8/9/62

Memorandum No. 46(1962)

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

Attached is a copy of the tentative recommendation on this subject, dated March 28, 1962.

Also attached are copies of a number of communications we received containing comments on this tentative recommendation:

Exhibit I (gold) (Southern Section of State Bar Committee)
Exhibit II (pink) (State Department of Finance)
Exhibit III (yellow) (City of Santa Monica)
Exhibit IV (white) (Department of Public Works)
Exhibit V (blue) (League of California Cities)
Exhibit VI (white) (Los Angeles County Counsel)

In connection with this tentative recommendation you will also need to study carefully a portion of the research study we have not previously considered: Part X (Park, Recreation, Cultural and Amusement Functions), pages 670 to 698.

You should also review pages 41-52 and 450-518 of the research study (discussing liability for dangerous conditions of public property).

Also attached is Exhibit VII (green) which is referred to in the text of this memorandum.

The following matters are suggested for Commission consideration:

1. General approach of statute. Note that in Exhibit III (yellow sheets) the Chairman of the League of California Cities Committee on Governmental Immunity makes the following statement:

It was the general feeling of the Committee that it might be a good idea, in view of the very substantial case law that has been built up, to leave the 1923 Public Liability Act as is but make it applicable to all public agencies. Many of the Committee members feel that to change the Public Liability Act will entail a complete unsettlement of this case law, and that many years of litigation may be necessary before the ultimate impact of the Tentative Recommendation is finally determined.

This suggestion represents a possible alternative approach to the problem that should be considered by the Commission. The existing statutes governing liability for dangerous conditions are Section 53051 of the Government Code (text on page 20 of tentative recommendation) relating to liability of local agencies and Section 1953 of the Government Code (text on page 19 of tentative recommendation) relating to the liability of officers. The Commission has previously concluded that the existing statutes governing liability of governmental entities for dangerous conditions of public property are unsatisfactory. (See page 5 of tentative recommendation.)

The position of the State Department of Finance is stated in Exhibit II (pink sheets) as follows:

1. The state should be subject to no greater liability as a property owner than the liability to which private property owners are subject.

2. The vastness of state activities and property holdings, and the fact that the state is under a duty to engage in a variety of activities not engaged in by private individuals, justify imposing a lesser standard of care on the state, in some respects, than is imposed on private property owners.

3. The state should be liable for dangerous conditions only on property which the public is authorized and invited to use and only for damages resulting from use for the purpose intended. We do not believe that a standard imposing liability upon the state on the basis of "foreseeable use" should be adopted.

Exhibit II (pink sheets) contains the comments of the Department of Finance justifying the above stated position.

In Exhibit V (blue sheets), Mr. Lewis Keller, Associate Counsel, League of California Cities, gives his thoughts (not to be construed to be the final expression of League policy) on the tentative recommendation. He states:

> In general, we would suggest certain principles for the guidance of the Commission in defining the liability of public agencies for dangerous conditions of public property as follows:
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> 1. The State and all public agencies should be treated identically with respect to liability for the same type of property.
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> 2. Public agencies should be subject to no greater liability than that of private persons owning or occupying the same type of property.
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> 3. Public agencies should be liable for dangerous conditions only with respect to property which is authorized for public use by the owning public agency and only when the damages result from a use by the member of the public agency for the purpose for which the property was authorized to be used by the owning public agency.
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> 4. The validity and scope of public activities and property holdings and the fact that public agencies are, in many cases, under a legal duty to engage in activities which are not and have never been engaged in by private individuals or organizations requires that a lesser standard of care or complete immunity be the standard of liability imposed on public agencies with respect to such properties and activities.

An examination of Exhibit IV (white sheets) and Exhibit VI (white sheets) will indicate that the Department of Public Works and the Los Angeles County Counsel take substantially the same position as the Department of Finance and the League of California Cities.

2. Special provisions relating to park and recreation functions. Professor Van Alstyne, our research consultant, suggests that the following characteristics of park and recreation functions provide a basis for treating these functions in a different manner than other governmental activities already considered (see generally Study at 674-80):

(a) As a result of the variety of possible recreational programs and the potentially wide range of public responsibilities assumed in connection with any given program, the risk exposure in the park and recreation area of liability may be unusually large and subject to extreme variations as between entities otherwise equally situated. (See Study, pp. 675-76.)

(b) The large number and variety of entities authorized to engage in these activities far surpasses the number of entities engaged in more narrow pursuits of fire protection and the like. Thus, the impact of expanding tort liability in this area will be more pervasive than with respect to other kinds of injury-producing governmental functions. (See Study, pp. 676-77.)

(c) For the most part, public park and recreation programs are less essential in the scale of important governmental activities and operations than fire protection, law enforcement, medical care, and the like. Hence, expanding governmental liability in this area may result in the curtailment, deferment or elimination of park and recreation programs. (See Study, pp. 678-80.)

The policy questions presented for resolution by the Commission in this portion of the study seem to be as follows: Should liability for dangerous conditions of park and recreation property be more restrictive than liability for other types of property? (See generally Study at 681-98.) The consultant suggests that this type of property ordinarily is not dangerous per se; rather, the danger stems from the use to which such property is put. In other words, the injuries sustained are of the type that are expected to occur, no matter how carefully recreation

programs may be conducted or property maintained. (See examples in the Study at 681-82.) Accordingly, the consultant recommends two limitations on liability for dangerous conditions of park and recreation property.

(1) Limitations should be imposed on the basis of the use to which such property is put. Specifically, he proposes:

(a) No liability for dangerous conditions of hiking, riding, fishing, hunting and other interior access roads and trails. (Study, pp. 684-85.) [Reason: These are not open to the public generally but are used primarily by persons voluntarily engaging in these activities (which necessarily entail some risk). Potential liability might require the entity to take protective precautions that are so expensive that the entity would discourage the use of such facilities. The proposed policy is already contained in Section 54002 of the Government Code (public bridle trails).]

(b) No liability for dangerous conditions of natural lakes, streams, rivers, reservoirs, canals, etc. (and their shorelines) devoted to water-oriented activities, except where the entity fails to warn of known concealed conditions constituting a substantial threat of serious injury or death. (Study, pp. 685-88.) [Reason: Imposition of liability would deter optimum use of such areas at a time when areas for such activities are scarce. Users should be placed on a par with licensees.] But artificial swimming pools should be excepted from this immunity. (Study, p. 687.) [Reason: There is maximum use of these facilities by the public in proportion to the area used and imposition of liability would not result in an onerous duty.]

(c) No liability for dangerous conditions of other "undeveloped" park and recreation areas, except when the entity fails to warn of known concealed conditions constituting a substantial threat of serious injury or death. But, liability should be imposed in areas that are "developed". (Study, pp. 688-89.) [Reason: Same as for (b) above, namely: to promote optimum use of such areas.]

The consultant recommends that "undeveloped" be defined to mean those portions of public lands intended for recreational uses which are presently being held in their natural state, without substantial artificial improvements or changes except to the extent such changes are essential to their preservation and prudent management (such as fire trails and fire breaks; roads for prudent lumbering and for conservation purposes; projects for reforestation of burned areas, and the like). On the other hand, areas which are "developed" by cutting of roads and sidewalks, construction of buildings, vehicle parking areas, camping sites with stoves, running water, sanitary facilities, garbage service and organized recreational activities, or which consist of playgrounds, golf courses, picnic tables and other typical recreational facilities characteristic of municipal parks, would be excluded from the scope of the proposed immunity for "undeveloped" park and recreational areas, and presumably would be covered by the recommendation relating to liability for dangerous conditions of public property. Is this distinction acceptable to the Commission?

The consultant further suggests that park officials be authorized to post signs indicating where the physical limits of the "improved" park areas are. Is this suggestion acceptable to the Commission?

(2) The rules of evidence regarding assumption of risk should be modified to substitute a "reasonable man" standard for the present subjective appreciation of dangers. (Study, pp. 689-98. See specific recommendation in the Study at 696.) The consultant suggests such change in recognition of inherent risks involved in voluntary recreational activities.

3. Comments on proposed statute. The following is a section by section analysis of the comments we received on our proposed statute:

Section 901.1. The Department of Public Works suggests that the introductory clause of this section be revised to read:

> Except where immunity from liability is [as] otherwise provided by statute, . . .

See Exhibit IV (white pages), pages 8-9.

The League of California Cities (Exhibit V--blue sheets) suggests that the introductory clause "except as otherwise provided by statute," be deleted entirely.

An examination of the materials considered by the Commission and of the Minutes of Commission meetings gives no indication of the reason why the phrase "except as otherwise provided by statute" was included.

Section 901.2. The Southern Section of the State Bar Committee suggests that subdivision (a) of this section be revised to read:

> (a) "Dangerous condition" means a condition of public property that exposes persons or property to a substantial (as opposed to merely a possible) risk of injury when the public property is used in a manner in which it is reasonably foreseeable that the public property will be used.

See Exhibit I (gold sheets) pages 1-2.

The Department of Public Works suggests that subdivision (a) be revised to read as follows:

(a) "Dangerous or defective condition" means a condition of public property which breaches a legal duty of care and thereby ~~that~~ exposes persons or property to a substantial and unreasonable risk of injury when the public property is used in a lawful manner for its intended purpose ~~in which it is reasonably foreseeable that public property will be used~~.

See Exhibit IV (white sheets), pages 2-5, 9. Note that the revision proposed by the Department of Public Works would shift the burden on showing reasonableness--under our proposed statute the public entity has to show that, all factors considered, the public entity did not act unreasonably.

Note also that the revision proposed by the Department of Public Works would limit liability to those cases where the property is "used in a lawful manner for its intended purpose." The substitution of "intended purpose" for the standard of reasonably foreseeable use would substantially change existing law. At the present time danger in foreseeable use is the standard. In Torkelson v. City of Redlands, 198 A.C.A. 359, a 10 year old child drowned in a storm drain. The defendant city contended that the drain was not dangerous for the purpose for which it had been constructed; that its use as a playground for children cannot be made a basis for liability; and that the trial court properly granted its motion for a directed verdict. The court stated:

> When the property of a public agency is in that condition which involves an unreasonable risk of injury to the general public, it is in a dangerous condition within the meaning of the Public Liability Act . . . .
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> * * *
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> One of the factors pertinent to a determination of the question whether the condition of public property is dangerous to the general public, is the use to which that property is put. The respondent has cited a number of cases which indicate that liability is limited to injuries sustained in the ordinary,

> usual and customary use of the public property in which the alleged dangerous condition exists [citations omitted]. The opinions in some of these cases contain language referring to the use of such property "for the purpose intended" [citation omitted], its "intended lawful use" [citation omitted], and its use for purposes inconsistent with those for which it was intended. [citation omitted]. Respondent relies upon these statements and contends, in substance, that the ordinary, usual and customary use of property is that use for which it was designed or originally intended; claims that Linda was using the ditch as a playground; that this was not its designed or intended use; that her death resulted from a use inconsistent with that for which the ditch was designed or intended; and, for this reason, the city is not liable therefor. This concept is a limitation upon the scope of the stated rule not justified either by reason or precedent. In many cases the liability of a public agency for injuries caused by the dangerous condition of its property has been affirmed even though such injury arose out of a use thereof other than that for which it was designed or originally intended. [citations cmitted.] An ordinary usual and customary use, for the purpose at hand, includes that which reasonably should be anticipated, even though without the bounds of the designed or originally intended use [citations omitted.], and any established actual use which, being known to and acquiesced in by the public agency owner, has converted or enlarged the design ed or originally intended use. [citations omitted.] It should be noted that the actual use thus considered must be an established or customary use as distinguished from a casual or unusual use. [citation omitted.]
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> We hold that in determining whether public property constitutes a dangerous condition the use factor to be considered in making such determination includes not only its designed or originally intended use, but every other reasonably anticipated use and also any use actually being made of it, conditioned always upon the fact that the owning agency has knowledge of its actual use, and conditioned further upon the fact that such use is not a mere casual one but a customary use.

In Acosta v. County of Los Angeles, 56 Adv. Cal. 198, a child riding a bicycle on a sidewalk in violation of an ordinance forbidding such conduct, was held to be within the protection of the Public Liability Act.

The State Bar Committee (Southern Section) suggests that the term "public property" be defined. The Southern Section suggests the following definition:

> (e) "Property" includes both real and personal property but does not include food stuffs, beverages, drugs, medicines or other consumable or therapeutic agents.

See Exhibit I (gold sheets), page 2 and Case No. 3 in Exhibit A thereto (pages 5 to 7 of Exhibit).

The Department of Public Works suggests that "public property" be defined so that it does not include public utility facilities and private encroachments. In addition, the department would exclude State property leased to another and property leased by the State from another. In the lease cases, it would seem that an indemnity agreement could adequately protect the public entity. See Exhibit IV, pages 9-10.

The Department of Public Works suggests that the word "and" be changed to "or" in subdivisions (b) and (c). The staff does not object to the proposed change. See Exhibit IV, page 10.

Paragraph (d), a definition of "public entity," should be deleted. A general definition of this term will be drafted.

Section 901.3. The Southern Section of the State Bar Committee suggests that 901.3 be revised to read:

> 901.3. A condition is not a dangerous condition within the meaning of this article if the trial or appellate court [~~,-viewing-the-evidence-most-favorably-to-the-plaintiff,~~] determines that the risk created by the condition to a person exercising reasonable care was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition exposed persons or property to a substantial risk of injury when the public property was used in a manner in which it was reasonably foreseeable that the public property would be used."

See Exhibit I (gold pages) pages 2-4. This section is intended to be a codification of the directed verdict rule--under which the court is required to view the evidence most favorably to the plaintiff. Accordingly, the Southern Section's suggestion that the words "viewing the evidence most favorably to the plaintiff" be deleted should not be accepted. These words are needed to make clear that the section is a codification of the directed verdict rule. The staff does not agree that the inclusion of the words would lead to the construction that the mere happening of the accident rendered the condition neither minor nor trivial. It is apparent that the section could have no meaning if this construction were adopted.

The Southern Section suggests the addition of the words "to a person exercising reasonable care." The staff would prefer that these words not be added. The court is required to make its determination "in view of the surrounding circumstances" which might be such that a person would not necessarily be exercising reasonable care. For example, a child playing in a sewer drain may not be contributorily negligent--but what effect would the inclusion of the language suggested by the bar have on the result. Does the inclusion suggested by the bar mean that the test is whether a reasonable man would be contributorily negligent if he were injured or does it mean that the plaintiff (a small child) would of necessity be contributorily negligent if he were injured.

The Department of Public Works asks: "Does the Commission intend that the appellate court can reweigh the evidence where a trivial defect is involved?" The words of the proposed statute would permit the court to consider the evidence to the extent that it does so in directed verdict and nonsuit cases.

The Department of Public Works suggests that the substance of the following provision be added to Section 901.3:

> The mention of the existence of this section, or the mention of the fact that the public entity has or has not requested the court to make a determination that the property was not in a dangerous condition, either on the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or at any other time in the presence of the jury, constitutes grounds for a mistrial.

