regulations." W. PROSSER, LAW OF TORTS § 131 at 979 (4th ed. 1971).

[15] *Id.*

[16] *Id.*

[17] Although the term "corporate" is widely used to illustrate the distinction, activity characteristically performed by the "private sector," as opposed to the "public sector" is a helpful analogy.

[18] Carr v. City and County of San Francisco, 170 Cal. App. 2d 48, 338 P.2d 509 (2d Dist. 1959) (merry-go-round); Muses v. Housing Authority, 83 Cal. App. 2d 489, 189 P.2d 305 (1st Dist. 1948) (slum clearance).

[19] An injury which occurred in a swimming pool (the operation of which was held a governmental activity) would not render a public entity liable, but an injury which occurred on a golf course (the operation of which was held a proprietary activity) would render the public entity liable. *See* Muskopf v. Corning

In 1961, the California Supreme Court decided *Muskopf v. Corning Hospital District.*[20] The opinion, written by Justice Traynor, concluded that, "the rule of governmental immunity from tort liability . . . must be discarded as mistaken and unjust."[21] Justice Traynor traced the roots of local district immunity to an English case, *Russell v. The Men Dwelling in the County of Devon.*[22] *Russell* was an action in tort against an unincorporated county, in which the court found for the county. The reasons were twofold. First, the county was not incorporated and had no revenues with which to pay a judgment. Second, the court found it "better that an individual should sustain an injury than that the public should suffer an inconvenience."[23] This rule was subsequently applied in the United States even in cases in which the defendant-county *was* incorporated and *had* a fund with which to satisfy judgments.[24]

In *Muskopf*, the court decided that the underlying policy of *Russell* had no place in society today. "Public convenience does not outweigh individual compensation. . . ."[25] Furthermore, the court cited numerous instances which indicated that the law "has become riddled with exceptions, both legislative . . . and . . . judicial and the exceptions operate so illogically as to cause serious inequality."[26] The court seized upon the illogical operation of the law as a basis for abrogating governmental immunity entirely. It did not, as it might have, sustain the general rule of immunity while insisting on a more systematic application.

The Legislature, in reaction, suspended the effect of *Muskopf* until the ninety-first day after the final adjournment of the 1963 Regular Session.[27] If no legislation had been enacted by that time, *Muskopf* would become law. The California Law Revision Commission undertook a careful study of sovereign immunity and submitted proposed legislation.[28] This series of proposed statutes, with some changes, was adopted in 1963.[29]

Hospital Dist., 55 Cal. 2d 211, 216-17, 359 P.2d 457, 459-60, 11 Cal. Rptr. 89, 90-91 (1961). For history of *Muskopf see* text accompanying notes 27-29 *infra;* Cal. L. Revision Comm'n, *A Study Relating to Sovereign Immunity,* in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 808 (1963).

[20] 55 Cal. 2d 211, 259 P.2d 457, 11 Cal. Rptr. 89 (1961).

[21] *Id.* at 213, 359 P.2d at 458, 11 Cal. Rptr. at 90.

[22] 100 Eng. Rep. 359 (1788).

[23] *Id.* at 362.

[24] Mower v. Leicester, 9 Mass. 247, 249 (1812).

[25] 55 Cal. 2d at 216, 359 P.2d at 459-60, 11 Cal. Rptr. at 91-92.

[26] *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

[27] Ch. 1404, 1961 CAL. STATS 3209.

[28] CAL. L. REVISION COMM'N, *A Study Relating to Sovereign Immunity,* in 4 REPORTS, RECOMMENDATIONS, AND STUDIES (1963). The official comment of the commission was formally adopted as indicating legislative intent by the Senate Committee of the Judiciary, 2 SEN. J. 1885 (1963) and the Assembly Committee on Ways and Means, 3 ASSEM. J. 5439 (1963).

[29] Ch. 1681, 1963 CAL. STATS. 3266.

II. THE 1963 CALIFORNIA TORT CLAIMS ACT

The 1963 Act,[30] unofficially titled the California Tort Claims Act, is codified in California Government Code sections 810 through 996.6. It provides that public entities are immune from liability unless they are declared to be liable by enactment.[31] The Act specifies limited circumstances under which liability will exist. The Law Revision Commission, in formulating the statute, balanced the "interest of the public in effective governmental administration against the need for providing compensation to those injured by the activities of the government."[32] The policy considerations which shaped the statute re-establishing governmental immunity were based on the unique role of government. A governmental entity is fundamentally different from a private person. A government must run the risks inherent in making laws, building and maintaining highways, prosecuting criminals, and otherwise protecting the general welfare of its citizens, whereas a private person can reduce the risk of liability by refraining from engaging in any risk-producing activity.

