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## Governmental tort liability: Dodging the immunities

THE STATUTES ARE FULL OF EXCEPTIONS, AND SOMETIMES EXCEPTIONS TO THE EXCEPTIONS

In California, claims and actions against public entities and public employees are governed by California Government Code section 810-996.6. The division is referred to as the Government Claims Act (Gov. Code, § 810(b).) Without a doubt, the provisions of the Government Claims Act (hereinafter “the Act”) can be confusing and often appear contradictory. On one hand, the Act describes when the public entity or public employee is liable in tort, and on the other hand, contains exceptions or immunities which snatch liability away. This article attempts to summarize the general provisions of the Act’s declaration of liability and to summarize the various immunities that apply to the Act’s liability provisions.

### History of the Government Claims Act

In common law the concept of sovereign immunity shielded public entities

from tort liability. Over time, many cases eroded the concept, finding exceptions to many of the common law immunities. Having no assistance from the legislature in resolving the issues, the California Supreme Court in *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, basically “discarded as mistaken and unjust” the concept of sovereign immunity forcing the legislature to act. The resulting legislation was Government Code section 810 et seq., enacted in 1963, which generally declared that public entities are now liable in tort to the extent declared by statute, subject to stated immunities and defenses. It should be noted the Act doesn’t affect liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee. (Gov. Code, § 814.)

The Act abolished common-law liability for a public entity. Now, liability must be based on a California statute.

Sovereign immunity is still the rule in California, no liability in tort. However, exceptions found in statute impose liability, subject to the exceptions found in statutory immunities, and further subject to common law defenses (i.e., comparative fault, assumption of risk). (*Cochran v. Hereg Engraving Co.* (1984) 155 Cal.App.3d 405; *Ramos v. Madera* (1971) 4 Cal.3d 685.)

If liability is conferred by statute, said liability is then subject to any immunity provided by statute and any defense provided to a private person or entity. From a practical standpoint one should first analyze government liability to determine whether a statute exists to impose liability, and then determine if yet another statute provides an immunity. This “give and take” is seen in Government Code section 815.2 which confirms that a public entity is vicariously liable for the negligence of its employee

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acting in the scope of his/her employment (§ 815.2(a)) subject to any statute declaring that employee is immune from liability (§ 815.2(b)).

### The Act's imposition of statutory liability in tort

**Public entity:** The general introduction to the government's liability of the public entity (as opposed to the public employee) is to declare immunity, except where provided by statute.

The Act states: Except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity, or a public employee, or any other person. (Gov. Code, § 815(a).)

The Act imposes statutory liability to the public entity in three general situations: **1.** Vicarious liability for public employees and independent contractors (Gov. Code, § 815.2 and § 815.4.)

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action. (Gov. Code, § 815.2)

**2.** Dangerous conditions of public property (Gov. Code, § 835.)

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/her employment created the dangerous condition; or

**b)** The public entity had actual or constructive notice of the dangerous condition sufficient time prior to the injury to have taken measures to protect against the dangerous condition. (Gov. Code, § 835.)

Pursuant to this provision, a public entity may be liable for a dangerous condition of public property even though no employee is personally liable.

**3.** Failure to discharge mandatory duty (Gov. Code, § 815.6.)

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty. (Gov. Code, § 815.6.) An example where liability would attach is a social service agency's negligence in placement of children or failure to properly supervise children after placement in foster care. Public employee immunities are not applicable in suits for failure to discharge a mandatory duty.

**Public employee:** The general introduction to the liability of a public employee (as opposed to the public entity) is to declare liability, except where provided by statute. The Act states:

Except as provided by statute, a public employee is liable for injury caused by his/her act or omission to the same extent as a private person, and said liability is subject to any defenses that would be available to the public employee if he/she were a private person. (Gov. Code, § 820.)

Government Code section 815.3 provides an immunity for the public entity for the intentional tort of elected officials where the immunity applies for the public entity not named as a co-defendant in the same action. So, unless the elected official and the public entity are named as co-defendants in the same action, a public entity is not liable to a plaintiff for an intentional tort committed by an elected official, employed by or otherwise representing the public entity. The term intentional tort includes, but is not limited to, harassment, sexual battery, and intentional infliction of emotional distress. The public entity may be liable to pay the judgment even if the intentional tort did not arise out of the performance

of the elected official's duties but, plaintiff must first try to collect the judgment from the elected official and if insufficient, plaintiff may then seek collection from the public entity.

### The Act's general statutory immunities granted the public entity

The following are general statutory immunities specific to public entities:

- A public entity is not liable for an injury arising out of any activity conducted by a member of the California National Guard. (Gov. Code, § 816.)
- A public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed for the sake of example, and by way of punishing the defendant. (Gov. Code, § 818.) No punitive damages.
- A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law. (Gov. Code, § 818.20.)
- A public entity is not liable for any injury caused by the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certification, where the public entity/employee is authorized to determine whether or not such authorization should be issued, denied, suspended or revoked. (Gov. Code, § 818.4.) (There are exceptions set forth in case law where liability has been found for knowingly allowing incompetent drivers issuance of a driver's license.)
- The DMV is liable for any injury to a lien holder or good faith purchaser of a vehicle proximately caused by an ownership certificate issued by the department. (Gov. Code, § 818.5.)
- 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. (Gov. Code, § 818.6.)

