3/15/62

Memorandum No. 12(1962) Supplement

Subject: Study No. 52(L) - Sovereign Immunity (Dangerous Conditions of Public Property)

Attached to this memorandum is a letter of transmittal and, on blue paper, a draft recommendation to go with the statute that was forwarded with Memorandum No. 12. We are hopeful that we will be able to distribute both this recommendation and the statute previously sent after the March meeting.

Certain additional matters in connection with the draft statute attached to Memorandum No. 12 should be noted:

Page 5, line 14. The word "intended" in this line is intended to convey the idea that the public entity is holding out its property for a particular use. Since the entity is doing so, it is expected to use due care to determine whether the property is safe for such use. Some question has been raised whether this idea is adequately expressed. The Commission may wish to consider the substitution of "invited" for "intended" or the substitution of the phrase "purpose for which the public entity owned or occupied the property" for the language of lines 13, 14 and 15 beginning with the word "use" in line 13.

Page 5, line 16. The "(c)" in this line should, of course, be "(d)".

Page 8, line 2. Delete all of the line and insert "Division 3.5 (commencing with Section 600) of". Chapter 2 applies only to claims against local public entities. The substituted language will refer to

the appropriate claim filing procedure applicable to the particular public entity, whether it be the State or a local public entity.

Page 8, first line of Section 901.11. After "legal liability" insert "of a public entity". This change will preserve the present law. We make no attempt in the proposed statute to make any substantive changes in the provisions of law relating to payment of claims or compromise of disputed claims.

Pages 8 and 9, Section 901.13. In Memorandum No. 12(1962), the basis for the liability stated in this section was supported by a quotation from Black v. Southern Pac. Co., 124 Cal. App. 321, 328 (1932), which was quoted with approval in Fackrell v. City of San Diego, 26 Cal.2d 196, 205 (1946). Neither the Fackrell case nor the Black case has been overruled or disapproved; however, the case on which the Black case relied--Moore v. Burton, 75 Cal. App. 395 (1955)--was disapproved in Bauer v. County of Ventura, 45 Cal.2d 276, 291 (1955). In the Bauer case, in an opinion by Justice Shenk, the Supreme Court held that no cause of action was stated against individual members of the Ventura Board of Supervisors for creating and maintaining a dangerous condition because there was no allegation that the supervisors, individually, had the authority and the duty to remedy the condition that caused the damage, and there was no allegation that the supervisors, individually, had county funds immediately available to them for that purpose. Meeting the contention that such allegations were necessary only if the defect was not in the original construction or in the planned revisions thereof, the court said:

> But there is no language in the statute which supports that construction. Section 1953 provides that no liability

> shall attach unless "all" the enumerated conditions are shown to exist. The requirements of the individual defendant officers' authority and duty under the law to remedy the defective or dangerous condition, the availability of funds in their hands individually for that purpose, their ability to do so within a reasonable time or to give adequate warning, and the plaintiffs' exercise of due care in the premises are all material allegations. [45 Cal.2d at 290-91.]

After the Bauer case was decided, Bettencourt v. State of California, 139 C.A.2d 255 (1956), arose. The plaintiff had run into Dumbarton Bridge while the drawbridge was partially raised. He sued the bridge tender on the grounds (1) that he had created a dangerous condition by raising the bridge while the wigwag and barrier used to warn motorists of the elevating of the bridge were not working and (2) that he negligently caused injury to the plaintiff by raising the bridge while plaintiff was approaching without taking precautions to give the public any warning. The defendant was granted a nonsuit in the trial court after the opening statement on the ground that the action was based on Government Code Section 1953 and there was no allegation or offer to show that the defendant had authority and funds to repair the condition. The appellate court held, though, that liability of public employees may be based on either common law negligence or on Section 1953. Where an employee is negligent, there is nothing in Section 1953 that relieves him from liability merely because a dangerous condition of public property contributes to the injury and all the matters required by Section 1953 cannot be shown. The Bauer case was distinguished on the ground that the complaint in that action in no way attempted to set forth a cause of action other than one under Section 1953. The Supreme Court denied a hearing in the Bettencourt case with Justice Shenk, the

author of the Bauer opinion, voting to grant the hearing.