The new language is based on Section 4986 of the Revenue and Taxation Code. See Exhibit IV, pages 10-11.

Note that Department of Public Works suggests that this section be made a part of the definition of "dangerous condition." Exhibit IV, page 6.

Section 901.4. (1) The Department of Public Works objects to Section 901.4 on the grounds that the section creates an artificial distinction between a wrongful act and an omission to act. See Exhibit IV, pages 6-7. The department takes this position because Section 901.4 bases liability on the "creation" of a dangerous condition.

Sections 901.4 and 901.5 base liability for dangerous conditions upon two distinct grounds. Under Section 901.4,

as the Department of Public Works notes, liability is based on the negligence of the public entity in creating the dangerous condition. This section does not require proof of notice of the dangerous condition, and the entity may not defend on the ground that the dangerous condition was not corrected or that warning was not given by reason of lack of time or for any other reason.

Under existing law, the liability of a public entity for a condition of property may be based upon either (1) notice and failure to exercise reasonable diligence to repair or (2) the negligent creation of a dangerous condition. Justice Ashburn stated the basis for this second ground of liability in Pritchard v. Sully-Miller Contracting Co., 178 Cal. App.2d 246, 256 (1960), a case in which the City of Long Beach was urging that it had no authority to go on to State highway property to change the timing of a traffic signal it had negligently set to work as a trap:

> The action sanctioned by section 53051, Government Code, is based on negligence . . . , and the provision for notice to "the legislative body, board or person authorized to remedy the condition" is intended for the protection of the city, not to assist it in inflicting a wrong. The elements of notice and failure to exercise reasonable diligence ordinarily are essential to show culpability on the part of the city but where it has itself created the dangerous condition it is per se culpable and notice, knowledge and time for correction have become false quantities in the problem of liability.

The case held that where the condition is created by the entity, neither notice nor an opportunity to correct are necessary for liability. Justice Ashburn indicated that the existing Public Liability Act is not worded so precisely as to necessarily eliminate this basis of liability, and since it would be unreasonable to construe it to eliminate this basis of liability the statute would not be so construed.

Other cases, too, have imposed liability where it has been apparent that there has not been notice and an opportunity to correct. Some of these cases indicate that creation of the condition merely eliminates the need for notice, but analysis of the facts will indicate that (as stated by Justice Ashburn) the need for opportunity to correct has also been eliminated.[1]

The liability of private landowners for dangerous conditions has the same two bases that are expressed in Sections 901.4 and 901.5. The general rule, of course, is that private landowners must warn their invitees of dangers which are known to the landowner (unless the condition is obvious to the invitee). In Hatfield v. Levy Bros., 18 Cal.2d 798, 806 (1941), the Supreme Court explained the requirement of "knowledge" as follows:

> Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting

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1. See, for example, Fackrell v. City of San Diego, 26 Cal.2d 196, 206 (1945) ("where the dangerous condition is due to the negligent act or omission of the officers doing or directing the work it is unnecessary to prove as a condition to liability that they had notice of the condition, and the authority . . . to correct it"); Duran v. Gibson, 180 Cal. App.2d 753 (1960) (slippery condition caused by city truck washing debris from street, following semitrailer skidded and caused injuries involved); Teilhet v. Co. of Santa Clara, 149 Cal. App.2d 305 (1957) (smoke caused by weed burning crew created hazardous condition on adjoining road; Ass't County Road Commissioner--a "person authorized to remedy the condition"--was chargeable with notice because he authorized it); Selby v. County of Sacramento, 136 Cal. App.2d 94 (1956) (sewer line cut, exposing livestock in adjoining pasture to disease; "The work was conceived by and carried out in accordance with previous plans of the defendants, and, hence, . . . no further notice of the condition created thereby was needed . . . ."); Wood v. County of Santa Cruz, 133 Cal. App.2d 713 (1955) (brush cutting crew left brush protruding into roadway where it pierced motorcyclist's foot, notice given by fact crew negligently created the condition).

> within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him . . . . Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it.

Thus, elimination of Section 901.4 probably would eliminate a certain amount of existing liability under the Public Liability Act, for the proposed statute articulates the basis for liability with a great deal more precision than does the existing statute. Moreover, the elimination may leave public entities immune from a liability they now have and which private occupiers now have where negligence of this sort can be proven. Of course, it is possible that the courts may construe the statute as loosely as they have construed the existing Public Liability Act and that Section 901.4 could be eliminated. But it seems more desirable to set forth this basis of liability expressly than to rely on the courts to create it by disregarding the language of the statute.

(2) The Southern Section of the State Bar Committee (Exhibit I--gold pages--page 4) favored extending to the Section 901.4 actions, the affirmative defenses available to the public entity under Section 901.7. This is in substance the same as eliminating Section 901.4 and does not seem to be a desirable change because the time available

for correction should not be a factor where the public entity itself has created the dangerous condition. (However, it would appear that the determination of whether the employee was negligent should take into account some of the factors listed in 901.7. See suggested revision of 901.4(c) below.)

(3) The Department of Public Works suggests in substance that the introductory clause of Section 901.4 be revised to prevent the plaintiff pleading the mere recitation of the statute. Thus, the words "all of the following" should be deleted and the words "facts showing that" should be inserted in place thereof. Exhibit IV, page 11. This seems to be a desirable change and makes clear the intent of this provision.

(4) In subdivision (a) of Section 901.4, the Department of Public Works suggests that the words "at the time of the injury" be added. This seems to be a desirable addition. As revised, subdivision (a) should read:

> (a) The public property [~~of the public entity~~] was in a dangerous condition at the time of the injury.

(5) The staff suggests that Section 901.4(c) be revised to read:

> (c) The dangerous condition was created by a negligent or wrongful act of an [~~officer, agent or~~] employee of the public entity acting [~~in the course and~~] within the scope of his [~~office, agency or~~] employment. Whether an act is negligent or wrongful shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

This revision makes the standard provided by Section 901.7 (so far as applicable) apply to Section 901.4 actions. This revision seems to

meet in part the objection the Southern Section of the State Bar Committee had to Section 901.4. See Exhibit I, gold pages, item 5 at the top of page 4.

(6) The Southern Section of the State Bar Committee proposed that a limited discretionary immunity be added to Section 901.4(c). The Section suggests that the following be added to Section 901.4(c):

> Negligent or wrongful act of an officer, agent or employee, as used herein, does not embrace any knowing or intentional good faith decision to take one of two or more available courses of action where the responsibility for making such decision has been delegated by the public entity to the officer, agent or employee.

See Exhibit I (gold sheets) page 4.

The Department of Public Works also urges that public entities should be immune for the discretionary acts of their officers and employees. See Exhibit IV, pages 17-18.

(7) The Department of Public Works suggests that Section 901.4(d) be revised so that the burden of proving that the risk was unreasonable be placed on the plaintiff. See Exhibit IV, page 12 and pages 2-5.

(8) The words "and the public entity did not take adequate measures to protect against that risk" should be deleted from Section 901.4(d). The plaintiff is required to prove under 901.4(a) that the public property was in a dangerous condition at the time of the injury. The quoted language from 901.4(d) adds nothing to this and may lead to confusion. Exhibit III, the letter from the Chairman of the League of California Cities Committee on Governmental Immunity, indicates the confusion that is caused by the quoted phrase: "Wherever the phrase 'did not take adequate measures to protect against that risk' is used, the word 'adequate' should be changed to read 'reasonable.'

Obviously, if the measures were adequate, the claimant would have sustained no injuries."

Section 901.5. In accordance with the suggestion of the Department of Public Works, the words "all of the following" should be deleted from the introductory clause of this section and the words "facts showing that" inserted. Exhibit IV, page 12.

Subdivision (a) of Section 901.5 should be revised to read:

(a) The public property [~~of the public entity~~] was in a dangerous condition at the time of the injury.

See Exhibit IV, page 12.

The Department of Public Works suggests that subdivision (d) of Section 901.5 should place upon the plaintiff the burden of proving that the public entity did not act reasonably to remedy the condition or to protect against it.

For the reasons given above, the words "and the public entity did not take adequate measures to protect against that risk" should be deleted from Section 901.5(d).

Section 901.6. (1) Should the words "pleads and proves facts showing that" be inserted for the word "proves" in the introductory clause to Section 901.6? See Exhibit IV, page 12.

(2) The Department of Public Works suggests that subdivision (a) of Section 901.6 be revised to provide expressly for the applicability of rules concerning the imputation of notice to public entities. Exhibit IV, page 7. The Department suggests that notice be given to the person authorized to remedy the condition or to an agent or employee whose duty it is to deliver such communications to the

proper official. Section 901.6(a) does not specifically indicate what person must have notice. In connection with this matter, consideration should be given to whether the ordinary rules of imputed notice are adequate to handle the problem of who must have the notice. Note that the tentative recommendation clearly indicates that the Commission intends that the usual rules will apply. Tentative Recommendation, pages 8-9.

Civil Code Section 2332 provides:

> As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary case and diligence, to communicate to the other.

Under this principle, "notice to an agent is not notice to the principal unless such knowledge is of a matter concerning which the agent has authority." Lorenz v. Rousseau, 85 Cal. App. 1, 6 (1927). An employee's actual knowledge of the existence of a dangerous condition may be imputed, though, even in the absence of showing a specific duty of the employee to act in relation to the condition. Such knowledge may be imputed where such knowledge could reasonably be said to give rise to an employee's duty with respect to the condition to act as the employer's representative. Thus, in Hollander v. Wilson Estate Co., 214 Cal. 582 (1932), complaints to an elevator operator concerning a grinding noise in an elevator (which later fell four stories) were held to impute notice to the owner. In Baker v. Stanford University, 133 Cal. App. 243 (1933), the knowledge of a staff doctor as to the faulty condition of an electric lamp was imputed to the hospital.

The imputed notice principle is not so broad, though, that notice will be imputed through employees who have no reasonable connection with the defect. No tort cases have been found, but analogous cases in other fields may be found in which the doctrine of imputed notice is limited. For instance, in Lorenz v. Rousseau, 85 Cal. App. 1 (1927), the knowledge of a real estate agent--whose only duty was to collect the rent--that the lessee was constructing an improvement on the property was not imputed to the owner so as to require the posting and recording of a notice of nonresponsibility under the mechanic's lien law. In Primm v. Joyce, 83 Cal. App.2d 288 (1948), the knowledge of a rental collection agent that a lessee had sublet the premises was not imputed to the owner so as to charge him with knowledge that a condition of the lease against subletting had been breached.

The Commission originally determined that it was not necessary or desirable to attempt to spell out the doctrine of imputed notice with particularity in the dangerous conditions statute.

If it is desired to specify a rule for imputed notice in the statute, it is suggested that the substance of the following be added to Section 901.6:

> For the purposes of this section, the knowledge of an employee concerning a dangerous condition is to be imputed to the public entity if under all the circumstances it would have been unreasonable for the employee not to have informed the appropriate employee of the public entity of the dangerous condition.

With respect to subdivision (b) of Section 901.6, the Southern Section of the State Bar Committee is of the opinion that imposing

upon the plaintiff the burden of proving what would be an inspection system reasonably adequate to inform the public entity, considering the practicality and cost thereof against the magnitude of the potential danger from failure to inspect, was impractical and probably unworkable in practice. See Exhibit I (gold pages) pages 4-6. The Southern Section recommended that subdivision (b) be deleted and the following be substituted therefore:

> (b) The dangerous condition is sufficiently obvious in the course of routine inspection and has existed for such a period of time that knowledge of its existence should be imputed to the public entity. Whether or not notice is to be imputed under this subsection shall be determined by the court, without a jury, in advance of any trial upon the merits.

The staff believes that the proposed substitute for present subdivision (b) merely covers up the fact that the issue is whether a reasonable inspection system would have disclosed the dangerous condition. An analysis of the proposed substitute will indicate that this is the question to be answered in determining whether the dangerous condition "has existed for such a period of time that knowledge of its existence should be imputed to the public entity." If this is not the question, then what are the considerations that determine whether the dangerous condition has existed for such a period of time.

The Department of Public Works, on the other hand, indicates that it approves of the idea of a standard of notice based upon the reasonable inspection system. Such a standard may be helpful (according to the department) if the definition of "public property" is limited as suggested by the department in its comments on

Section 901.2(a). In other words, the department suggests that subdivision (b) should be amended so that a reasonable inspection system is only required for the intended and lawful use of the public property. See Exhibit IV, pages 12-13.

The Commission may wish to reconsider the staff suggestion as to what should constitute a reasonable inspection. You will recall that the staff suggested, in substance, that present subdivision (b) of Section 901.6 be deleted, and two new subdivisions be added to read as follows:

> (b) The dangerous condition would have been revealed by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the property; or
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> (c) A structure or excavation was in a dangerous condition and:
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> (1) The structure or excavation was one that was reasonably foreseeable might become so dangerous as to create a very substantial risk of death or serious bodily harm to persons who it is reasonably foreseeable would come into dangerous proximity to it; and
>
> (2) The existence of its dangerous character would have been revealed by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the structure or excavation had become so dangerous as to create a very substantial risk of death or serious bodily harm to persons who it is reasonably foreseeable would come into dangerous proximity to it.

Subdivisions (b) and (c) set out above specify what constitutes a reasonable inspection system and provide for constructive notice of anything that such a reasonable inspection system would have disclosed. The burden of proof has been left on the plaintiff, for the existence of a dangerous condition for an "unreasonable" length of time so as to charge the entity with constructive notice is meaningful only in relation to the nature of the inspection system that would have revealed the defect. Thus, the plaintiff can prove that a condition existed for "an unreasonable length of time" only if he shows that it existed for a period long enough for it be be discovered by "a reasonable inspection system." Normally, the burden of showing "unreasonable" conduct to support the charge of negligence is on the plaintiff.

The inspection required by these subdivisions is probably the same as that required by common law of private occupiers of land. For example, in Devins v. Goldberg, 33 Cal.2d 173 (1948), it was held that an employer had the duty of inspecting his property to learn of dangers not apparent to the eye so as to make his property reasonably safe for his employees. A private occupier, too, owes invitees the duty to make reasonable inspections to see that the premises are safe for the invitees. "The main difference between the duty owed a licensee and that owed the person referred to in California as an invitee . . . is that in addition to using ordinary care not to harm the invitee or business visitor the landowner must

use reasonable care to discover conditions which might cause harm." Boucher v. American Bridge Co., 95 Cal. App.2d 659 (1950). However, the private occupier's duty to inspect, as a general rule, does not extend beyond the "area of invitation." Thus, in Powell v. Jones, 133 Cal. App.2d 601 (1955), the defendant was held not liable to a baby sitter who was injured by a dangerous condition because the injury occurred while the sitter was returning from a personal errand next door and was entering the house by an entrance that she would not have been expected to use for her baby sitting activities. When the sitter was outside the area where she was employed to be, the property owner's duty--the court said--was merely to refrain from active negligence or wanton or wilful injury.

