#52.30 8/21/69

Memorandum 69-89

Subject: Study 52.30 - Sovereign Immunity (Plan or Design Immunity)

You have previously received the consolidated recommendation relating to sovereign immunity. Contained therein at pages 6-18 and 47-49 (and 78) is the portion of the recommendation relating to the plan or design immunity that was distributed for comment. Attached to this rmemorandum are complete copies of the comments received (see Exhibits I-X); the memorandum itself summarizes the issues that the Commission has previously considered and discusses the few new points raised.

Predictably, those associated with public entities for the most part oppose any weakening of the present immunity. (See Exhibits II, VII, VIII, and X.) However, the staff does not believe that any new arguments in support of this opposition have been presented. The basic issue is simply to what extent should legislative discretion be permitted to be reviewed by the courts. The entities' answer is--not at all. They do not believe that Section 835.4 (which permits a defense based on the reasonableness of the entities' action or inaction in remedying an alleged dangerous condition) offers them adequate protection, and more basically they do not apparently believe that the issues should even be subject to judicial review. (See, e.g., Exhibit II.) In short, they desire absolute legislative discretion in this area. For the most part, their letters reflect a concern about the additional cost that the change would make. Nevertheless, none of the entities indicate what their pre-1963 experience was (before which point, cities, counties, and school districts were liable for dangerous conditions of their property and had neither the plan or design immunity nor a defense analogous to that permitted by Section 835.4). Nor do they justify their unique position with respect

to improvements such as schools, office buildings, and similar facilities, where a private person similarly situated enjoys no comparable shield from liability. With respect to roads, the staff feels the entities underestimate their ability to take corrective measures short of replacement and the two-edged nature of an obviously dangerous condition, such as a three-lane highway or winding, twisting, narrow mountain road. Finally, several writers fail to recognize that liability may exist on an inverse condemnation theory without regard to the plan or design immunity.

The bulk of the letters received come from public entities; however, some support for the recommendation was received. See the letters from the Committee on Administration of Justice of the Bar Association of San Francisco (Exhibit I) and from William T. Ivey (a member of a firm generally representing personal injury plaintiffs) (Exhibit IV).

Turning to more specific problems, two commentators suggest that the determination whether the plan or design immunity is applicable in a given situation should be made by the jury, rather than the court. (See Exhibits V and VII.) Somewhat surprisingly, this suggestion comes from representatives of public entities, and the staff wonders whether these gentlemen fully appreciated the fact that, while the recommendation would require the court to determine whether the immunity applied and in so doing would make a finding that a dangerous condition existed, the jury would also have to be persuaded independently that a dangerous condition existed. In effect, then, the entity would have two chances at avoiding liability on the basic issue in the case. The present law requires the court to determine whether the immunity exists and it would seem appropriate, therefore, for the court to continue to make this determination. In this regard, the comments of Justice Friedman, noting the extreme difficulties encountered by juries in

applying statutory concepts take an added significance. (See Exhibit IV.) The staff recommends that no change in this aspect of the recommendation be made.

Others raise them, but Mr. Root, a Senior Counsel with the Department of Employment, best summarizes some problems concerning the reference of the section to "injuries . . . which demonstrated that the plan or design resulted in the existence of a dangerous condition." His comments are as follows:

> With respect to Recommendation Number 11 relating to plan or design immunity, several questions are presented as to the Commission's intent concerning the interpretation of "other juries" and "such injuries" in paragraphs (2) and (3) of subdivision (b) of Section 830.6 of the Government Code. Existing Section 810.8 defines the term "injury". Section 13 of the Government Code provides that the singular includes the plural, and the plural the singular. The proposed draft uses the plural, not the singular. Is the plural usage deliberate and intended by the Commission to overcome the general rule of Section 13 that the plural includes the singular? Is a single injury prior to a plaintiff's injury sufficient to permit a trial court finding that "other injuries" had occurred, or must the trial court find that at least 2 "other injuries" had occurred?
>
> A problem appears also to be presented with respect to application to injuries occurring prior to the effective date of the legislation. Must an injury in order to be included in "other injuries" have occurred on or after the effective date of the proposal, when enacted, or does an injury qualify for inclusion in "other injuries" if it has occurred prior to the effective date of the legislation?
>
> Finally, can an injury qualify for inclusion in "other injuries" where a plaintiff proves that it occurred as the result of an identical plan or design approved by one public entity and became known to a different public entity after the latter approved the identical plan or design for the particular facility at which the later injury occurred on which the plaintiff's cause of action is based?
>
> In the absence of clarifying change in the language of the proposed draft of the Commission, or at least an expression of the Commission's intent, we believe that each of the foregoing three questions may arise in litigation under the proposal.
>
> On the first question, successive or numerous injuries following a single injury would appear to reinforce a plaintiff's case. However,