Thus, it is somewhat uncertain at the present time whether a public officer may be held liable for a dangerous condition he has negligently created in the absence of a showing that he had the duty and funds available to correct the condition. But whatever the existing law may be, the staff believes that employees who negligently create dangerous conditions should be liable for resultant injuries and that the provisions of Section 901.13 are sound. The language of Justice Ashburn in regard to entity liability (quoted on page 9 of Memorandum No. 12) may be appropriately applied to the problem of employee liability. The matter is mentioned here, though, so that the Commission may be fully aware of the nature of the existing law when it considers the proposed statute.

Page 10, line 6. Delete "actual knowledge" and substitute "personal knowledge". This change is to make clear that the officer or employee must himself have actual knowledge of the condition.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

LETTER OF TRANSMITTAL

The California Law Revision Commission was directed by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

In January 1961, the California Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961), declared that "the doctrine of governmental immunity for torts for which its agents are liable has no place in our law." In response to the Muskopf decision, the Legislature enacted Chapter 1404 of the Statutes of 1961. This chapter bars certain tort actions against governmental entities until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature. The Muskopf decision and the subsequent enactment of Chapter 1404 have made imperative the development of legislation governing the tort liability of governmental entities.

The Law Revision Commission is giving first priority to the study of sovereign immunity so that a recommendation dealing with the most acute problems in this field may be made to the 1963 Legislature. Enclosed is a tentative recommendation of the Commission relating to liability for dangerous conditions of public property. This is the first of a series of tentative recommendations that will be prepared by the Commission to cover various phases of the sovereign immunity problem.

The enclosed tentative recommendation is being distributed at this time so that interested persons will have an opportunity to study it and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation.

The Commission must receive your comments and criticisms not later than June 1, 1962, if it is to have an adequate opportunity to consider them. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

March 16, 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

T E N T A T I V E

RECOMMENDATION AND PROPOSED LEGISLATION

relating to

Liability for Dangerous Conditions of Public Property

NOTE: This is a tentative recommendation and proposed statute prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

(52)

March 16, 1962

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Liability for Dangerous Conditions of Public Property

Background

Prior to the 1961 decision in Muskopf v. Corning Hospital District,[1] a public entity was not liable for an injury resulting from a dangerous condition of public property owned or occupied for a "governmental" purpose, as distinguished from "proprietary" purpose, unless some statutory waiver of its sovereign or governmental immunity was applicable. The principal statutory waiver was found in the Public Liability Act of 1923, now Section 53050 et seq. of the Government Code.[2] This act waived immunity from liability for dangerous conditions only for cities, counties and school districts. There is no other general statute waiving governmental immunity from liabilities arising out of dangerous conditions of public property.

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1. 55 Cal.2d 211 (1961).

2. The section of the Public Liability Act that states the conditions of liability for dangerous conditions is Government Code Section 53051. It provides:

> A local agency [defined in Section 53050 as a city, county or school district] 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.

Prior to the Muskopf decision, however, all public entities were liable for injuries arising out of "proprietary" activities. This liability was based upon common law principles of liability applicable to private individuals. Thus, all public entities were liable for injuries caused by dangerous conditions of property owned or occupied for a proprietary purpose to the same extent that private owners and occupiers of land are liable to trespassers, licensees and invitees for injuries caused by dangerous conditions. In the case of cities, counties and school districts, liability for injuries caused by dangerous conditions of property owned or occupied for a proprietary purpose could be based either on the Public Liability Act or on common law principles of liability of owners and occupiers of land.

