

File

Memorandum No. 78(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Senate Preprint Bill No. 8)

Attached is a copy of Senate Preprint Bill No. 8. Please read the bill to determine whether you believe any changes should be made in it.

We will send you this week a set of galley proofs for the recommendation relating to tort liability. These galleys will contain the bill as set out in Senate Preprint No. 8, together with the comments we will print under each section and the text of the recommendation. Please read the galley proofs to determine whether you believe any changes should be made in the recommendation or comments that will be set out under the proposed sections.

We are sending you Senate Preprint Bill No. 8 and this memorandum now so that you will not be delayed in doing your "homework" for the December meeting.

This memorandum points up some matters for your consideration in light of the hearing held on this bill by the Assembly Interim Committee on Judiciary on November 27 and 28. In addition, other matters are suggested for your consideration by the staff.

This memorandum contains the following exhibits:

Exhibit I (pink pages) - Extract from testimony of Mr. Reed at interim hearing

Exhibit II (white pages) - Testimony of League of California Cities at interim hearing [We do not have enough copies of this exhibit to provide a copy to each person receiving a copy of this memorandum.]

Exhibit III (yellow pages) - revision of Section 855.8.

General Comment

The interrelationship of various provisions in the proposed bill creates difficult problems. In general, our statutory scheme is as follows: The liability provisions are cumulative--liability may exist if any provision can be found imposing liability; but the liability provisions are subject to any immunity provision that exists. Thus, even though liability would appear to exist under a liability provision, it will not exist if an immunity provision is applicable. In revising the "unless" clauses in the immunity sections to declare affirmatively that liability exists, we have had to qualify the declaration of liability in order to preserve this scheme. We suggest that each of these provisions be considered by the Commission. These sections are listed below for Commission consideration together with certain other sections we believe should be considered by the Commission:

Section 820.2. The Commission directed that this section be revised to indicate that the section does not abolish liability for false arrest or false imprisonment. We did not revise the section to read: "but an employee is liable for false arrest or imprisonment" because some immunities would exist that would make an employee not liable for false arrest or false imprisonment in certain cases. For example, no liability for confining a mental patient, no liability for false imprisonment in fighting a fire.

Section 820.6. Should the liability imposed by this section be subject to the qualification "except as otherwise provided by statute (including Section 820)"?

Section 820.8. Should the liability imposed by this section be subject to the qualification? It seems clear that the qualification

should be retained.

Section 821.8. Should the liability imposed by this section be subject to the qualification?

Section 840. This section, which deals with the liability of public employees for dangerous conditions, has been previously approved in this form.

Section 845. We made this section apply "notwithstanding 815.6."

Section 845.2. Note that this immunity does not apply to a public entity; a public entity may be liable if a statute is found imposing such liability. For example, a public entity may be held liable if a mandatory duty exists to provide a jail, detention or correctional facility. And liability would exist for a dangerous condition in such a facility under the dangerous conditions statute. Should this immunity apply to public entities notwithstanding Section 815.6, thereby preserving the liability for dangerous conditions but eliminating liability based on a mandatory statute?

Section 845.4. Should the qualification on liability in this section be retained? One could argue that an intentional and unjustifiable interference with a right to obtain a judicial determination or review of legality of confinement should not be subject to the discretionary immunity (which applies "whether or not such discretion be abused").

Section 845.6. Should the qualification on liability be retained?

Section 845.8. Should this immunity extend to public entities notwithstanding Section 815.6?

Section 850.8. Should the qualification on liability in the second paragraph of this section be retained? Should this immunity extend to public entities notwithstanding Section 815.6?

Section 855.2. Should the qualification on liability be retained?
See comment to Section 845.4 above.

Section 855.8. Should the immunity provided by this section extend to public entities notwithstanding Section 815.6?

Sections 810.6, 811 and 811.8.

These definitions have been drafted in accordance with instructions received at the November meeting. The word "employee" should be substituted for "officer" in three places in Section 811.6.

Section 815.

We added "or any other person" at the end of this section.

Section 815.2.

The primary objection to the proposed legislation by witnesses at the interim hearing was directed at this section. In response, we have expanded the discussion in the text of the recommendation of the reasons why we are proposing this section. We will send you galley proofs of the recommendation before the meeting; the printer is now preparing these.

Section 816.

Public Works is concerned about this section. The department believes that in almost every case where an attempt to discharge an employee is unsuccessful, an action will be commenced against the public entity under this section. Note, however, that the plaintiff in such an action could be required to provide an undertaking (under our claims recommendation).

Section 820.8.

Note that this section literally imposes liability, subject to qualifications, for an injury proximately caused by the employee's own negligent or wrongful act or omission. This stems from revision of the "unless" clause, which merely limited the immunity granted by this section, to declare affirmatively that liability exists. The declaration here is so basic and sweeping that it might be more

appropriate to state it at the beginning of the article. Some persons reviewing the bill have thought that employee liability exists only when provided by enactment because of the repeated declaration that liability exists in particular situations. Hence, the broad statement of employee liability at the beginning might tend to clarify what the liability of an employee is.

General comment on dangerous condition statute.

The League of California Cities has taken the position that the Public Liability Act of 1923 should be retained with a few changes that would eliminate most cases of liability under that statute. The League is opposed to our recommended legislation relating to dangerous conditions. See Exhibit II, white sheets, attached.

The League apparently took this position because it does not understand that our recommended legislation will substantially reduce liability for dangerous conditions of city property. For example, the definition of "dangerous condition" requires a showing that almost amounts to a showing of an absence of contributory negligence. Moreover, we have provided that a reasonable inspection system is a defense--a defense that does not exist under the existing law. We permit the public entity to show its own financial condition--a showing that is not permitted under the existing law. We have provided some specific immunities that do not exist under existing law.