at what point does a plaintiff know that his injury is no longer an "other injury" and immunize--when he is the second injured person--or the third--or the fourth? Is the line left to the varying discretion of the trial court? It will surely be forcefully argued that only the first unfortunate injured person is confronted by immunity, and that his successors may overcome the immunity under the proposal. If this is the result intended, we suggest the Commission consider use of a singular ("other injury" and "such injury") in the proposed draft, accompained by a discussion of the Commission's intent.

On the second question, we believe it can be argued that injuries prior to the effective date of the proposal, when enacted, are antecedent facts or conditions which are not themselves the basis for the plaintiff's cause of action arising from his injury occurring on or after the effective date of the legislation. Assuming that no corrective action had been taken by the public entity directly involved in the Cabell case, would the first plaintiff whose injury occurred on or after the effective date of the legislation and caused by the very same plan or design of the same public entity involved in Cabell be confronted with immunity? We think not. However, there are policy arguments for either result. If the Commission's intent is, generally, that the first injury on or after the effective date is immunized, we suggest that consideration be given to something like the following language in subdivision (b)(2) of Section 830.6 in the proposal:

> "(2) Prior to such injury and subsequent to the approval of the plan or design, or the standards therefor, and subsequent to the effective date of this subdivision, other injuries . . ." (Underscored provision indicates change from proposed draft of Commission)

On the third question, there appears to be no restrictive language in the proposed draft clearly limiting the occurrence of an injury to a facility under the control of a public entity which had approved the plan or design, for such injury to constitute an "other injury". It would appear that a plaintiff with a cause of action for injury against one public entity could escape immunity by showing that an injury occurred at another identical facility under the control of another public entity which had approved the identical plan or design, coupled with a showing of knowledge by the public entity of the occurrence of such prior other injury at the other facility under the control of the other public entity. This may or may not be the Commission's intent. We suggest that if the Commission intends a more restrictive result, consideration be given to language that would clearly limit the grounds for avoiding the immunity defense, accompanied by a discussion of the Commission's intent.

Taking Mr. Root's points in order, the staff believes that the Commission's intent was and the proper rule should be that only one prior injury may be sufficient to demonstrate the dangerousness of a condition. (On the other hand, several injuries under certain circumstances may be insufficient.) The staff does not believe that a change in the statute is necessary, but suggests that the Comment be revised to make the intent clear. The following might be added before the last sentence in the first paragraph on page 49.

> The term "injuries" includes the singular "injury." That is, in some circumstances, a single prior injury may be sufficient to demonstrate the dangerousness of a condition. Of course, one injury may not be conclusive and even a number of injuries may fail to demonstrate dangerousness.

With respect to the second point, the staff feels certain that the intent of the Commission is to refer to any injury without regard to the effective date of the legislation and is highly doubtful that any other interpretation would be given to the section as drafted. However, the issue has been raised. Does the Commission believe the point should be clarified in the Comment? If so, perhaps the following could be added to the additional material immediately above:

> The injuries referred to need not have occurred after the effective date of subdivision, but are rather any injuries that have occurred during the life of the improvement in question.

With respect to the third point, the staff believes that Mr. Root has correctly analyzed the intent of the Commission and presumably no clarification is therefore needed. Does the Commission agree?

These are the specific problems raised by the letters received. In addition, as noted above, one or two of the letters seem to indicate an unawareness of the liability potential under a theory of inverse condemnation and the fact that, where liability is predicated under the latter theory,

the plan or design immunity is inapplicable. Does the Commission believe that this point should be expressly set forth in the recommendation? If so, perhaps the following could be added to footnote 31 on page 15:

> Moreover, all public entities are subject to liability under a theory of inverse condemnation "for actual physical injury to real property proximately caused by . . . [an] improvement as deliberately designed and constructed . . . under article I, section 14, of . . . [the California] Constitution. . . ." Albers v. County of Los Angeles, 62 Cal.2d 250, 263-264, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965). Such liability obviously is not subject in any way to the immunity provided by Section 830.6. See generally Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L. J. 431 (1969).

