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Lewis Duncan, individually and as personal representative of the Estate of PATRICK DUNCAN, deceased, et al, v. Union Pacific Railroad Company, the State of Utah, Paul Kleinman : Brief of Respondent

Utah Supreme Court

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BRIEF

900233

IN THE SUPREME COURT OF THE STATE OF UTAH

LEWIS DUNCAN, individually and
as personal representative of
the Estate of PATRICK DUNCAN,
deceased, et al.,

Plaintiff,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation; THE
STATE OF UTAH; PAUL KLEINMAN;
and DOES 1 through 100,
inclusive,

Defendants.

Case No. 900233

BRIEF OF RESPONDENTS STATE OF UTAH

Appeal from the Decision of the Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Estate of Patrick Duncan, deceased
JASON P. DUNCAN, a minor by and through his Guardian Ad Litem
ALICE DUNCAN
NORREN DUNCAN
MICHAEL DUNCAN
TIM DUNCAN
DEVIN DUNCAN
BRIEN DUNCAN
MICHELLE BOWERS, individually and as personal representative of
the Estate of Jeffrey Bowers, deceased
JUDSON BOWERS
FLORENCE HANSON
SHELLY BOWERS
SHERRY BOWERS
MONICA HENWOOD, individually and as personal representative of
the Estate of Ramon Henwood, deceased
PHYLLIS HENWOOD
OWEN HENWOOD

DEFENDANTS/RESPONDENTS

UNION PACIFIC RAILROAD COMPANY, a corporation
PAUL KLEINMAN
THE STATE OF UTAH
DOES 1 through 100, inclusive

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JURISDICTION OF THIS COURT

Defendant State of Utah (the "State") adopts plaintiffs' statement concerning the jurisdiction of this court for review of the decision of the Utah Court of Appeals by a grant of Plaintiff's Petition for a Writ of Certiorari.

STATEMENT OF ISSUES

The State accepts and adopts plaintiffs' statement of the issues.

DETERMINATIVE STATUTES AND RULES

The following statutes and rules are believed to be determinative of the issues presented above:

Utah Code Ann. Sec. 54-4-14 through 15.4

Utah Code Ann. Secs. 63-30-1 through 10

23 U.S.C. § 409

Rule 56(f), Utah Rules of Civil Procedure

The contents of the cited authority are fully set forth in the Addendum to this Brief in accord with Rule 24(f), Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

The State adopts plaintiffs' statement of the nature of the case and incorporates by reference the exceptions and/or supplements to plaintiffs' statement of the course of the proceedings below made by Defendant Union Pacific Railroad Company in its Brief at pages 2-5, specifically items numbered 1, 2, 4.

In addition, the State makes the following supplement to the plaintiffs' and the Railroad's statement of the course of the proceedings below:

Affidavits submitted by UDOT's Surveillance Team

Plaintiffs suggest that automatic crossing gates had been recommended by UDOT prior to the Duncan accident but that installation was postponed until Federal funding became available. This mischaracterizes the actual sequence of events and the process for obtaining approval for upgrades. The uncontradicted affidavit of Ross D. Wilson states that the surveillance team decided to recommend that gates and signals be installed at the crossing at such time as federal funding became available and it was not the intention of the team that approval for upgrading be sought immediately, or that federal funding be sought for the Droubay crossing ahead of all other crossings for which the surveillance team had then recommended improvement, but for which federal funding had not yet been available. It was not until 1983, after this accident and after the Federal Highway Administration standards had been changed, that there was a sufficiently high accident prediction rate to warrant application for federal funding.

Disposition of the Court Below

Plaintiffs assert that the District Judge upheld the State immunity because the determination as to enhancement of warning devices was the exercise of a discretionary function, and thus trivialize the Court's ruling. The Court did not discuss "discretionary function" in terms of a simple decision whether to enhance warning devices. District Judge Hanson actually held that:

[t]he process is far beyond the perfunctory decisions that government officials may make on a day-in and day-out basis, which are not entitled to protection as discretionary decisions. The process of evaluation involved here embodies the classic elements of a discretionary function, to wit: balancing various needs of differing railroad crossings throughout the state, weighing competing interests for available funding, [and] balancing potential risk versus dollar and manpower available. (Memorandum Decision, p.7; R. at 482)

The District Court obviously acknowledged all of the classic elements of a discretionary function and found them to exist in this instance.

Plaintiffs also state that Judge Bullock, in writing the opinion of the Utah Court of Appeals, assumed plaintiffs had stated a prima facie case of negligence. In footnote 14, Judge Bullock specifically stated that the court merely presumed for purposes of argument that plaintiffs had stated a prima facie case of negligence. (790 P.2d 600, n.14)

STATEMENT OF FACTS

The State adopts and incorporates by reference the corrections and additions to the plaintiffs' Statement of Facts set forth in the Brief of Union Pacific Railroad at pages 5-12, with the following supplemental facts:

1. The three warning signs located on the approach to the crossing were reflectorized and visible at night from one-half mile to one mile away depending on whether low-beam or high-beam lights were used. (R. at 373). The speed limit on Droubay Road was 55 m.p.h. (R.431). At a sight distance of 1/2 to one mile from the warning signs, and an additional 305 feet to the track, a vehicle travelling at 55 m.p.h. would have more than ample time to stop before reaching the track (R.340-343). These calculations do not take into consideration the visibility of the train's headlights and flashing yellow strobe light or the audible warning of the train's whistle and bell, although the investigating officer testified by affidavit that tests conducted on evenings subsequent to the accident indicated that headlights on westbound trains could be seen for a distance exceeding two miles, and could be readily observed for several minutes before trains reached the crossing. (R.372)

