2/12/62

Memorandum No. 9 (1962)

Subject: Study No. 52(L) - Sovereign Immunity (Dangerous and Defective Conditions)

This memorandum contains the draft of a statute to effectuate the Commission's decisions in regard to dangerous and defective conditions of public property.

It seems likely that the existing Public Liability Act will have to be repealed because it appears in a division of the Government Code entitled "Cities, Counties and Other Agencies." The exact numbering and location of the proposed statute will have to be deferred until we have a general idea of the amount of legislation to be proposed in this field of law.

To aid your understanding of problems that will be raised by the proposed statute, there is attached as Exhibit I (pink pages) a brief summary of the law relating to the liability of occupiers of land. The liability of a governmental entity for dangerous and defective conditions is essentially an occupier's liability; hence, the liability of private occupiers is set forth for purposes of comparison.

In contrast to the law relating to private occupiers, the statute proposed here makes no distinction between invitees, licensees and tolerated intruders. Instead of focusing on the status of the plaintiff, the proposed statute focuses on the duty of the public entity to maintain its property in a reasonably safe condition; and liability is based on

the failure of the entity to take reasonable measures to make its property safe regardless of the plaintiff's status. To take the case of the tolerated intruder, the entity would be required under the proposed statute to repair any condition which it actually knows is likely to injure such a person provided that there is a reasonably feasible method of removing the danger. However, the entity would be under no duty to inspect its property to see that it is safe for tolerated intruders, it would only have the duty to inspect the property (1) for the purpose of determining whether the property is safe for the purpose for which the property is maintained and (2) where the property is so dangerous that death or serious bodily injury will result to persons foreseeably on the property. Under this statute, the injured person does not win or lose because he is a licensee instead of an invitee, he wins or loses upon the questions whether the entity has failed in its duty of inspection and repair and whether he is himself partially responsible for the accident.

Title of article and definitions.

Article ____. Dangerous Condition of Public Property

Section 1. As used in this article:

(a) "Dangerous condition" means a condition of public property that is likely to cause injury to person or property when the property is used for a purpose for which it is reasonably foreseeable that the property will be used.

(b) "Public entity" includes the state and any local public entity.

COMMENT

The phrase "dangerous condition" is defined and used in this article instead of the phrase "dangerous or defective condition" which is used in the existing law. "Dangerous condition" seems to describe more exactly what is contemplated.

Under the definition of dangerous condition there is no requirement that the condition "unreasonably" exposes persons or property to danger. A condition is dangerous if it is likely to cause injury to persons or property. Whether such an exposure is "unreasonable" seems relevant to whether the public entity has a duty to take action to remedy the condition, but not to the question of danger. Other sections of this article embody the concept of "unreasonable" danger as a relevant factor in determining the extent of the duty to inspect (Section 3) and to repair (Section 4).

The phrase "likely to cause injury" is intended to emphasize that a remote possibility of injury is insufficient to make a condition a dangerous condition.

The qualification as to use was added in recognition of the fact that almost anything can become dangerous if subjected to abnormal use.

"Local public entity" is defined in Division 3.5 of the Government Code. Hence, if this article is located within the portion of the Government Code to which the local public entity definition applies, the above definition of "public entity" is adequate to cover all governmental entities. If this article is compiled elsewhere, the definition of local public entity will have to be included in Section 1.

Liability for injuries resulting from dangerous condition of public property.

Section 2. Except as provided in Section 4, a public entity is liable for death and for injury to persons and property proximately caused by a dangerous condition of its property if the public entity:

(a) Had notice of the dangerous condition; and

(b) Failed to remedy the condition or to take action to protect persons and property against the condition.

COMMENT

Compare the proposed section with the language in present Government Code Section 53051:

> A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
> (a) Had knowledge or notice of the defective or dangerous condition.
> (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

The proposed section sets out the elements of the prima facie case against the public entity. The plaintiff has the burden of proving that the condition was a dangerous condition (as defined in Section 1), that the injury was proximately caused by the dangerous condition, that the public entity had notice (determined under Section 3) of the dangerous condition and that the public entity failed to remedy the condition or to take action to protect persons and property against the condition.

Section 4 sets out the matters which may be established by way of defense. For example, under Section 4 the public entity can show as a defense to the prima facie case of liability that it had taken reasonable action towards remedying the condition.