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memo 69-89

EXHIBIT I

THE BAR ASSOCIATION OF SAN FRANCISCO

SUITE 528 MILLS BUILDING • 220 MONTGOMERY STREET
SAN FRANCISCO, CALIFORNIA 94104
Telephone 392-4461

July 25, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Enclosed is a letter from the Chairman of the Committee on Administration of Justice of the Bar Association of San Francisco, commenting upon the Commission's recommendations 11 and 12 concerning soverign immunity.

If you should like further comment, please let me know.

Yours very truly,

Fredrick H. Hawkins
President

Enc.

cc: Milton W. Schlemmer, Esq.

FLEHR, HOHBACH, TEST, ALBRITTON & HERBERT
(FLEHR & SWAIN)
ATTORNEYS AT LAW
PATENTS, TRADEMARKS AND COPYRIGHTS
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ELMER S. ALBRITTON
THOMAS O. HERBERT
BAYLOR G. RIDDELL
MILTON W. SCHLENNER
DONALD N. MACINTOSH
ROBERT B. BLOCK
JERRY G. WRIGHT
EDWARD S. WRIGHT
DAVID J. BREZNER

JOHN F. SWAIN (1914-1963)

PENINSULA OFFICE
734 MENLO AVENUE
MENLO PARK, CALIF. 94025
(415) 328-0747

July 24, 1969

Fredrick H. Hawkins, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California

Re: Committee on Administration of Justice

Dear Bud:

In your letter of May 19, 1969, you forwarded for consideration by our Committee numbers 11 and 12 of the Tentative Recommendations of the California Law Revision Commission concerning sovereign immunity. You also requested our comments, if any, no later than August 4, 1969.

On Recommendation number 11, those members of our Committee present at the meeting at which this matter was discussed were unanimous in recommending its support by the Bar Association. It is the feeling of the Committee that the proposed amendments to the Government Code relating to the liability of public entities and public employees would be a reasonable and just extension of governmental liability for injury caused by the plan or design of public property when that plan or design created a dangerous condition.

Recommendation number 12, relating to ultra-hazardous activities by governmental entities, was approved in principle unanimously by those members of our Committee present at the meeting at which this Recommendation was considered. While it was felt that essentially the same imposition of liability for ultra-hazardous activities should apply toagovernmental body as are applicable to private concerns, it is recognized that governmental bodies may have specific problems which would not be applicable to private entities. For example,the

question was raised whether or not broader immunity than is available to private persons in connection with hazardous activities, such as spraying with DDT to combat a locust plague or similar outbreak, should be available to public entities. Thus, it is felt that further study is required on this Recommendation to delimit specific areas in which governmental agencies may require broader immunity protection.

If you would like any further comments, please let me know.

With best personal regards.

Sincerely,

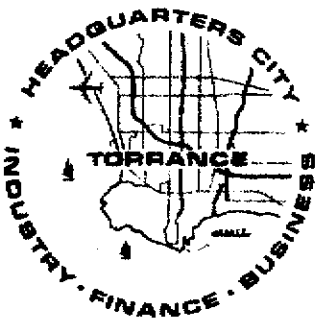
Milton W. Schlemmer

MWS/lma

Memo 69-89

EXHIBIT II

STANLEY E. REMELMEYER
CITY ATTORNEY



CITY OF TORRANCE
3031 TORRANCE BOULEVARD, TORRANCE, CALIFORNIA
TELEPHONE (213) 328-5310 90503

August 14, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

ATTENTION: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

I have recently reviewed your proposed amendments to the statutes on Sovereign Immunity. I am concerned with your recommendation that immunity for discretionary decisions in the planning or designing of public improvements should be considered terminated when the court finds that (1) the planned design as effectuated has actually resulted in a dangerous condition at the time of an injury, (2) prior injuries have occurred that demonstrate that fact and (3) the public entity has had knowledge of these prior injuries.

