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Memorandum 68-101

Subject: Study 52 - Sovereign Immunity (Liability to Employees of Independent Contractors)

The following memorandum outlines in some detail a problem arising under the common law relating to independent contractors. Although the basic policy with regard to public entity liability for the negligence of independent contractors was established when the Commission first worked on this general topic, a careful review of the minutes does not disclose that the particular problem outlined here ever received the attention of the Commission.

Section 815.4 of the Government Code provides that a public entity is liable to the same extent that a private person would be liable for the acts of an independent contractor. While the "general" rule is that one who employs an independent contractor is not liable for the tortious conduct of the latter, this rule has been extensively eroded by exceptions. Two major exceptions are formulated under the concepts of (1) a "nondelegable" duty and (2) "intrinsically dangerous" activities. Under the former, where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, he cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. The duty may be imposed by statute, charter, or by common law. For example, where a statute requires that a public utility do everything necessary to see that rules of the Public Utilities Commission are complied with, the statute imposes upon the public utility a duty to comply with such rules which cannot be delegated

to an independent contractor. Thus, the public utility is subject to liability where the independent contractor fails to comply with such rules. Snyder v. Southern Cal. Edison Co., 44 Cal.2d 793, 285 P.2d 912 (1955).

> The rule of nondelegable duty has been applied to the maintenance of premises by a landlord through an independent contractor with respect to his tenants or their employees . . . ; to the owner of an amusement concession operated by an independent contractor when a parton was injured . . . ; to the owner of property who, through an independent contractor, so repaired part of the premises as to cause damage to the one occupying the floor below . . . . Where an activity involving possible danger to the public is carried on under public franchise or authority the one engaging in the activity may not delegate to an independent contractor the duties or liabilities imposed on him by the public authority . . . and generally speaking there are many situations in which the person cannot absolve himself from liability by delegating his duties to an independent contractor. . . .

Snyder v. Southern Cal. Edison Co., supra at 798-799 (citations omitted); see also Maloney v. Rath, 69 Adv. Cal. 455 (automobile owner's non-delegable duty of maintenance); Clark v. Dziabas, 69 Adv. Cal. 463.

A variation of the second, "intrinsically dangerous" exception is set forth in Section 416 of the Restatement Second of Torts and quoted with apparent approval in Van Arsdale v. Hollinger, 68 Adv. Cal. 249, 258, as follows:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

Although these rules of exception do not impose absolute or strict liability, they do result in true vicarious liability, that is, liability for the misconduct of the independent contractor, even though the employer is absolutely free of all personal fault. See Maloney v. Rath, 69 Adv. Cal. 455; Van Arsdale v. Hollinger, 68 Adv. Cal. 249.

Some of the considerations that have led courts to adopt and extend these exceptions "are that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's because he is the party primarily to be benefited by it, that he selects the contractor, is free to insist upon one who is financially responsible, and to demand indeminity from him, that the insurance necessary to distribute the risk is properly a cost of the employer's business, and that the performance of the duty of care is of great importance to the public" and the imposition of liability will serve to defer negligent and encourage nonnegligent conduct. See Van Arsdale v. Hollinger, supra.

Notwithstanding the acceptability, indeed desireability, of these rules generally, they produce an anomaly in one fairly common situation. For example, in Van Arsdale, plaintiff's employer entered into a contract with the city to make certain street improvements. The contract required plaintiff's employer to furnish barricades, flagmen, and warning signs and to provide generally such safeguards as would be used by a diligent and prudent contractor. Plaintiff was injured when he was struck by an automobile while eradicating lane lines. Despite the fact that the city was specifically found to be not negligent, it was held liable for the injuries proximately caused by the independent contractor-employer's negligence. The theory of recovery was that the work created a peculiar risk of physical harm to others, including plaintiff, unless special precautions were taken and the employer's negligence in failing to take such precautions was, therefore, imputed to the city. The anomaly which results is that the nonnegligent city is subject to liability which is unlimited in amount, while the negligent employer is directly liable only for the recovery afforded by the Workmen's Compensation remedy.