2. The State inspection team did not recommend in 1981 moving signals from Bauer Road to the Droubay Crossing. While the team considered moving signals from the Bauer crossing (which

had been closed to the public) to the Droubay crossing, inspection of the signals showed them to be outdated substandard, and moving the old signals would have been almost as expensive as installing new ones. (R. 406)

3. Plaintiffs mischaracterize the approval and funding process for installation of improved warning devices. The State has the responsibility to apportion the costs of active warning devices at public crossings between railroads and the governmental entities with jurisdiction over the roads. The devices are funded 90% from federal funds and 10% from the local entity with jurisdiction over the road in question. (R. 407, 408) Approximately 15% of the 1,373 public at-grade crossings in Utah have active warning devices. Federal funding was generally available for only eight to ten projects each year. (R. 408) Thus, the State developed and used a Hazard Index Rating, approved by the Federal Highway Administration, as one means of determining the priority of a crossing for upgrading. (R. 408) The State uses an inspection team which, with railroad and local government representatives, performs on-site inspections of crossings throughout the state, using the Hazard Index. (R. 407) In 1981 The State surveillance team inspected the Droubay crossing, applied the Hazard Index Rating system, and found that the Droubay crossing would not, as compared with other crossings, qualify for federal funding that year but should be considered

for federally funded improvement at some time in the future. (R. 404, 405)

4. Making determinations regarding the existing, or predicted, hazards at railroad crossings was only part of the discretionary function performed by the Utah Department of Transportation through its crossing inspection and review process. (R. 405, 351) An equally important discretionary function was an analysis of all inspection team findings in light of available federal funding to produce a priority list of crossings where limited federal funds should be used. (R. 404, 405) The memorandum of Ross D. Wilson (R. 351), in awareness of the requirement of establishing priorities, indicated that the Droubay crossing was not of sufficient priority to qualify for federal funding. It was not until 1983, after the subject accident, using a newly approved FHWA "accident prediction rate" as an additional factor, that the Droubay crossing reached sufficient priority to be recommended for federal funding of gate and signal installation. (R. 402, 403)

SUMMARY OF ARGUMENTS

AT POINT I

The District Court and the Court of Appeals were correct in holding that the activities engaged in by the State of Utah were governmental and constituted discretionary functions and as such are protected by the Utah Governmental Immunity Act. This

decision is in accord with Utah Supreme Court precedent,
legislative intent and sound public policy.

AT POINT II

The recognition of immunity for discretionary functions is
mandated by the Doctrine of Separation of Powers and sound public
policy.

AT POINT III

The immunity issue aside, the District Court and the Court
of Appeals correctly held that the Droubay crossing was not
"extra-hazardous" as a matter of law. For liability to exist for
a crossing mishap, there must be something about the crossing
that creates a hazard to motorists greater than the inherent
hazard presented by the mere fact that the railroad and the
street intersect at grade. There are no facts in this case which
support the assertion that the crossing was more than ordinarily
hazardous.

ARGUMENT

POINT I

THE STATE'S ACTIVITIES COMPLAINED OF IN THIS ACTION ARE DISCRETIONARY AND IT IS IMMUNE

Sovereign immunity - the principle that the state cannot be
sued in its own courts without its consent - was a well-settled

principle of American common law at the time Utah became a state. Wilkinson v. State, 42 Utah 483, 492-93, 134 P. 626, 630 (1913).

The Utah Governmental Immunity Act, U.C.A., 1953, § 63-30-1, et seq., which became effective in 1966, reaffirmed governmental immunity "for any injury which results from the exercise of a governmental function," subject only to express statutory waivers, Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Governmental immunity exists if: (1) the injury resulted from the exercise of a "governmental function,"¹ and (2) immunity has not been otherwise waived by the Governmental Immunity Act.

Plaintiffs argue that recent cases expand the State's liability and that the immunity for discretionary functions which is retained by § 63-30-10(1)(a), is superseded by § 63-30-8, Utah Code Annotated, which states, in pertinent part:

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe or dangerous condition of any highway, . . . or other structure located thereon.

Plaintiffs cite Richards v. Leavitt, 716 P.2d 276 (Utah 1985) and Bigelow v. Ingersol, 618 P.2d 50 (Utah 1980), for the proposition that the Utah Supreme Court has held that the express immunity waiver of § 63-30-8 is not modified by discretionary

¹Defined as activity "of such a unique nature that it can only be performed by a governmental agency or that is essential to the core of governmental activity," Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1237 (Utah 1980)

function immunity provided by § 63-30-10(1)(a). Neither case so held. There is no case which expressly holds that § 63-30-8 stands on its own and is not qualified by § 63-30-10(1)(a), at least where, as in this case, the claim is premised on merely negligent conduct of governmental employees.

In Bigelow, the lower court held that the State of Utah was immune from suit where it was alleged that the state negligently designed traffic control lights at an intersection where an automobile collision occurred. In Bigelow, traffic lights had been improperly synchronized, resulting in a collision between a left-turning car in which plaintiffs were passengers and an oncoming vehicle. This Court held that although acts of the state in designing traffic control systems involve some degree of discretion, the design of this particular system did not involve the "basic policy making level" so as to render the state immune from suit. While this Court discussed the contention that § 63-30-8 was not modified by the discretionary function exception of Sub-Section 10, it did not so rule; the issue was never reached, the court simply holding that the designing of the improperly synchronized lights was not a discretionary function.

In Richards the plaintiff alleged that a city was negligent in allowing trees, shrubs, and other growth to obscure vision at an intersection and that it negligently failed to maintain a stop sign. The court held only that maintenance of traffic control

devices is a governmental function and dismissed plaintiff's complaint for failure to comply with the Notice requirements of the Governmental Immunity Act.