For the past decade or more the City of Torrance, like many other cities in the Los Angeles basin has been subject to a rash of suits every year as a result of the winter rains. For this calendar year the claims total about $950,000 to date. Frequently, the cause of the plaintiff's damage is a presently inadequate plan or design priorly approved by the City or its predecessor in interest. Storm drains, sumps and culverts fall in this class. The City of Torrance has several areas which flood every year or almost every year because the storm drains that serve the area are inadequate to evacuate the storm water with sufficient speed to prevent flooding.

However, in order to cure this type problem it is not only necessary that the offending storm drains be redesigned and enlarged, but new exits must be provided. Large area wide storm drains must be constructed to take the storm waters to the ocean. Such principal drains are constructed by the County Flood Control District in accordance with the County master

plan of storm drains.

It appears to me that the amendment would make the City an insurer of property from flood damage. The expense of eliminating such a dangerous condition is likely to be prohibitive. In some cases it is impossible because of lack of bond issue funds.

The question of which of the many "dangerous conditions" which exist in every jurisdiction are to be eliminated is one to be answered by its legislative body. Each year the City Council of Torrance struggles with this difficult problem. There are many such conditions but not enough money to eliminate all of them. Conferring on the courts the right to second guess the City Council in its performance of such type duties pursuant to Section 835.4 does not, in my opinion, comport with the happy dichotomy of judicial-legislative functions which has been the hallmark of our government.

Respectfully submitted,

STANLEY E. REMELMEYER
City Attorney

SER:J

Memo 69-89

EXHIBIT III

TATE OF CALIFORNIA

RONALD REAGAN, Governor

DEPARTMENT OF EMPLOYMENT
ACRAMENTO 95814

July 22, 1969

REFER TO:

53:3:cf

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

SOVEREIGN IMMUNITY: TENTATIVE RECOMMENDATIONS OF THE COMMISSION

We submit comment concerning Tentative Recommendation Number 11 of the Commission, in response to your letter of May 15, 1969.

With respect to Recommendation Number 11 relating to plan or design immunity, several questions are presented as to the Commission's intent concerning the interpretation of "other injuries" and "such injuries" in paragraphs (2) and (3) of subdivision (b) of Section 830.6 of the Government Code. Existing Section 810.8 defines the term "injury". Section 13 of the Government Code provides that the singular includes the plural, and the plural the singular. The proposed draft uses the plural, not the singular. Is the plural usage deliberate and intended by the Commission to overcome the general rule of Section 13 that the plural includes the singular? Is a single injury prior to a plaintiff's injury sufficient to permit a trial court finding that "other injuries" had occurred, or must the trail court find that at least 2 "other injuries" had occurred?

A problem appears also to be presented with respect to application to injuries occurring prior to the effective date of the legislation. Must an injury in order to be included in "other injuries" have occurred on or after the effective date of the proposal, when enacted, or does an injury qualify for inclusion in "other injuries" if it has occurred prior to the effective date of the legislation?

Finally, can an injury qualify for inclusion in "other injuries" where a plaintiff proves that it occurred as the result of an identical plan or design approved by one public entity and became known to a different public entity

PUBLIC EMPLOYMENT SERVICE

after the latter approved the identical plan or design for the particular facility at which the later injury occurred on which the plaintiff's cause of action is based?

In the absence of clarifying change in the language of the proposed draft of the Commission, or at least an expression of the Commission's intent, we believe that each of the foregoing three questions may arise in litigation under the proposal.

On the first question, successive or numerous injuries following a single injury would appear to reinforce a plaintiff's case. However, at what point does a plaintiff know that his injury is no longer an "other injury" and immunized--when he is the second injured person--or the third--or the fourth? Is the line left to the varying discretion of the trial court? It will surely be forcefully argued that only the first unfortunate injured person is confronted by immunity, and that his successors may overcome the immunity under the proposal. If this is the result intended, we suggest the Commission consider use of the singular ("other injury" and "such injury") in the proposed draft, accompanied by a discussion of the Commission's intent.