If it is believed that the plaintiff should make a showing similar to that now required under Government Code Section 53051, Section 2 could be worded as follows:

> Section 2. Except as provided in Section 4, a public entity is liable for injuries to persons and property proximately caused by a dangerous condition of its property if:
> (a) The public entity had notice of the dangerous condition; and
> (b) The public entity, within a reasonable time after receiving notice of the dangerous condition, failed to remedy the condition or to take action reasonably necessary to protect persons and property against the condition.

It appears, however, that the public entity should have the burden of showing the reasonableness of its conduct since the public entity is in possession of the facts that bear on whether its action was reasonable under the circumstances.

Notice of dangerous condition of public property.

Section 3. A public entity has notice of a dangerous condition within the meaning of Section 2 only if:

(a) The public entity has actual knowledge of the dangerous condition;

(b) The dangerous condition is directly attributable to work done by or under the direction of an officer, agent or employee of the public entity in a negligent, careless or unworkmanlike manner;

(c) The property was actually inspected by the public entity while in its dangerous condition and the dangerous condition would have been discovered if the inspection had been made with reasonable care;

(d) The property is maintained by the entity for a particular use and the dangerous condition would have been revealed by an inspection system that is reasonably adequate, considering the practicability and cost of inspections and the likelihood and magnitude of the potential danger, to inform the entity whether the property is safe for such use; or

(e) The public entity has created or maintained an artificial condition on its property and the dangerous nature of the artificial condition would have been revealed by an inspection system that is reasonably adequate, considering the practicability and cost of inspections and the likelihood and magnitude of the potential danger, to inform the entity whether the property is in a condition likely to cause death or serious bodily harm to persons who it is reasonably foreseeable will come in dangerous proximity to the condition.

COMMENT

This section spells out the notice requirement.

Subdivisions (d) and (e) impose the requirement of a reasonable inspection system. The problem that these subdivisions attempt to solve is the extent to which an entity must set up the reasonable inspection system. Exhibit I indicates that the principal difference

between an occupier's duty to a licensee and his duty to an invitee is that he has a duty to inspect to see that the premises are safe only for the invitee and only for the "area of invitation". As a general rule, a public entity should have no heavier duty to inspect its property. It should not be required to establish a "reasonable inspection system" to see that the property is safe for all foreseeable uses or even for all uses that are "reasonably" foreseeable. It is helpful to consider what is the reasonable expectation of the user of the property. If the entity has improved its property and invited the public to use it, the user may reasonably expect that the entity inspects for defects in order to be sure the property is safe. In this case, the entity should probably have the duty to do so. But if property is not improved and maintained for public use, the entity should not be compelled to conduct inspections of the property to see that it is safe for use by trespassers or "tolerated intruders" even though it is foreseeable that the property will be used by them.

Where an entity maintains a condition, though, that is likely to cause death to foreseeable users of the property unless the property is periodically inspected to see that it does not become highly dangerous, it is not unreasonable to expect the entity to conduct such periodic inspections. For example, if a high tension wire is maintained in a place where it is reasonably foreseeable that persons will be walking underneath it or will otherwise be coming in proximity to it, it is not unreasonable to expect the entity to periodically inspect the wire to see that it has not become loose and sagged to

a point where a person could accidentally touch it. Where the condition, though, is not one involving such a great danger to human life, the entity should not be expected to do any more than to see that the property is safe for its intended use.

To use the example of the fishing pathway discovered by Mr. Reed and related at the last meeting: even though it is foreseeable that fishermen will be using that pathway to go up and down the river, the State should have no duty to inspect the pathway to be sure that it is safe for fishermen, and probably the fishermen that use the path have no expectation that the State will engage in such an activity. On the other hand, in a State park which is improved and maintained for public use, people may reasonably expect that the State will make some inspection of the premises so that the property is safe for the purpose for which it is maintained. Or to use the corporation yard example: the entity should have the duty to inspect the premises to be sure that they are reasonably safe for use as a corporation yard, but it should have no duty to inspect the premises to be sure that they are safe for persons who may desire to use the corporation yard for a short-cut. Probably such persons do not expect the entity to make the yard safe for short-cuts.

Sections 2 and 4 do, however, require an entity to take reasonable measures to protect persons likely to be injured by a dangerous condition if the entity acquires actual knowledge that they are so exposed. It does not seem unreasonable to require an entity to protect persons against conditions of which the entity has actual knowledge if no extra duty is imposed on entities to look for such conditions.

Defenses available to public entity.