There are significant differences in the standard of liability under the Public Liability Act and the common law standard of liability for owners and occupiers of land. There are also striking similarities. Under the Public Liability Act, as well as under common law principles, liability for dangerous conditions of property may exist only if the owner or occupier of the property has created or otherwise knows of the condition. Knowledge of the condition under either the Public Liability Act or common law principles may be actual or constructive. However, under the Public Liability Act, a public entity may be held liable only if the knowledge is that of the governing body or of an officer authorized to remedy the condition. Under common law principles, the knowledge of employees will be imputed to the landowner if such knowledge relates to a matter within the scope of the employee's employment.

As a general rule liability of a private landowner to a trespasser or licensee for a condition of the property must be based upon wanton or wilful injury and not merely upon negligent failure to discover or correct dangerous conditions. Hence, a private landowner is under no general duty to inspect his land to discover conditions that are apt to expose licensees and trespassers to danger. A private landowner may be held liable, however, to licensees -- and possibly to trespassers -- for failure to discover and repair dangerous conditions in instrumentalities such as electric power lines where extremely hazardous conditions may arise if inspections and repairs are not made with due diligence.

On the other hand, the Public Liability Act draws no distinctions between invitees, licensees and trespassers. Thus, a public entity may be held liable under the Public Liability Act for injuries to trespassers and licensses caused by conditions of property even though common law principles would not impose liability under the same circumstances.

Effect of the Muskopf Decision

In the Muskopf case, the effect of which has been postponed until 1963 by the enactment of Chapter 1404 of the Statutes of 1961, the Supreme Court held that the doctrine of sovereign immunity will no longer be a defense for public entities. Under this decision, public entities other than cities, counties and school districts will probably be liable under common law principles for injuries caused by dangerous conditions of public property -- whether such property is owned or occupied in a governmental or proprietary capacity -- to the same extent that private landowners are liable. Just what effect the

Muskopf decision will have upon the liabilities of cities, counties and school districts for dangerous conditions of property is not certain. Recent decisions of the District Courts of Appeal have indicated that the Muskopf decision will have no effect at all -- that these entities will be liable for dangerous conditions of property owned or occupied in a governmental capacity only under the conditions specified in the Public Liability Act and will be liable for dangerous conditions of property owned or occupied in a proprietary capacity under both the Public Liability Act and common law principles. These decisions reflect the view that the Muskopf decision did not purport to alter the legislatively declared standards of liability. It is possible, though, that the Supreme Court may hold that common law principles may furnish another basis for the liability of cities, counties and school districts for dangerous conditions of property even for such property as is owned or occupied in a governmental capacity.

So far as counties, cities and other municipal corporations are concerned, the Muskopf decision probably will not broaden their liability for dangerous street and sidewalk conditions. Streets and Highways Code Section 5640 grants these entities a statutory immunity from liability for street and highway defects except to the extent that the Public Liability Act imposes liability. Although the Muskopf decision may have wiped out the common law immunity of governmental entities, it is likely that it did not affect this statutory immunity.

Recommendation

The Law Revision Commission has concluded that the pre-Muskopf law relating to the liability of governmental entities for dangerous conditions of public property does not adequately protect persons injured by such conditions. Many governmental entities are not liable at all for injuries caused by their negligence in maintaining their property. In the cases where the Public Liability Act is applicable, the liability that has been placed upon public entities has been broader than is warranted by a proper balancing of public and private interests, for the Public Liability Act does not have any standard defining the duty of an entity to make inspections to discover defects in its property. As a result, public entities have been held liable at times for dangerous conditions which a reasonable inspection system would not have revealed.

Moreover, the pre-Muskopf law is unduly and unnecessarily complex. If no changes are made in the existing statutes, it seems unlikely that situation will be greatly improved when the Muskopf decision becomes effective. There is, for example, no reason for having one law applicable to dangerous conditions of publicly owned swimming pools (held to be a governmental activity) and another law applicable to dangerous conditions of publicly owned golf courses (held to be a proprietary activity), for applying one standard of liability to cities, counties and school districts and another to all other governmental entities, or for having one law applicable to municipal streets and sidewalks and another law applicable to all other governmental property.