On the second question, we believe it can be argued that injuries prior to the effective date of the proposal, when enacted, are antecedent facts or conditions which are not themselves the basis for the plaintiff's cause of action arising from his injury occurring on or after the effective date of the legislation. Assuming that no corrective action had been taken by the public entity directly involved in the Cabell case, would the first plaintiff whose injury occurred on or after the effective date of the legislation and caused by the very same plan or design of the same public entity involved in Cabell be confronted with immunity? We think not. However, there are policy arguments for either result. If the Commission's intent is, generally, that the first injury on or after the effective date is immunized, we suggest that consideration be given to something like the following language in subdivision (b)(2) of Section 830.6 in the proposal:

> "(2) Prior to such injury and subsequent to the approval of the plan or design, or the standards therefor, and subsequent to the effective date of this subdivision, other injuries . . ." (Underscored provision indicates change from proposed draft of Commission)

On the third question, there appears to be no restrictive language in the proposed draft clearly limiting the occurrence of an injury to a facility under the control of a public entity which had approved the plan or design, for such injury to constitute an "other injury". It would appear that a plaintiff with a cause of action for injury against one public entity could

escape immunity by showing that an injury occurred at another identical facility under the control of another public entity which had approved the identical plan or design, coupled with a showing of knowledge by the public entity of the occurrence of such prior other injury at the other facility under the control of the other public entity. This may or may not be the Commission's intent. We suggest that if the Commission intends a more restrictive result, consideration be given to language that would clearly limit the grounds for avoiding the immunity defense, accompanied by a discussion of the Commission's intent.

Sincerely,

MAURICE P. MC CAFFREY, CHIEF COUNSEL

Charles M. Root

BY: CHARLES M. ROOT, SENIOR COUNSEL

EXHIBIT IV

Memo 69-89

STATE OF CALIFORNIA
COURT OF APPEAL
THIRD APPELLATE DISTRICT
119 LIBRARY AND COURTS BUILDING
SACRAMENTO, CALIFORNIA 95814

LEONARD M. FRIEDMAN
ASSOCIATE JUSTICE

June 6, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, Calif. 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

This letter is stimulated in part by recent work on litigation involving the "dangerous conditions" provisions of the 1963 tort liability legislation and your May 15, 1969, bulletin on the same subject. My comments are aimed at these provisions as drawn, rather than at the tentative amendments.

These statutes have their practical and most frequent application in the trial court and pacticularly in the jury room. For every appellate court that expatiates on these statutes, a dozen juries will apply them - or try to. If they are not meaningful to a jury, they fail in their prime purpose.

In my opinion no trial judge and no committee of trial judges can frame instructions making these tort liability statutes meaningful to 12 lay jurors. The BAJI committee has struggled manfully with the task. The fact that their suggestions communicate a single liability or immunity concept only through the medium of a half dozen interlocking instructions is no fault of the BAJI committee. It is the fault of the statutes.

Unfortunately, most statutory draftsmen have never entered a jury room. Many have not observed a jury trial. It is empty optimism to expect a jury to absorb and apply the interlocking statutory concepts of the tort liability law.

For example, a highway liability case might require the jury to recall and apply in combination instructions incorporating Government Code sections 830, 830.2, the second sentence of 830.8, 835(b), 835.2(b) and 835.4(b). Is not this a mountainous, practically impossible task for any 12 jurors?

"He jests at scars that never felt a wound," and I hasten to tell you that I have drafted legislation in past years. I do not minimize the draftsman's task. I think that the difficulties are increased when ideas are strung out through a series of statutory statements, when a concept in one statute depends on definitions in a second and qualifications in a third. They are lessened when a jury can decide a case on a self-contained rule. The latter alternative multiplies the number of available rules and requires a refined selection of the appropriate one by the trial judge. Nevertheless, I think we ought to give these 12 laymen a chance to do a rationally acceptable job.

Very truly yours,

Leonard M. Friedman
Associate Justice

LMF:zm

Memo 69-89

EXHIBIT V

OFFICE OF THE CITY ATTORNEY
AND CITY CLERK

CITY HALL, SANTA ROSA, CALIFORNIA 95403

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JOHN D. FLITNER
ACTING CITY ATTORNEY

MICHAEL J. DONOVAN
ASSISTANT CITY ATTORNEY

MRS. AGNES M. BICK
CITY CLERK

FRANCIS J. MAIETTA
RIGHT OF WAY AGENT

June 10, 1969

re: Law Commission Recommendation
on Sovereign Doctrine
Government Code Section 830.6

John H. De Moully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear Mr. De Moully:

This will respond to the Tentative Recommendation relating to Sovereign Immunity, Number 11 - Immunity for Plan or Design of Public Improvement, bearing number 52.30 and bearing a revision date of May 14, 1969.