Plaintiffs also argue that the State's activities complained of in this action are "operational" not "policy-making", and therefore not discretionary, relying on Bigelow, supra, Richards, supra, and Bowen v. Riverton City, 656 P.2d 434 (Utah 1982). However, each of those cases involved the improper design or maintenance of traffic lights or signs, activities clearly "operational" and not discretionary.

This case, however, is controlled by Rocky Mountain Thrift Stores v. Salt Lake City, 784 P.2d 459 (Utah 1989); Gleave v. Denver & Rio Grande Western R., 749 P.2d 660 (Utah App. 1988); and Velasquez v. Union Pacific Railroad Company, 469 P.2d 5 (Utah 1970).

Velasquez is the seminal case in Utah dealing with the discretionary power of governmental entities in the installation of safety devices at railroad crossings. Velasquez was a passenger in a pickup truck involved in a crossing collision, and claimed the State erred in failing to require additional safety devices at the crossing. Affirming summary judgment in the State's favor on immunity grounds, the court found that the statutory directive prescribing the installation of "appropriate" safety devices, under Utah Code Ann. Section 54-4-14, indicated a

legislative intent to confer discretion on the responsible agency (at that time, the Public Service Commission). This court held that the statute gives the state the power to require a different safety device at the crossing in question, "but that does not mean that the plaintiff should recover simply because a better warning signal could or should have been installed." Id. at 6. Velasquez remains the law of this State.

In Gleave v. Denver & Rio Grande W. R.R. Co., 749 P.2d 660 (Utah 1988), the Court of Appeals outlined the history of the tests to determine governmental immunity. Gleave held that the regulation of public safety needs and the evaluation, installation, maintenance and improvement of safety signals or devices at railroad crossings is a governmental function, and in light of that holding went on to discuss whether UDOT's allegedly negligent failure to install different safety devices at the crossing in question was a "discretionary function" within the meaning of Utah Code Ann. § 63-30-10(1)(a). Holding in the affirmative, the court noted that the "discretionary function" exception was "intended to shield those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseeable ways from individual and class legal actions, the continual threat of which would make public administration all but impossible." Gleave, supra, citing Frank v. State, 613 P.2d 517, 520 (Utah 1980).

The Gleave court applied the analysis² of Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983), and found that the State's decision not to install certain safety devices at a railroad crossing was a "purely discretionary function within the meaning of U.C.A. Sec. 63-30-10(1)(a)." Gleave, supra, at 669.

Applying the Little test, the Court of Appeals held: First, the basic governmental objective involved in "installing, maintaining, reconstructing, and improving" safety devices is the consistent promotion of public safety, a basic government objective. Second, the evaluation of crossings and assignment of priorities for upgrades is essential to the realization of the

²(1) Does the questioned act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(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?

(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?

(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?

Id. 667 P.2d at 51.

protection of public safety, especially in light of limited funds. Third, UDOT exercises "basic policy evaluation, judgment, and expertise" when evaluating railroad crossings for safety signal improvements and when deciding which crossings should have upgraded safety appliances first. In applying UDOT's safety policy, UDOT's surveillance team performs on-site inspections and weighs the numerous factors relating to crossing safety. The team consists of transportation experts who exercise their collective judgment and expertise in making their evaluations of the relative dangerousness of railroad crossings in Utah, taking into consideration their physical characteristics and configurations, the volume and type of vehicular and train traffic, and other relevant factors. Fourth, Utah Code Ann. Sec. 54-4-14 et seq. (1990) empowers UDOT to supervise and regulate the safety of all the State's railroad crossings, including the authority to provide for the installing, maintaining, reconstructing, and improving of safety devices and signals there. UDOT clearly has the legal authority to use the monies available for safety signal improvement at the most dangerous crossings first, which means that other less dangerous crossings, such as this one, must await their turn for improvement.

In Rocky Mountain Thrift, supra, the Utah Supreme Court's most recent decision dealing with discretionary functions, plaintiffs were owners of commercial properties along North

Temple Street. They brought an action against several governmental entities for damages caused by defendants' alleged negligent mismanagement of flood waters during the 1983 spring runoff. The trial court granted defendants' motions for summary judgment based on the Utah Governmental Immunity Act. Plaintiffs appealed and this court, while remanding on other grounds, upheld the trial court's decision that the construction, operation, and maintenance of the storm system was a governmental function. In distinguishing between the operation of a sewer system [which has been held not to be a governmental function] and the operation of a storm drain system, the trial court held, and this court agreed:

The maintenance and operation of a city-wide storm drainage system may appear similar to that applied to a city-run sewage system, but on closer examination they are quantitatively and qualitatively distinct. First, operation of a flood control system in the Salt Lake valley requires a breadth of coordination that cannot reasonably be attained by private parties. Further, no private parties can deal with flood control, as they might sewage disposal, on an individual basis. Finally, the immediate threats posed to life and property by uncontrolled flooding make such operations uniquely governmental, almost equivalent to police and fire protection. This Court therefore finds that all activities relating to flood control management in City Creek Canyon are governmental functions for the purposes of construing governmental immunity under the Immunity Act. Rocky Mountain Thrift, supra, at 462.

This court then went on to a discussion of whether immunity had been expressly waived, and the "discretionary function" exception to any waiver of immunity. This court again agreed with the trial court that the design, capacity, and construction of the City Creek drainage system involved a basic governmental policy, program, or objective of flood control to protect life and property, and that defendants' acts and decisions required the exercise of basic policy evaluation, judgment and expertise:

The design of the City Creek drainage system is a uniquely discretionary function. Such design is the product of a balancing of policy factors including interpretation of data relevant to climate, rainfall, rates of erosion, etc., the development of appropriate design parameters and the economic resources that a community is willing to devote to a project providing a necessarily finite degree of protection. . . . These are precisely the activities for which waiver of immunity is denied. Id. at 463.