Despite this distinction, forceful policy considerations favored imposing some liability on government entities. It would be unfair to preclude all persons injured as a result of some wrongful or negligent act of public employees from obtaining compensation merely because the party that caused the injury was an agent of a governmental entity. The Act attempted to strike a delicate balance between these competing considerations.[33]

In the specific area of dangerous conditions of public property the significant sections of the statute are California Government Code section 835[34] which sets out the conditions of liability, and section 830.6 which confers plan or design immunity.[35] The design

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[30] CAL. GOV'T CODE §§ 810-996.6 (West 1966 & Supp. 1977).

[31] Cal L. Revision Comm'n, *A Study Relating to Sovereign Immunity*, in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 811 (1963).

[32] *Id.*

[33] *Id.*

[34] CAL. GOV'T CODE §§ 835 (West 1966) provides:

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonable foreseeable risk of the kind of injury which was incurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

[35] CAL. GOV'T CODE § 830.6 (West 1966) provides:

> Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design or a construction

or plan immunity was a creation of the 1963 Act,[36] prompted by the concern that a jury should not second-guess decisions properly left to the discretion of public officials. Section 830.6, therefore, establishes a qualified presumption favoring officials' design decisions.[37]

In an action against a public entity for injuries caused by a dangerous condition, the plaintiff must first establish a prima facie case for liability under section 835.[38] This involves a showing of the existence of a dangerous condition, proximate cause, actual cause, and either negligence or notice and failure to protect against the dangerous condition.[39] In the hypothetical posed in the introduction, Thisselthwaite must first prove that the superelevation of the curve in the road was a dangerous condition as defined in section 830.[40] This includes a proof that the condition created a "substantial" risk of injury when the property on which it exists is used with due care in a manner that is "reasonably foreseeable."[41] Additionally Thisselthwaite must show that the superelevation proximately caused her car to skid out of control. This involves a showing that it was foreseeable that a car driven over the road at the posted speed would skid out of control.[42] She must further show either the negligent act or omission of an employee of the public entity, or the public entity's actual or constructive knowledge of the dangerous condition.[43]

> 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, if the trial or appellate court determines that there is any substantial evidence upon the basis of which
> (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

[36] CAL. GOV'T CODE § 830.6, Law Revision Comm'n Comment (West 1966).

[37] Cal. L. Revision Comm'n, *A Study Relating to Sovereign Immunity*, in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 823 (1963).

[38] Bakity v. Riverside County, 12 Cal. App. 3d 24, 29, 90 Cal. Rptr. 541, 544 (4th Dist. 1970).

[39] CAL. GOV'T CODE § 830, Law Revision Comm'n Comment (West 1966).

[40] CAL. GOV'T CODE § 830 (West 1966) provides:

> Dangerous condition means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

[41] *Id.*

[42] W. PROSSER, LAW OF TORTS §§ 42, 43 (4th ed. 1971).

[43] *See* CAL. GOV'T CODE § 835(a) or 835(b) (West 1966) set forth in note 34 *supra*.

The county's answer, asserting design immunity as an affirmative defense,[44] would have to prove three elements: First, the dangerous condition, i.e., the superelevation of the curve, must have been a part of a design approved by a person with discretionary authority. Second, the superelevation must have been the cause of the injury. Third, substantial evidence must have supported the reasonableness of the approval.[45] If the county can successfully establish all three elements, it will have defeated the liability imposed under section 835.