In fact, except for the "area of invitation" the private occupier of land has neither the duty of inspection nor the duty of repair. The private occupier's duty so far as the remainder of his property is concerned is merely to refrain from wanton or wilful injury. In Hume v. Hart, 109 Cal. App.2d 614 (1952), the defendant was held not liable to a trespasser who fell into an open grease pit. In Palmquist v. Mercer, 43 Cal.2d 92 (1954), the Union Oil Company was held to be under no duty to warn horseback riders of a low clearance created by a pipeline trestle because such riders were licensees and the Oil Company's only duty was to refrain from "wanton or wilful injury."

From the foregoing, it appears that a private occupier's general inspection duty is to see that the property is safe for people who have been invited to use it, whether as employees or as patrons. In some instances, though, the duty of inspection has been extended further.

These duties are discussed in Dunn v. P.G. & E. Co., 43 Cal.2d (1954). Quoting in part from prior cases involving power lines, the court said:

> [W]ires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom. Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein . . . .
>
> In Lozano v. Pacific Gas & Elec. Co. (1945), 70 Cal. App.2d 415, 420, 422, . . . it is declared that the defendant company's duty "to use care sc as to avoid injury to persons or property was established by a clear showing that the company owned, maintained and operated the power line in question. Such duty extended to every person rightfully on the premises and was obviated only as to trespassers and individuals unlawfully there at the time of injury.

So far as trespassers are concerned, no California case has been found clearly indicating that there is ever a duty to inspect property to see that it does not create a hazard to the trespassers. There are a few cases, though, from which such a duty might be implied. It is clear that a private occupier does have some duties to foreseeable trespassers. He may not wantonly and wilfully create conditions intended to injure a trespasser. He may not create conditions that are extremely hazardous to immature persons who are likely to trespass and who will not appreciate the hazard that exists. King v. Lennen, 53 Cal.2d 340 (1959). Moreover, he may not negligently create "traps" into which foreseeable trespassers may fall without any appreciation of danger. Blaylock v. Jensen, 44 Cal. App.2d 850 (1941). Apparently, if there is a statutory standard of safety to be observed which has been imposed for the protection of the general public, a violation of the standard will result in liability even to a trespasser. Langazo v. San Joaquin Light & Power Co., 32 Cal. App.2d 678 (1939).

In none of the cases cited in the preceding paragraph, is there any specific indication that the private landowner owes a duty to look for the conditions that will result in injury to the trespasser. However, the facts of some of the cases indicate that there may in fact be such a duty. In the Blaylock case, the plaintiff went into an oil sump covered with dirt to rescue her dog and became imbedded in tar. The court held that the evidence of defendant's negligence was sufficient but reversed for a finding upon the question of plaintiff's contributory negligence. One may surmise that the hazard of the sump became concealed and the sump became a "trap" because of the defendant's failure to regularly inspect and take precautions. Malloy v. Hibernia Sav. & Loan Soc., 3 Cal. Unrep. 76 (1889) is similar. There a small child fell into an open cesspool that was covered with dirt so that it appeared the same as the surrounding ground. The defendant was held liable. In Loftus v. Dehail, 133 Cal. 214, 218 (1901), the Supreme Court explained that the defendant would have been liable "had an adult been killed under the same circumstances, for the complaint showed a veritable trap--a cesspool, open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land. Into such a trap anyone, adult or child, might have walked." Again, one may surmise that the negligence involved may have been the failure to inspect to see that the obvious hazard did not become concealed. The unreported case, though, seems to predicate liability on the removal of the surrounding fence. The Langazo case might be read to require power companies to inspect their lines to see that they comply with P.U.C. safety orders and failure to do so may result in liability to trespassers; however, such a duty is nowhere stated.

Subdivision (c), as suggested above, would clarify some of these uncertainties so far as public entities are concerned. It restates what the cases have held the private occupier's duty is to licensees. It may state what a private occupier's duty will be held to be to foreseeable trespassers if a proper case is presented. In any event, the staff believes that the duty it imposes is not an unreasonable one.

See Exhibit VII (green pages) for examples contrasting the results in various cases under the tentative recommendation and under the staff proposal.

Section 901.7. The Department of Public Works suggests amendments consistent with its recommendations above discussed concerning factual pleading and burden of proof.

In Exhibit III, the Chairman of the League of California Cities Committee suggests that "not unreasonable" be changed to "reasonable".

Section 901.8. The Department of Public Works suggests that "the person who suffered the injury" be substituted for "the plaintiff or his decedent" in subdivision (b). The purpose of the original language was to cover a wrongful death case where the plaintiff (as distinguished from the decedent) was guilty of contributory negligence. The existing language provides that the contributory negligence of the plaintiff will prevent his recovery in the wrongful death action. Query as to the result under the language proposed by Public Works.

Sections 901.9 to 901.12. The Department of Public Works suggests that the existing law, Government Code Section 1953, be retained and that Sections 901.9 to 901.12 be deleted from the proposed draft. The purpose of 901.9 to 901.12 is to make the burden of proof consistent in an

action brought against a public entity and its employee. Otherwise, the jury would be given complex instructions as to what must be proved to hold the public entity liable and what must be proved to hold the public employee liable. The basic protection provided to the employee by Section 1953 is retained--he must have notice of the condition and he must have the duty and funds to correct it.

The Commission may wish to consider the following alternative provision to Sections 901.9 to 901.12:

> A public employee is not liable for death or for injury to person or property resulting from a dangerous condition of public property unless he acted or failed to act with actual fraud, corruption or actual malice.

Is there any need to impose liability for dangerous conditions upon public employees; the statute imposes the liability upon the public entity. Under our general rule, the public entity will be required to assume the liability of the public employee unless he acted or failed to act with actual fraud, corruption or actual malice.

Sections 901.13 to 901.17. These sections should be deleted; the substance of these sections is covered by other tentative recommendations.

Additional amendments. The following amendments should be added to the proposed legislation. These were considered by a subcommittee of the Commission and approved in the form set out below. The Commission, however, has never considered or approved these amendments.

SEC. Section 941 of the Streets and Highways Code is amended to read:

941. Boards of supervisors shall by proper order cause those highways which are necessary to public convenience to be established, recorded, constructed, and maintained in the manner provided in this division.

No public or private road shall become a county highway until and unless the board of supervisors, by appropriate resolution, has caused said road to be accepted into the county road system; nor shall any county be held liable for [~~failure to maintain~~] a dangerous condition of any road unless and until it has been accepted into the county road system by resolution of the board of supervisors.

SEC. Section 943 of the Streets and Highways Code is amended to read:

943. Such board may:

(a) Acquire any real property or interest therein for the uses and purposes of county highways. When eminent domain proceedings are necessary, the board shall require the district attorney to institute such proceedings. The expense of and award in such proceedings

may be paid from the road fund or the general fund of the county, or the road fund of any district benefited.

(b) Lay out, construct, improve, and maintain county highways.

(c) Incur a bonded indebtedness for any of such purposes, subject to the provisions of Section 944.

(d) Construct and maintain stock trails approximately paralleling any county highway, retain and maintain for stock trails the right-of-way of any county highway which is superseded by relocation. [~~The county shall not be liable in any way for any damages resulting from the use of such stock trail by any vehicle.~~] Such stock trails shall not be included in the term "maintained mileage of county roads" as that term is used in Chapter 3 of Division 3 of this code.

SEC. Section 954 of the Streets and Highways Code is amended to read:

954. Except in the case of highways dedicated to the public by deed or by express dedication of the owner or acquired through eminent domain proceedings, all county highways which for a period of five consecutive years are impassable for vehicular travel, and on which during such period of time no public money is expended for maintenance, are unnecessary highways, subject to abandonment pursuant to Sections 955 and 956, or as herein provided. The board of supervisors of any county on its own motion or on the petition of any interested taxpayer of the county may abandon any such unnecessary highway or may designate such county highway a stock trail. The board of supervisors shall cause notices to be posted upon such stock trails, and also at the entrance of such stock trails, directing all persons to drive all untethered stock thereon.

After a stock trail has been established or designated as provided in this chapter, the county [~~shall~~] is not [~~be~~] liable [~~in any way for any damages resulting from the use of such stock trail by any vehicle~~] for death or injury to a vehicle owner or operator or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition of the stock trail.

Such stock trails shall not be included in the term "maintained mileage of county roads" as that term is used in Chapter 3 of Division 3 of this code.

SEC. Section 1806 of the Streets and Highways Code is amended to read:

1806. No public or private street or road shall become a city street or road until and unless the governing body, by resolution, has caused said street or road to be accepted into the city street system; nor shall any city be held liable for [~~failure to maintain~~] a dangerous condition of any road unless and until it has been accepted into the city street system by resolution of the governing body.

Suggested additions to the proposed statute. (1) Several public entities suggest that the existing rule of evidence which allows the happening of the accident to be regarded as some evidence that the property was in a dangerous condition should be changed by statute. The consultant proposed this in his study. The Commission declined to include such a provision in the recommended statute because of its concern for the problem such a provision would create in a case where it would be appropriate to apply the doctrine of res ipsa loquitur. See Exhibit IV (page 15); Exhibit III. The definition of "dangerous condition" in the proposed statute will permit the court to determine that a dangerous condition does not exist if the only evidence that there is a dangerous condition is the happening of the accident. Such evidence does not seem to be evidence that the "condition exposed persons or property to a substantial risk of injury . . ." (Emphasis supplied.).

(2) Public Works suggests that actual notice should be the basis for liability. See Exhibit IV (page 16).

(3) Public Works suggests that a provision be added to the statute making inadmissible evidence of subsequent precautions or repairs by a public entity. It does not seem that we need to codify this rule of evidence in the proposed statute. Although the statute is the exclusive basis for liability, this does not mean that the ordinary rules of

evidence will not be applicable. Do we need, for example, to codify the hearsay rule?

(4) Public Works and the League of California Cities suggest that the burden of proof of lack of contributory negligence should be placed upon the plaintiff except in wrongful death cases. See Exhibit IV (pages 16-17) and Exhibit III. There is some merit to this position. One can argue that the plaintiff is ordinarily the one best in a position to produce evidence as to whether he acted with reasonable care. The special rule for dangerous conditions of property cases might be justified on the ground that in these cases the public entity is often unable to produce evidence as to whether the plaintiff acted with reasonable care.

We suggest that you read the attached exhibits with care to determine whether any matters not included in this memorandum should be reviewed by the Commission in view of the comments we received on the tentative recommendation.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

EXTRACT

from

Minutes of Meeting of Southern Section

STATE BAR COMMITTEE ON SOVEREIGN IMMUNITY

April 25, 1962

The Section considered the tentative draft recommendation of the California Law Revision Commission relating to Liability for Dangerous Conditions of Public Property. The review of the draft legislation was made in the light of certain hypothetical fact situations, copy of which is attached hereto as Exhibit A.

The recommendations of the Section with respect to the draft legislation and the reasons therefor were as follows:

1. In Section 901.2 (a) it was recommended that there be added after the word "substantial" in the second line the following: "(as opposed to merely a possible)", so that the definition of dangerous condition would read as follows:

> "(a) 'Dangerous condition' means a condition of public property that exposes persons or property to a substantial (as opposed to merely a possible) risk of injury when the public property is used in a manner in which it is reasonably foreseeable that the public property will be used."

The Law Revision Commission in the last sentence on page 6 of its recommendations emphasizes that the condition of the property should

create a substantial risk of injury, as opposed to conditions creating a possibility of injury. In view of the erosion of what are intended as legislative limitations by Appellate Court opinions, particularly when affirming jury verdicts, it seemed well to emphasize that the word "substantial" is intended to mean just what it says.

2. The Section recommends that "property" as referred to in the draft statute be defined so as to exclude drugs, food stuffs and similar consumables. See Case No. 3 in Exhibit A. By this the Section does not mean to imply that public entities should be immune from liability from injuries occasioned by deleterious food stuffs or injurious drugs, but rather that this kind of tort liability did not seem properly to belong in a statute relating to Dangerous Conditons of Public Property.

It was accordingly recommended that a new subsection (e) be added to Section 901.2, as follows:

> "(e) 'Property' includes both real and personal property but does not include food stuffs, beverages, drugs, medicines or other consumable or therapeutic agents."

3. In Section 901.3 the Section recommends the deletion of the phrase in the second line "viewing the evidence most favorably to the plaintiff". In the minor and trivial defect exception the quoted words either have no meaning, in which case there is no justification for their inclusion, or, as seems likely, they could have the effect of placing an unwarranted limitation on the trivial defect rule as it has heretofore been developed by the courts. If the legislature instructs the courts that they must view the evidence most favorably to the plaintiff in

applying the trivial defect rule, it might lead to the construction that the mere happening of the accident rendered the condition neither minor nor trivial. If the section is construed as a codification of a directed verdict rule, the courts in directing any verdict under the section would, as a matter of law, without legislative fiat, have to view the evidence most favorably to the plaintiff.

4. Again, in Section 901.3, the Section recommended that the trivial defect rule be expanded to cover persons "exercising reasonable care". See Case No. 4 in Exhibit A. This would be accomplished by adding after the word "condition" in the fourth line of the section, the following: "to a person exercising reasonable care". In short, if the defect is found to be minor or trivial to one exercising reasonable care for his own safety even though not minor or trivial to a careless person, the case should not be permitted to go to the jury and the public entity be put to the burden of proving assumption of risk or contributory negligence.

Section 901.3, as revised by the recommendations of the Section, would read:

> "901.3. A condition is not a dangerous condition within the meaning of this article if the trial or appellate court [, viewing the evidence most favorably to the plaintiff,] determines that the risk created by the condition <u>to a person exercising reasonable care</u> was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition exposed persons or "property to a substantial risk of injury when the public property was used in a manner in which it was reasonably foreseeable that the public property would

be used."

5. The Section favored extending to Section 901.4 actions, the affirmative defenses available to the public entity under Section 901.7. See Case No. 1 in Exhibit A. Where the public entity is to be charged with liability arising out of a dangerous condition created by the negligent act of an employee, no good reason is apparent why the public entity should not be permitted to justify the existence of the condition by "weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against risk of such injury".

6. The Section recommended adding an additional sentence of Section 901.4 (c), to read as follows:

> "Negligent or wrongful act of an officer, agent or employee, as used herein, does not embrace any knowing or intentional good faith decision to take one of two or more available courses of action where the responsibility for making such decision has been delegated by the public entity to the officer, agent or employee."

The reason for the proposed addition appears from Case No. 1 and is an attempt to provide in a limited fashion immunity from liability for errors of judgment on the part of a responsible officer making a discretionary decision within the scope of his authority.

7. As anticipated, the most troublesome section of the draft legislation was the imputed notice provision in Section 901.6 (b).

The Section was of the opinion that imposing upon a plaintiff the burden of proving what would be an inspection system reasonably adequate to inform the public entity, considering the practicality and cost thereof against the magnitude of the potential danger from failure to inspect, was impractical and probably unworkable in practice. See Case No. 2 in Exhibit A attached.

The Section was of the view that limiting notice to actual notice, as in New York and as recommended by Professor Van Alstyne (Study, pages 490-495), would result in frequent cases of hardship, and the difficulty of proving that the entity had actual notice would in many instances be insuperable.