This Court in Rocky Mountain Thrift applied the analysis approved in Little, and followed in Gleave, to determine whether an act or omission was a discretionary function. Like the drainage system in Rocky Mountain Thrift, a decision relating to the improvement of the railroad crossing in this case is a uniquely discretionary function. The decisions of the State relating to upgrading the crossing requires a balancing of policy factors including interpretation of data relevant to locale, traffic, accident history, accident prediction, and the evaluation of economic resources that a community is willing to devote

to a project providing a necessarily finite degree of protection. These are precisely the types of functions for which immunity must be retained, as recognized by Rocky Mountain Thrift, Gleave, and Velasquez.

Velasquez, Gleave, Rocky Mountain Thrift and Duncan all fall into a category completely distinct from the situations arising in the cases cited by plaintiffs. Richards, Bigelow, and Bowen all involve design or maintenance of traffic signals or signs, while Velasquez, Gleave, Rocky Mountain Thrift and Duncan all involve policy decisions dependent on limited funds and based on numerous factors affecting large numbers of people in a myriad of unforeseeable ways. Evaluating all of the approximately 1,373 railroad crossings in the state and assigning priorities for crossing upgrades is essential to the realization of the protection of public safety, especially in light of the fact that there are not unlimited funds available to upgrade all needy crossings at once. The State has, and must have, discretion to compare each crossing in the state with all other equally hazardous or more hazardous crossings for the allocation of limited funds. This key function goes far beyond mere responsibility for repair of a fallen or obscured sign.

The activities of the State in prioritizing crossings for upgraded warning devices are clearly discretionary and the

immunity provisions of the Governmental Immunity Act protect the State when it is involved in such activities.

POINT II

IMMUNITY FOR DISCRETIONARY FUNCTIONS IS MANDATED BY SOUND PUBLIC POLICY AND THE DOCTRINE OF SEPARATION OF POWERS.

The Utah Supreme Court "has followed the lead of cases interpreting the Federal Tort Claims Act by distinguishing between those decisions occurring at a broad, policy-making level and those taking place at the implementing "operational" level." Frank v. State, 613 P.2d 517 (Utah 1980).³

The Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1964) and the Utah Governmental Immunity Act § 63-30-10(1)(a) (1987) provide nearly identical provisions excepting the government from liability for injuries arising out of discretionary acts. Federal courts, in discussing the discretionary functions protected by the Federal Tort Claims Act, have pointed to the

³Thus, this court may properly look to decisions of the Federal Courts which have interpreted the Federal counterpart to § 63-30-10, 28 U.S.C. § 2680(a), particularly as it has been applied to highway design cases. The following cases have held activities similar to those here involved to be discretionary, and the government immune: ARA Leisure Services v. U.S., 831 F.2d 193 (9th Cir. 1987)(guardrail); Bowman v. U.S., 820 F.2d 1393 (4th Cir. 1987)(guardrail); Patton v. U.S., 549 F.Supp 36 (W.D. Missouri 1982)(speed limit, design of curve); Miller v. U.S., 710 F.2d 656 (10th Cir. 1983) Cert.den., 104 S.Ct. 352 (approval of plans, guardrail, shoulder width, warning signs); Wright v. U.S., 568 F.2d 153 (10th Cir. 1977)(location and construction of bridge and approach roads).

separation of powers doctrine as a proper foundation for such an exception to waivers of immunity.

Dalehite v. United States, 346 U.S. 15, 97 L.Ed 1427, 73 S. Ct. 956 (1953) outlined the boundaries of discretionary immunity under the Federal Tort Claims Act and recognized the separation of powers doctrine as a basis for the discretionary function exception.

In following the Dalehite decision, the U.S. Supreme Court held that the discretionary function exception was plainly intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.

This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." (citations omitted)

U.S. v. S.A. Empresa De Viacao Aerea Rio Grandense, 104 S.Ct. 2755, 2765 (1984).

Where the discretionary function provision of the Governmental Immunity Act conflicts with other provisions of the Act, the discretionary function provision should control. Utah

law calls for a harmonizing of conflicting statutory provisions, indicating that the provisions "should be considered together and it is proper to examine into the background and purpose as well as to the language of the statute to discover what the legislative intent was as to which should have priority." Worthen v. Shurtleff & Andrews, Inc., 426 P.2d 223, 225 (Utah 1967). This investigation into background, purpose and intent takes into consideration the relative weight of the arguments underlying each of the conflicting statutory provisions. The discretionary function provision should be given priority over other more general provisions.

There has historically been a preference for specific statutory provisions over general provisions. Williams v. Public Service Com'n of Utah, 754 P.2d 41 (Utah 1988). This court has discussed statutory construction in terms of the general purposes statutes are intended to serve:

[S]tatutes are necessarily stated in general terms. . . . [O]ften there is neither the prescience to foresee, nor sufficient flexibility of language to cover with exactitude, all of the exigencies of life which may arise. For this reason one of the fundamental rules of statutory construction is that the statute should be looked at as a whole and in the light of the general purpose it was intended to serve; and should be so interpreted and applied as to accomplish that objective. In order to give the statute the implementation which

will fulfill its purpose, reason
and intention sometimes prevail
over technically applied
literalness.

Andrus v. Allred, 404 P.2d 972, 974 (Utah 1965).

The discretionary function exception should prevail over other more general statutory provisions such as § 63-30-8 or § 63-30-9 which broadly waive immunity for "any injury" caused by defective "highways, bridges or other structures" or "public building, structure, or other public improvement," respectively. While § 63-30-10(1)(a) in and of itself may not provide greater specificity than other provisions of the Act, § 63-30-10 with its elaborate system of waivers for negligence and its detailed set of exceptions to waiver does provide a more specific statutory scheme for determination of governmental immunity.