III. JUDICIAL MODIFICATION OF THE DESIGN IMMUNITY DOCTRINE

The California Supreme Court heard two cases in 1967,[46] *Cabell v. State of California*[47] and *Becker v. Johnston*,[48] in which the central issue was the scope of the design immunity. In each case the court interpreted section 830.6[49] to mean that once the immunity had been established, it remained in force without regard to the actual operation of the design. Subsequent evidence of the inherently unsafe nature of the design or of changed circumstances creating a dangerous condition did not abrogate the immunity already conferred. *Cabell* and *Becker* set a precedent for a strict interpretation of the statute which was not consonant with prevalent attitudes toward such considerations as compensating innocently injured parties.[50] Ultimately, subsequent appellate courts abandoned this literal interpretation in favor of doctrines enabling them to impose liability notwithstanding the literal language of the statute.[51]

In *Cabell*, the plaintiff brought suit against the State for the injuries he sustained when his hand broke through the glass in a lavatory door in a San Francisco State College dormitory. Evidence indicated that other students had been involved in similar accidents. In each instance the glass was replaced with glass of the same non-safety variety. The court held that the state was protected from liability by the design immunity statute. It found that the design had been approved by the State Architect and that such approval had been

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[44] *See generally* Cameron v. State, 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972); Davis v. Cordova Recreation and Park Dist., 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 (3d Dist. 1972); Johnston v. County of Yolo, 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 (3d Dist. 1969).

[45] *See* CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra*.

[46] These two cases were the first design immunity cases to reach the State Supreme Court since the enactment of the statute in 1963, and were thus its first opportunity to interpret the statute.

[47] 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

[48] 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

[49] *See* CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra*.

[50] *See* text accompanying notes 98-103 *infra*.

[51] *See* text accompanying notes 69-93 *infra*.

reasonable when given.[52] The court seemed to rely heavily on Professor Van Alstyne's[53] statement that "the reasonableness of adoption or approval of the design, plan or standards is measured as of the time the adoption or approval occurred. A plan or design now judged to have been reasonable when adopted is not actionable even though its defective nature is considered wholly unreasonable under present circumstances and conditions."[54]

In his dissents to *Cabell* and *Becker*, Justice Peters argued forcefully that the majority had misinterpreted the intended scope of the statute's applicability. He argued that the Law Revision Commission's interpretation of the statute indicated that its underlying policy was to prevent essentially inexperienced juries from simply reweighing the same factors that had been before the body that initially approved the design.[55] In support of this contention, Peters noted the Law Revision Commission's reference[56] to the case of *Weiss v. Fote*,[57] in which the highest New York court limited the scope of the immunity granted and affirmed an entity's "continuing duty to review its plan in the light of its actual operation."[58] Justice Peters thus concluded that it was never the intention of the legislature to extend immunity to the government where the actual operation of an improvement discloses a dangerous condition which is evidenced by accidents.[59] In such cases juries *would not* simply reweigh the same factors already considered by the agency approving the plan, but would instead determine whether the public entity had since had

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[52] 67 Cal. 2d at 154, 430 P.2d at 37, 60 Cal. Rptr. at 479.

> It is thus apparent that there is substantial evidence upon the basis of which a reasonable public employee could have adopted the plan or design or standards for the lavatory doors, including the glass, or a reasonable governmental body or employee could have approved them, and that accordingly defendant State has established its immunity under section 830.6 with respect to the door as originally planned and constructed.

[53] Professor Arvo Van Alstyne of the School of Law, University of Utah authored the study later adopted in large part by the Law Revision Commission.

[54] A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 556 (1964), *cited with approval in* Cabell v. State, 67 Cal. 2d at 153, 430 P.2d at 36, 60 Cal. Rptr. at 478.

[55] *See* Justice Peters' dissent in Cabell v. State, 67 Cal. 2d at 157, 430 P.2d at 39, 60 Cal. Rptr. at 481; Cal. L. Revision Comm'n, *A Study Relating to Sovereign Immunity*, in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 811 (1963).

[56] CAL. GOV'T CODE § 830.6, Law Revision Comm'n Comment (West 1966).

[57] 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

[58] *Id.* at 587, 167 N.E.2d at 67, 200 N.Y.S.2d at 415.

[59] *See* Justice Peters' dissent in Cabell v. State, 67 Cal. 2d at 156 n.2, 430 P.2d at 38 n.2, 60 Cal. Rptr. at 480 n.2.

> It is a well-settled principle of statutory construction that, where legislation is framed in the language of an earlier enactment which has been judicially construed, there is a very strong presumption that there was an intent to adopt the construction as well as the language of the prior enactment. This principle has been held to apply when

actual or constructive notice of the hazardousness of the design as implemented. Under Justice Peters' rationale, immunity would not apply to such a "changed circumstance" situation. There would be new information—notice of a dangerous condition—to take into account.