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- No public entity or public employee is liable for any damage or injury resulting from the publication of any report/record concerning any person convicted of any law relating to the use, sale or possession of controlled substances when such publication is to school authorities. (Gov. Code, § 818.7.)

- A public entity is not liable for any injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional. (Gov. Code, § 818.8.) This statute provides an absolute immunity from liability for misrepresentation of any sort. The public employee may be liable for actual fraud or corruption, but the public entity is wholly immune. The immunity for the public entity for negligent or intentional misrepresentations of its employee is absolute, as it relates to interference with financial or commercial interests. This immunity does not apply in social services areas.

- A court or county, its employees, independent contractors, and volunteers shall not be liable because of any advice provided to small claims court litigants or potential litigants as a public service on behalf of the court or county pursuant to the Small Claims Act. (Gov. Code, § 818.9.)

### The Act's general statutory immunities granted the public employee

The following are general statutory immunities specific to public employees:

- Discretionary acts: Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his/her act or omission where the act or omission was the result of the exercise of the discretion vested in him/her whether or not such discretion be abused. (Gov. Code, § 820.2.) Peace officers' decisions not to render assistance or respond to emergency shall be deemed an exercise of discretion. (Gov. Code, § 820.25.)

- Executor of enforcement of laws: A public employee is not liable for his/her act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a

public employee from liability for false arrest or false imprisonment. (Gov. Code, § 820.4.)

- Acting under unconstitutional enactment: If a public employee acts in good faith, without malice, and under the appropriate authority of an enactment that is unconstitutional, he/she is not liable for injury caused thereby. (Gov. Code, § 820.6.)

- Acts or omissions of others: Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of other persons. (Gov. Code, § 820.8.)

- Officials: Mayors, local officials, members of city councils, are not vicariously liable for injury caused by the act or omission of the public entity, except if caused by his/her own wrongful conduct. (Gov. Code, § 820.9.)

- Adoption/failure to adopt, enactment: A public employee is not liable for an injury caused by his/her adoption of or failure to adopt an enactment, or by his/her failure to enforce an enactment. (Gov. Code, § 821.)

- Issuance, denial, suspension of permit or license: A public employee is not liable for an injury caused by his/her issuance, denial, suspension of, revocation of, or by his/her failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order, or similar authorization where he/she is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked. (Gov. Code, § 821.2.)

- Failure to inspect property: A public employee is not liable for injury caused by his/her failure to make an inspection or negligent inspection of property, other than public property for purposes of determining whether the property complies with or violates an enactment. (Gov. Code, § 821.4.)

- Tunnel traffic: Public employees are not liable for failing to restrict cargo tank vehicles to display placards in tunnels. (Gov. Code, § 821.5.)

- Judicial proceedings: Public employees are not liable for any injury caused by instituting or prosecuting any judicial or administrative proceeding within the

scope of his/her employment even if he/she acts maliciously and without probable cause. (Gov. Code, § 821.6)

- Entry upon property: Public employees are not liable for an injury arising out of his/her entry upon any property where such entry is expressly or impliedly authorized by law. (Gov. Code, § 821.8.)

- Stolen funds: Public employees are not liable for money stolen from their official custody. (Gov. Code, § 822.)

- Misrepresentations: A public employee acting in the scope of his/her employment is not liable for an injury caused by his/her misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice. (Gov. Code, § 822.2.)

### The Act's statutory immunities regarding dangerous conditions of public property

In addition to the general immunities applicable to all governmental liability and the usual tort defenses of comparative negligence and assumption of risk, the act sets forth statutes specific to actions based on dangerous conditions of property. Specific immunities and defenses include the following statutes:

#### Conditions deemed "not dangerous"

- Minor, trivial or insignificant risk. (Gov. Code, § 830.2.)

- A condition is not dangerous merely because of the failure to provide regulatory traffic control signals, stop signs, yield, right-of-way signs, or speed restriction signs. (Gov. Code, § 830.4.)

- Subsequent Remedial Measure is not evidence public property was a dangerous condition. (Gov. Code, § 830.5.)

#### Plan or design immunity

A public entity or employee is not liable for an injury where all of the following are shown:

- a) Causation of the injury by a defective plan or design for the construction or improvement of public property;
- b) Advanced approval of the plan or design by the entities' legislative body or by some other body or employee exercising discretionary authority or

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preparation of the plan or design in conformity with standards previously so approved.  
 (Gov. Code, § 830.6.)

There are exceptions where this immunity may not apply to an injury caused by the temporary dangerous condition of public property that arises during the construction of an improvement. One must also consider whether the facts of the individual case warrant a claim of “changed conditions” where the design defect defense is unavailable where changed circumstances have produced a dangerous condition of which the public entity had notice. Simply put, the design immunity is not perpetual, such as when a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably improved in advance, or prepared in conformity with standards previously so approved, as being safe. Nevertheless, in its actual operation under changed physical conditions, produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by Government Code section 830.6.