To hold that there is no immunity where the State engaged in a discretionary function would require judicial second guessing and would defeat the purpose of the Governmental Immunity Act, which is to insulate governmental entities from liability for actions taken for the over-all public good and which require policy-making rather than operational decisions. To abrogate immunity in such circumstances simply because a railroad crossing is dangerous would require the State to make safe every railroad crossing in the state, regardless of locale, traffic, accident history or accident prediction. Indeed, the only way to insure a

perfectly "safe" railroad crossing would be to construct an overpass, a fiscal impossibility.

There is, obviously, a broad spectrum of governmental activities relating to highways, from repairing chuckholes to deciding to build multi-lane freeways, to prioritizing the improving of railroad crossings. The failure to repair a chuckhole does not require any policy-making analysis and, presumably, is not protected by discretionary function immunity. On the other hand, the decision to build a multi-lane freeway which would admittedly be "safer" than the existing two-lane road, requires the balancing of policy factors including interpretation of data relevant to locale, traffic, accident history, accident prediction, and allocation of economic resources; clearly a discretionary act.

The fact that a road, or a railroad crossing, can be made safer does not make the road or crossing defective. Every railroad crossing, by its very nature, is dangerous.⁴ However, as the Court of Appeals pointed out,

it is obvious that every railroad crossing is hazardous, but, since it is not practicable to eliminate all railroad crossings, the simple existence of a railroad crossing is not in itself a breach of a duty of care.

⁴"Dangerous" means "exposing to or involving danger; able or likely to inflict injury." In discussing synonyms, Webster says "dangerous applies to something that may cause harm or loss unless dealt with carefully." Webster's Ninth New Collegiate Dictionary.

Much of everyday life presents hazards; driving or walking along a street are hazardous, and so are stairs, electricity, and many other things, but we tolerate those hazards because of the impracticability of eliminating them."

Duncan v. Union Pacific Railroad Company, 790 P.2d 595, 598 (Utah App. 1990). To hold the UDOT liable in the instant case would allow judicial second-guessing, with 20-20 hindsight, of functions entrusted by law to the agency of the executive branch possessing the requisite expertise - an unwise and unwarranted breach of the doctrine of separation of powers.

POINT III

THE LOWER COURTS APPROPRIATELY
FOUND THAT THE CROSSING WAS NOT
"EXTRA-HAZARDOUS" AS A MATTER OF
LAW.

Both the District Court and the Court of Appeals found that the crossing was not "extra-hazardous" as a matter of law, and therefore no duty existed to take added precautions.

Plaintiffs argue that the lower courts should have considered the affidavit of their "expert," Robert Crommelin, who concluded that the crossing warranted additional safeguards, specifically automatic crossing gates.

In considering the State's Motion for Summary Judgment, Judge Hanson found that the Crommelin affidavit could not be considered because it was based on inadmissible evidence and misinformation; but more importantly, the crossing did not meet

the Supreme Court test as outlined in Bridges v. Union Pacific Railroad Co., 488 P.2d 738 (Utah 1971), and followed in Hobbs v. Denver & Rio Grande Western R.R., 677 P.2d 1128 (Utah 1984), that there must be something unusually hazardous about the crossing.

The District court ruled that even if the affidavit were considered, the case should be dismissed on its merits. The Court of Appeals addressed the confusion concerning the standard of care in making railroad crossings safe for motorists to cross. The confusion arises from the use of the words "more than ordinarily hazardous," which were used in applying the standard of care in two Utah cases, Bridges v. Union Pacific R.R. Co., supra, and English v. Southern Pacific Co., 13 Utah 407, 45 P.47 (1896).

These words were never intended to impose a standard of care higher than ordinary care, the degree of care exercised by a reasonable person under the circumstances. . . . In determining what is reasonable under the circumstances of a railroad crossing, it is obvious that every railroad crossing is hazardous, but, since it is not practicable to eliminate all railroad crossings, the simple existence of a railroad crossing is not in itself a breach of a duty of care. . . . [T]he question is not whether a hazard existed, but rather whether, under prevailing community standards the defendant should bear the responsibility to discover and ameliorate a hazard, in light of the practicability of doing so and the costs and benefits to society of requiring the defendant so to act. In the case of railroad crossings, the cost of eliminating the hazard, such as by installing overpasses at all railroad crossings, including rural ones, does not

warrant a duty of care so rigorous that simply having a railroad cross a street is tortious. Rather, for a railroad to be liable for a crossing mishap, there must be something about the railroad's right of way that creates a hazard to motorists greater than the hazard presented by the simple fact that the railroad and the street intersect. Duncan, supra, at 598-599.

The Bridges court held that "there must be evidence to indicate that the crossing was more than ordinarily hazardous, i.e., there must be something in the configuration of the land, or in the construction of the railroad, or in the structures in the vicinity, or in the nature or amount of the travel on the highway, or in other conditions, which renders the warning employed at the crossings inadequate to warn the public of danger." 488 P.2d at 739.

The kinds of obstructions, traffic problems and "other conditions" which might render a crossing extra-hazardous are described in earlier cases decided by this Court. In Pippy v. Oregon Short Line R.R., 11 P.2d 305 (Utah 1932) and Toomer's Estate v. Union Pacific R.R., 239 P.2d 163 (Utah 1951), the crossings were found to be more than ordinarily hazardous because (1) the railroads had created obstructions to view of the oncoming trains on an adjacent track right up next to the crossing; (2) there were electrical signals present at the crossings which the drivers relied upon and which failed to work; (3) the trains were speeding greatly in excess of a city-imposed speed limit;

(4) there was excessive noise being emitted by adjacent railroad operations which tended to drown out any warning signals being emitted by the oncoming train; and (5) there were other circumstances which the courts held tended to confuse the motorist into thinking it was safe to cross when it was not, or made it impossible for the drivers to safely make such a determination.

