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PARMA ANNUAL CONFERENCE

FEBRUARY 7-10, 2023

SACRAMENTO CONVENTION CENTER

Emerging Risk for California Cities and Towns

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Topics for Discussion Today:

1. Climate Change, Extreme Weather
2. Cyber Security and Cyber Liability
3. Law Enforcement Liability
4. Senate Bill 447: Decedents' Pain, Suffering, or Disfigurement
5. Homelessness – Municipal Liability



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Climate Change, Extreme Weather

Weather and climate changes continue to occur in California driving significant exposures to municipal infrastructure and services.

- *Drought, Water Supply*
- *Sea Level Risk*
- *Rainstorm*
- *Wildfire*
- *Damage to Agriculture*
- *Public Health*
- *Flooding*



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Climate Change, Extreme Weather Continued

- Property Insurance/Reinsurance Impacts
 - Earthquake
 - Wildfire
 - Flood and Water Damage
 - Near-term Program Renewals



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Climate Change, Extreme Weather Take-Aways

- Crisis Management Planning
- Appraisals
- Evaluation of Property Insurance Programs
 - 'Attachment Point' Reviews (Individual and JPA)
 - Segregated Limits by Exposure



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Cyber Security and Cyber Liability

- Primary issue is crime (not accidents like other coverages)
- Cybercrime will cost estimated \$10.5 Trillion worldwide by 2025
- Ransomware attacks occurred every 11 seconds in 2021
- Verizon Data Breach Report
- IBM Data Breach Report



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Cyber Security and Cyber Liability Continued

- Must meet minimum requirements to be insured
 - Multi-factor Authentication (MFA)
 - Data Backups
 - Endpoint Detection
 - Employee Education & Training Programs

Cyber Security and Cyber Liability Take-Aways

- Evaluate non-IT risks:
 - Security of water systems
 - Election security (mis- and dis- information)
 - Ethical use of AI
 - Privacy (e.g. library information)
 - Physical security
 - Critical infrastructure



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Cyber Security and Cyber Liability Take-Aways

- Coordination with Technology Team
- Vendor Management
- Notification and Communication Planning
- Insurance Underwriting Compliance, Planning, Tracking
- Develop an effective “Incident Response Plan”
- www.cisa.gov/cybersecurity



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Law Enforcement Liability

Business Insurance (June 1, 2022):

“Two years after the murder of George Floyd by a police officer and the nationwide turmoil the killing sparked, the law enforcement liability insurance market, which was already hardening, remains challenged, and many experts say it is unlikely to dramatically change any time soon.”



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Law Enforcement Liability

Law enforcement liability market has been further aggravated by:

- Nuclear Jury Verdicts
- Civil Unrest
- Pandemic
- Social Environment



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Law Enforcement Liability Continued

- Carriers are withdrawing from the CA market
- Remaining carriers are offering less insurance limits and requiring higher retentions
- Bifurcation of law enforcement coverage from the public entity placement



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Law Enforcement Liability

- Underwriters: increased focus on policing policy & procedures
- Settlement and verdict costs are escalating
- Frequent media reports & negative public sentiment
- Universities interested in evaluating causation
 - Can it be used to change officer behavior and agency policies, training standards, and culture?

Law Enforcement Liability Take-Aways

Some law enforcement agencies are taking the following steps to reduce liability:

- Train in the use of body cameras
- Introduce traffic stop protocols
- Legal departments periodically review policies and procedures
- Address high-speed chases
- Communicate with the public through social media on high-profile incidents and explain the next steps in the investigations



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Law Enforcement Liability Take-Aways

Some law enforcement agencies are taking the following steps to reduce liability:

- Work with social service workers to de-escalate situations, including establishing mental crisis response units
- Have jail systems take steps to review inmates' medical conditions; hire medically trained vendors to manage those conditions



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Law Enforcement Liability Take-Aways

- Evaluate and analyze losses
- Identify and implement resources to help reduce adverse events
 - Benchmark Analytics, Arx Alert, Lexipol, Cordico, targeted training
- Ensure policies and training are up-to-date
- Ongoing measurement



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Senate Bill 447: Decedents' Pain, Suffering, or Disfigurement

On October 1, 2021, California Governor Gavin Newsom signed into law SB 447, which amended [California Code of Civil Procedure section 377.34](#) to permit wrongful death claimants in California to recover damages for decedents' pain, suffering or disfigurement.

The bill is applicable to all wrongful death complaints filed between January 1, 2022, and January 1, 2026, as well as to all existing wrongful death cases in which a motion for trial preference under California Code of Civil Procedure section 36 – under which trial must begin within 120 days of the granting of such a motion – had been granted in a personal injury action before the personal injury plaintiff died.



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Senate Bill 447 Continued

In a wrongful death action, the following are recoverable damages (per CACI 3921):

1. Economic Damages

- Loss of future economic support
- Burial expenses

2. Non-Economic Damages

- Loss of the decedent's love, companionship, comfort, care, assistance, affection, society, moral support,
- Loss of sexual relations (husband)
- Loss of training and guidance



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Senate Bill 447 Continued

IMPORTANT! Prior to SB 447:

Family could not recover for the suffering their loved one experienced between the date of the subject accident and the time of death.

- Why? Pain and suffering damages were deemed to be personal to the decedent and paying the heirs for those damages would not compensate the decedent.

Heirs should not be compensated for their grief and sorrow.

