



# Government Immunity Act of Utah (Updates)

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# Kerr v. Salt Lake City, 2013 UT 75

August 21, 2007:

City received a call from the hotel adjacent to the sidewalk.

location from west edge (in.)	12	24	36	48	60	72
sudden elevation change (in.)	1.0	1.0	.75	.75	1.0	.75





August 28, 2007:

City generated a Commercial Property Estimate according to its programs and policies.

DEPARTMENT OF PUBLIC SERVICES  
SALT LAKE CITY  
Concrete Division



ESTIMATE DATE: Aug 28, 2007  
EXPIRATION DATE: Sep 27, 2007  
Metropolitan Inn  
524 S West Temple  
SALT LAKE CITY, UTAH 84101

Estimate Number: ES 23008

THESE PRICES ARE BASED ON  
CURRENT ENGINEERING PRICES  
AND ARE SUBJECT TO CHANGE.

Estimate Type - COMMERCIAL PROPERTY ESTIMATE  
( 07 / 08 )

Estimate for replacement of deteriorated concrete under the COM program.

**SIDEWALK**

78 Sq Feet 4" Sidewalk Replacement @ \$7.00 = \$546.00

PROPERTY OWNER'S PAY THIS AMOUNT: **\$546.00**

Due to high demand and limited funding for the 50/50 Concrete Replacement Fund, we must confirm city funding availability for this year and receive your payment in full before we schedule your project. Please call our office at 535-6974 to verify availability of city funding and make arrangements for us to pick up your payment. As soon as your payment is deposited, we will schedule your project. Please make check payable to Salt Lake City Treasurer. If you have any further questions, please phone Robert Beard at 535-6974, 7:30-9:00 AM weekdays.

Please note: THIS PROGRAM IS VOLUNTARY AND THIS ESTIMATE IS NOT A BILL.

THE WORK CAN BE SCHEDULED AND ACCOMPLISHED WITHIN ONE YEAR.

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Return this portion of the Estimate with your check.

**Job Address:**  
Metropolitan Inn  
524 S West Temple  
SALT LAKE CITY, UTAH 84101

COMMERCIAL PROPERTY ESTIMATE  
( 07 / 08 )

EST NUMBER: ES 23008  
EXPIRATION DATE: Sep 27, 2007  
PROPERTY OWNERS COS1: 3546.00

**Mailing Address:**  
Metropolitan Inn  
524 S West Temple  
SALT LAKE CITY, UTAH 84101

SLCCKERR  
000001



August 29, 2007:

Mr. Kerr tripped on the sidewalk and was injured.



KERR 0055





# Motion for Summary Judgment

City did not have notice of a dangerous condition or sufficient time to remedy the condition.

City entitled to discretionary function governmental immunity.





# Undisputed Facts:

1. City conducted on-site studies of its overall sidewalk network. Studies formed basis for briefing papers.
2. The papers were discussed and evaluated by high level City officials, including the Mayor's office and the Salt Lake City Council.



# Undisputed Facts:

3. The City exercised its expertise in maintenance of the public way in a reasonably safe manner.
4. It engaged in collaborative decision-making and analysis of safety factors, while balancing financial and practical considerations.



MSJ Denied.

Court held that discretionary function immunity does not apply to a dangerous condition.



Laney v. Fairview City, 2002 UT 79 (height of power lines)

Keegan v. State, 896 P.2d 618 (Utah 1995) (interstate improvements)

Duncan v. Union Pac. Railroad, 842 P.2d 832 (Utah 1992) (railroad crossing upgrades)



# First Trial

City granted directed verdict at close of plaintiff's case. Plaintiff failed to introduce evidence that the City was on notice of a dangerous condition or that it had a sufficient amount of time to remedy or repair the sidewalk.



Trial Court grants new trial.



# Second Trial

Jury verdict in favor of plaintiff.

\$125,000 pain and suffering  
+ \$9,000 medical.

# What did the jury say about the case?

Liability – City was 100% liable because Mr. Kerr wasn't skipping, he wasn't drunk, and he wasn't doing anything irresponsible.







# What did the jury say about the case?

Sidewalk should have been fixed according to City's Ordinance defining defective concrete as a displacement that is greater than  $\frac{1}{2}$  inch.

# What did the jury say about the case?

Notice – Telephone call from hotel employee constituted notice to the City.



The jurors said that if the City had done something to warn the public, then they may have found differently.

Also, they believed that the estimate for repair was too high.

# Amount of Award

Jury said they wanted to send the City a message.

They discussed a verdict in the range of \$50,000 to \$150,000. Decided on \$125,000.



All agreed they wanted to send the  
City a message and make it “sting.”

# Biggest factors in jury's decision


The City failed to maintain the sidewalk in a safe condition.

The City failed to warn the public of the condition after it was on notice.

The sidewalk still wasn't fixed at time of trial.



Immunity analysis.

- 
1. Does the activity involve a governmental function entitled to blanket immunity under Utah Code Section 63G-7-201?


Parties agreed the City was immune.






2. If the activity is a governmental function, does a different section of the Immunity Act waive immunity?

Parties also agreed the immunity was waived.




3. If immunity has been waived, is there an exception to the waiver which acts to preserve immunity?

City argued that the exception to the waiver was discretionary function immunity.



Whether the alleged injury “arises out of, in connection with, or results from: (a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused.” Utah Code § 63G-7-301(5)(a).



¶16 Because all cities must decide how to allocate scarce public funds to maintain sidewalks, Salt Lake City's interpretation of the discretionary function exception would completely negate the explicit waiver of governmental immunity for defective or dangerous sidewalks. For this reason alone, we must reject Salt Lake City's broad governmental immunity claim.

# Discretionary Function Exception 4

## Part Little Test.

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

No dispute.

# Discretionary Function Exception 4

## Part Little Test.

2. Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

Dispute.

# Discretionary Function Exception 4

## Part Little Test.

3. Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

Dispute.

# Discretionary Function Exception 4

## Part Little Test.

4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

No Dispute.



# City Argued:

Requiring the City to immediately replace any concrete upon request, without regard to funding, staff, equipment and material availability; the safety of the site at issue; or the benefit to the adjacent property owner, would make it impossible for the City to realize the governmental objective of preserving the safety of the overall sidewalk network and the public way within its fiscal means.



# Court Held:

The decision not to repair the sidewalk was not essential to its program of building and maintaining sidewalks.

# City Argued:

Over 800 miles of concrete sidewalk.


Engineering expertise, analysis of safety factors for public way access for pedestrians, and issues of available funding.

Discussing and weighing the options at all levels of City government demonstrates that the City's policy considerations merit immunity.



# Court Held:

The decision was operational.





¶ 26 The city's policies also allowed—indeed promoted—horizontal saw cutting to eliminate tripping hazards for displacements less than one and a quarter to one and a half inches.

The displacement at issue here, which ranged “from one inch down to three-quarters of an inch,” qualified for such a repair. Thus, the decision by a city employee not to directly remedy the sidewalk defect is a classic operational determination—that is, a decision implementing the existing sidewalk maintenance policy.




No evidence in record that this displacement qualified for saw cutting.



New precedent: an appellate court may not review an order granting a new trial where a jury did not enter a verdict in the first trial.





¶ 37 A new trial is “akin to a reconsideration of the trial court’s prior directed verdict ruling, placing the litigants in the same procedural position as if the prior aborted trial had never occurred.”

(J. Lee dissents)




Is discretionary function a viable defense in sidewalk cases?



Judge Kelly granted summary judgment in *Clemente v. Salt Lake City* (March 5, 2014).

# Distinguished From Kerr:


- \* In Clemente, plaintiff alleged that not on City call log from four years before the trip and fall constituted notice.
- \* The call log indicated a complaint about the entire south side of North Crest Drive, the road on which plaintiff fell.

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- \* All displacements eligible for saw cutting were taken care of six months before the call.
  - \* The City employees exercised no discretion and merely followed the policies and programs put in place by the City.



Is discretionary function immunity  
worth pursuing?

Are trip and falls worth defending?



Other case law updates on  
immunity (and beyond).

*Francis v. Utah Div. of Wildlife Resources,*  
2013 UT 65, 321 P.3d 1089 (2013)

Camper was killed by a bear while camping with his family in American Fork Canyon. State argued it did not owe camper a duty and that the natural condition exception to the Immunity Act precluded liability.



Utah Supreme Court held that the State owed a duty to the camper and that the bear was not a “natural condition” on publicly owned or controlled land within meaning of the Governmental Immunity Act of Utah.

# SB 250 Public Duty Doctrine Amendments (Bramble)

Provides that a general duty that a governmental entity owes to the public does not create a specific duty to an individual member of the public unless there is a special relationship between the governmental entity and the individual member of the public.

Amends Utah Code § 63G-7-202.

# HB 293S01 Governmental Immunity Waiver Amendments (McKell)

Bill provides that Governmental Immunity is not waived for injuries related to the activity of wildlife that arises during the use of a public or private road.

Amends Utah Code § 63G-7-301.

# Torrie v. Weber County, 2013 UT 48, 309 P.3d 216

A law enforcement officer engaged in high speed pursuit of a suspect owes a statutory duty of care to a fleeing suspect. Reverse and remand on negligence claim— Utah Supreme Court only decided that there was a duty.

# HB 20S02 Emergency Vehicle Operator Duty of Care Revisions (Dee)

Provides that an operator of an emergency vehicle owes no duty of care to a person who is a suspect in the commission of a crime, if that individual is fleeing from law enforcement, and that no duty of care is owed to a passenger in such a vehicle unless the passenger is being held involuntarily. Amends Utah Code § 41-6a-212.

# SB 267S01 Governmental Immunity Act Amendments (Weiler)

Provides that if a claimant files a Notice of Claim timely, but with the wrong jurisdiction, the Claimant has an additional 30 day extension of time to discover that mistake and file that claim with the correct governmental entity.

Amends Utah Code § 63G-7-401.

*Jenkins v. Jordan Valley Water Conservancy  
Dist.*, 2013 UT 59, 321 P.3d 1049 (2013), *vacating*  
2012 UT App 204, 283 P.3d 1009 (2012)

Court of Appeals decision worth  
reading (although vacated) because  
analysis of “governmental function.”