**No traffic signal:** Neither public entity nor public employee is liable for an injury caused by the failure to provide traffic or warning signals. Government Code section 830.4 provides immunity only where the alleged dangerous condition is caused solely by the absence of a regulatory traffic device or street marking; except where a sign or marking is needed to warn of a hazard or trap not reasonably apparent. (Gov. Code, § 830.8.)

**Defective traffic signal:** The general rules of government liability for dangerous conditions apply to defective traffic signals, signs and markings, except a public entity is not liable for an injury caused by the operation or non-operation of signals when controlled by an emergency vehicle. (Gov. Code, § 830.9.)

**Weather conditions’ effect on streets and highways:** Neither a public entity nor public employee is liable for an injury caused by the effect on the use of streets or

highways of weather conditions as such. No immunity exists if the effect would not be reasonably apparent to, and would not be anticipated by, a person exercising due care or where the weather conditions resulted in physical damage to, or deterioration of the street or highway. (Gov. Code, § 831)

**Natural condition of unimproved property:** Neither a public entity nor public employee is liable for an injury caused by a natural condition of any unimproved public property including, but not limited to, any natural condition of any lake, stream, bay, river, or beach. (Gov. Code, § 831.2.)

Public beaches are deemed to be in a “natural condition.” (Gov. Code, § 831.21.) There is also no duty to warn. This statute provides an absolute immunity.

**Land failures caused by natural condition:** (Gov. Code, § 831.25.)

**Nondedicated roads:** (Gov. Code, § 831.3.)

**Unimproved and unoccupied public land:** (Gov. Code, § 831.6.)

**Unpaved access roads to recreational or scenic areas, trails, paved paths on easements, granted to public entities:** This immunity would apply to any unpaved bike or walking trail, which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas. (Gov. Code, § 831.4.)

**Hazardous recreational activities:** Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity on public land. (Gov. Code, 831.7.) Exceptions to this immunity include:

- Failure to guard or warn of dangerous condition not reasonably assumed by dangerous activity.
- Permission to participate for a fee.
- Improper construction or maintenance of recreational structure or equipment.
- Improper promotion of activity if grossly negligent.
- Act of gross negligence.
- No immunity for non-public entity person.

**Dog park:** Immunity for public entity that owns or operates a dog park for injury or death of a person or pet resulting

solely from the actions of a dog in the dog park. (Gov. Code, § 831.7.5.)

**Reservoirs, canals, drains:** Generally, a public entity or employee is not liable for injury caused by the condition of a water improvement or distribution facility, if the injured person was using it for any purpose other than that intended or permitted. This applies to reservoirs, canals, conduits, drains, floor control channels. (Gov. Code, § 831.8.) There are exceptions when the person injured is less than 12 years of age. (Gov. Code, § 831.8.)

### Police and correctional activities

Chapter 3 of the Government Claims Act sections 844 to 846 addresses police and correctional activities, claims against correctional facilities which include the following immunities:

- Immunity for injury to prisoners. (Gov. Code, § 844.6.)
- Immunity for failure to provide police protection. (Gov. Code, § 845.)
- Immunity for failure to provide prison or jail facilities. (Gov. Code, § 845.2.)
- Immunity for interference with right of prisoner to obtain judicial determination of legality of his confinement. (Gov. Code, § 845.4.)
- Immunity for failure to provide medical care to prisoner. (Gov. Code, § 845.6.)
- Immunity for injury resulting from prisoner release or escape. (Gov. Code, § 845.8.)
- Immunity for failure to make arrest or retain an arrested person in custody. (Gov. Code, § 846.)

### Fire protection

Chapter 4 of the Government Claims Act sections 850-850.8 provide the following immunities:

- Immunity for failure to establish a fire department or otherwise provide fire protection service. (Gov. Code, § 850.)
- Immunity for injury resulting from failure to provide or maintain sufficient personnel or equipment or other fire protection facilities (Gov. Code, § 850.2 and § 850.4.), or for injury to person being lawfully transferred by fire department. (Gov. Code, § 850.8.)

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### **Medical hospitals and public health activities**

Chapter 5 of the Government Claims Act sections 854-856.6 addresses immunities of public entities and employees in activities related to mental health and prevention of disease or controlling communication of disease. Immunity exists with some exceptions.

### **Administration of tax laws, use of pesticides and abatement of impending peril**

Chapter 6 of the Government Claims Act, sections 860-860.4, provide immunity of public entity and employees related to tax collection.

Government Code section 862 confirms liability on a public entity for injuries caused by its use of pesticides to the same extent as a private person.

Government Code section 865-867 provides immunity for the public entities' activities in the abatement of gradual earth movement.

### **Conclusion**

As one analyzes the statutes set forth above, what is most apparent are the seemingly endless contradictions and exceptions, which can be both confusing and frustrating but provide insight on defeating the immunities. The statutes are full of exceptions, and sometimes exceptions to the exceptions. The art in navigating these immunities is to develop

the individual facts and circumstances of your case, determine liability, and then avoid or except your case from the immunity.

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