Section 4. A public entity is not liable for injuries to persons or property proximately caused by a dangerous condition of its property if:

(a) The person who suffered the injury to his person or property was using the public property at the time of the injury and such use was not of a kind that was reasonably foreseeable;

(b) There was no reasonably feasible way to remove the danger, taking into consideration the practicability and cost to the public entity of effective precautions and the probability and gravity of harm to persons and property;

(c) Within a reasonable time after receiving notice of the dangerous condition, the public entity acted reasonably to remedy the condition or to protect the persons and property foreseeably exposed to the risk of injury, having regard to the practicability and cost of remedying the condition or protecting the persons and property and the probability and gravity of harm because of the continued existence of the condition;

(d) The person who suffered the injury to his person or property knew of the condition, realized the risk created thereby and, in view of all the circumstances, could reasonably be expected to avoid the injury by using reasonable care or avoiding exposure to the risk; or

(e) The person who suffered the injury to his person or property was contributorily negligent.

COMMENT

Subdivision (a) states a proposition that was approved in principle by the Commission at the January meeting.

Subdivisions (b) and (c) are, in substance, a restatement of the principle approved at the January meeting that a public entity is not liable for injuries caused by the dangerous condition of public property if it has done all that it could reasonably be expected to do to remedy the condition or to protect the public against the condition. The principle approved by the Commission, though, was stated as a rule of evidence [evidence of the reasonableness of the entity's conduct was to be admissible by way of defense], whereas the statute proposed above states the proposition as a rule of substantive law. Thus, under subdivision (b), the entity is not liable if there is no reasonably feasible way to remove the danger; and under subdivision (b), the entity is not liable if it acted reasonably to remove the danger.

Subdivision (d) in a way relates to what is a dangerous condition; for it might be said that a condition is not dangerous if the risks it creates are apparent and easily avoidable. The proposition stated is similar to that stated in Restatement of Torts Section 340:

> A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein.

The Restatement doctrine, though, has been modified to reflect the fact that knowledge of the risk is not sufficient if such knowledge does not enable the person exposed to avoid the risk. Subdivision (d) permits

the defense of "assumption of the risk," but its purpose is somewhat broader. Under subdivision (d) the entity will not be liable if it could reasonably expect the plaintiff to avoid the hazard even though the plaintiff in fact did not.

Subdivision (e) may be unnecessary, since the consultant reports that the cases hold contributory negligence to be a defense under the Public Liability Act. However, it seems desirable to restate the proposition for the sake of completeness.

Trivial defects.

Section 5. A condition is not a dangerous condition within the meaning of this article if the court finds, based on all the evidence viewed most favorably to the plaintiff, that the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that a reasonable person would conclude that the condition was not likely to cause injury to person or property when the property was used for those purposes for which it was reasonably foreseeable that the property would be used.

COMMENT

The trivial defect rule is stated in much the same language as that presented by the consultant to the Commission at the January meeting.

The section is phrased so that the condition is not a dangerous condition within the meaning of the proposed statute if the court finds that the defect is trivial.

Memorandum No. 9(1962)

EXHIBIT I

Introduction

This memorandum discusses the liabilities of private occupiers of land to those persons who are injured by dangerous conditions upon their lands. It is the purpose of this exhibit to refresh your recollection concerning these liabilities so that the liability of private occupiers of land for dangerous and defective conditions may be compared with the liability to be imposed on public entities for dangerous and defective conditions.

At common law, the liability of land owners differed according to the status the plaintiff occupied when the plaintiff was injured. The defendant's liability depended, and still depends, on whether the plaintiff was outside the premises, was trespassing, was a gratuitous licensee or was a business visitor.

Liability for harm occurring outside the premises.

As to persons outside of the premises, Prosser summarizes the rule as follows:

> A possessor of land is required to make reasonable use of his premises which causes no unreasonable harm to those in the vicinity, either by reason of the character of the use itself or because of the manner in which it is conducted. His liability may be based upon intent, upon negligence, or upon a condition or activity for which strict liability may be imposed. In particular, he is required to exercise reasonable care for the protection of those using the public highway.
>
> It is the general rule that there is no liability for conditions of purely natural origin existing on the land, but there are indications of the development of a different rule as to urban land.

In general, the possessor of land is required to exercise reasonable care to prevent harm resulting from the conduct of other persons on his premises. [Prosser, Law of Torts 427 (2d ed. 1955).]

Liability to trespassers.

So far as trespassers are concerned, the Restatement of Torts sets forth the general rule as follows:

> § 333. Except as stated in §§ 334 to 339, a possessor of land is not subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care
>
> (a) to put the land in a condition reasonably safe for their reception, or
>
> (b) to carry on his activities so as not to endanger them.