The Section recommended that there be substituted for Section 901.6 (b) a codification of the existing case law on constructive notice and providing for the severance of this issue and its predetermination by the court without a jury, in advance of a trial on the merits. It was believed that this approach would result in the elimination of much needless and expensive litigation, and by separating the issues would cast the question of constructive notice in sharper relief than where it is confused with evidence on all other issues in the case.

The Section recommended the substitution for Section 901.6 (b) of the following:

> or "(b) The dangerous condition is sufficiently obvious in the course of routine inspection and has existed for such a period of time that knowledge of its existence should be imputed to the public entity.

"Whether or not notice is to be imputed under this subsection shall be determined by the court, without a jury, in advance of any trial upon the merits."

As applied to the facts in Case No. 2 in Exhibit A, the court should have no difficulty in determining prior to any trial on the merits that with three patrol cars per day traversing the intersection, the dangerous condition had not lasted for a sufficient length of time to impute notice to the City of Los Angeles.

8. The Section took no action upon Sections 901.9 through 901.12, because it was not altogether clear from Mr. DeMoully's letter of April 14, 1962, whether the Law Revision Commission had yet taken a position whether there should be a concurrent cause of action for the dangerous condition of public property both against the public entity and against the responsible officer or employee. It was noted that Mr. DeMoully's letter suggests that the Committee defer consideration of the substance of Sections 901.13 to 901.17 until it receives the Commission's tentative recommendations relating thereto. However, in the preceding paragraph of Mr. DeMoully's letter it would likewise appear that the Law Revision Commission is reserving for future recommendation the liability of officers and employees as reflected in Sections 901.9 through 901.12. Accordingly, the Section reserves any action on or recommendations regarding these sections of the draft legislation.

9. In Section 3 no reason is apparent for failing to provide for the repeal of Government Code Section 53050, the effect of which would leave an article in the Government Code denuded of all substance with the exception of definitions.

10. Attention is invited to Streets and Highways Code Sections 941 and 1806 (found at Study, pages 215 and 217), which if retained would have the possible effect of excepting certain public streets from the coverage of the proposed legislation until acceptance into the City or County road and street system. Attention is further invited to Government Code Section 54002 and Civil Code Section 1714.5 (found at Study pages 219 and 221), excluding bridle trails and fallout shelters from the coverage of the draft legislation. It is assumed that the Law Revision Commission had considered these exceptions in failing to recommend their repeal.

The Section adjourned sine die, pending receipt of the minutes of the Northern Section meeting to he held on Saturday, April 28th.

HBC:gj 4/23/62
10h, 4th

In re State Bar Committee on
Sovereign Immunity

CASE NO. 1

Mary Smith is driving through a cut in the mountains when a boulder, dislodged by recent rains, rolls down the slope of the cut, hitting her car and killing her. The road is amply posted with warning signs stating "Slide Area" and "Watch for Rocks on Road".

Mr. Smith, surviving husband, sues the State of California under Section 901.4, alleging that the property was in a dangerous condition because the angle of the slope of the cut was so steep that falling rocks, particularly following a rainfall, were reasonably probable and that had the excavation been engineered with a lesser angle of slope this danger could have been materially lessened. He alleges that the dangerous condition was created by the negligence of the State engineer who engineered the excavation of the road at that particular point in that he did not allow for a sufficiently wide excavation to reduce the angle of slope to one of reasonable safety against falling rocks, and that in engineering the cut he was acting in the course and scope of his employment as a State engineer.

Comment: Notice or knowledge on the part of the State need not be shown because the plaintiff has alleged that the dangerous condition was created by the negligent act of an employee of the

EXHIBIT A

State acting in the scope of his employment.

It is also apparent that the State engineer in deciding upon the angle of the cut was acting in the exercise of a discretionary function and under the Federal Tort Claims Act the public entity would not be liable for the creation of the condition. Under the Commission's draft no distinction is made between negligence in the performance of discretionary functions, as opposed to ministerial duties.

Furthermore, in an action under Section 4 the public entity does not have the defense available under Section 7, namely, "weighing the probability of injury against the practicability and cost of protecting against the risk of injury". It would seem in the case postulated that the State should be permitted to show that the cost of the excavation to a lesser angle of slope would have been an extravagant and wasteful use of highway funds under all of the circumstances.

Suggestion: Expand Section 901.4 to read "except as provided in Sections 901.7 and 901.8," etc.

Add to Section 901.4 (c) the following: "Negligent or wrongful act of an officer, agent or employee as used herein does not embrace any knowing or intentional decision to take one of two or more available courses of action where the right and power to decide has been delegated by the public entity to the officer, agent or employee."

CASE NO. 2

The traffic light at a blind intersection in the City of Los Angeles is not working, with the result that two automobiles collide in the intersection. The owners of both automobiles sue the City for the damage to their respective cars, alleging that a nonfunctioning traffic light creates a dangerous condition, exposing persons or property to a substantial risk of injury. The plaintiffs are unable to prove that the City had actual knowledge of the nonfunction of the light, so they proceed under Section 6 (b) to show that had a police officer been on duty at the intersection he would have immediately discovered the dangerous condition and would have taken appropriate steps to have it remedied, and that the monthly cost of maintaining a policeman at the intersection in question would have been not more than $450.

The City defends under Section 7 by pleading and proving that the Chief of Police had issued instructions to all police patrol cars to report malfunctioning or nonfunctioning traffic lights to the Division of Streets and Highways, and that an average of three patrol cars per day pass through the intersection in question, and that no report of the nonfunctioning of the light had been made. It urges that this action to protect against risk of injury created by nonfunctioning traffic signals was not unreasonable and that the cost of maintaining a traffic officer at every intersection in the City at which there was a traffic light would be prohibitive.

Comment: In the case postulated, under Section 5 (d) ("The public entity did not take adequate measures to protect aginst risk"), how would a plaintiff go about proving inadequate measures to protect against the risk, except on some basis of res ipsa loquitur, namely, the fact of a nonfunctioning traffic light is itself evidence of inadequate measures taken to protect against the risk of collision at the intersection.

Under Section 6 (b) how does a plaintiff go about proving what would be a reasonably adequate inspection system to inform the public entity of the nonfunctioning of the traffic light "considering the practicability and cost of inspection" weighed against the likelihood of potential danger from failure to inspect? Section 6 (b) as presently cast would seem to impose upon plaintiff the necessity of producing actuarial avidence, cost studies and evidence of mathematical probabilities that would be far beyond the practicalities or means of the average litigant.

Suggestion: It would seem preferable, rather than imputing notice to the public entity through proof of what a reasonably adequate inspection system might have disclosed, considering its practicality and cost against the likelihood and magnitude of potential danger, to phrase the requirements for constructive notice in the manner in which it has been developed by case law, and to have the issue of constructive notice determined by the court without a jury in advance of trial upon the merits.

This avoids confusing the question of constructive notice with other issues, such as the injuries suffered, the reasonableness of the action taken by the public entity to remedy or inspect, and the contributory negligence of the plaintiff, etc. Prior determination by the court on the question of constructive notice would well result in the elimination of lengthy trials before a jury on all the issues involved. Furthermore, the shadowy penumbra of when the entity should or should not be charged with constructive notice of a dangerous condition is in my opinion more readily understood and appreciated by a judge rather than a jury, particularly when the question is determined separately from the other issues in the action.

I would suggest substituting for Section 901.6 (b) the following:

> "(b) The dangerous condition is sufficiently obvious in the course of routine inspection and has existed for such a period of time that knowledge of its existence should, in the interests of justice, be imputed to the public entity. Whether or not notice is to be imputed under this subsection shall be determined by the court, without a jury, in advance of any trial upon the merits."

CASE NO. 3

A prisoner awaiting trial in the County Jail eats some beans

which result in food poisoning and which in turn leads to the necessity for an operation upon a resulting duodenal ulcer. Following his acquittal, he brings action against the County, alleging that the beans were public property, and that having become spoiled they created substantial risk of injury when eaten. The plaintiff is unable to prove that the County or its jail officials knew of the spoilt condition of the beans, so he has to proceed under Section 6 (b), by proving that at no cost to the County a Trusty could have been assigned the duty of visually inspecting (and perhaps tasting) all food to be served County Jail prisoners.

The County defends under Section 7, by proving that food for consumption at the County Jail was bought through its purchasing department, which maintains a regular staff of inspectors, and that the condition of the beans in question would not have been apparent to its inspectors when they were purchased.

Comment: Are food stuffs, beverages, medicines, etc., the type of public property contemplated in the draft legislation covering dangerous conditions of public property?

Again, we have the difficulty of determining what is the type of proof of a reasonably adequate inspection system under the facts postulated that would satisfy the requirements of Section 6 (b) and the weighing of the plaintiff's burden of proof under that Section against the burden of proof on the public entity under Section 7 as to the reasonableness of the action it in fact took to protect against risk of injury.

Suggestion: A statute relating to defective and dangerous conditions of public property would not seem to properly embrace food stuffs, drugs and like consumables, which may in fact be owned by a public entity. Query, whether there may not be need for a definiton of public property to expressly exclude this type of consumable property.

## CASE NO. 4

Mary Jones enters the City Hall at Ventura on a rainy day. For the protection of persons entering the foyer, the janitor has had a rubber mat spread down, to prevent slipping on the terrazzo floor. The rubber mat is corrugated and made with small holes to add traction and prevent slipping. Mary Jones' spike heel catches in one of these holes in the mat, with the result that she falls and breaks her wrist.

She sues the City for maintaining a dangerous condition of public property, exposing persons to substantial risk of injury. She alleges that the City knew of the dangerous condition through its janitor, who put down the mat, through its purchasing department which purchased it and through the Mayor and City Council, who regularly had occasion to walk upon it. (Recovery in an identical case was affirmed on appeal in an action against a privately owned building.)

Comment: The accident in the case posed might be held to have

arisen from a condition of a minor, trivial or insignificant nature in Section 3, but it would seem to be the type of case which should not be permitted to reach a jury. The public entity, it would seem, should not have the burden of defending under Section 8 (a), assumption of risk, or 8 (b), contributory negligence.

Suggestion: Professor Van Alstyne recommends that the plaintiff should have to prove his exercise of due care, rather than that the burden of proving contributory negligence should rest upon the public entity. A reasonable compromise would be to add to the minor and trivial defect section a provision permitting disposition by the court (as opposed to the jury) of cases where it is apparent that someone using reasonable care would not have been injured.

Add after the words in Section 901.3 "the condition was of such a minor, trivial or insignificant nature" the following: "or so little apt to occasion injury to a person exercising reasonable care".

Memo 46 (1962) EXHIBIT II

STATE OF CALIFORNIA

SACRAMENTO 14

Interdepartmental Communication

California Law Revision Commission
School of Law
To: Stanford University, California

Date: June 7, 1962

Attention: Mr. John H. DeMoully
Executive Secretary

From: Department of Finance--Executive Offices

Subject: Tentative Recommendation of California Law Revision Commission Relating to Liability for Dangerous Conditions of Public Property

Your letter of 3-28-62 kindly requested comments on the tentative recommendation of the commission relating to liability for dangerous conditions of public property.

The position of the Department of Finance in general, with regard to liability for dangerous conditions of state property is:

1. The state should be subject to no greater liability as a property owner than the liability to which private property owners are subject.

2. The vastness of state activities and property holdings, and the fact that the state is under a duty to engage in a variety of activities not engaged in by private individuals, justify imposing a lesser standard of care on the state, in some respects, than is imposed on private property owners.

3. The state should be liable for dangerous conditions only on property which the public is authorized and invited to use and only for damages resulting from use for the purpose intended. We do not believe that a standard imposing liability upon the state on the basis of "forseeable use" should be adopted.

The state is unique among property owners as its holdings are vast in number, extent and variety. Some state property is acquired, improved and maintained for use by members of the public who are expressly or impliedly invited to use particular areas of such state property for specified purposes. Examples of this class of state property are: highways, colleges, hospitals, parks, and state office buildings. The state, in common with other property owners, should operate and maintain

such property so as to provide reasonably safe places for proper uses by those who are invited to use such property. The second class of state property is that not dedicated to or developed for use by members of the public, but from which it is not practical or desirable to exclude the public. Examples are: tide and submerged lands, forest lands, desert and beach lands, and water and power project lands. The state should not be required to inspect land of this type and make it safe; any use made of such land would be only on the basis of a tolerated use by persons who have no reason to believe the property is safe and therefore voluntarily expose themselves to whatever dangers exist. The third class of state property is that owned and maintained for a public purpose, but from which the members of the public must be excluded to protect such property and the members of the public. Examples are: corporation yards or buildings where machinery and equipment is stored or operated, pumping plants, electrical power plants, water supply facilities and property upon which radioactive material is stored or used. The state should not be required to make such property safe but should employ reasonable means to prevent entry or notify the public that entry is prohibited.

The draft statute in the commission's tentative recommendation would impose greater liability on the state than the liability imposed on private property owners or the liability imposed by the Muskopf decision. The draft would impose liability on the state for injuries resulting from illegal or improper use of state property. The imposition of such broad liability on the state would not only seem unjustified but would have a financial impact on the state government of serious proportions. The tremendous increase in state costs would compel drastic reductions in state facilities and services or an increase in taxes sufficient to balance the increase in expenditures.

During the first 14 months following the Muskopf decision (March 1961 through April 1962) there were 226 claims filed with the Board of Control totaling $14,619,393.35 for damages resulting from dangerous conditions of state property. This figure represents only a part of the claims against the state for damages incurred during said period from dangerous property conditions as there is a two year filing period for such claims and some of the 157 additional claims filed during the same period for damages alleged to have been caused by acts of state employees will prove to be based on dangerous property conditions.

The inherent complexity of the subject has not permitted us to progress at this time beyond the formulation of general principles to serve as guides in drafting specific statutory language. We appreciate it will be helpful to the commission to receive suggested changes to its tentative recommendations and we will continue our efforts to draft statutory language for submission to the commission.

Very truly yours,

/s/ Hale Champion

Hale Champion
Director of Finance

HC:wek
30019

EXHIBIT III

CITY OF SANTA MONICA
CALIFORNIA

Office of the City Attorney
City Hall

May 21, 1962

The California Law Revision Commission
School of Law
Stanford University
Stanford, California

Re: Liability for Dangerous Conditions of Public Property

Gentlemen:

As chairman of the League of California Cities Committee on Governmental Immunity, I have been charged with conveying the Committee's views on the proposed legislation relating to liability for dangerous conditions of public property, with particular reference to the Tentative Recommendation, dated March 28, 1962. Before presenting our views, let me state that there has been only one meeting of the full Committee since the Committee received the pertinent material from the Commission, and the only proposals the Committee has been able to discuss are those contained in the March 28, 1962, Tentative Recommendation.

The Committee is a League of California Cities committee and has not, as yet, had an opportunity to report to the League on its findings and is therefore presently in no condition to make any statements which purport to be the League's position. However, in the interests of assisting the Commission in drafting the proposed legislation, and without in any way meaning to indicate either approval or disapproval of the Tentative Recommendation, the following is submitted.