The determination of whether a crossing is extra-hazardous is, in the appropriate case, initially for the Court to make as a matter of law. In Bridges it was noted that the Court may "authorize" a jury to consider the extra-hazardous crossing issue only after the court first determines that there is probative, admissible evidence showing the existence of such a crossing. If the Court concludes that there is no such evidence, it may rule that the crossing is not more than ordinarily hazardous as a matter of law. Id. at 488 P.2d 739. After reviewing the file, Judge Hanson found that the photos and investigating officer's tests and observations all showed that the surrounding land in the area of the automobile's approach was flat, at least to the extent that approaching trains can be readily seen and observed by the driver of an automobile. There are no buildings or other structures in the area to divert a driver's attention, or to otherwise confuse. There are no lights or unusual noises to confuse or deceive an otherwise unsuspecting driver. There was nothing about the crossing that could provide notice to UDOT

personnel that the warnings which were there at the time of the accident were not adequate to warn the public. "While any railroad crossing can be hazardous, it is hard to imagine a crossing that presents a smaller hazard than the one in question before the Court." (Memorandum Decision at pages 10-11; R. 478-479).

The Crommelin Affidavit cannot properly be considered as probative evidence because it relies upon both false and inadmissible "facts" in reaching the conclusion that the crossing was extra-hazardous.

Crommelin relied on demonstratably false "fact" that "as many as 1,500 vehicles traversed the railroad crossing per day" (R. 189). The UDOT records clearly show that the 1,500 vehicles per day number was only an "expected" anticipated increase which never materialized. The actual count that Crommelin should have relied upon, as more specifically set forth in the Statement of Facts, was only 580 vehicles per day.⁵

The unreliability (and hence the inadmissibility) of the Crommelin Affidavit is underscored by its assertion that the Manual on Uniform Traffic Control Devices mandates that the railroad advance warning sign be placed at least 750 feet away

⁵Vehicular traffic volume is one of the key factors used in the Hazard Index.

from the crossing. The MUTCD neither mandates nor requires such sign placement.

While § 8B-3 of the Manual provides that such a sign is "normally" 750 feet or more in advance of the crossing in rural areas, that same section also states that placement of such a sign shall be in accordance with § 2C-3, which only suggests that in rural areas "warning signs should normally be placed about 750 feet in advance of the hazard or conditions," and goes on to note that warning signs may be placed as far as 1500 feet or as close as 250 feet depending upon the nature of the locale and the prevailing speeds. Section 2C-3 further provides:

The actual advance warning distance will be determined by two factors, the prevailing speed and the prevailing condition. These bear respectively on the time available to the driver to comprehend and react to the message, and the time needed by him to perform any necessary maneuver.

It should also be noted that the table found in § 2C-3 titled "a guide for advance warning sign placement distance" provides for distances for warning signs in areas where the posted speed is 55 miles per hour to be anywhere between 700 and 300 feet, with 450 suggested if it may be necessary for the driver to stop.

Implicit throughout the entire MUTCD is the notion that, while the manual provides standards and guidelines, it is not a

substitute for engineering judgment. One of the preliminary sections, § 1A-4, states that:

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this manual provides standards for design and application of traffic control devices, the manual is not a substitute for engineering judgment. It is the intent that the provisions of this manual be standards for traffic control devices installation, but not a legal requirement for installation.

Section 1A-5 also defines the words "shall" and "should." "Shall" means a mandatory condition whereas the word "should" means an "advisable usage, recommended but not mandatory." A review of the manual as it relates to the placement of the railroad crossing advance warning signs nowhere uses the word "shall," but only the word "should" and thus, at least as to distances that such signs are to be located in advance of the railroad crossing, there is no mandatory minimum distance.

Last but not least, Section 2C-3 provides that "the effectiveness of the placement of any warning sign should be tested periodically under both day and night conditions." In this case it is uncontradicted that, within a few days after the subject accident, the highway patrol undertook a nighttime evaluation of the crossing and the signs, including the advance warning sign and the crossbucks, and found them clearly visible at one mile away if the vehicles lights were on high beam. With

the lights on low beam, all of the signs were clearly visible one-half mile away (2640 feet) or more than three times the 750 foot distance which the Crommelin Affidavit claims the manual "mandated." There is, of course, nothing in the record to indicate that the driver of the plaintiff's vehicle should not have had his lights on high beam; if he had, he would have had a clear view of not only the advance warning sign, but also the crossbucks and the crossing itself at a distance seven times greater the 750 foot "minimum." Also, the stopping tests performed by the Highway Patrol clearly show that the lesser distance of 305 feet was more than adequate for reaction time and maneuvering to stop a vehicle travelling at 55 m.p.h.

Further, as noted by the District Court at p.9 of its Memorandum Decision (R. 450), placement of the sign at 305 feet as opposed to 750 feet could not possibly have been a proximate cause of the accident, because the undisputed facts show that plaintiffs totally ignored the warning signs which were clearly and readily noticeable at a distance of up to one mile (5,280 feet) away from the crossing. Plaintiffs offer no explanation of how placement of the advance warning sign an additional few hundred feet away from the crossing would have made any difference with respect to how the accident vehicle was operated as it approached the crossing.

Crommelin's reliance on the other accidents occurring at the crossing is also in error. Each of the accidents was totally dissimilar in its surrounding circumstances. Accordingly, if Crommelin's conclusion was based in any material degree on such an erroneous assumption, the conclusion is without proper foundation, and therefore, inadmissible.