Justice Peters' view found support among legal commentators who felt that extending governmental immunity in a *Cabell* type situation was misguided and in contravention of public policy.[60] Public policy is not served by allowing public entities to ignore dangerous conditions of public property, and thus expose others to harm, when they have knowledge of the condition and are in a position to take appropriate remedial steps. Section 835(b) was expressly designed to make a public entity liable for dangerous conditions of public property of which they had knowledge a "sufficient time prior to the injury to have taken measures to protect"[61] against it. The fact that the original approval of the design was reasonable should not insulate the public entity from liability for failure to correct a condition later proven to be dangerous.

Although appellate courts did not directly criticize the *Cabell* and *Becker* decisions, they did begin to narrow the availability of the plan or design immunity as a defense.[62] *Cabell* indicated that immunity is the general rule, not an exception to the broader rule of liability.[63] Since intermediate courts, bound by *Cabell* and *Becker*, were precluded from utilizing a "changed conditions" analysis[64] to limit governmental immunity, they developed theories of liability to circumvent immunity while still complying with *Cabell*.[65] These

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> the statute copied by California is that of another state, is federal legislation, or is that of a foreign government.

Justice Peters goes on to argue by analogy that the above rule makes applicable to California statutes the reasoning of cited cases of other states as well.

[60] *See* Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HAST. L.J. 584 (1968); *Supreme Court of California 1967-1968*, 56 CAL. L.R. 1612, 1756 (1968).

[61] CAL. GOV'T CODE § 835(b) is set forth in note 34 *supra*; Cal. L. Revision Comm'n. *A Study Relating to Sovereign Immunity*, in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 854 (1963).

[62] *See, e.g.*, Flournoy v. State, 275 Cal. App. 2d 806, 80 Cal. Rptr. 485 (2d Dist. 1969); Johnston v. County of Yolo, 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 (3d Dist. 1969).

[63] 67 Cal. 2d at 153, 430 P.2d at 36, 60 Cal. Rptr. at 478 citing with approval Cal. L. Revision Comm'n, *A Study Relating to Sovereign Immunity*, in 4 REPORTS, RECOMMENDATIONS, AND STUDIES 823 (1963) as follows:

> There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval.

[64] *See* text accompanying notes 94-103 *infra*.

[65] *See, e.g.*, De La Rosa v. City of San Bernardino, 16 Cal. App. 3d 739, 94 Cal. Rptr. 175 (4th Dist. 1971); Flournoy v. State, 275 Cal. App. 2d 806, 80 Cal. Rptr. 485 (3d Dist. 1969); *see* text accompanying notes 69-93 *infra*.

included a narrow construction of the scope of the plan or design immunity (section 830.6), a narrow construction of the term "design-related,"[66] and a high standard for "any substantial evidence."[67] Ultimately the California Supreme Court adopted the "changed conditions" doctrine[68] first advocated by Justice Peters in his dissent to *Cabell.*

A. Narrow Construction of the Scope of Section 830.6

The plan or design immunity is an affirmative defense[69] which, if proved, immunizes a government against any liability imposed under the chapter.[70] Thus, properly construed, section 830.6 conceivably immunizes a public entity from any liability imposed by the dangerous conditions statute (section 835). Thus, in the hypothetical, even if Thisselthwaite can prove her case under section 835, the county may still escape liability by establishing the design immunity defense.

One method of circumventing the immunity was to interpret the immunity granted by section 830.6 as narrower in scope than the liability conferred by section 835. Section 835(a)[71] covers dangerous conditions of public property caused by the negligent or wrongful act or omission of an employee within the scope of his or her duty. Section 835(b)[72] covers dangerous conditions of public property about which the public entity had actual or constructive notice and sufficient time prior to the accident to have taken protective measures. Courts allowed the defendant-entity to assert the design immunity as a defense to its "active" negligence in the creation of the dangerous condition, but would not allow it to assert design immunity as a defense to its "passive" negligence—failure to repair or warn of the dangerous condition once created and proved to be dangerous.[73]

The passive negligence described in section 835(b) was considered by courts to be "independent of design."[74] This definitional distinction allowed appellate courts to apply a straight negligence standard

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[66] "Design-related" or "design-caused" appear throughout the decisions and refer to the requirement of California Government Code Section § 830.6 set forth in note 35 *supra.*

[67] *See* CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra.*

[68] *See* text accompanying notes 94-103 *infra.*

[69] *See generally,* Cameron v. State, 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972); De La Rosa v. City of San Bernardino, 16 Cal. App. 3d 739, 94 Cal. Rptr. 175 (4th Dist. 1971); Johnston v. County of Yolo, 274 Cal. App. 2d 46, 79 Cal. Rptr. 33 (3d Dist. 1969).