Considerable uncertainty was expressed by members of the Committee as to the intended purpose of the two sections, 901.4 and 901.5. It would appear to have been the intention of the Commission to provide alternative bases for liability: in the one instance (901.4), no notice would be requires where the dangerous condition is created by the plan or supervision; and in the other (901.5), notice would be required where the condition develops without any act of the public body. If this was the Commission's intention, then Section 901.4 is wide of the mark, as the section as it stands removes all of the safeguards of the 1923 Public Liability Act and would make the public entity liable for isolated acts of negligence by employees having no connection with the plan or its execution.

If we are correct in our assumption that Section 901.4 is meant to apply to those cases where a dangerous and defective condition is created by

the plan or supervision of the public entity, then the section should be corrected to clearly show this. It would also seem proper that if the dangerous or defective condition was created by such plan or supervision, such should be pleaded, because as the section presently stands, a general allegation that the dangerous condition was created by a negligent or wrongful act of an employee will suffice to overcome a demurrer in every case.

Some further comments may be summarized as follows:

Section 901.2(c) defines "protect against" in the conjunctive, and we believe it should be in the disjunctive, for instance: " . . . providing safeguards against a dangerous condition, and or warning of a dangerous condition." Wherever the phrase "did not take adequate measures to protect against that risk" is used, the word "adequate" should be changed to read "reasonable." Obviously, if the measures were adequate, the claimant would have sustained no injuries. And in those sections using the phrase "inspection system that was reasonably adequate," the word "adequate" should be changed to "designed." Section 901.7 should be changed to include Section 901.4, and the double negative "not unreasonable" should be changed to read "reasonably." Section 901.7 also fails to properly consider warning signs.

Additionally, I would like to comment on certain recommendations of the Commission's consultant which appear to have been disregarded or otherwise overlooked by the Commission, but which the Committee feels should be given very careful consideration by the Commission. On page 476 of the consultant's report, he points out that the present rule permits the happening of the accident to be some evidence that the property was in a dangerous or defective condition, the most recent reaffirmation of the rule being Johnson v. City of Palo Alto, 199 A.C.A. 144. To give full effect to Section 901.3, it would seem that this rule should be abrogated as recommended by the consultant.

Another recommendation of the consultant has to do with the defense of contributory negligence and commences on page 495 of his report. As there pointed out, claimants never seem to have trouble with dangerous and defective conditions in the public ways on busy street corners where witnesses would be present, but almost invariably--and in my ten-year experience in the field, invariably--fall in some isolated area where there are no witnesses, or the only witness is a close friend or relative. It is believed by the Committee that this Commission should give serious consideration to requiring the plaintiff to prove himself free of contributory negligence in this type of case, as the defense of contributory negligence in the normal trip-and-fall case imposes an almost insurmountable burden on the defendant.

The Committee believes that the Commission must bear in mind that there is substantial reason for treating governmental agencies differently from private business. Where there is a governmental duty, the public entity cannot withdraw where liability or other factors are too expensive, although

private business would be at liberty so to do, and a private corporation normally cannot assess its shareholders for losses nor prevent their shareholders from withdrawing, whereas a public entity may assess by raising the taxes, and the taxpayer (shareholder) is stuck.

It was the general feeling of the Committee that it might be a good idea, in view of the very substantial case law that has been built up, to leave the 1923 Public Liability Act as is but make it applicable to all public agencies. Many of the Committee members feel that to change the Public Liability Act will entail a complete unsettlement of this case law, and that many years of litigation may be necessary before the ultimate impact of the Tentative Recommendation is finally determined.

The foregoing comments are not to be construed as in any way concurring in the proposition that the 1923 Public Liability Act applies to property maintained by the public entity in its proprietary capacity, nor to concur in the thought that the public entity should be denied the protection afforded private landowners as against trespassers and licensees. Nor is the foregoing intended as a complete discussion of the drafting difficulties inherent in the Tentative Recommendation.

I also wish to reiterate the comment made at the outset that these remarks are not to be construed to be the position of the League of California Cities at this time or that the League has taken any position, either favorable or unfavorable, towards the Tentative Recommendation. The only purpose of these comments is to assist the Commission in its drafting of its proposed legislation. The Committee will, from time to time, comment on the other Tentative Recommendations that have heretofore been submitted.

In closing, I feel it appropriate to call the Commission's attention to the following quotation from Monick v. Town of Greenwich, 136 A. 2d 501:

> "Apparently all trees should be cut down, and the entire earth should be paved, so that mindless, heedless people may teeter in happy sightlessness over a smooth concrete world. The requirement that pedestrians should keep their eyes open clearly is an obsolete relic of primitive times when trees, grass and flowers were deemed prettier than asphalt or concrete. Uglification is triumphant."

Respectfully submitted,

S/ Robert G. Cockins

ROBERT G. COCKINS
City Attorney

EDMUND G. BROWN
Governor of California

ROBERT E. REED
Chief of Division

ROBERT B. BRADFORD
Director

EX. IV

STATE OF CALIFORNIA
# Department of Public Works
DIVISION OF CONTRACTS AND RIGHTS OF WAY
(LEGAL)

PUBLIC WORKS BUILDING
1120 N STREET
(P. O. BOX 1499)
SACRAMENTO 7, CALIFORNIA

PLEASE REFER TO
FILE NO.

July 13, 1962

California Law Revision Commission
School of Law
Stanford University, California

Attention: Mr. John H. DeMoully

Gentlemen:

Re: Liability of Public Entities for Dangerous Conditions of Public Property

Pursuant to your request of March 28, 1962, the Department of Public Works desires to comment on the tentative recommendation of the California Law Revision Commission relating to liability of public entities for dangerous conditions of public property.

You will recall that by our letters to the Commission of December 8, 1961 and January 8, 1962 on this same subject we indicated that in our opinion the subject of dangerous or defective condition of public property requires separate consideration inasmuch as it involves a distinct legal relationship, in addition to a different standard of care. These letters set forth our basic position and contain our preliminary recommendations on this subject. Our comments will be first directed to the tentative recommendation of the Commission and then we will comment separately on each section in the proposed statute.

To begin with, we agree with the Commission's statement that the present law relating to the liability of governmental agencies for dangerous or defective condition of public property does not "adequately protect the public entitity against unwarranted tort liability" (page 5). In addition, we agree that "the general principles of the Public Liability Act should be retained" (page 6). The consultant to the Commission emphasized the relative importance of this problem when he said:

> "Dangerous and defective condition claims thus, in all likelihood, may be deemed the single most important area of governmental tort liability." (Study, page 452)

TENTATIVE RECOMMENDATION

Recommendation No. 1

a. In this recommendation the Commission has defined the term "dangerous condition" without regard to the foundation for the law of negligence liability, i.e., the creation of an unreasonable risk of harm. Common law negligence is defined as conduct involving unreasonable risks (Prosser, Chapter 6, Section 25; Restatement of Torts, Section 282). The Commission has defined the term on the basis of the creation of a substantial risk of harm without proof by the plaintiff of the unreasonableness of the risk. This definition is contrary to the Public Liability Act which is predicated upon negligence liability (Study, page 465), and is contrary to the recommendation of the consultant. The consultant recommended a definition of dangerous condition, using the words "unreasonable exposure".

Under present law, a dangerous condition is one involving an unreasonable risk. A risk is not necessarily unreasonable merely because injury may be foreseeable. Foreseeability is but one consideration. Even though injury is foreseeable, there is no violation of any duty to a plaintiff unless he has been subjected to an unreasonable risk. The definition of "dangerous condition" should follow the consultant's recommendation and incorporate this basic requirement of common law negligence.

The proposed recommendation and statute radically changes the foundation of our present law. It shifts the burden of proof as to the existence of an unreasonable risk by requiring that the public entity prove as a matter of defense that it acted reasonably under the circumstances. Since the plaintiff does not have to prove the existence of a duty, and since the public entity can only show lack of duty by proving that the impracticabilities outweigh the gravity of the harm, there is no possibility for a determination that there was no duty as a matter of law for purposes of a demurrer or motion for a nonsuit.

This reverse basis for imposing liability will upset existing case law where it has enunciated a rule of no liability because of no duty. For instance there can be a substantial risk of foreseeable harm to downstream riparian owners, yet there is no basis for liability where a public agency merely increases the flow of a stream. It is our opinion that under the proposed definition this would be a "dangerous condition"

and the public entity would have to prove that the cost of remedy was disproportionate to the harm. This is squarely contrary to the case of Archer v. City of Los Angeles, 19 Cal. 2d 19. There the Supreme Court held that the public entity had no duty to improve an outlet in the stream and further held that it could not be held liable for doing what it had a right to do even though a different plan might have avoided the damage to the downstream riparian owner.

California Jurisprudence has succinctly stated this rule in the following quotation:

> "A party may be actually damaged without having any right of recovery where the person inflicting the injury has done no legal wrong. In other words, no cause of action arises from the doing of a lawful act or the exercise of a legal right in a lawful or proper manner, for any resulting damage is damnum absque injuria, or damage without wrong. The doctrine of damage without legal injury means that a person may suffer damage and be without remedy because no legal right or right established by law and possessed by him has been invaded, or because the person causing the damage holds no duty known to law to refrain from going the act causing the damage. Familiar examples of damage without legal injury are damages necessarily arising from the reasonable use of one's own property, and any incidental damage which may result from the prosecution of a public work authorized by the state. ..." (1 Cal. Jur. 2d, Actions, Sec. 14, p. 594, et seq.)

Very recently this principle was applied in the case of Thon v. City of Los Angeles, 203 A.C.A. 199. At page 202 the court stated:

> "Failure to provide a public street, fire apparatus, traffic signals, a traffic stop sign, or other public convenience or necessity gives no rise to a cause of action...."

In order to follow the principle enunciated in this case, it is our opinion that the foundation for liability for the dangerous condition of public property must be based upon the breach of a duty to the plaintiff and the creation of an unreasonable risk of harm. It is our suggestion that the term "dangerous condition" be defined as being a condition which exposes persons or property to a substantial and unreasonable risk of injury

or damage and which breaches a legal duty of care to the plaintiff.

b. Another concept in the definition that concerns us is that liability is based upon all foreseeable uses of the public property. We believe that the concept of liability for this type of activity should be restricted to the intended and lawful use of the public property. For example, it may well be anticipated that certain individuals will drive at an excessive rate of speed on a public highway. The public entity charged with responsibility for designing, constructing and maintaining such highway should be responsible only for persons using the highway at not more than the maximum speed specified by law. The consultant to the Commission indicates that this is the present case law. He states in his study, on page 461, "The rule that public property need only be made reasonably safe for its intended purpose is already a well-settled interpretation of the Public Liability Act...."

The Commission, in this part of its recommendation, recognizes the fact that "any property can be dangerous if used in a sufficiently abnormal manner" (page 7). Even the case law on negligence liability of owners and occupiers of land distinguishes between persons who at the time of the injury were trespassers and those who were licensees or invitees. The proposed rule would impose upon public entities a duty of care which would be more stringent than the most serious duty imposed upon private property owners. In addition, it was the recommendation of the consultant that the "plaintiff must plead and prove as a condition of recovery ... that he did not have notice or knowledge that his use or entry upon the allegedly defective property was wrongful or unauthorized" (Study, page 466). We believe that intended and lawful use is a necessary part of the definition of the dangerous or defective condition which should be factually pleaded by the plaintiff.

The courts have recognized the fact that liability of this nature should be only to those persons lawfully using the public property. In the case of Electrical Products Corp. v. County of Tulare, 116 Cal. App. 2d 147, the court said, at page 154:

> "... A duty rests on a driver to see that which is clearly visible and which would be seen by anyone exercising ordinary care. (Huetter v. Andrews, 91 Cal. App. 2d 142 [204 P. 2d 655].) It would seem that this would be especially true with respect to commonly used warning signs placed in a proper

> position. If the placing of such signs, where the repairs cannot be immediately made, does not constitute the action reasonably necessary to protect the public, required by the statute here involved, the only reasonable alternative would be for the public bodies to place barricades and prevent all use of the streets or roads until repairs could be made. This would be an unreasonable hardship on the traveling public and in many cases is entirely unnecessary. There was evidence that many cars passed safely over this depression shortly after the accident; that one of these was a paint truck; and that two ladders on this truck 'jarred very hard' but did not fall off. It would be unreasonable to stop all use of such a road, to the great inconvenience of careful drivers, because a few drivers might disregard such warning signs...."

If the public entity is liable to the drivers that disregard warning signs, it would be required to take the drastic alternative action mentioned in the above opinion.

The scope of the definition of dangerous condition necessarily revolves around the standard of care to be imposed upon public entities. Many cities and counties measure the total length of the streets and sidewalks under their jurisdiction in the hundreds of miles and the State Highway System stretches into 17,000 miles. (Study, page 456) No private owner has responsibilities of this nature. The consultant, after evaluating the magnitude of this risk, comments as follows:

> "The sheer vastness of the total governmental enterprise counsels the need for a realistic and workable standard of care. ... The standard of care should thus ideally be established at a point which provides the maximum possible protection against injuries to the public, but which is reasonably within the capacity of governmental entities to meet." (Study, page 457)

c. In addition, we do not believe there should be a deletion of the words "or defective" from the term "dangerous or defective condition". This term is contained in the Public Liability Act (Government Code Sections 801 to 1953) and has been judicially construed and applied for many years.

Recommendation No. 2

We agree with the Commission that the "trivial defect" rule should be codified. However, we feel that the trivial defect definition should be made a part of the definition of dangerous condition of public property rather than in a separate section. We will specifically comment on this in our suggestions concerning the draft of the proposed statute.

Recommendations No. 3 and No. 4

We see no reason for a distinction between liability for a dangerous condition that is created by the affirmative negligent act of a public employee as distinguished from a dangerous condition arising from a failure to act.

Whether a particular course of conduct is regarded as an affirmative act or an omission is, to a great extent, a matter of semantics. For example, assume a stop sign is obscured by vegetation or shrubbery. This can be regarded as an omission by alleging that the defendant negligently failed to cut the vegetation and shrubbery. On the other hand, it can be treated as an affirmative act by alleging that the defendant negligently allowed the vegetation and shrubbery to grow and obscure the stop sign, or negligently performed his duties in that the vegetation grew in front of the stop sign.

Another illustration of the artificial distinction between the creation of a dangerous condition by an affirmative act as compared with an omission to act is a highway constructed years ago with narrow lanes, to then acceptable design standards, although today it is regarded as substandard. It could be alleged that the dangerous condition was created by the affirmative negligent act of the public agency and no proof of notice of the dangerous condition would be necessary to impose liability. On the other hand this could be regarded as an omission to act by alleging that the public agency negligently failed to widen the highway or to place appropriate signs warning of its narrow width.

A third example of the artificial distinction between an affirmative act and an omission to act is presented by the case of two flagmen. The first flagman, stationed at the beginning of the construction project, negligently waves a car into a danger zone, causing an accident. The second flagman negligently fails to signal a car, causing the second car to have an accident. Is notice required to be proved in the second case and not in the first case? And is the first case an affirmative act and the second case an omission to act?

The answers to these questions point up the fallacy in this arbitrary distinction on whether the case is to be tried under proposed Section 901.4 or Section 901.5.