- Why? Because every living person will die at some point and survivors will inevitably experience grief, sorrow, etc.



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Senate Bill 447 Continued

Beginning January 2022, SB 447 Allows:

- The Estate to recover damages for pain and suffering experienced by decedent between time of injury-producing event and time of death.
- Damages go to heirs.



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Senate Bill 447 Continued

Impact on Trial Evidence: When decedent's pre-death pain and suffering is at issue, what evidence is now admissible?

- Graphic depictions of injuries?
- Testimony by family of the agony decedent endured before death?
- Hearsay statements of decedent made before death?
- Expert testimony regarding pain and suffering likely experienced by decedent?

Under Prior Law – **None of This Would Be Admissible!**

Under New Law – **All Could Be Admitted!**



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Senate Bill 447 Continued

Issues for Public Entities:

1. Creates Liability To Decedent For Pain and Suffering Which Did Not Previously Exist (and which now must be factored into evaluation of the case.)
2. Evidence that was previously inadmissible may now be presented to jury for consideration.
3. Potentially Increases Value of Wrongful Death Claim By Inflaming Jury.



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Senate Bill 447 Continued

National average, wrongful death, single individual: >\$6M (\$1.5M in 2015).
Nationally, the average verdict in wrongful death case has spiked since 2020.

California wrongful death numbers 2018-2022:

Single Individual, 13 to 28 years old

No spouse, no children

Plaintiffs = One or both parents

- 8 verdicts in Southern California, \$60 million (highest) and \$900,000 (lowest)
Average \$19.8 million

Throw-out highest and lowest as outliers

Average \$16.3 million



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Senate Bill 447 Take-Aways

Identify claims in which the new law could be asserted by plaintiffs.

Be proactive with respect to maintenance & accident history (e.g. traffic studies, SWITRS, US Berkley-Transportation Injury Mapping History).

Develop and implement inspection/maintenance/review schedules:

- Facilities, pools, sidewalks, streets, landscaping, crosswalks, signal phasing
- Implement checklists
- Properly document and retain materials

Homelessness – Municipal Liability

- *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584
 - Criminal prosecution under citywide ordinance prohibiting sleeping in public violates the Eighth Amendment (cruel and unusual punishment) when no alternative sleeping space is available.
 - “Narrow” decision – criminal prosecution; citywide; no available beds.
 - Basic premise – criminal enforcement prohibited if the homeless individual has no option and no alternative but to sleep in public.

Homelessness – Municipal Liability

- *Johnson v. City of Grants Pass* (9th Cir. 2022) 50 F.4th 787
 - Ordinance prohibiting use of bedding (blanket, pillow, sleeping bag) or cardboard box for protection from the elements while sleeping outside violates Eight Amendment (cruel and unusual punishment).
 - Homeless must be allowed minimal items to stay warm and dry.
 - Fact that case primarily involved civil fines (rather than criminal prosecution) did not save the ordinance.
 - Repeated “civil” violations can lead to criminal citation.

Homelessness – Municipal Liability

- Restrictions/evictions on less than entire city.
 - *Aitken v. City of Aberdeen* (W.D. Wa. 2019) 393 F.Supp.3d 1075 (“Martin does not limit the City’s ability to evict homeless individuals from a particular public place”)
 - *Blain v. CalTrans* (N.D. Cal. 2022) ___ F.Supp.3d ___, 2022 WL 2919646 (prohibiting living on discrete property does not violate the Eighth Amendment under *Martin*.)

Homelessness – Municipal Liability

- *Blain v. CalTrans* (N.D. Cal. 2022) ___ F.Supp.3d ___, 2022 WL 2919646
 - Temporary restraining order (“TRO”) issued in July 2022 against removal of homeless encampment on CalTrans property (on 5 days’ notice) pending development of sheltering plan.
 - TRO later dissolved in phases from September 7, 2022 to October 5, 2022; homeless must make “immediate plans to move.” (2022 WL 3702106 [Aug. 26, 2022 Order].)
 - Balance of notice to occupants and public health and safety concerns.

Homelessness – Municipal Liability

- *Yeager v. City of Seattle* (W.D. Wa. 2020) 2020 WL 7398748 [unpublished case]
 - Notice of eviction from park (2 days' notice).
 - Part of an alleged police “sweep.”
 - Property removed and stored for up to 70 days at no charge; owner can reclaim.
 - City would even deliver items to owner.
 - Temporary restraining order against evictions denied.
 - City has substantial interest in public health and safety.



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Homelessness – Municipal Liability Take-Aways

- Cannot enforce based on involuntary status or unavoidable consequences.
- Citywide bans on camping/sleeping are problematic when beds are unavailable.
- Must allow minimal and rudimentary precautions for warmth, dryness, and protection from elements.
- Must provide reasonable notice of any removal/eviction.

Homelessness – Municipal Liability Take-Aways

- Can restrict camping to certain times and places.
- Can reasonably limit amount of bedding and camping materials.
- Can provide process for seizing items violating ordinance provided there is due process.
 - Prior notice and an opportunity for return of items.
- Can provide for health and safety regulations.
 - Limitation on stoves, fire hazards, dangerous structures.

Homelessness – Municipal Liability Take-Aways

- Civil penalties?
- Criminal prosecution?
- Can provide additional beds (e.g. shelters)
 - Note: Cannot rely on secular or religious-based shelters (First Amendment)



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Thank you.

Questions for Discussion?



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