The city would be better off financially if it were negligent itself, but had the work performed by its own employees. (Similarly, if it exercised sufficient control over the work to be considered a "special employer" under Labor Code Section 3300, it would be entitled to the Workmen's Compensation dollar limitation upon recovery. See Sehrt v. Howard, 187 Cal. App.2d 739, 10 Cal. Rptr. 128 (1960).) Even assuming that the city will be indemnified by the negligent employer, such costs will eventually be reflected in an increase in the cost of projects generally. Moreover, indemnification results in the employer being subject to a liability greater than that afforded under Workmen's Compensation, thereby undermining this supposedly "exclusive" remedy. The policy reasons advanced in support of liability to third persons generally for the negligence of an independent contractor seem largely irrelevant with respect to the limited issue of whether there should be vicarious liability to the employees of an independent contractor. In no event is the employee deprived of his Workmen's Compensation recovery, the issue is simply should he be entitled to seek a greater recovery from one who is by hypothesis not negligent.

It is not suggested that the rules outlined above are unique in their application to public entities, but their impact on such entities is great, and because the liability of public entities is already governed exclusively by statute, the task of revising the law in this area as it applies to public entities only would be less difficult to accomplish than a revision of the law generally. One solution would simply be to limit an employee of an independent contractor to his Workmen's Compensation remedies, but provide that such remedies could be enforced against a public entity, at least in those cases where the

public entity would be vicariously liable to third persons for the negligence of the independent contractor. See attached Exhibit I.

The problem outlined above as it relates to public entities can be studied by the Commission under its retained authority to revise the law relating to sovereign immunity. If the Commission desires to broaden the scope of its study it may, of course, request the authority to do so.

The Commission is now engaged in a revision of the portion of the governmental liability act relating to law enforcement and hospital and medical activities. A recommendation on the right of employee's of independent contractors of public entities could be combined with the recommendation on the other two areas.

Respectfully submitted,

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EXHIBIT I

Section 815.4

§ 815.4. (a) Except as provided in subdivisions (b) and (c), a public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person.

(b) Nothing in subdivision (a) ~~this section~~ subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.

(c) Nothing in subdivision (a) subjects a public entity to liability to an employee of an independent contractor for the act or omission of an independent contractor of the public entity greater than that of the employer of such employee under Division 4 (commencing with Section 3201) of the Labor Code. In no event shall an employee of an independent contractor of a public entity be entitled to recover for the same injury from both the public entity under this section and his employer under Division 4 of the Labor Code.

Comment. Subdivision (c) of Section 815.4 changes former law. Under former law, a public entity was often subject to unlimited liability for injuries to an employee of an independent contractor caused solely by the negligence of the independent contractor. See Van Arsdale v. Hollinger,

68 Adv. Cal. 249 (1968). Because workmen's compensation is the exclusive remedy for the employee against his employer, this rule of vicarious liability produced the anomalous result that the nonnegligent entity was subject to greater liability than the negligent contractor. To the extent that this result was offset through indemnification of the entity by the employer-contractor, the policies underlying exclusivity of the workmen's compensation remedy were subverted.

Under subdivision (c) a public entity's liability for injuries to an employee of an independent contractor of the entity caused solely by the negligence of the contractor is limited to an amount equivalent to that recoverable by the employee against his employer under the Workmen's Compensation Act; moreover, the employee may not recover from both the entity and his employer. It should be noted that this section deals only with vicarious liability for the acts of an independent contractor and subdivision (c) does not, therefore, affect the entity's liability for the negligent conduct of its own employees. See Government Code Section 815.2. Subdivision (c) does not affect the law regarding the determination of liability; it merely limits the scope of recovery. The entity may, therefore, raise defenses (e.g., contributory negligence, assumption of risk) that are unavailable under the Workmen's Compensation Act. The limitation on recovery only applies to "an employee" and does not affect the recovery of third persons generally. Although generally the employee will recover as a matter of course from his employer, subdivision (c) provides a cause of action against the entity in the rare situation where the contractor-employer fails to secure payment of compensation. In

essence, the entity simply becomes a guarantor of workmen's compensation where the conditions of liability obtain. Finally, subdivision (c) applies whenever liability is predicated on the negligence of an independent contractor. For example, city (C) engages A and B, both independent contractors, to perform certain work. (1) E, an employee of A, is injured through the negligence of A in circumstances where C would be subject to vicarious liability under Section 815.4. E can recover no more than the relief provided under the Workmen's Compensation Act. (2) Similarly where E, is injured solely through the negligence of B, E can recover no more than workmen's compensation from C, though his recovery against B is unlimited.