Recommendation No. 5

It is our understanding that the ordinary rules for imputing notice are intended to be applicable to public entities without an express statement to that effect in the statute. We agree with the Commission that the ordinary rules on imputing notice are sensible and reasonable. However, since the proposed statute is the exclusive basis for liability the Commission should include in the statute a provision consistent with this recommendation and expressly provide for the applicability of rules concerning imputation of notice of public entities.

The example given by one of the Commissioners at a recent meeting points up one extreme factual situation. The Commission would not want to impute notice to the State of California of a dangerous or defective condition from the personal observations of a Law Revision Commissioner in his everyday travels on our State highways. We believe that the notice should be to the person authorized to remedy the condition or to an agent or employee whose duty it is to deliver such communications to the proper official.

Recommendation No. 6

The adoption by the Commission of a standard of notice based upon the reasonable inspection system does have somewhat of an effect of limiting the present law concerning constructive notice. Although it is a lengthy and complicated provision, it may be helpful in a dangerous or defective condition statute if the definition of "public property" is limited in scope as we have suggested in our comments on Section 901.2(a).

Recommendation No. 7

The Commission in its recommendation has indicated that there should be no liability where the agency attempted to remedy, warn or protect. This, we believe, is inconsistent with the proposed draft of the statute, which allows the matter to go to the jury. It is our opinion that there should be no liability in situations where the public agency did all that it could have been expected to do under the circumstances, where it warned of the condition or protected against the condition. A public entity should be free from liability as a matter of law where it has utilized a warning sign or regulatory sign authorized under the provisions of the Streets and Highways Code, Vehicle Code, or other

provisions of law pertaining to the use and installation of standard warning signs and devices. This would be in line with the holding of the court in Electrical Products Corp. v. County of Tulare, 116 Cal. App. 2d 147, referred to under Recommendation No. 2.

Recommendation No. 8

The Commission in this recommendation has attempted to "equalize" the liability of public officers and employees with that of public entities for the dangerous or defective condition of public property. We do not agree with the Commission that Government Code Section 1953 should be revised and the liability expanded where it may deviate from the liability standards adopted by the Commission. Several reasons prompt our suggestion in this matter. First of all, most public entities presently have insurance on their officers and employees for this particular type of liability. By amending Section 1953 to increase the public employees' exposure to liability, there will be a possibility that insurance on public officers and employees will be cancelled or no longer obtainable. We also believe that the Legislature, in enacting Section 1953, intended to strictly limit the personal liability of public officers and employees (as contrasted with the liability of the public entity) because of their extreme exposure to liability from the mandatory duties of their work. The only apparent reason given by the Commission for expanding the liability of public officers and employees to the same extent as that of the public entity is consistency. This, we submit, is not a proper basis for there are many distinguishable features between exposing a public employee to liability as compared to a public entity. The Lipman case is a good example of the application of this distinction.

Recommendation No. 9

We see no objection to relocating this subject matter in the Government Code since legislation concerning liability of public officers and employees should be located together.

TENTATIVE STATUTE

Government Code Section 901.1

We recognize the intent of the Commission in the first clause of this section in not repealing by implication other statutes providing for immunity of public agencies in certain special areas. There is some concern with respect to the effect of this change on other statutes, e. g., the wrongful death

statute (Code of Civil Procedure Section 377). The wrongful death statute was recently held, in the case of Flournoy v. State of California, 20 Cal. Reptr. 627, to be applicable to the State of California whether it acted in a governmental or proprietary activity. Thus, it would be argued that where the dangerous or defective condition of public property resulted in a wrongful death, the basis of liability would not be as set forth in proposed Article 2 but would be Section 377 of the Code of Civil Procedure. The same argument can be made in the statutory liability for nuisance (Civil Code Sections 3479 and 3501, et seq.). We suggest that the first clause of Section 901.1 read as follows:

> "Except where immunity from liability is otherwise provided by statute, ..."

There might be a conceptual problem created by the clause "caused by a dangerous condition of public property". Assume, for example, a highway surfacing that is slippery. A flagman is stationed at the beginning of the slippery highway to warn oncoming cars. He negligently performs his job and injury results. Would this injury be caused by a dangerous condition of public property or could a claimant's attorney plead that it was caused merely by the flagman's negligence and therefore not within the provisions of proposed Section 901.1, et seq.?

Government Code Section 901.2(a)

Our comments on the Commission's Recommendation No. 1 are applicable to the definition of the term "dangerous condition". We believe this subsection should read as follows:

> "(a) 'Dangerous or defective condition' means a condition of public property which breaches a legal duty of care and thereby ~~that~~ exposes persons or property to a substantial and unreasonable risk of injury when the public property is used in a lawful manner for its intended purpose ~~in which it is reasonably foreseeable that public property will be used.~~"

It is our opinion that the term "public property" should be defined in the statute. This term is used extensively throughout the proposed statute. We can see serious problems in what property comes within the purview of the liability encompassed by this article. There are many miles of our State highways wherein third parties have rights or easements to maintain structures or facilities not under the jurisdiction or control of the State of California. We have in mind such things as telephone cables and electric power lines. In addition, many encroachments are permitted within the State highway right of way. The term "public property" should be defined to exclude this type of property from the purview of the statute. This is particularly true when viewed in light of the proposed sections concerning a

reasonable inspection system. The Commission, in order to provide for notice based upon a reasonable inspection system did not contemplate the inspection of property not akin to that of the public entity and exclusively maintained by third parties. We do not believe that a public entity should establish and maintain an inspection system which includes public utility facilities and private encroachments. The liability should be upon the public utility or person maintaining such structure or facility within the public property. The public agency should have no liability for rutted street car tracks, sagging trolley wires, leaky gas mains or rotting telephone poles where they do not have the authority or means with which to inspect such property, and particularly the authority and funds to remedy such a condition.

We also have in mind situations where the State rents floor space in office buildings and the control over the heating, lighting and common areas in the building are under the jurisdiction, maintenance, inspection and control of the landlord. In addition, the Department of Public Works leases areas under freeways and bridges for public parking, and rents many parcels of improved properties to obtain rental income prior to actual construction. In our opinion there is a definite need for a definition of "public property" with an exclusion to cover the above situations.

Government Code Section 901.2(b)

For purposes of clarity, we believe there should either be a comma after the word "person" or, in the alternative, the word "and" be replaced by the word "or".

Government Code Section 901.2(c)

Again, for purposes of clarity, we believe the word "and" before "warning" should be changed to "or".

Government Code Section 901.3

We have several comments concerning the codification of the "trivial defect rule". We note that the provision includes not only the trial court but the appellate court's determination of what constitutes a trivial defect. Does the Commission intend that the appellate court can reweigh the evidence where a trivial defect is involved?

A provision similar to that contained in Revenue and Taxation Code Section 4986 should be added to Section 901.3,

making it grounds for automatic mistrial if the plaintiff's attorney mentions the existence of Section 901.3 and the defendant's unsuccessful use of it or failure to utilize this provision. An example of this would be the plaintiff's attorney's final argument telling the jury that the entity had a chance if they thought the defect was trivial to raise it under Section 901.3 and by failing to do so it thereby admitted that this was more than a trivial defect. Such prejudicial conduct should be an automatic ground for mistrial.

Government Code Cection 901.4

In the introductory clause the word "factually" should be inserted after the word "plaintiff" before the word "pleadings". We do not think that the mere recitation of the statute by the plaintiff should be sufficient to state cause of action. The plaintiff should and must allege the ultimate facts constituting the basis for liability. In addition, this thought of requiring factual pleading is consistent with the present trend in discovery. It also is necessary to make the trivial defect section workable, since without it a plaintiff could get to the trial stage without ever indicating what the dangerous condition consisted of by use of a mere conclusion.

Government Code Section 901.4(a)

We believe this subsection should be amended to read as follows:

> "(a) The public property of the public entity was at the time of the injury in a dangerous or defective condition."

This amendment is self-explanatory.

Government Code Section 901.4(b)

As we indicated above, the term "dangerous or defective condition" should be used in lieu of the term "dangerous condition".

Government Code Section 901.4(c)

What we have said above in regard to Recommendation No. 4 is equally applicable to this subsection concerning the artificial distinction between wrongful act or omission to act.

Government Code Section 901.4(d)

This subsection again does not reflect the basis of our common law rule concerning negligence liability. As we have indicated in our comments on Recommendation No. 2, negligence liability is based upon the creation of an unreasonable risk of injury to person or property. This section refers to a reasonable risk which is contrary to the present basis of our tort law. This subsection should be amended to read as follows:

> "(d) The dangerous or defective condition created ~~reasonable~~ an unreasonable and foreseeable risk of injury and the public entity did not take adequate measures to protect against that risk."

Government Code Section 901.5

This section should contain the same reference to factual pleading as Section 901.4 for the reasons stated above.

Government Code Section 901.5(a)

This subsection should refer to the public property in accordance with our recommendation above. Subsection (a) should read as follows:

> "(a) The public property of the public entity was in a dangerous or defective condition at the time of the injury."

Government Code Section 901.5(d)

What we have said above with regard to subsection 901.4(d) is equally applicable here. The statute should refer to the creation of an "unreasonable and foreseeable risk of injury".

Government Code Section 901.6

To be consistent with the language used by the Commission in Sections 901.4 and 901.5 and our recommendation, the last clause of the introductory sentence should read "only if the plaintiff factually pleads and proves".

Government Code Section 901.6(b)

This section should be amended to be in line with our suggestions concerning Recommendation 7 and Section 901.2(a), in that a reasonable inspection system is only required for

the intended and lawful use of the public property. This amendment can be accomplished by inserting the words "the lawful and intended use" after the words "property was safe and the" and before the words "use or uses" and by striking the last clause beginning with the words "and for uses that". No inspection system would be reasonable if it went beyond the intended and lawful use of the property, otherwise the inspection system would be as broad as all the imaginative unlawful uses that could be made of public property.

Government Code Section 901.7

In conjunction with our above suggestions, this section should be amended to read as follows:

> "A public entity is not liable under Section 901.5 for injury caused by a dangerous condition of its public property if the public entity factually pleads and proves that the action it took to protect against the risk of injury created by the condition or its failure to take such action was ~~not~~ unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the possibility and gravity of potential injury to person or property foreseeably exposed to an unreasonable and foreseeable ~~the~~ risk of injury against the practicability and cost of protecting against the risk of such entity."

Government Code Section 901.8(b)

Delete the language "the plaintiff or his decedent" and substitute "the person who suffered the injury". This makes this subsection consistent with subsection (a). The term "injury" as defined in subsection 901.1(b) includes death.

Government Code Sections 901.9, 901.10, 901.11 and 901.12

These sections should be deleted from the proposed draft of Article 2 for the reasons stated in our comments concerning Commission's Recommendation No. 8.

Government Code Section 901.13

This section should be amended to read as follows:

> "A cause of action for damages against a public officer or employee under this article is barred unless a claim for such damages naming such public officer or employee has been presented to the public entity in the manner and within the period prescribed by law as a condition to maintaining an action therefor against the public entity."

If the claim against the agency is to also be the basis of a cause of action against the employee, it should certainly specify the name of the officer or employee sought to be charged with personal liability.

Government Code Section 901.14

This proposed section is redundant inasmuch as the subject matter is presently covered by Code of Civil Procedure Section 313.

Government Code Section 901.17

This subsection should be deleted and considered separately in the tentative recommendation relating to insurance coverage for public entities and public officers and employees.

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After fully reviewing the recommendation of the Commission and the proposed statute, we feel that an undue amount of complicated provisions has been incorporated in the statute. These detailed provisions will create more problems than they will aid in defining and limiting liability. Besides the creation of a multitude of issues to be tried in such cases, the statute unnecessarily compounds these issues by reversing the normal burden of proof in such cases. The law on this subject, when given in the way of instructions to the jury, would be so confusing that it would undoubtedly be disregarded. Additional and lengthy instructions will be required and in nonjury cases there will necessarily have to be Findings of Fact and Conclusions of Law in each of the many issues set forth in the statute. It is our belief that a simple and concise statute should be drafted somewhat along the lines of Government Code Section 1953 pertaining to the liability of public officers and employees for the dangerous or defective condition of public property. In our letter to the Commission on January 8, 1962 we attempted to set forth our thoughts on such statute.

The insurance consultant to the Commission pointed up the great problem which will be encountered in a statute such as that which has been tentatively proposed by the Commission. Mr. Sifford pointed out that a factor in the cost of liability and in the cost of liability insurance is the cost of defense. A broad potential liability which is later cut down by defense eats up a lot of the liability cost in defending cases. If the liability standards are narrower, fewer cases are brought initially, but a much higher percentage of the claimants recover. Thus, more of the liability cost is for the payment of claims rather than for the overhead of defense (Minutes of Regular Meeting, March 23-24, 1962, page 9).

In addition to the specific comments above concerning the tentative recommendation and the proposed statute, we believe the following matters should be considered by the Commission and incorporated into any statute which is drafted pertaining to this liability.

A. The existing rule of evidence which allowed the happening of the accident to be regarded as some evidence that the property was in a dangerous or defective condition should be changed by statute.

This matter was thoroughly researched and analyzed by the consultant to the Commission in his study (page 475).

The consultant states that there is "little merit to the rule which also obtains in California under which evidence that the injury to the plaintiff happened is permitted to be regarded by the jury as some evidence that the public property in question was defective". The necessary result of this rule, if applied consistently, would mean that the issue of defectiveness of public property would always be a jury question and the minor defect rule as provided for in the Commission's statute would be abrogated.

The consultant concluded that it would seem equally appropriate to infer from the happening of the accident that the plaintiff was contributorially negligent or that the injury was an unavoidable accident. The consultant submitted that legislation on this matter should additionally provide that the jury be instructed that the happening of the accident is not evidence that the condition was dangerous or that the plaintiff was contributorially negligent.

B. Actual notice should be the basis of liability.

The proposed statute, as pointed out above, has attempted in a minor way to reduce the onerous burden now imposed upon a public agency by the constructive notice rule by engrafting on the constructive notice the requirement of a reasonable inspection system. This requirement of a reasonable inspection system would not be so difficult if it were not for the fact that the inspection system provided for in the statute includes all foreseeable and unlawful uses of public property, and the definition of public property includes encroachments within public property and public utility facilities. We concur with the consultant's recommendation that the term "actual notice" should be defined in any statute on the dangerous or defective condition of public property (page 492). The suggested wording proposed by the consultant appears to be workable.

C. Subsequent precautions or repairs by a public entity.

In the ordinary negligence case the case law provides both on the grounds of relevancy and public policy that evidence of subsequent precautions or repairs is excluded on the issue of negligence. Their relevancy is based upon the fact that in a negligence case the question at issue is whether the defendant exercised due care at the time of the injury to plaintiff in the light of existing knowledge or notice of the circumstances. The evidence is also excluded on the grounds of public policy because when an accident occurs new knowledge is gained of possible risks and the defendant may, to avoid future harm, make repairs, improvements, or practice additional safety measures. The courts have concluded that the admission of such evidence would discourage persons from engaging in a highly beneficial activity of safety. The same rule of evidence should be applied to cases based upon the dangerous or defective condition of public property, since the same rules of relevancy and public policy are equally applicable. Since the proposed statute is the exclusive basis for liability, this proposed rule of evidence should necessarily be codified as a part thereof.