Repeal of the existing statutes relating to dangerous conditions of public property would achieve uniformity in the law and would avoid such inconsistencies as are outlined in the preceding paragraph. Repeal of these statutes, however, would not necessarily improve the law, for in many respects the Public Liability Act is greatly superior to the common law as it relates to the liabilities of owners and occupiers of land. The Public Liability Act does not draw any distinctions between invitees, licensees and trespassers. Liability may be established simply by showing a breach of duty to keep property in a safe condition and that foreseeable injuries resulted from this breach of duty. The Commission has concluded, therefore, that the general principles of the Public Liability Act should be retained. That statute should be revised, however, to eliminate certain anachronisms and to make it the exclusive basis for the liability of all governmental entities for all dangerous conditions of public property, whether owned or occupied in a governmental or proprietary capacity.

Accordingly, the Commission recommends the enactment of new legislation that would retain the desirable principles of the Public Liability Act with the following principal modifications:

1. "Dangerous condition" should be defined as a condition of property that exposes persons or property to a substantial risk of injury or damage when the property is used in a manner in which it is reasonably foreseeable that the property will be used. The condition of the property involved should create a "substantial risk" of injury, for an undue burden would be placed upon public entities if they were

responsible for the repair of all conditions creating any possibility of injury, however remote that possibility might be. The "dangerous condition" of the property should be defined in terms of the manner in which it is foreseeable that the property will be used in recognition that any property can be dangerous if used in a sufficiently abnormal manner. Governmental entities should only be required to guard against the potentialities of injury that arise from reasonably foreseeable uses of their property.

2. The "trivial defect" rule developed by the courts in sidewalk cases arising under the Public Liability Act to prevent juries from imposing unwarranted liability on public entities should be extended to all cases arising under the act. Under this rule, the courts will not permit a governmental entity to be held liable for injuries caused by property defects unless the court (as distinguished from the trier of fact) is satisfied that a reasonable person could conclude that the defect involved actually created a substantial risk of injury.

3. The doctrine developed by the courts that the happening of the accident in which the injuries were incurred is itself some evidence that the condition was dangerous should be legislatively repealed. The happening of the accident is no more evidence of the dangerous condition of the property than it is evidence that the injured person or some third person was negligent. Accidents may occur for a variety of reasons, and the happening of the accident should not be permitted to be considered as evidence that it happened for but one of the possible reasons.

4. The dangerous conditions statute should provide specifically that governmental entities are liable for dangerous conditions of property created by the negligent or wrongful act of an employee acting within the scope of his employment even if no showing is made that the entity had any other notice of the existence of the condition or an opportunity to take precautions. The courts have construed the existing Public Liability Act to hold public entities liable for negligently created defects.

Just as private landowners may be held liable for deliberately creating traps calculated to injure persons coming upon their land, public entities should be liable under the terms of the dangerous conditions statute if a public employee commits similar acts within the scope of his employment.

5. Where the dangerous condition has not been created by the negligent or wrongful act of an officer or employee of the entity, the entity should be liable only if it fails after notice to repair a dangerous condition of property or otherwise to protect persons against it. This is an existing basis for the liability of public landowners under the Public Liability Act and for the liability of private landowners as well, but private landowners are generally liable only to invitees upon this basis. The Public Liability Act, however, does not distinguish between invitees, licensees and trespassers in determining liability after the duty to discover and remedy defects has been breached. These distinctions were developed to limit the private landowner's duty to maintain his property in a safe condition.

The Commission believes, though, that if this duty is to be limited for public entities, the limitation should be expressed directly rather than by adopting a rule that denies recovery to persons foreseeably injured as a result of the breach of a conceded duty.

It should be noted that under this recommendation and under the decisions construing the Public Liability Act, a public entity is liable for injuries caused by a dangerous condition to a person who is using the property in a manner in which it is reasonably foreseeable that the property will be used even though the property is not being used in the manner in which it is intended to be used. This does not necessarily mean, however, that an entity must inspect its property to see if it is safe for unauthorized use; it merely means that if the entity actually knows that a defective condition of property creates a substantial risk of injury to those who foreseeably will use it, the entity must take reasonable steps to warn or otherwise protect those exposed to the risk.