It seems to me that the question involved is the degree of protection or insulation from liability to be given to a public agency, as a matter of law or policy, against the necessity to encourage and stimulate, if necessary, the public agency to make corrective repairs to public property.

I believe that the purpose of the law can best be served by allowing the trial judge to determine that there is sufficient evidence to sustain a jury finding and then submitting the question to the jury to make the finding, if appropriate.

It seems to me that the jury should be entitled to receive instructions about the immunity and weigh the instructions against the facts of the case.

How should the fact that several accidents occurred on a heavily traveled road in Los Angeles County bear on a similar accident in Alpine County? Should the University of California be liable for injuries sustained on the Santa Barbara campus involving University property in view of the fact that similar accidents occurred on the Davis Campus? The answer to these questions depend on the facts and that, I submit, is a question the jury must decide.

Very truly yours,

JOHN D. FLITNER
City Attorney

JDF/jes

Memo 69-89

EXHIBIT VI

C. RAY ROBINSON
W. E. CRAVEN
WILLIAM T. IVEY, JR.
CONRAD R. KOHRS
JOHN E. WHITING
JOHN SUCAN

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June 7, 19 9

Mr. John H. DeMoully
Executive Secretary
State of California
California Law Revision Commission
School Of Law, Stanford University
Stanford, California 94305

RE: Tentative Recommendation - - Sovereign Immunity

Number 11

Dear Mr. DeMoully:

Reference is made to your letter of May 15, 1969 with regard to the above numbered recommendation.

In my opinion the proposed legislative enactment would be fair to both the public entity and the general public in the situation where the public entity has failed to maintain the property free of defects or where subsequent changes or conditions have intervened between the reasonable adoption of a plan or design and the injury in question. However, I am concerned with the use of the word "injuries" in what would be amended Sections 830.6 (b) (2) and (3). Is it intended by this language that there must have been more than one prior injury, of which the public entity had knowledge, before the exception to the immunity provided by Section 830.6 (a) applies? While the number of prior injuries which might have occured may very well be a fact to be considered by the trial court in determining whether the immunity has been lost, it would not seem proper to require multiple prior injuries before a plaintiff could have the benefit of the proposed revision.

Very truly yours,

LAW OFFICES OF C. RAY ROBINSON

BY William T. Ivey, Jr.

WILLIAM T. IVEY, JR.

WTI:gs

Memo 69-89 EXHIBIT VII

COUNTY OF SAN MATEO

KEITH C. SORENSON, DISTRICT ATTORNEY

HALL OF JUSTICE AND RECORDS
COUNTY GOVERNMENT CENTER
REDWOOD CITY, CALIFORNIA 94063
TEL 369 1441 EXT 602

ROBERT E. CAREY
CHIEF CRIMINAL DEPUTY
JAMES M. PARMELEE
CHIEF CIVIL DEPUTY
A. L. LAMPORT
CHIEF INVESTIGATOR

June 3, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California, 94305

Re: Opposition to Tentative Recommendation of Law Review Commission Relating to Government Code § 830.6.

Gentlemen:-

The Commission proposes to change § 830.6 of the Government Code so that the design immunity established by that section would exist only at the date of construction of the project. It is argued that if later events show that the design does cause or contribute to accidents, the immunity should terminate.

The application of this doctrine in many situations including some of the examples cited in the report would result in the courts making determinations which are essentially legislative and not judicial. The courts would actually be usurping the legislative function. Perhaps the best examples within common knowledge relate to highway design. Three lane highways were an accepted design for a few years and perhaps were not too unsafe at automobile speeds in the day they were constructed. However, they became rapidly unsafe as the amount of traffic and speed increased and many accidents occurred on such highways. The determination as to the replacement or enlargement of such highways in relation to available funds and other priorities for funds should always be a legislative determination. That determination should not be forced upon the legislative body by the holding of a court that from now on the design immunity is terminated, and the governmental agency is liable for every passing accident that can be attributed in some manner to the three lane design.