[70] CAL. GOV'T CODE § 830.6, Law Revision Comm'n Comment (West 1966).

[71] CAL. GOV'T CODE § 835 (West 1966) set forth in note 34 *supra.*

[72] *Id.*

[73] *See, e.g.,* De La Rosa v. City of San Bernardino, 16 Cal. App. 3d 739, 94 Cal. Rptr. 175 (4th Dist. 1971).

[74] Flournoy v. State, 275 Cal. App. 2d at 811, 80 Cal. Rptr. at 489.

while ostensibly recognizing design immunity. They could conclude that, though design immunity might defeat Thisselthwaite's claim with respect to the *creation* of the dangerous condition, the intervening failure to warn is likely to give rise to liability. "[A]ccording to the general rule of negligence law, a defendant may be liable if his negligence is a substantial factor in causing the injury, and the presence of intervening causal forces does not relieve him from liability if those forces were foreseeable."[75] In a sense, appellate courts were in fact taking into account "changed conditions," although they could not introduce this new doctrine because of the precedent established by the majority opinion in *Cabell.*[76]

B. Narrow Construction of the Term "Design-related"

A second means of avoiding immunity was to limit the plan or design immunity to a very technical construction of the term "design-related cause."[77] For the immunity to apply, the public entity must allege and prove that the accident was caused by an element of the approved design.[78] The "design-related" requirement can be viewed in two ways. In one sense, every aspect of an improvement is an element of the design. In the more limited sense in which the courts chose to interpret the term, an element is only "design-related" if the plan specifically refers to it as an element. In Thisselthwaite's case, once she establishes liability for dangerous conditions of public property under section 835,[79] the public entity must prove that the degree of superelevation was the cause of the accident[80] and that the degree of superelevation was a specific aspect of the plan as approved. If the plan merely called for the curve to be superelevated without specifying the degree, the court would be free to find that it was the particular degree of superelevation which caused the accident. Since that aspect would not be found to be "design-related," because not specified in the plan, the immunity would not apply.[81]

This puts a substantial burden upon the entity formulating a design,[82] requiring it expressly to include all elements of a design in the

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[75] *Id.* at 813, 80 Cal. Rptr. at 490.

[76] *See* text accompanying notes 102-103 *infra.*

[77] *See* note 66 *supra.*

[78] CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra.*

[79] CAL. GOV'T CODE § 835 (West 1966) set forth in note 34 *supra.*

[80] Curiously, in order to invoke the immunity under section 830.6, the defendant-entity must prove that the injury was caused by the dangerous condition. This is to insure that the immunity is limited to cases in which the condition which caused the injury was in fact authorized.

[81] The analysis from this point would be straight negligence. *See* Cameron v. State, 7 Cal. 3d at 329, 497 P.2d at 784, 102 Cal. Rptr. at 312.

[82] The absence of particularity in a design can also defeat an assertion of immunity if the immunity is construed to apply only to active, not to passive, negligence. If a governmental entity designs an intersection, for example, with-

approved plan. An entity cannot assume that a feature not explicitly included will be understood to have been included by implication. Taken to its extreme, such a requirement might make it practically impossible for an entity to design a plan with sufficient particularity to insulate it from liability. The extent to which a court can rely upon particularity in the plan remains an open question.[83]

C. *High Standard for "Any Substantial Evidence"*[84]

A third method of limiting the availability of the design immunity is to construe "any substantial evidence" as placing on the public entity a heavy burden of proof as to the reasonableness of the design. The substantial evidence rule generally denotes a relaxed standard of review—enough evidence to support a reasonable conclusion, even though contrary evidence might reasonably support an opposite conclusion.

". . . [I]f reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as 'substantial.'"[85] It is more than a scintilla, but less than a preponderance;[86] it might be thought of as that level of proof which would normally be sufficient to give the question to a jury. According to the statute, if a judge considers the defendant-entity's proffered evidence adequate to convert the issue into a question of fact (as opposed to one of law), then the judge must resolve the question in favor of the entity.