6. The requirement that the dangerous condition of public property be known to the governing board or a person authorized to remedy the defect should be repealed. The ordinary rules for imputing the knowledge of an employee to an employer should be applicable to public entities just as they are applicable to private owners and occupiers of land. Under these rules, the knowledge of an employee concerning a dangerous condition will be imputed to the employer if under all the circumstances it would have been unreasonable for the employee

not to have informed the employer thereof. The knowledge of employees will not be imputed to the entity in other circumstances. These rules are sensible and workable. For example, a public entity should not be absolved from liability for failure to repair a dangerous condition after a telephone complaint to the proper office on the ground that the telephone receptionist was not a "person authorized to remedy the condition."

7. A public entity should be charged with notice or knowledge of a dangerous condition of its property if it has actual knowledge thereof, if the entity actually inspected the property but negligently failed to discover the defect, or if the condition would have been revealed by a reasonable inspection system.

A reasonable inspection system should be defined as one reasonably adequate (1) to determine whether the property is safe for the use for which the entity is using the property or is inviting others to use the property, and (2) where an entity maintains an instrumentality that may become extremely hazardous to persons who may foreseeably come in proximity to it, to see that the extreme hazard does not occur. Thus, if an area of its property is intended to be used only by the entity's employees, the entity's duty of inspection should be to see that the property is reasonably safe for use by employees. Insofar as streets and highways are concerned, the duty of the entity should be to see that the property is safe for use as streets and highways. But if, for example, the entity maintains electric power lines, it should be required to conduct inspections to see that

conditions have not developed that would expose to death or serious bodily harm persons who foreseeably would come into dangerous proximity to the condition.

Under these standards, public entities would have no duty to inspect the vast areas of the State that are governmentally owned and which the public is permitted to use, but which are not maintained for any particular use. Inspection duties would arise only as to artificial conditions that are likely to expose persons to extreme hazards unless regularly inspected and to property that entities have invited persons to use or which the entity itself uses. These duties correspond very closely with the duties of inspection which private owners and occupiers of land are required to discharge; but they are left uncomplicated by the somewhat arbitrary common law classifications of trespassers, licensees and invitees.

8. A public entity should be able to absolve itself of liability for a dangerous condition of public property -- other than those conditions it negligently created -- by showing (1) that it did not have time before the injury occurred to take any action to remedy the condition or to protect persons against it, (2) that there was nothing that could reasonably have been done under the circumstances either to remedy the condition or protect persons against it, or (3) that the entity did all that it reasonably could have been expected to do under the circumstances. A public entity should not be an insurer of the safety of its property. When its action or failure to take action is all that reasonably could have been expected

of it under the circumstances, there should be no liability.

9. The standards for personal liability of public officers and employees for negligently or wrongfully creating or failing to remedy dangerous conditions, now contained in Government Code Section 1953, should be revised so that they are not inconsistent with the liability standards contained in the sections relating to public entities. In addition to the matters that must be shown to establish entity liability, a person seeking to hold an officer or employee personally liable for failing to remedy a dangerous condition should be required to show that the officer or employee had personal knowledge of the condition, that he had the funds available and the duty to remedy the condition, and that he acted unreasonably in failing to remedy the condition. This further showing is necessary to show culpability on the part of the officer or employee.

10. The legislation dealing with liability for dangerous conditions of property should be removed from the divisions of the Government Code where it is now located, for it is now located in divisions concerned only with the liability of local agencies or of public officers and employees. The legislation should be placed in Division 3.5 of the Government Code, which relates to claims against all governmental entities as well as claims against public officers and employees.

In the present article on the liability of local agencies for dangerous conditions, there are a number of related provisions dealing with the filing and compromise of claims, the defense of

actions and insurance. The substance of these provisions will be the subject of later recommendations by the Commission. For the present, these provisions should be moved into Division 3.5 of the Government Code without substantive change so that all of the statutory law relating to dangerous conditions of public property will be found in one place.