Some of the exceptions stated in Sections 334 to 339 of the Restatement relate to activities carried on by the occupier of land. Since we are here concerned with liability for conditions as opposed to liability for active negligence or other active torts, the exceptions will be quoted only to the extent that they bear upon the condition of the premises.

> § 335. A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm caused to them by an artificial condition thereon, if
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved therein.

§ 337. A possessor of land who maintains thereon an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact therewith, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them thereof if

(a) the possessor knows or, from facts within his knowledge, should know of their presence in dangerous proximity to the artificial condition, and

(b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved therein.

§ 339. A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

Prosser states somewhat more briefly:

In general the possessor of land is not liable for harm to trespassers caused by his failure to put the land in a reasonably safe condition for their reception, or to carry on his activities so as not to endanger them. An increasing regard for human safety has led to the development of certain exceptions to this general rule:

(a) If the presence of the trespasser is discovered, the possessor is commonly required to exercise reasonable care for his safety as to any active operations the possessor may carry on, and possibly as to any highly dangerous conditions on the land.

(b) If the possessor knows that trespassers frequently intrude upon a particular place or a limited area, he is required to exercise reasonable care as to any activities carried on, and probably as to any highly dangerous conditions.

(c) As to trespassing children the greater number of courts impose a duty to exercise reasonable care where the trespass is foreseeable, the condition of the premises should be recognized as involving an unreasonable risk of harm to the child, the child because of his immaturity does not discover or appreciate the danger, and the utility of maintaining the condition is slight as compared to the risk. [Prosser 432.]

Prosser points out that a number of cases have held a landowner liable to a trespasser for highly dangerous passive conditions known to the possessor, such as a concealed high-voltage wire, or a bull in a pasture near a path. Some courts have attempted to justify the holdings by reclassifying the trespasser as a licensee because of the landowner's continued toleration of the trespassers. However, Prosser concludes "the real basis of liability of such 'tolerated intruders' would seem to be only the ordinary duty to protect another, where the harm to be anticipated from a risk for which the defendant is responsible outweighs the inconvenience of guarding against it." (Prosser 438.)

Liability to licensees.

So far as licensees are concerned, that is persons who come on the land with the consent or permission of the occupier but who are not classified as "invitees", Witkin states:

Where no active negligence is involved, the duty is practically no greater than that owed to a trespasser; i.e., the licensee assumes the risks incident to the condition of the premises, and can recover only for "wilful or wanton injury." This means that the landowner need not inspect the land to discover possible or probable dangers. [Witkin, Summary of California Law 1449 (7th ed. 1960).]

The Restatement says:

> § 342. A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he
>
> (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and
>
> (b) invites or permits them to enter or remain upon the land, without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to warn them of the condition and the risk involved therein.

Witkin indicates that the California cases differ as to whether the Restatement rule is the law in California or not.

Liability to business visitors.

The remaining class of persons to whom occupiers of land are found to be liable are business visitors. The Restatement defines a business visitor as "a person who is invited or permitted to remain on land in the possession of another for a purpose directly or indirectly connected with the business dealings between them." (Restatement § 332.) The Restatement takes the position that:

> § 343. A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.

However, under the Restatement rule, the occupier is not liable to either licensees or business visitors "for bodily harm caused to them by any dangerous condition . . . , whether natural or artificial, if they know of the condition and realize the risk involved therein." (§ 340.)

Prosser is critical of the "business visitor" test. He believes that the underlying ground of liability in these cases is that there is "a representation to be implied when [the occupier] encourages others to enter to further a purpose of his own, that reasonable care has been exercised to make the place safe for those who come for that purpose." (Prosser 455.) That this is the real basis for liability in these cases seems apparent upon a review of the cases for many of the cases do not require "business dealings" as a condition for liability. (See Witkin 1453-54.) Moreover, in many of the "business" cases the courts talk of the "area of invitation" and the occupier owes the duty of inspection and making the premises safe only within the area of invitation. (Witkin 1459-60; Prosser 458.) The "area of invitation" extends to "all parts of the premises to which the purpose [of the visit] may reasonably be expected to take [the visitor], and to those which are so arranged as to lead him reasonably to think that they are open

to him." Harper and James believe liability will ensue if either the "business" or "invitation" test is met. (Harper and James, Law of Torts 1478.)