In straining to avoid immunity, courts have imposed a higher standard than the one just delineated. The court of appeal applied such a higher standard to defeat the design immunity defense in

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out specific provision for a stop sign, it seems logical to assume that it considered the need for a stop sign and decided against it. In effect then, the plan implicitly calls for no stop sign. It might be said that no stop sign is an element of the design. Under the first analysis, however, if the plaintiff proves that the lack of such a sign amounted to a dangerous condition under section 830 and proved a case for liability under section 835, the defendant-entity would probably still be held liable, not for the creation of the dangerous condition (because of the successful assertion of the design immunity), but for the failure to warn of or correct a foreseeably dangerous condition.

[83] Thus far the courts have applied this line of reasoning to the degree of elevation of a curve, Cameron v. State, 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972), the exact position of a stop sign, De La Rosa v. City of Bernardino, 16 Cal. App. 3d 739, 94 Cal. Rptr. 175 (4th Dist. 1971), and the freezing over of a bridge, Flournoy v. State, 275 Cal. App. 2d 806, 79 Cal. Rptr. 33 (3d Dist. 1969).

[84] *See generally*, CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra*.

[85] Smith v. Schumacker, 30 Cal. App. 2d 251, 260, 85 P.2d 967, 972 (3d Dist. 1938).

[86] Estate of Darilek, 151 Cal. App. 2d 322, 330, 311 P.2d 615, 621 (1st Dist. 1957).

Davis v. Cordova Recreation and Park District.[87] The *Davis* plaintiffs sued for damages following the death of their son, who drowned in a "fish hole" that had been built into a lake in a park. The plans for the lake, which had been approved by a board of directors, called for a "fish hole" near its center. In deciding whether the design immunity was an available defense to this action, the court scrutinized the plan in light of the requirement of reasonableness laid out in the statute.[88] At the trial, conflicting evidence of reasonableness of design had been presented.[89] Under the "substantial evidence" standard described above, the city introduced evidence of reasonableness which should have been sufficient to invoke the immunity, notwithstanding this conflict.[90] Nevertheless, the court concluded

> that defendant had actual knowledge of the concentration of young children engaging in activity which made the construction and maintenance of an open, abrupt and unguarded hole in this pond dangerous, hazardous, and of high risk, and that no substantial evidence was introduced in support of the reasonableness of this part of the facility.[91]

In finding that substantial evidence of the reasonableness of the design had not been presented, the *Davis* court employed the following test:[92] "Evidence that reasonably inspires confidence and is of solid

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[87] 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 (3d Dist. 1972).

[88] CAL. GOV'T CODE § 835.4 (West 1966) provides:

> (a) A public entity is not liable under subdivision (a) of section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.
>
> (b) A public entity is not liable under subdivision (b) of section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

[89] Two expert witnesses testified, one for the plaintiff and one for the defendant. Although defendant's expert witness' testimony went mainly to the reasonableness of the intended use of the pond, he also testified to the reasonableness of the prediction that persons would not venture physically into the vicinity of the fish hole.

[90] Given the testimony set forth in note 89 *supra*, it seems that the question should have gone to a jury (*see* text accompanying notes 85-86 *supra*). In this case it would mean that the verdict should be in favor of the defendant-entity (*see* CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 34 *supra*).

[91] 24 Cal. App. 3d at 800, 101 Cal. Rptr. at 366.

[92] People v. Bassett, 69 Cal. 2d 122, 139, 443 P.2d 777, 788, 70 Cal. Rptr.

value."[93] It appears that in applying this test, the *Davis* court took advantage of its ambiguous language to demand of the defendant-entity more than the statutory requisite amount of evidence, thus precluding it from successfully invoking the design immunity.

D. The "Changed Conditions" Doctrine

In 1971, the California Supreme Court departed from the literal interpretation of the design immunity statute which had fettered appellate courts since 1967. It interpreted the statute to except from immunity any condition, safe when designed, which had become unsafe due to changed conditions not contemplated by the original design. In so doing, the court in *Baldwin v. State of California*[94] unanimously overruled *Cabell* and *Becker*. The opinion, written by Justice Sullivan, adopted Justice Peters' dissent in those two cases[95] and thus carved out the "changed conditions" exception to design immunity.