D. The burden of proof of lack of contributory negligence should be placed upon the plaintiff except in wrongful death cases.

The consultant to the Commission devoted nine pages of his study (pages 493-503) to a discussion and analysis of this subject. Because of the magnitude and special nature of the administrative and management problems facing public entities where dangerous or defective conditions of public property are concerned, there is justification for a shifting of the burden of proof on this issue

to the plaintiff. He pointed out that New York, for example, which possibly has the most expansive waiver of governmental immunity of any state in the Union, requires the plaintiff to plead and prove freedom of contributory negligence as a part of the proof necessary to sustain a recovery, except in wrongful death cases where a statutory provision alters the rule. We believe that if California is to have a workable statute on the liability for dangerous or defective condition of public property similar to that of New York, it should also adopt this part of the New York rule. The consultant's recommendation was summarized on page 503 as follows:

> "It is suggested that the Public Liability Act be amended to impose the burden of proof of lack of contributory negligence upon the plaintiff in all cases thereunder except those for wrongful death. The presently existing rule placing the burden on the defendant should be retained in death cases."

The Legislature has adopted this as part of the statutory law governing cases based upon the dangerous or defective condition of public property that are brought against public officers and employees. Government Code Section 1953(3) provides that the plaintiff must plead and prove that "the damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the damage due to such condition."

We believe the examples included in our letter of January 8, 1962 (pages 5 and 6) justify our suggestion and the consultant's recommendation in this matter.

E. Public entities should be immune for the discretionary acts of their officers and employees.

One of the most important problems that must be resolved by this Commission concerns the effect of the ruling in the Lipman case. This case held that a public agency may be liable in certain cases for the discretionary acts of its officers, even though the officer himself is not liable. The consultant in his study, on page 318, indicates that the "discretionary immunity of public personnel is directly and immediately relevant to the basic issue of governmental immunity".

The Commission in its consideration of this subject has classified it as "a major policy decision exception". The minutes of the meeting of February 16 and 17, 1962, on page 11, reflect the Commission's consideration of this subject and indicate its intent to consider this matter at a later time. We believe this matter must be considered as a part of the scope of this liability. There are many instances where official discretion is exercised and the existing case law has indicated no duty exists which gives

rise to a cause of action for a dangerous condition of public property, such as the determination to install traffic signals or stop signs. Very recently the case of Thon v. City of Los Angeles, 203 A.C.A. 199, held, at page 202:

> "Failure to provide a public street, fire apparatus, traffic signals, a traffic stop sign, or other public convenience or necessity, gives no rise to a cause of action...."

The holding of this case must necessarily be included as a part of the Commission's proposed statute.

We agree with the recommendation of the office of the County Counsel of Los Angeles. In their letter to the Commission dated January 15, 1962, they have recommended that public agencies not be liable for the discretionary acts of their officers and employees, and have drafted a statute to that effect.

The Federal Tort Claims Act in 28 U.S.C.A., Section 2680(a), provides for an exception to liability for discretionary acts. While Congress desired to waive the Government's immunity from actions for injuries to persons and properties occasioned by the tortious conduct of its officers and employees, it was not contemplated that the Government should be subject to liability arising from all acts of a governmental nature. This exclusion from liability under the Federal Tort Claims Act has been judicially construed and is now a part of the tort claims acts in the states of Alaska and Hawaii. We believe that California should provide a similar exception in any waiver of sovereign immunity. Senate Bill 651, introduced at the 1961 Session of the Legislature, provided an immunity for discretionary acts in Section 663.

We wish to thank the Commission for this opportunity to comment on its work and to participate in its deliberations.

Yours very truly,

Robert E. Reed

ROBERT E. REED
Chief of Division

Memo 46 (1962)

EXHIBIT V

LEAGUE OF CALIFORNIA CITIES

Berkeley 5, California
August 2, 1962

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: John H. DeMoully, Executive Secretary

Gentlemen:

This is in response to your request for comments and recommendations of the League and its Committee on Governmental Immunity directed toward the Commission's tentative recommendations relating to . . . .

Liability for Dangerous Conditions of Public Property

With respect to this subject, this letter should be considered as supplementary to the letter directed to the Commission on behalf of the League Committee by Chairman Robert C. Cockins on May 21, 1962. This letter, too, must be considered as an expression of the conclusions and recommendations of the undersigned based on discussions of the subject with city officials and not as a final expression of League policy.

In general, we would suggest certain principles for the guidance of the Commission in defining the liability of public agencies for dangerous conditions of public property as follows:

1. The State and all public agencies should be treated identically with respect to liability for the same type of property.

2. Public agencies should be subject to no greater liability than that of private persons owning or occupying the same type of property.

3. Public agencies should be liable for dangerous conditions only with respect to property which is authorized for public use by the owning public agency and only when the damages result from a use by the member of the public agency for the purpose for which the property was authorized to be used by the owning public agency.

4. The validity and scope of public activities and property holdings and the fact that public agencies are, in many cases, under a legal duty to engage in activities which are not and have never been engaged in by private individuals or organizations requires that a lesser standard of care or complete immunity be the standard of liability imposed on public agencies with respect to such properties and activities.

With regard to the proposed Section 901.1, if the liability of public entities and public officers and employees for injuries caused by public property is to be limited to the conditions specified in the proposed Chapter 4, it is believed that Section 901.1 should expressly so state and should not start out by stating that "except as otherwise provided by statute" liability shall be exclusively governed by the Article. On this assumption, proposed Section 901.1 should simply state that public entities and public officers and employees shall not be liable for injuries or damages arising out of the dangerous condition of public property except under the conditions set forth in Chapter 4.

With regard to the liability of public officers and employees, it is assumed that the proposed Section 901.10 is intended to cover negligence for maintenance only, whereas Section 901.9 is intended to include negligence in construction or design. It would appear desirable to limit the liability for negligence of public officers and employees to maintenance. Imposing liability for design would, in our opinion, result in an almost complete inability to pinpoint individual responsibilities. For example, a dangerously abrupt curve in a city street may go all the way back in its origin to an action taken by the City Council in acquiring the right-of-way many years prior to an accident.

The decisions imposing liability on officers for the dangerous conditions of highways have in California been almost exclusively in respect to maintenance as distinguished from design. This common law liability was recognized in California and resulted in the 1917 Act being construed as limiting such liability (see Shannon v. Fleishhacker, 116 Cal. App. 285, at page 263, and Ham v. County of Los Angeles, 46 Cal. App. 148, at page 161).

The entire matter of liability for design can result in somewhat ridiculous situations. The idea of submitting to a jury the question of the competence of an architect or engineer in designing public property or improvements appears to place upon juries a function which is historically and factually beyond their role and practical ability.

* * *

We are appreciative of the opportunity to comment on the tentative recommendations of the Commission. The League Committee on

Governmental Immunity will meet at this office on August 10, and it is hoped that additional detailed recommendations on the foregoing and other tentative recommendations of the Commission will be developed in that meeting.

Sincerely,

S/LEWIS KELLER
Lewis Keller
Associate Counsel

LK:ls

Examples of Reasonable Inspection System Problems

To evaluate the respective standards under Section 901.6(b) of the tentative recommendation and under subdivisions (b) and (c) of Section 901.6 as recommended by the staff, consider the following cases:

1. State University (S.U.) owns, in addition to its campus grounds, a large tract of undeveloped land. This land is used by horseback riders, picnickers, kite fliers and lovers. Although the land is fenced, S.U. makes no effort to keep these people off of its land. P, a horseback rider, is riding rapidly along a path worn by previous horses when the horse rounds a turn and smashes P into a tree limb that fell across the path at head level during a recent storm which felled a number of trees. P sues for his injuries. P introduces evidence showing that S.U. is constructing a linear accelerator upon its undeveloped land, that consequently personnel of the university pass in the vicinity of the horse path on which the injury occured, that it would not be an unreasonable expenditure of either time or money for such personnel to travel along the horse path from time to time to look for such hazards and for S.U. to warn users of such hazards.

Under these facts, present subdivision (b) would permit S.U. to be held liable, for S.U. is charged with notice of what a reasonable inspection would have revealed. Substitute subdivisions (b) and (c) (staff recommendation) would require a holding of no liability because S.U. had no actual notice and no duty to inspect, and hence no duty arose to protect persons against the condition. If S.U. were Stanford University instead of a public school, there would be no liability, for private occupiers don't have an obligation to inspect unless they have invited people into the area or have created extra-hazardous artificial conditions. Moreover,

even if Stanford had actual knowledge of the condition there would be no liability, for a private occupier's duty to licensees is only to refrain from wanton and wilful injury. Palmquist v. Mercer, 43 Cal.2d 92 (1954).

(One may surmise that after the first case of liability, S.U. would diligently seek to exclude all intruders from its property.)

2. County Road Commissioner A inspects a county maintained bridge to see if the creek flowing underneath has caused an undue amount of erosion. While inspecting the bridge, he notices a pathway alongside the stream. Although the path is somewhat hazardous, the risks involved in traversing it are apparent to anyone using it. Several months later, P, a fisherman, is seriously injured when a portion of the path gives way, the stream having undermined the path in a way not apparent to the users of the path. P sues the county because the injury occured upon land owned by the county. P introduces evidence to show that county road personnel have done repair work on the road in the vicinity and have also performed maintenance work on the bridge since the defect was created, that consequently it would have involved no great expenditure of time or money on the part of the county to have had a person inspect the path for hidden defects such as that which caused the injury, that since the path was known to A the use of the path in the manner P was using it when injured was reasonably foreseeable, and that a reasonable inspection would have revealed the defect.

Present subdivision (b) would permit the county to be held liable. Substitute subdivisions (b) and (c) would require a holding of no liability, for the path was not created or maintained by the county for any use and, hence, there would be no duty to inspect it.

If, instead of a county, the defendant was P.G. & E who discovered the path on its property near a bridge maintained for its dam personnel, there would be no liability, for private occupiers of land owe a duty of inspection only to invitees and only for the "area of invitation"--except for certain artificial conditions involving great danger.

3. The State maintains an agricultural experiment station. The station is operated generally as a farm. The station manager is aware that one corner of a field is used as a short cut by persons in the neighborhood. Passers-by occasionally throw broken bottles and other trash on the field; however, the quantity involved has never been so large as to interfere with the agricultural machinery or farm operations and no efforts have ever been made to remove the small amounts involved. Two weeks after the field is plowed, P cuts his foot on a broken bottle concealed by some loose dirt thrown over the bottle by the plow. P sues the State and shows that the persons using the field for a short cut generally crossed the corner of the field that he was crossing when his foot was cut, that the presence of broken glass created a reasonably foreseeable risk to persons crossing the field, that the State could have had one of its personnel periodically inspect the area where people crossed, that a mere visual inspection conducted at intervals of a week would . . the State no more than five minutes per week, that such a visual inspection would have revealed the bottle that caused P's injury before it became concealed by the plowing, and that the removal of the few bottles and cans involved could have been accomplished without additional cost if the persons inspecting the property picked up the bottles and cans that were found.

Under existing subdivision (b), the State could be held liable because an unreasonable effort on the part of the State would not be required to inspect the corner of the field and to keep it in a reasonably safe condition for short-cutters. Under recommended subdivision (b), the State would not be liable, for it had no actual notice and was not required to inspect the area to see that it was safe for tolerated trespassers. Its inspection duty under recommended subdivision (b) would be to see that the field is safe for agricultural purposes. Under recommended subdivision (c), the State would not be liable because the condition is not a structure or excavation.

If the farm were operated by California Packing Corporation, there would be no liability, for there would be no duty to inspect in order to make the property safe for trespassers.

4. The San Pablo Utility District (SPUD) maintains a network of high tension wires running half the width of the State to bring power to its consumers. In the mountains, SPUD has acquired fee simple title to a considerable amount of property surrounding its dam and power generating facilities. Upon the SPUD property at a considerable distance from the dam, deer hunters, campers, fishermen, etc., have worn a path-way underneath the power lines. The path leads to and through a wire fence in a state of disrepair that was located on SPUD's property when the property was acquired. SPUD ceases to use one of its transmission lines, but does not remove it because it anticipates placing it in service

again when power demands increase. In the course of time, wind and storm cause the abandoned line to deteriorate and to break and hang to the ground in several places. The breaks are not noticed because power transmission is not interrupted. T, a hunter, is electrocuted when he touches the wires of the fence. Subsequent investigation reveals that a storm the previous night had blown the abandoned line into contact with both a live wire and the wires of the fence. P, suing for wrongful death, shows that the wire had deteriorated so that it was in such a condition that the likelihood of its breaking would have been apparent to anyone looking at it, that because of its proximity to live wires an extreme hazard was thus created toward anyone using the path, and that periodic inspections would have revealed the condition to SPUD and would have permitted SPUD to either repair the wire or to post warnings to the users of the path. SPUD defends on the ground that T was a trespasser to whom no duty was owed to inspect or make the property safe, that it conducted reasonable inspections of its live wires which were all in good condition, and that it did not inspect wires not in service unless and until they were to be placed in service.

Under existing subdivision (b), SPUD could be held liable if the trier of fact found that the risk of injury was not disproportionately slight when compared with the cost of inspection and repair. Under recommended subdivision (b), SPUD would not be liable in the absence of a showing that the danger would reasonably have been revealed by an inspection adequate to keep the property safe for power transmission purposes. However, under recommended subdivision (c), SPUD could be held liable because the condition was a structure

that it was reasonably foreseeable would be very likely to kill users of the pathway if allowed to deteriorate, and, therefore, SPUD would have the duty to inspect to see whether such deterioration had taken place. Under the same circumstances, P.G. & E.'s liability, if any, would appear to depend upon whether a P.U.C. safety order or any other statutory duty had been violated. Existing cases have clearly held that the duty of inspection of private entities in regard to power lines runs to licensees, but the cases have indicated that there is no duty to inspect for trespassers. An alternative basis for the holding in Langazo v. San Joaquin Light & Pwr. Co., 32 Cal. App.2d 678 (1939) is that the defendant is liable for violation of statutory duties even to trespassers. However, the court also held in that case that the plaintiff was not a trespasser as to the defendant who was merely an easement holder; hence, its authority may be questioned.

5. P is injured by a defective door while using the city hall as a short cut from one street to another. Under both existing subdivision (b) and recommended subdivision (b) the city would be liable if a reasonable inspection would have revealed the defect. Both proposals would here impose liability where common law would deny liability, for there is no duty of a private occupier to licensees save to refrain from active negligence or wanton or wilful injury.

6. Ice plant grows onto the sidewalk of the City of Iceplantium. P is injured when he trips over the ice plant. Under both proposals, the city would be liable if a reasonable inspection system to keep the sidewalks safe for users thereof would have revealed the hazard.