In conclusion we believe that in many situations the determination to replace structures or other public facilities that have become obsolete and perhaps unsafe from a design point of view should remain with the legislative body and with the voters who must approve the bonds or other financing that may be required for replacement purposes.

We do not believe that the replacement of glass in a door or a public building is entirely comparable. Certainly when glass is replaced, the replacement is equivalent to a complete reconstruction if safer glass can be installed with nothing more than minor changes. The replacement should be in accord with proper design at the time of replacement.

In the event that the Commission does adopt the tentative recommendation, and we believe that it should not, it would seem proper to treat the factual questions in the same manner as other factual questions are resolved unless there are substantial reasons for having the court determine the facts. No reasons have occurred to us for finding that this particular factual question should be taken from the jury and given to the court. In the absence of such reasons we conclude that the question of whether the immunity has terminated should be left to the jury.

Very truly yours,

KEITH C. SORENSON
District Attorney

By Howard E. Gawthrop
Howard E. Gawthrop
Deputy

HEG:MK

Memo 69-89

EXHIBIT VIII

MARTIN J. BURKE
ROYAL M. SORENSEN
DWIGHT A. NEWELL
JAMES T. BRADSHAW, JR.
GEORGE W. WAKEFIELD
MARK C. ALLEN, JR.

RICHARD R. TERZIAN
MARTIN L. BURKE
CARL K. NEWTON

LAW OFFICES
BURKE, WILLIAMS & SORENSEN
SUITE 920 ROWAN BUILDING
458 SOUTH SPRING STREET
LOS ANGELES, CALIF. 90013

TELEPHONE
623-4136

HARRY C. WILLIAMS
(1912-1967)

May 28, 1969

Mr. John H. DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Sovereign Immunity Number 11

Dear Mr. DeMoully:

I submit these comments on your proposed tentative recommendation relating to immunity for plan or design of public improvement in response to your invitation contained in your letter of May 15, 1969. The present law on plan or design permits a public agency that is responsible for a large varity of different types of public works to make elections without a court or jury second guessing those elections. The proposed modifications suggested by the Law Revision Commission permits such second guessing, and in my opinion, is not constructive and should not be recommended to the Legislature by your Commission.

By way of a hypothetical situation to illustrate my point, a city or county or other public agency could be faced with a culvert under a street or roadway that drained an area of very expensive residential or industrial property. The city could know that the culvert, if covered with a grill, would substantially increase the back-up of water, and in cases of very heavy storms, assure that the water would back up and flood the industrial or residential property. On the other hand, they could know that if the culvert was not protected by such a grill, that small children could be washed into the culvert to their death. Under the present law, the City Council may determine to put the grill over the culvert to protect the lives of children at the expense of the property of residents or industrial areas in the drainage area. If the present proposal of the Law Revision Commission is adopted, if the City Council makes such a choice, the public entity would become liable to the property owners. Because the plan or design did actually create a dangerous condition, not only at the time of injury, but the time it was constructed, but the court and jury, or court or jury will face only the damaged property owners.

My practice does not include the defense of personal injury or property damage cases, as my clients are insured and that responsibility falls to the attorneys for the insurance carrier. I am, however, faced with the responsibility of advising public agencies at the time that construction or improvements are contemplated, as to what effect a particular decision will have on their actual or potential liability.

It appears to me that the Law Revision Commission has unduly focused upon the tort claims field and ignored, or not given sufficient emphasis to the desirability of permitting Government to make difficult choices in the general public interest without having the judiciary second guessing that determination.

I would, therefore, request that the Commission discontinue their efforts and disapprove tentative recommendation No. 11.

Respectfully submitted,

MARK C. ALLEN, JR.

MCA:lk

cc: Mr. Richard Carpenter, Executive Director
League of California Cities

Mr. Roger Arnebergh, City Attorney
City of Los Angeles, California

Memo 69-89 EXHIBIT IX

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May 26, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Gentlemen:

Re: Number 11 - Immunity for Plan or Design of Public Improvement

As to the above said tentative recommendation on the proposed amendment to Government Code Section 830.6 and comment, it would be appreciated if you would review the following comments.

