

PARMA CONFERENCE 2017

**MAKING THE MOST OF
GOVERNMENTAL
IMMUNITIES**

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IMMUNITY

Government Code §815 provides that liability against a public entity must be established through statute, and provides that any statute setting forth an immunity excepts a public entity from liability.

Except as otherwise provided by statute:

- (a) 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
- (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

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SELMAN BREITMAN LLP

SCOPE OF IMMUNITIES

Lawsuits Involving . . .

- Dangerous Condition of Public Property
- Police and Correctional Activities
- Fire Protection
- Medical, Hospital, and Public Health Activities

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UTILIZING IMMUNITIES

When to invoke?

- Government Tort Claim
- After Filing of Complaint
- After Filing of Answer

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WHEN TO INVOKE?

Government Tort Claim

- Benefit: Avoid Cost of Litigation
- Risk: Pleading Around the Immunity

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WHEN TO INVOKE?

Demurrer / Motion for Judgment on the Pleadings

- Benefit: Avoid Further Litigation Costs
- Risk: Plaintiff May Amend Complaint
- Key: Immunity Must Exist On Face Of Complaint

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WHICH IMMUNITIES?

Demurrer/Motion for Judgment on the Pleadings

- Trail Immunity (§831.4)
- Hazardous Recreational Immunity (§831.7)
- Natural Condition of Unimproved Public Property Immunity (§831.2)



WHEN TO INVOKE?

Motion for Summary Judgment

- Before Discovery Commences
- After Initial Discovery
- After Completion of Discovery



WHICH IMMUNITIES?

Motion for Summary Judgment

- Design Immunity (§830.6)
- Signage Immunity (§830.8)
- Grading/Road Maintenance (§831.2)



GOVERNMENT CODE §831.4 TRAIL IMMUNITY

A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:

- (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.
- (b) Any trail used for the above purposes.
- (c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads.

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GOVERNMENT CODE §831.4 TRAIL IMMUNITY

Legislative Intent

Encourage public entities to open their property for public recreational use.

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GOVERNMENT CODE §831.4 TRAIL IMMUNITY

Key Issue

Is the dangerous condition alleged to have existed on a "trail"?



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**GOVERNMENT CODE §831.4
TRAIL IMMUNITY**

Design and use are controlling, not the name.

- Paved pathway through a park determined to fall within the immunity.
- Bikeway was a "trail" even though bikeway was part of public streets and highway.
- Walkway along the oceanfront was a "trail" despite the proximity to a roadway.



**GOVERNMENT CODE §831.4
TRAIL IMMUNITY**

As long as recreational use exists, it is irrelevant why the plaintiff was using the trail.



**GOVERNMENT CODE §831.4
TRAIL IMMUNITY**

What Can Be Done Now?

- Formally designate trails or pathways.



GOVERNMENT CODE §831.4 TRAIL IMMUNITY

What Can Be Done Now?

- Require and maintain written agreements for any improvements to trails or pathways.



GOVERNMENT CODE §831.7 HAZARDOUS RECREATIONAL IMMUNITY

- (a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.
- (b) As used in this section, hazardous recreational activity means a recreational activity conducted on property of a public entity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator.



GOVERNMENT CODE §831.7 HAZARDOUS RECREATIONAL IMMUNITY

Hazardous recreational activity also means:

- (1) Water contact activities, except diving, in places where, or at a time when, lifeguards are not provided and reasonable warning thereof has been given, or the injured party should reasonably have known that there was no lifeguard provided at the time.
- (2) Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given.
- (3) Animal riding, including equestrian competition, archery, bicycle racing or jumping, bicycle motocross, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rockteering, rodeo, self-contained underwater breathing apparatus (SCUBA) diving, spelunking, skydiving, sport parachuting, paragliding, body contact sports, surfing, trampolining, tree climbing, tree rope swinging, waterskiing, white water rafting, and windsurfing. For the purposes of this subdivision, mountain bicycling does not include riding a bicycle on paved pathways, roadways, or sidewalks. For the purpose of this paragraph, body contact sports means sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants.



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

Legislative Intent

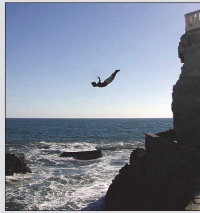
Encourage public entities to open their property for public recreational use.



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

Key Issues:

- Was a hazardous recreational activity involved?



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

Key Issues:

- Was a hazardous recreational activity involved?
- Does an exception apply?



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

Involvement of a third party does not preclude immunity.



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

Plaintiff's knowledge of any particular risk is irrelevant.

$$E=mc^2$$



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

What Can Be Done Now?