7. H is killed by a fall from a cliff overlooking the ocean. The

cliff is owned by the State but is not maintained for any purpose. A ranger station is nearby which is maintained for a fire lookout. Those maintaining the ranger station are unaware of any hazard in connection with the cliff that is not obvious to anyone. No inspections are made. The rangers are aware that the cliff is frequently climbed on by picnickers. In fact, the cliff is composed of a type of rock that is quite crumbly. Unknown to the rangers or to H, wind and storm had so undermined a portion of the cliff that an apparently solid ledge on which H was standing gave way. P, suing for wrongful death, shows that the rangers were well aware that people climbed on the cliff, that reasonable inspections conducted at no additional cost would have revealed the hazardous condition of the rock, that such inspections would have revealed the hazardous condition of the ledge that crumbled away, a sign warning of the hazard would have been sufficient to prevent H's death, and that the State owed a duty to see that the cliff was safe for climbing since it was reasonably foreseeable that people would use it for that purpose.

Under existing subdivision (b), the State could be held liable. Under recommended subdivisions (b) and (c), the cliff not being a structure or excavation, the State would not be liable for it would have no duty to inspect to see whether the cliff was safe for climbers, for the State had extended no invitation to climb the cliff and had not represented in any way that the cliff was safe for that purpose. If the owner of the cliff were a private person, there would be no liability, for such persons have no duty to inspect their property to see that it is safe for licensees or trespassers.

8. Same facts as 7, except that the rangers in the course of their

duties happen to discover the extremely hazardous condition of the cliff. Under either proposal it is likely that there would be liability if no action were taken to warn those exposed to the risk of the nature of the hazard to be encountered. A private person would still be immune from liability, for he has no duty to warn licensees or trespassers of natural conditions. His duty to such users of his property is to refrain from active negligence or wanton or wilful injury.

The foregoing examples are adequate to show how the respective standards of inspection would work. The recommended provisions have the same philosophical basis as the common law, i.e., the risk of injury from dangerous conditions of the property is sometimes placed on the landowner and sometimes placed on the user. This allocation of risk generally seems to be based upon the reasonable expectations and the implied representations of the parties. If a person invites people to use his property or maintains property for their use, the users may reasonably expect that he will act reasonably to discover hazards and make the property safe for such use. On the other hand, if no such invitation or maintenance is involved, the risk is assigned to the user except where a structure or excavation creating an extreme hazard is involved. The present tentative recommendation potentially assigns all risk to the land owner unless the cost of discovering the hazards becomes unreasonably great. The staff believes that the magnitude of the potential risk thus assigned to the public property owner will in many cases force it to act diligently to keep people off its property in order to avoid liability. This will merely result in the withdrawal of large areas of public land from permitted use. The staff believes this result is undesirable.

Bridle Trails

(3) Sections 54000 to 54005 of the Government Code provide:

54000. Upon application to the Department of Public Works, a flood control district, county, or city, and subject to any conditions imposed by it, permission may be granted to any person, or riding club to enter, traverse, and use for horseback riding, any trail, right of way, easement, river, flood control channel, or wash, owned or controlled by the State, a city, or county.

54001. A fee shall not be charged for the use of such bridle paths.

54002. The State, city, or county, is not liable for damages caused by accidents on the bridle trails.

54003. An equestrain group may be granted the right to erect and maintain suitable trail markers for the convenience and guidance of horseback riders but a structure shall not be erected on state-owned property without the approval of the Division of State Lands.

54004. It is unlawful for any person to remove, deface, or destroy the markers, or to erect fences, barbed wire, or other obstructions on the bridle trails.

The consultant notes that Section 54002 fails to list flood control districts although Section 54000 authorizes flood control districts to permit use of their property for horseback riding. He recommends that flood control districts be listed in Section 54002. See research study, pages 219-221.

The consultant also notes that Section 54002 confers what he believes is too broad an immunity. He recommends in substance that the immunity be limited to "death or injury to horseback riders resulting from dangerous conditions of the bridle trails."

If the consultant's recommendations are adopted, the section might be revised to read:

54002. The State, flood control district, city [,] or county [,] is not liable for ~~[damages caused by accidents on]~~ death or injury to horseback riders or their horses resulting from dangerous conditions of the bridle trails.

(52)

March 28, 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Liability for Dangerous Conditions of Public Property

NOTE: This is a tentative recommendation 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.

March 28, 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 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 that Act for injuries to trespassers and licensees 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 standards of liability declared in the Public Liability Act as interpreted by the court decisions, despite the fact that those standards incorporated the distinction between governmental and proprietary functions. In view of the unqualified renunciation of that distinction in Muskopf, however, it is possible that the Supreme Court may hold that common law principles furnish an alternative basis for the liability of cities, counties and school districts for dangerous conditions of property owned or occupied in a governmental capacity.

So far as counties, cities and certain other public entities 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 used for governmental purposes does not adequately protect persons injured by such conditions, nor does it adequately protect public entities against unwarranted tort liability. Many governmental entities are not liable at all for injuries caused by their negligence in maintaining such 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 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 the 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, is not recommended, 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 defects 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 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.

4. 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 acts unreasonably in failing after notice to repair the condition or otherwise to protect persons against the risk of injury. 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; however, private landowners are generally not liable to licensees or trespassers upon this basis. The Public Liability Act, like the proposed statute, 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.

5. 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 is 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."

6. A public entity should be charged with notice of a dangerous condition of its property if it has actual knowledge of the condition and should have realized its dangerous character or if the condition and its dangerous nature would have been revealed by a reasonable inspection system. The Public Liability Act provides that entities are liable if they fail to remedy dangerous conditions after "notice" without specifying how such notice may be acquired. As a result entities have at times been held liable for defects that could not have been discovered even through reasonable inspections. Such a "notice" standard imposes too great a burden upon public entities, for it virtually requires them to be insurers of the safety of their property. The proposed legislation makes clear that public entities are not chargeable with notice unless they have acted unreasonably in failing to inspect their property.

7. A public entity should be able to absolve itself of liability for a dangerous condition of public property--other than those conditions it negligently or wrongfully created--by showing that the entity did all that it reasonably could have been expected to do under the circumstances to remedy the condition or to warn or protect persons against it. 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.

8. 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 particular officer or employee knew or should have known of the condition and that he had the means available and the authority and responsibility to take action to remedy the condition or to warn or to provide safeguards but failed to do so. This further showing is necessary to show personal culpability on the part of the officer or employee. The officer or employee should be able to show by way of defense that he did not act unreasonably in failing to remedy the condition or protect against the risk of injury created by it.

9. 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.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 4 (commencing with Section 900) to Division 3.5 of Title 1 of the Government Code, and to repeal Sections 1953, 53051, 53052, 53054, 53055 and 53056 of the Government Code, and to amend Section 8535 of the Water Code, and to repeal Sections 5640 and 5641 of the Streets and Highways Code, relating to dangerous conditions of public property.

The people of the State of California do enact as follows:

SECTION 1. Chapter 4 (commencing with Section 900) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 4. LIABILITY OF PUBLIC ENTITIES

Article 1. [Section 900.1 et seq. - reserved]

* * *

Article 2. Dangerous Conditions of Public Property

901.1. Except as otherwise provided by statute, this article exclusively governs the liability of public entities and public officers and employees for injury caused by a dangerous condition of public property and applies whether the public property is owned, used or maintained for a governmental or proprietary purpose.

901.2. As used in this article:

(a) "Dangerous condition" means a condition of public property that exposes persons or property to a substantial risk of injury when the public property is used in a manner in which it is reasonably foreseeable that the public property will be used.

(b) "Injury" includes death, injury to a person and damage to property.

(c) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, and warning of a dangerous condition.

(d) "Public entity" includes the State and a county, city, city and county, district, local authority or other political subdivision of the State.

901.3. A condition is not a dangerous condition within the meaning of this article if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition exposed persons or property to a substantial risk of injury when the public property was used in a manner in which it was reasonably foreseeable that the public property would be used.

901.4. Except as provided in Section 901.8, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff pleads and proves all of the following:

(a) The property of the public entity was in a dangerous condition.

(b) The injury was proximately caused by the dangerous condition.

(c) The dangerous condition was created by a negligent or wrongful act of an officer, agent or employee of the public entity acting in the course and scope of his office, agency or employment.

(d) The dangerous condition created a reasonably foreseeable risk of the injury and the public entity did not take adequate measures to protect against that risk.

901.5. Except as provided in Sections 901.7 and 901.8, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff pleads and proves all of the following:

(a) The property of the public entity was in a dangerous condition.

(b) The injury was proximately caused by the dangerous condition.

(c) The public entity had notice of the dangerous condition under Section 901.6.

(d) The dangerous condition created a reasonably foreseeable risk of the injury and the public entity did not take adequate measures to protect against that risk.

901.6. A public entity has notice of a dangerous condition within the meaning of Section 901.5 only if the plaintiff proves:

(a) The public entity had actual knowledge of the existence of the condition and knew or should have known of its dangerous character; or

(b) The existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably

adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

901.7. A public entity is not liable under Section 901.5 for injury caused by a dangerous condition of its property if the public entity pleads and proves that the action it took to protect against the risk of injury created by the condition or its failure to take such action was not unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

901.8. A public entity is not liable under Section 901.4 or 901.5 for injury caused by a dangerous condition of its property if the public entity pleads and proves either or both of the following defenses:

(a) The person who suffered the injury assumed the risk of the injury in that he (i) knew of the dangerous condition, (ii) realized the risk of injury created thereby and (iii) in view of all the circumstances, including the alternatives available to him, acted unreasonably in exposing himself to the risk of such injury.

(b) The plaintiff or his decedent was contributorily negligent.

901.9. Subject to the same defenses that are available under Section 901.8, an officer or employee of a public entity is personally liable for injury caused by a dangerous condition of public property if the plaintiff pleads and proves all of the following:

(a) The property of the public entity was in a dangerous condition.

(b) The injury was proximately caused by the dangerous condition.

(c) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the officer or employee and the officer or employee had the authority and the means immediately available to take alternative action which would not have created the dangerous condition.

(d) The dangerous condition created a reasonably foreseeable risk of the injury and no adequate action was taken to protect against that risk.

901.10. Except as provided in Section 901.12 and subject to the same defenses that are available under Section 901.8, an officer or employee of a public entity is personally liable for injury caused by a dangerous condition of public property if the plaintiff pleads and proves all of the following:

(a) The property of the public entity was in a dangerous condition.

(b) The injury was proximately caused by the dangerous condition.

(c) The officer or employee had notice of the condition under Section 901.11.

(d) The officer or employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the means for doing so were immediately available to him.

(e) The dangerous condition created a reasonably foreseeable risk of the injury and no adequate measures were taken to protect against that risk.

901.11. A public officer or employee has notice of a dangerous condition within the meaning of Section 901.10 only if the plaintiff proves:

(a) The public officer or employee had personal knowledge of the existence of the condition and knew or should have known of its dangerous character; or

(b) The existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate within the meaning of paragraph (b) of Section 901.6 and the public officer or employee had the authority and it was his responsibility to make such inspections or see that such inspections were made and the means for doing so were immediately available to him.

901.12. A public officer or employee is not liable under Section 901.10 for injury caused by a dangerous condition of public property if he pleads and proves that the action taken to protect against the risk of injury created by the condition or the failure to take such action was not unreasonable. The reasonableness of the inaction or action shall be determined by taking into consideration the time and opportunity

the public officer or employee had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

901.13. A cause of action for damages against a public officer or employee under this article is barred unless a claim for such damages has been presented to the public entity in the manner and within the period prescribed by law as a condition to maintaining an action therefor against the public entity.

901.14. When it is claimed that an injury has been caused by a dangerous condition of public property, a written claim for damages shall be presented to the public entity in conformity with and shall be governed by Division 3.5 (commencing with Section 600) of Title 1 of the Government Code.

901.15. When an action is brought against a public entity under this article, the attorney for the public entity shall be defense counsel unless other counsel is provided. The fees and expenses of defending the suit are proper charges against the public entity.

901.16. Where legal liability of a public entity asserted under this article is admitted or disputed the public entity may pay a bona fide claim or compromise a disputed claim out of public funds if the attorney for the public entity approves of the compromise.

901.17. A public entity may insure against liability under this article, except a liability which may be insured against pursuant to Division 4 of the Labor Code, by self-insurance or insurance in an

admitted insurer (except in the case of school district governing boards to the extent they are authorized to place insurance in non-admitted insurers by Sections 1044 and 15802 of the Education Code). The premium for the insurance is a proper charge against the public entity.

SEC. 2. Section 1953 of the Government Code is repealed.

[1953. No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear:] REPEALED

[(a) The injury sustained was the direct and proximate result of such defective or dangerous condition.]

[(b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.] REPEALED

[(c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.] REPEALED

[(d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.] REPEALED

[(e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition.] REPEALED

SEC. 3. Section 53051 of the Government Code is repealed.

[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:] REPEALED

[(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.] REPEALED

SEC. 4. Section 53052 of the Government Code is repealed.

[53052. When it is claimed that a person has been injured or property damaged as a result of the dangerous or defective condition of public property, a written claim for damages shall be presented in conformity with and shall be governed by Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of the Government Code.] REPEALED

SEC. 5. Section 53054 of the Government Code is repealed.

[53054. When a damage suit is brought against a local agency for injuries to person or property allegedly received as a result of the dangerous or defective condition of public property, the attorney for the local agency shall be defense counsel unless other counsel is provided for. The fees and expenses of defending the suit are lawful charges against the local agency.] REPEALED

SEC. 6. Section 53055 of the Government Code is repealed.

[53055. When legal liability is admitted or disputed the local agency may pay a bona fide claim or compromise a disputed claim out of public funds, if the attorney for the local agency approves of the compromise.]

REPEALED

SEC. 7. Section 53056 of the Government Code is repealed.

[53056. A local agency may insure against liability, except a liability which may be insured against pursuant to Division 4 of the Labor Code, for injuries or damages resulting from the dangerous or defective condition of public property by self-insurance, or insurance in an admitted insurer (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code). The premium for the insurance is a charge against the local agency.]

REPEALED

SEC. 8. Section 8535 of the Water Code is amended to read:

8535. Except as otherwise provided in Article 2 (commencing with Section 901.1) of Chapter 4 of Division 3.5 of Title 1 of the Government Code, the drainage district, the board and the members thereof are not responsible or liable for the operation or maintenance of levees, overflow channels, by-passes, weirs, cuts, canals, pumps, drainage ditches, sumps, bridges, basins, or other flood control works within or belonging to the drainage district.

AMENDED

SEC. 9. Sections 5640 and 5641 of the Streets and Highways Code are repealed.

[5640. If, because any graded street or sidewalk is out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using the street or sidewalk and exercising ordinary care to avoid the danger, suffers damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against the city.] REPEALED

[5641. If the defect in the street or sidewalk has existed for a period of 24 hours or more after written notice thereof to the superintendent of streets, then the person on whom the law may have imposed the obligations to repair such defect in the street or sidewalk, and also the officer through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained; provided, that the superintendent of streets has the authority to make the repairs, under the direction of the legislative body, at the expense of the city.] REPEALED