In addition to the above described misstatements of foundational facts, the affidavit also improperly relies upon evidence which is statutorily inadmissible pursuant to 23 U.S.C. § 409 (Addendum). The obvious public policy intent of 23 U.S.C. § 409 is to promote candor between governmental officials and railroads regarding applications submitted by state and local governments for federal funds to enhance safety at railroad grade crossings. If highway officials and railroads must be concerned that information included in applications for federal funds will be used against them as "admissions" in damage suits based upon accidents at such crossings, such officials will be inhibited in making any such statements or applications or in preparing the underlying data used by the federal officials in passing upon such applications.

The use of the phrase "for any purpose" in 23 U.S.C. § 409 precludes the use of such reports by expert witnesses. In view of the remedial purpose for which the section was enacted, it would be extremely prejudicial to allow a party to get into

evidence through the "back door" of an expert's opinion what the statute prohibits from coming in as direct, factual evidence.

The Crommelin Affidavit relies, albeit erroneously, upon the UDOT reports in concluding that the crossing is extra-hazardous. There is no question that the UDOT reports reflect the results of an investigation which was undertaken to determine the appropriateness and feasibility of installing additional crossing warning devices through use of available federal funding. Accordingly, neither the reports nor any of the data contained therein can be relied upon either by way of evidence or argument, to support the contention that the crossing was extra-hazardous or that either of the defendants was negligent in failing to upgrade the crossing devices.

CONCLUSION

For the reasons stated above, the decisions of Judge Hanson and the Utah Court of Appeals granting summary judgment to the State of Utah should be affirmed. As a matter of law, the crossing in question is not extra-hazardous. The State's activity was exclusively governmental and its decisions discretionary. The responsibility of the State to study and compare various railroad crossings and prioritize them for improvement is a discretionary activity and entitled to the protection of the Utah Governmental Immunity Act.

RESPECTFULLY SUBMITTED this 17 day of January 1991.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of January, 1991, I delivered via United States mail, postage prepaid, four copies of Brief of Respondents State of Utah to each of the following:

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ADDENDUM

23 U.S.C.

§ 409. Admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying¹ evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170.)

¹ Probably should have a comma inserted.

28 U.S.C.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

54-4-14. Safety regulation.

The commission shall have power, by general or special orders, rules or regulations, or otherwise, to require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances including interlocking and other protective devices at grade crossings or junctions, and block or other system of signaling, and to establish uniform or other standards of construction and equipment, and to require the performance of any other acts which the health or safety of its employees, passengers, customers or the public may demand, provided, however, that the department of transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

54-4-15. Establishment and regulation of grade crossings.

(1) No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the Department of Transportation having first been secured; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The department shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

(2) The department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school buses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the department shall find that public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the department may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

(4) The commission shall retain exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section.

54-4-15.1. Signals or devices at grade crossings — Duty to provide.

The Department of Transportation so as to promote the public safety shall as prescribed in this act provide for the installing, maintaining, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state.

54-4-15.2. Signals or devices at grade crossings — Funds for payment of costs.

The funds provided by the state for purposes of this act shall be used in conjunction with other available moneys, including those received from federal sources, to pay all or part of the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in Section 54-4-15.1 at any grade crossing of a public highway or any road over the tracks of any railroad or street railroad corporation in this state.

54-4-15.3. Signals or devices at grade crossings — Apportionment of costs.

The Department of Transportation, in accordance with the provisions of Section 54-4-15, shall apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in Section 54-4-15.1 between the railroad or street railroad and the public agency involved. Unless otherwise ordered by the department, the liability of cities, towns and counties to pay the share of maintenance cost assigned to the local agencies by the department shall be limited to the funds provided under this act. Payment of any moneys from the funds provided shall be made on the basis of verified claims filed with the Department of Transportation by the railroad or street railroad corporation responsible for the physical installation, maintenance, reconstruction or improvement of the signal or device.

54-4-15.4. Signals or devices at grade crossings — Provision of costs.

The Department of Transportation shall provide in its annual budget for the costs to be incurred under this act.

63-30-1. Short title.

This act shall be known and may be cited as the "Utah Governmental Immunity Act."

63-30-2. Definitions.

As used in this chapter:

- (1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.
- (2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.
(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.
- (3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.
- (4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.
(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.
- (5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.
- (6) "Personal injury" means an injury of any kind other than property damage.
- (7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.
- (8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.
- (9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental enti-

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

63-30-5. Waiver of immunity as to contractual obligations.

Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Section 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles — Exception.

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective until July 1, 1990].

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard; or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement; or

(k) arises from any natural condition on state lands or the result of any activity authorized by the Board of State Lands and Forestry;

(l) arises out of the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous waste; or

(iv) emergency evacuations; or

(m) arises out of research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

1A-4 Engineering Study Required

The decision to use a particular device at a particular location should be made on the basis of an engineering study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation.

Qualified engineers are needed to exercise the engineering judgment inherent in the selection of traffic control devices, just as they are needed to locate and design the roads and streets which the devices complement. Jurisdictions with responsibility for traffic control, that do not have qualified engineers on their staffs, should seek assistance from the State highway department, their county, a nearby large city, or a traffic consultant.

1A-5 Meanings of “Shall,” “Should” and “May”

In the Manual sections dealing with the design and application of traffic control devices, the words “shall,” “should” and “may” are used to describe specific conditions concerning these devices. To clarify the meanings intended in this manual by the use of these words, the following definitions apply:

1. SHALL-a *mandatory* condition. Where certain requirements in the design or application of the device are described with the “shall” stipulation, it is mandatory when an installation is made that these requirements be met.
2. SHOULD-an *advisory* condition. Where the word “should” is used, it is considered to be advisable usage, recommended but not mandatory.
3. MAY-a *permissive* condition. No requirement for design or application is intended.