In my opinion, the proposed amendment does not take into consideration defenses provided for under Government Code Section 835.4(b), which should exist and be applicable as to your presently planned amendment.

Without the protection of Government Code Section 835.4(b) to your proposed new amendment, severe hardship could be worked on governmental entities. An example of where liability could result under your proposed Section 830.6 which could properly be avoided if Section 835.4(b) were applied, is as follows:

> Plan and design of city street is approved and would qualify under present statute. A, while driving a car on said street, goes off the road at a curve because of absence or inadequacy of curve warning. City takes matter under consideration and decides a barrier and new type of warning device should be installed. Prior to decision or prior to installation, B goes off road at the same place and under the same conditions as A.

Very truly yours,

LLOYD TUNIK

LT:jo

Memo 69-89 EXHIBIT X

STATE OF CALIFORNIA—TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814

April 7, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California, 94305

Dear Mr. DeMoully:

Re: Proposed Change in the "Design Immunity" in Governmental Tort Liability Cases.

At its last meeting on March 7, 1969, the Commission proposed to change the "design immunity" to allow liability against public entities and public employees in cases where a facility was originally designed in a reasonable manner yet due to changed circumstances the public entity or public employee knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

The "design immunity" as presently set forth in Government Code §830.6 was enacted as a part of the Governmental Tort Liability Act of 1963 based on a recommendation of this same Commission. At that time the Commission stated "There should be immunity from liability for the plan or design of public construction or improvement where the plan or design has been approved by a governmental agency exercising discretionary authority unless there is no reasonable basis for such approval." The Department feels that any change in this original policy, as codified, would not be in the public interest and would open up the possibility of claims of liability which would be totally unjustified.

For example, mountainous and rural sections of our state are traversed for thousands of miles with roads which were originally designed reasonably but which could now be contended to be unreasonable and dangerous if used as though designed for modern conditions of vehicular

traffic. Local government agencies and the State simply cannot afford to bring all of these roads up to modern standards overnight, yet these facilities are absolutely vital to serve persons residing in such areas, and it is not practical that they be closed. The funds available for both the construction of new roads and the reconstruction and maintenance of old roads are being fully utilized. The question is one of priority, and an attempt is being made to allocate the funds where they are most needed. Obviously some areas must remain unchanged for many years even though they may be considered dangerous highways under modern conditions. The problem would be aggravated if damages were awarded to individuals injured on such roads since the funds so awarded would not be available to reconstruct or repair such defects and prevent other injuries.

Enclosed for your information is a copy of the 1968 State Highway Deficiency Study as well as the 1964-1968 Study for Local Roads. These studies indicate the extent of roads throughout the state which do not meet present day standards. As design standards improve, the deficiencies continue to increase. Without the design immunity, such improved design standards could be used against the public entity to show liability for known substandard conditions. (Curreri v. City and County of San Francisco, 262 ACA 657; see also Dillenbeck v. City of Los Angeles, 69 AC 489.) The reports also indicate that due to increased costs and inflation, public entities have found it difficult at the present time to substantially reduce the number of sub-standard facilities with available tax funds.

A possible alternative to correcting substandard facilities is warning the public of the condition. However, in view of the extent of roads in the State of California which do not meet present day standards, there would have to be so many warning signs that by their very number they would lose any impact upon the traveling public. Traffic engineers state that it is not effective to warn of every possible danger because the traveling public tends to ignore such warnings. It is more effective to limit the warnings to dangerous conditions which are not obvious. It is suggested that to the reasonable motorist the nature and risk of a substandard road is apparent. It seems unreasonable to make public entities liable to the motorist who does not adapt his driving habits to the nature of such roads, thus

draining the public treasury of funds that can be used as expeditiously as priority will allow for the upgrading of these roads to modern standards. Therefore, it is our view that the design immunity should be retained in its present form.

The Department expresses its appreciation for the opportunity afforded it by the Commission to comment on its proposals.

Very truly yours,

Robert F. Carlson

ROBERT F. CARLSON
Assistant Chief Counsel

Encls. 20 copies and 1 copy of each Study
cc's to: Willard A. Shank, A.G.'s Office
Norman B. Peek " Office
Robert L. Bergman " "
Thomas H. Clayton, Gen. Serv.
Norman Wolf
League of Cities
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Los Angeles County Counsel