➤ Provide warnings.



GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY

What Can Be Done Now?

- Provide warnings.



GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY

What Can Be Done Now?

- Keep structures and recreational equipment in good repair.



GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY

What Can Be Done Now?

- Guard or warn against another hazardous recreational activity that may occur nearby.



**GOVERNMENT CODE §831.7
HAZARDOUS RECREATIONAL IMMUNITY**

What Can Be Done Now?

- Limit specific fees to participate in activities.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

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



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

Legislative Intent

Prevent a jury from simply reweighing the same factors already considered by the public entity.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

A public entity claiming design immunity must establish three elements:

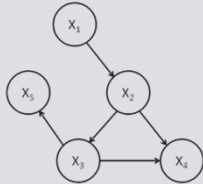
- Causal relationship
- Discretionary approval
- Substantial evidence of reasonableness



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

Element 1

A causal relationship between the plan or design and the accident.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**



Element 2

Discretionary approval of the plan or design prior to construction.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

Element 3
Substantial evidence supporting the reasonableness of the plan or design.

**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

Loss of Design Immunity

Even if all of the elements are met, design immunity can be lost.




**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

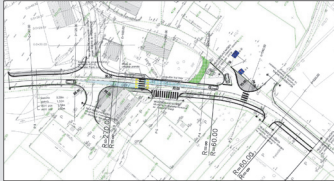
- Require and maintain agreements with design professionals as to scope of retention.




**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

- Require and maintain plan design documents.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

- Establish protocol for review of plan documents.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

- Establish protocol for final approval of plan documents.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

- Establish protocol for inspection during construction.



**GOVERNMENT CODE §830.6
DESIGN IMMUNITY**

What Can Be Done Now?

- Establish protocol for documenting substantial completion of construction.



**GOVERNMENT CODE §830.8
SIGNAGE IMMUNITY**

Legislative Intent

Determining and regulating the use of public property is better left to legislative and administrative bodies, rather than to the judiciary.



**GOVERNMENT CODE §830.8
SIGNAGE IMMUNITY**

Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code.



**GOVERNMENT CODE §830.8
SIGNAGE IMMUNITY**

“Trap” Exception



**GOVERNMENT CODE §830.8
SIGNAGE IMMUNITY**

What Can Be Done Now?

- Install Warning Signs



**GOVERNMENT CODE §830.8
SIGNAGE IMMUNITY**

What Can Be Done Now?

➤ Install Warning Signs





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IMMUNITIES – DANGEROUS CONDITION

Govt Code §830.6	Plan or Design of Construction of Public Property
Govt Code §830.8	Traffic or Warning Signal/Signage
Govt Code §830.9	Nonoperation of Traffic Control Signal
Govt Code §831	Effect on Use of Street of Weather Conditions
Govt Code §831.2	Natural Condition of Unimproved Public Property
Govt Code §831.25	Land Failure of Unimproved Public Property
Govt Code §831.3	Grading or Road Maintenance
Govt Code §831.4	Unpaved [or Paved] Road, Trail, Path, Sidewalk
Govt Code §831.7	Hazardous Recreational Activity
Govt Code §831.7.5	Actions of Dog in Dog Park
Govt Code §831.8	Condition of Reservoir, Canal, Conduit, Drain

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**IMMUNITIES –
POLICE, CORRECTIONAL, FIRE**

Police and Correctional Activities

Govt Code §845	Failure to Establish Police Department, Provide Police Protection, Respond to Burglar Alarm
Govt Code §845.2	Failure to Provide Prison, Jail, Sufficient Prison Equipment, Personnel
Govt Code §845.4	Interference with Right of Prisoner to Obtain Judicial Determination or Review of Legality of Confinement
Govt Code §845.6	Failure to Furnish Medical Care for Prisoner in Custody
Govt Code §845.8	Paroled or Escaped Prisoner, Escaped Arrested Person, Person Resisting Arrest
Govt Code §846	Failure to Make Arrest or Retain Arrested Person in Custody

Fire Protection

Govt Code §850	Failure to Establish Fire Department
Govt Code §850.2	Failure to Provide Fire Department Personnel, Equipment
Govt Code §850.4	Condition of Fire Protection Equipment, Facilities, Fighting Fires
Govt Code §850.6	Fire Protection Provided Outside Area Regularly Served
Govt Code §850.8	Transportation of Person Injured by Fire To Physician or Hospital