In *Baldwin*, the plaintiff sustained injuries while attempting to execute a left turn from a street which had no special left hand turn lane. Plaintiff introduced evidence which tended to prove both that the intersection was hazardous and that the state had had actual knowledge of this condition. The state established the elements necessary to plead the defense of design immunity.[96] The issue as posed by the court was

> whether the immunity granted by section 830.6 continues to shield a public entity from liability, even where, as here, the actual operation of the plan or design over a period of time and under changed circumstances discloses that the design has created a dangerous condition of which the entity has notice.[97]

This time the court answered that question in the negative.

If the actual operation of a design, which was reasonable when approved, reveals a condition which is dangerous when used with due care in a manner which is reasonably foreseeable, a public entity can no longer avail itself of the defense provided by section 830.6. In laying down this rule, the court divined the legislative intent from the

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193, 204 (1968).

[93] Although People v. Bassett is a criminal case, the *Bassett* court cites Crawford v. South Pac. Co., 3 Cal. 2d 427, 45 P.2d 183, 84 (1935) as the leading civil case on "substantial evidence" and applies the *Crawford* test a fortiori. In *Crawford*, the court stated:

> The power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

3 Cal. 2d at 429, 45 P.2d at 84.

[94] 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1971).

[95] 67 Cal. 2d at 155, 430 P.2d at 37, 60 Cal. Rptr. at 479.

[96] CAL. GOV'T CODE § 830.6 (West 1966) set forth in note 35 *supra*.

[97] 6 Cal. 3d at 431, 491 P.2d at 1125, 99 Cal. Rptr. at 149.

Law Revision Commission's citation of the New York case of *Weiss v. Fote*[98] and from a 1969 report of the Law Revision Commission which disapproved *Cabell* and *Becker*.[99]

Perhaps the most significant aspect of the opinion was the statement of public policy inherent in the court's new stance; the rule is now liability, and immunity is now the exception.[100] The trend is away from upholding immunity wherever possible, and toward compensating parties for their injuries. A policy which permits an entity knowingly to maintain a dangerous condition cannot be tolerated. In formulating this new policy, the court gave great weight to a public entity's prior notice and opportunity to repair. The maintenance of a dangerous condition in the face of notice and an opportunity to repair constitutes a flagrant disregard for public safety. In such circumstances, the grant of immunity essentially would be a license to ignore the actual operation of any given plan. Courts, once willing to allow the design immunity to override such policy considerations, have now retreated into a straightforward negligence analysis. A city can no longer implement a design and ignore subsequent events.[101]

In a sense, the changed conditions doctrine as set forth in *Baldwin* accomplishes, without analytically offensive maneuvering, the same end as did the narrow construction of section 830.6.[102] In effect, it declares that the policy behind section 835(b) outweighs the policy behind section 830.6, thus subjecting section 830.6 to an explicit limitation. Appellate courts were not able to impose this explicit limitation while *Cabell* and *Becker* were still good law and therefore were forced to rely on the more cumbersome technique of narrowly construing section 830.6.[103]

CONCLUSION: WHAT DOES THIS MEAN FOR THE PRACTITIONER?

A public entity will be liable under section 835 for dangerous conditions of public property if the actual operation of the plan reveals a dangerous condition which has resulted in injury even if the

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[98] 7 N.Y.2d 579, 167 N.E.2d 63 (1960), 200 N.Y.S.2d 409, *cited with approval* in Baldwin v. State, 6 Cal. 3d at 433, 491 P.2d at 1127, 99 Cal. Rpr. at 151.

[99] Cal. L. Revision Comm'n, *A Study Relating to Sovereign Immunity*, in 9 REPORTS, RECOMMENDATIONS, AND STUDIES 816 (1969), *cited with approval* in Baldwin v. State, 6 Cal. 3d at 435, 491 P.2d at 1128, 99 Cal. Rptr. at 152.

[100] *See* Muskopf v. Corning Hospital Dist., 55 Cal. 2d at 219, 359 P.2d at 462, 11 Cal. Rptr. at 94 where the court abrogated the common law doctrine of governmental tort immunity and noted, "where there is negligence, the rule is liability, immunity is the exception."

[101] *See* Baldwin v. State, 6 Cal. 3d at 434-36, 491 P.2d at 1125-29, 99 Cal. Rptr. at 149-53.