8B-3 Railroad Advance Warning Signs (W10-1, 2, 3, 4)

A Railroad Advance Warning (W10-1) sign shall be used on each roadway in advance of every grade crossing except:

1. On low-volume, low-speed roadways crossing minor spurs or other tracks that are infrequently used and which are flagged by train crews.
2. In the business districts of urban areas where active grade crossing traffic control devices are in use.
3. Where physical conditions do not permit even a partially effective display of the sign.

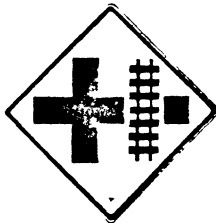
Placement of the sign shall be in accordance with Table II-1, Section 2C-3 and Sections 2A-21 to 2A-27, except in residential or business districts where low speeds are prevalent, the signs may be placed a minimum distance of 100 feet from the crossing. On divided highways and one-way roads, it is desirable to erect an additional sign on the left side of the roadway.

VIII-12 (c)
Rev. 5

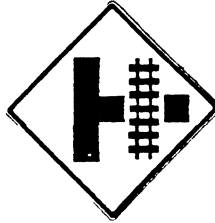
The W10-2, 3, and 4 signs may be installed on highways that are parallel to railroads. The purpose of these signs is to warn a motorist making a turn that a railroad crossing is ahead. Where there is 100 feet or more between the railroad and the parallel highway, a W10-1 sign should be installed in advance of the railroad crossing and the W10-2, 3, or 4 signs on the parallel highway would not be necessary.



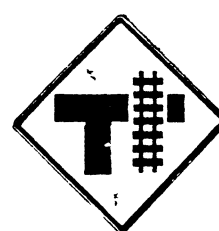
W10-1
36" Diameter



W10-2
30" x 30"



W10-3
30" x 30"



W10-4
30" x 30"

VIII-2 (c)
Rev. 2

2C-3 Placement of Warning Signs

Warning signs shall be erected in accordance with the general requirements for sign position as described in Section 2A-21 to 29.

Since warning signs are primarily for the benefit of the driver who is unacquainted with the road, it is very important that care be given to the placement of such signs. Warning signs should provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver. This total time to perceive and complete a reaction to a sign is the sum of the times necessary for Perception, Identification/understanding, Emotion / decisionmaking, and Volition/execution of decision, and is here referred to as the PIEV time. The PIEV time can vary from about 3 seconds for general warning signs to 10 seconds for high driver judgment condition warning signs. Table II-1 lists suggested minimum sign placement distances that may be used for three conditions:

II-4 (c)

TABLE II-1—A Guide For Advance Warning Sign Placement Distance¹

Posted or 85 percentile speed MPH	Condition A high	General warning signs ³						
	judg- ment	Condition B—Stop condition	Condition C—Deceleration condition to listed advisory speed— MPH (or desired speed at condition)					
	needed ³							
	(10 secs. PIEV)		0	10	20	30	40	50
20.....	³ 175	(⁴)	(⁴)					
25.....	250	(⁴)	² 100					
30.....	325	³ 100	150	³ 100				
35.....	400	150	200	175				
40.....	475	225	275	250	³ 175			
45.....	550	300	350	300	250			
50.....	625	375	425	400	325	³ 225		
55.....	700	450	500	475	400	300		
60.....	775	550	575	550	500	400	³ 300	
65.....	850	650	650	625	575	500	³ 375	

Typical Signs for the Listed Conditions in Table II-1. Condition A—Merge, Right Lane Ends, etc. Condition B—Cross Road, Stop Ahead, Signal Ahead, Ped-Xing, etc. Condition C—Turn, Curve, Divided Road, Hill, Dip, etc.

1 Distances shown are for level roadways. Corrections should be made for grades. If 48-inch signs are used, the legibility distance may be increased to 200 feet. This would allow reducing the above distance by 75 feet.

2 In urban areas, a supplementary plate underneath the warning sign should be used specifying the distance to the condition if there is an in-between intersection which might confuse the motorist.

3 Distance provides for 3-second PIEV, 125 feet Sign Legibility Distance, Braking Distance for Condition B and Comfortable Braking Distance for condition C as indicated in *A Policy on Geometric Design of Highways and Streets*, 1984, AASHTO, Figure II-13.

4 No suggested minimum distance provided. At these speeds, sign location depends on physical conditions at site.

5 Feet.

Condition A—a higher driver judgment condition which requires the driver to use extra time in making and executing a decision because of a complex driving situation; i.e., lane changing, passing, or merging. Condition B—a condition in which the driver will likely be required to stop; and Condition C—a condition in which the driver will likely be required to decelerate to a specific speed. The table is provided as an aid for determining warning sign location. The values contained in the table are for guidance purposes and should be applied with engineering judgment. The placement of temporary warning signs used at highway construction and maintenance sites is covered in Part VI of this Manual and the suggested minimum sign placement distances given in Table II-1 may not apply to that group of signs.

Other miscellaneous warning signs that advise of potential hazards not related to a specific location may be installed in the most appropriate locations since they are not covered in Table II-1. These include DEER CROSSING and SOFT SHOULDER signs. Minimum spacing between warning signs with different messages normally should be based on the PIEV times for driver comprehension and reaction.

The effectiveness of the placement of any warning sign should be tested periodically under both day and night conditions. Figure 2-5 (page 2A-17) shows typical installations of standard warning signs.

2C-4 Turn Sign (W1-1)

The Turn sign (W1-1R or 1L) is intended for use where engineering investigations of roadway, geometric, and operating conditions show the

Rule 56

UTAH RULES OF CIVIL PROCEDURE

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.