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IMMUNITIES – MEDICAL, HOSPITAL, PUBLIC HEALTH

Govt Code §854.8 Injury to or by Patients of Mental Institution
Govt Code §855.2 Interference with Right of Inmate of Medical Facility to Obtain Judicial Determination or Review of Legality of Confinement
Govt Code §855.4 Decision to Perform or Not to Perform Act to Promote Public Health by Preventing or Controlling Disease
Govt Code §855.6 Failure to Make Physical or Mental Examination to Determine Presence of Disease or Mental Condition
Govt Code §855.8 Diagnosing or Failing to Diagnose Mental Illness or Addiction
Govt Code §856 Determining Whether to Confine Person for Mental Illness or Addiction; Terms of Confinement
Govt Code §856.2 Injury by or to Escaped Person Confined for Mental Illness or Addiction
Govt Code §856.4 Failure to Admit Person to Public Medical Facility
Govt Code §856.6 Act or Omission by Public Entity, Employee, or Volunteer Participating in Influenza Program of 1976



CONTACT

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Gregg Thornton is a Partner in Selman Breitman's San Francisco office and is a Chair of the firm's General Liability and Public Entities practice groups. He represents public and private individuals and entities in a wide-range of matters, emphasizing municipal liability defense, employment, Americans with Disabilities Act, and business litigation. He also serves as General Counsel to a number of public entities and private businesses in the San Francisco Bay Area. Additionally, he has extensive experience defending insureds in disputes that involve third-party claims.

Gregg's decades-long experience in general liability and with public entities provides him a unique ability to evaluate complex issues, as well as to investigate and defend claims, starting at the government tort claim stage, through trial and on appeal. He works closely with clients, city attorneys, city managers and city councils to manage their risk, to anticipate and avoid problems when possible, and to solve the problems that cannot be avoided.

Gregg has been responsible for several published opinions before the California Supreme Court and the Ninth Circuit Court of Appeals, including the critical case of *Taus v. Loftus* (2007) 40 Cal. 4th 683 (scholarly research, calling into question the accuracy of a claim of recovery of repressed memory, was conduct in furtherance of free speech within meaning of anti-SLAPP statute).

Gregg is called upon by clients, PARMA (Public Agency Risk Managers Association) and ABAG (Association of Bay Area Governments) to give presentations on various subject matters relating to an array of topics, including those specifically relating to best practices, dangerous conditions of public property, roadway design, detention and arrest, search and seizure, and use of force, including not only the defenses to such claims, but also applicable legislatively created immunities.

Gregg is originally from Stanford, California, and grew up on the San Francisco Peninsula. He resides in Oakland, California, with his wife Mary. When not helping clients with their legal needs, he spends time involved in community activities.

BAR ADMISSIONS

California, 1990

U.S. Supreme Court

U.S. District Court Central
District of California

U.S. District Court Eastern
District of California

U.S. District Court Northern
District of California

U.S. District Court Southern
District of California

U.S. Court of Appeals, Ninth
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EDUCATION

University of San Francisco
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University of California,
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AWARDS & AFFILIATIONS

PARMA

ABAG

Big C Society, Executive
Committee, Board of
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Berkeley

San Francisco Bar Association

Super Lawyers, 2013-2016



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Danielle Kono Lewis is a Partner in Selman Breitman's San Francisco office and is a member of the firm's Public Entity and General Liability practice groups. She represents public and private individuals and entities at both the federal and state levels, in matters involving municipal liability defense, employment, Americans with Disabilities Act, general liability, and business litigation. Danielle's clients include public entities and employees, as well as private companies. She also defends insureds in disputes involving third-party claims.

Danielle's extensive experience informs her proficiency in evaluating complex issues, investigating and assessing government tort claims, and defending cases through trial and on appeal. She works closely with clients, city attorneys, city managers, and city councils to manage their risk, to create solutions for present issues, and to provide advice and counsel to develop strategies to avoid potential future problems.

Danielle is called upon by clients and the Association of Bay Area Governments (ABAG) to give presentations on various subject matters relating to claims and issues impacting public entities, including those specifically relating to dangerous conditions of public property, roadway design, detention and arrest, search and seizure, and use of force. She has been given the top rating of "AV Preeminent" by *Martindale-Hubbell*, and has also been recognized as a Northern California Super Lawyer/Rising Star 2013-2015, along with many other accolades.

Danielle is originally from Santa Cruz, California, and presently resides in San Francisco with her husband and their two young children.

BAR ADMISSIONS

California, 2001

U.S. Supreme Court

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U.S. District Court Southern
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U.S. Court of Appeals, Ninth
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EDUCATION

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Administrative Law Review,
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San Diego
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Departmental Honors

AWARDS &

AFFILIATIONS

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San Francisco Bar Association

American Bar Association

Super Lawyers, 2013-2015