[102] *See* text accompanying notes 69-76 *supra*. *But see* Cameron v. State, 7 Cal. 3d at 327-29, 497 P.2d at 783-84, 102 Cal. Rptr. at 311-12.

[103] *Id.*

entity can prove the elements of section 830.6. The adoption of rule, however, has not nullified the other exceptions discussed earlier.[104] The active negligence-passive negligence theory which was used to narrow the scope of section 830.6 seems to have continued application.[105] Similarly, the specificity requirement must be met in order for a plan to qualify under section 830.6.[106]

There are, however, questions with respect to the statute and its interpretation that remain unsettled. Is an entity obligated to review plans in the light of actual operation, so that any dangerous condition will be discovered prior to "notice" through an accident or injury? Does "changed condition" mean actually physically changed, or merely unreasonably dangerous in the light of actual operations?[107] Also unsettled is the question of how much detail should be included in a plan or design in order to maximize the protection afforded by section 830.6.

Despite the inroads discussed,[108] the plan or design immunity does have continued vitality. There is no duty imposed upon the public entity to repair all known dangerous conditions. A public entity may avoid liability under section 835 if it can meet the test for the reasonableness of the act or omission set out in section 835.4[109] which is basically a balancing test. The factors to be considered are the "probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury."[110] Looking at the Thisselthwaite hypothetical, if the public entity had discovered that the improper superelevation of the curve created a dangerous condition, it would not necessarily have had to reconstruct the road. Reasonable action in such a circumstance might amount to nothing more than a determination that the curve, even with the flawed superelevation, would not be dangerous at a speed of 30 mph, and posting of a sign so informing motorists.[111]

An assertion of the plan or design immunity will be most likely to succeed in a situation where the plaintiff has made out a case under

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[104] For a discussion of narrow construction of the scope of section 830.6, *see* text accompanying notes 69-76 *supra*, and of narrow construction of the term "design-related," *see* text accompanying notes 77-83 *supra*, and of high standard for "any substantial evidence," *see* text accompanying notes 84-93 *supra*.

[105] *See generally* Cameron v. State 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972).

[106] *See* text accompanying notes 77-83 *supra*.

[107] *See* Cameron v. State, 7 Cal. 3d at 326 n.10, 497 P.2d at 782 n.10, 102 Cal. Rptr. at 310 n.10.

[108] *See* text accompanying notes 69-103 *supra*.

[109] CAL. GOV'T CODE § 835.4 (West 1966), set forth in note 88 *supra*.

[110] CAL. GOV'T CODE § 835.4(a) (West 1966), set forth in note 88 *supra*.

[111] Baldwin v. State, 6 Cal. 3d at 437, 491 P.2d at 1129-30, 99 Cal. Rptr. at 153-59.

section 835(a)[112] which does *not* include a showing of actual or constructive notice on the part of the defendant-entity. If the plaintiff can prove that the entity had notice, courts will be less likely to apply the design immunity.[113] The clearest case for nonliability occurs when the plaintiff fails to prove that the injury sustained was caused by negligence independent of the design and fails to allege or prove that the city had actual or constructive notice of the alleged dangerous condition and failed to warn of the condition.[114] This, however, seems to say no more than that if a public entity is not negligent, it will not be liable for negligence.

This general area of governmental tort immunity, thus, remains rather unpredictable. The statute is relatively new and has sustained more than one interpretation. More and more, however, it seems that the applicable standard of the future in this area will be negligence.

> And the end of all our exploring
> Will be to arrive where we started
> And know the place for the first time.[115]

Jill S. Werber

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[112] CAL. GOV'T CODE § 835 (West 1966) set forth in note 34 *supra*.

[113] 9 CAL. L. REVISION COMM'N 876 (1969); Baldwin v. State, 6 Cal. 3d at 435, 491 P.2d at 1128-29, 99 Cal. Rptr. at 152-53.

[114] Thompson v. City of Glendale, 61 Cal. App. 3d 378, 132 Cal. Rptr. 52 (2d Dist. 1976) where city was not held liable for an injury sustained by plaintiff when she fell down an allegedly defective city-owned stairway. Plaintiff failed to allege or prove that the fall was caused by negligence independent of the design of the stairway and similarly failed to allege or prove that the city had notice and yet failed to warn of the condition.

[115] T. S. Eliot, "*Little Gidding*" in FOUR QUARTETS 59 (1943).