Prosser and Harper and James disagree with the Restatement's conclusion that a warning to the visitor or knowledge of the condition on the part of the visitor are sufficient to absolve the occupier of liability. Prosser says

> ordinarily nothing more than a warning is required. All of the circumstances, however, must be taken into account; and where the condition is one which the invitee would not expect to find in a particular place, or his attention is distracted by something on the premises, or the condition is one such as icy steps, which cannot be encountered with reasonable safety even though the invitee is aware of it, the jury may be permitted to find that the obviousness, warning or even knowledge is not enough. [Prosser 459-60.]

Harper and James state that

> the fact that a condition is obvious . . . does not always remove all unreasonable danger . . . . [T]he condition of danger [may be] such that it cannot be encountered with reasonable safety even if the danger is known and appreciated. An icy flight of stairs or sidewalk, a slippery floor, a defective crosswalk, or a walkway near an exposed high-tension wire may furnish examples. So may the less dangerous kind of condition if surrounding circumstances are likely to force plaintiff upon it, or if, for any other reason, his knowledge is not likely to be a protection against danger. It is in these situations that the bite of the Restatement's "adequate warning" rule is felt. Here, if people are in fact likely to encounter the danger, the duty of reasonable care to make conditions reasonably safe is not set aside by a simple warning; the probability of harm in spite of such a precaution is still unreasonably great and the books are full of cases in which defendants, owing such a duty, are held liable for creating or maintaining the perfectly obvious danger of which plaintiffs are fully aware. [Harper and James 1491-93.]

Liability to public employees.

The status of police and firemen and other people with a lawful right to enter premises has often troubled the courts for they do not

readily slip into the common law classifications of trespassers, licensees or invitees. Apparently the general rule is to classify them as licensees. However, the Restatement has a special rule applicable to them:

> § 345. A possessor of land is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter the land for a public or private purpose, irrespective of his consent, if he
>
> (a) knows that they are upon the land or are likely to enter it in the exercise of their privilege, and
>
> (b) knows of the condition and realizes that it involves an unreasonable risk to them and has no reason to believe that they will discover the condition or realize the risk, and
>
> (c) fails to exercise reasonable care
>
> (i) to make the condition reasonably safe or
>
> (ii) to warn them of the condition and the risk involved therein.

Prosser indicates that some courts have taken the position, though, "that such visitors are entitled to protection when they come under the same circumstances as other members of the public to a part of the premises open to the public, and that the occupier must at least exercise ordinary care to see that the usual means of access to his premises are safe for a visiting fireman." (Prosser 462.)

Liability of public utilities.

The Restatement has a special rule applicable to public utilities:

> § 347. A public utility is subject to liability to members of the public entitled to and seeking its services for bodily harm caused to them upon land in its possession by any natural or artificial condition thereon which it is reasonably necessary for the public to encounter in order

to secure its services, if the utility knows or should know of the condition and the unreasonable risk involved therein and could make the condition reasonably safe by the exercise of reasonable care.

In the explanation, the Restatement states:

> The risk involved in a particular condition, though great, may not be unreasonable if it is inseparable from repairs or other temporary conditions which are necessary to the performance of the public service functions of the utility.

Conclusion.

From the foregoing, it appears that the courts have been trying to fashion a rule of liability for occupiers of land which will both protect the landowner from unreasonable obligations to keep his premises safe and yet will protect visitors who are likely to expect that certain portions of the premises have been made safe for them. It would seem that a more appropriate way of getting at the problem would be to look at the occupier's duty to inspect and repair his land rather than at the status of the particular person who happens to have been injured. Then the difficult questions which are continually raised when the person injured has come to use the rest room instead of to buy gasoline or has been invited to share a drink and incidentally to talk a little business would be avoided. The policemen or firemen should be entitled to the standard of care that business visitors are entitled to so long as they are in the portion of the premises to which business visitors are invited. If the business visitor starts crossing a ploughed field to talk to the farmer he should not expect that the field is in a safe condition for anything else than for growing crops.

It is upon this basis that the liability statute contained in the

Memorandum to which this exhibit is attached has been framed. As a result, a few people who are classified as trespassers at the present time will have the rights presently accorded to licensees, some licensees will have the rights of business visitors under existing law and some business visitors will be treated as licensees are now. But the liability will be based in each case upon the failure of the occupier to perform some obligation it should perform anyway. The statute imposes no additional duties of inspection. The only additional duty the statute imposes on public landowners is the duty to protect foreseeable trespassers from known natural hazards. And this duty may readily be discharged by reasonable notice.