If the Commission has no objection, I propose to contact the League and to offer to go over all of our recommendations with the League Committee or with Mr. Carpenter. This would, I believe, be helpful and might result in a change in the position of the League on

this recommendation and on the claims recommendation as well.

Section 830.4.

It was apparent that the legislative committee would not accept this section in the form submitted by the Commission.

The Committee was concerned about the following type of case: A bridge is constructed. The day after the bridge is opened to traffic it collapses because of a negligently prepared plan or design.

The Committee was unable to believe that anyone would recommend immunity from liability in such a case, although that is exactly what the Commission recommends. Mr. Reed of the Department of Public Works advised the Committee that he believed that an amendment was in order to impose liability in the type of case presented above. He stated that the department was concerned with such matters as width of roads and does not recommend that liability exist in the case set out above.

The Commission might wish to consider the following revision of Section 830.4. This revision is designed to meet the objection of the interim committee. Delete the period at the end of the section and insert the following:

; but a public entity or a public employee may be liable in accordance with the provisions of this chapter for injury proximately caused by the destruction in whole or in part of the construction or improvement (such as but not limited to the falling, collapsing, breaking down or caving in of the construction or improvement) as a direct result of the plan or design.

As an alternative the Commission might wish to consider the prior version of this section that was previously approved. This prior version was rejected at the last meeting and the section as contained in Senate Preprint Bill No. 8 was approved. The prior version added at the end of the section as contained in the preprinted bill the following:

, unless the court finds that no reasonable public employee would have adopted the plan or design or that the action of the legislative body or other body or employee in approving the plan or design or the standards therefor was so arbitrary as to constitute an abuse of discretion.

Another alternative would be to add at the end of the section contained in the preprinted bill the following:

if the trial or appellate court finds that there is any evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

Section 830.6.

The Committee was concerned that this section might provide immunity where any dangerous condition exists that would be corrected by a traffic control signal or stop sign. Mr. Reed stated that the Department of Public Works believes that this provision is necessary merely so that a plaintiff can not frame a case on the theory that an injury would not have occurred if a traffic control signal had been provided. He stated that the section was not intended to relieve the department from liability where a dangerous condition existed and a warning signal should have been provided. See Exhibit I, pink sheets, for an extract of his testimony on this matter.

The Committee was also concerned about warning signs that are required by law--the general opinion of the Committee seemed to be that failure to provide such signs should be a basis of liability.

To clarify subdivisions (a) and (b) of Section 830.5, the staff suggests that they be placed in a separate section to read as follows:

830.5. Liability of a public entity or a public employee under this chapter may not be based on:

(a) The failure to provide traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described in the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

(b) The failure to provide other traffic or warning signals, signs, markings or devices described in the Vehicle Code; but a public entity or public employee may be liable in accordance with the provisions of this chapter for injury proximately caused by such failure if the signal, sign, marking or device was necessary to warn of a condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

If the above provision is approved, subdivisions (c), (d) and (e) of Section 830.6 would be renumbered as (a), (b) and (c), respectively. Also Section 830.5 should be listed in the introductory clause of Section 835.

Section 835.6.

The staff is somewhat concerned about the phrasing on subdivision (a) relating to the defense of assumption of risk.

This subdivision was phrased to cover the following case; The plaintiff was forced to enter the courthouse--although the steps were in a dangerous condition--because he was a witness in a civil action. The defense of assumption of risk would not be available in this case.

But what would be the result in the following case: Plaintiff attends a baseball game in a city park and is hit by a foul ball. It could be argued under Section 835.6 that the defense of assumption of risk is not available in such case.

Section 855.4.

One of the interim committee members suggested that the immunity provided by this section might be broad enough to cover malpractice.

To meet this objection, it is suggested that Section 855.4 be revised to read as follows:

855.4. (a) Notwithstanding Section 815.6, neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act relating to the prevention of disease or to ^{the} ~~control~~ ^{of} ~~the~~ spread of disease if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused.

(b) Neither a public entity nor a public employee is liable for an injury caused by an act or omission in carrying out with due care a decision described in subdivision (a).

(c) Except as otherwise provided in this section and in Sections 820, 821.2, 821.4, 821.6, 855.6 and 855.8, a public employee is liable for an injury proximately caused by his negligent or wrongful act or omission in performing or failing to perform any act relating to the prevention of disease or to the control of disease.

The revision suggested above will make clear that liability for malpractice will exist (except for certain cases involving mental patients).

Section 855.8.

The staff believes that a distinction should be made between (a) providing an immunity for diagnosis or prescribing treatment for mental illness and (b) providing an immunity for determinations relating to confinement or release of persons from public medical facilities. Liability

for diagnosing or prescribing is a malpractice type of liability; but liability for confining, paroling or releasing involves a review of the discretionary exercise of police powers and is indistinguishable in principle from liability for confining, paroling or releasing criminals. Exhibit III, yellow sheets, contains revised sections that provide a broader immunity than is provided by Section 855.8 for determinations relating to confinement or release of persons from public medical facilities. The sections also reflect revisions which the staff believes improve the proposed statutory provisions. A significant revision is found in Section 856(b) (Exhibit III) which provide for immunity for confinement, determining terms and conditions of confinement and for parole or release will exist only where the determination is made "in accordance with any applicable enactment." In Section 855.8(b), we eliminate any language concerning whether the person prescribing was authorized to prescribe. We believe that the deleted language is unnecessary and unduly complicates the statute.

SEC. 47 (Page 24 and 25 of bill)

This section is designed to carry out the Commission's determinations concerning the retroactive application of the proposed legislation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary