1/11/62

Memorandum No. 4(1962)

Subject: Study No. 52(L) - Sovereign Immunity

Attached is a letter from the Department of Public Works setting forth a proposed statute relating to dangerous and defective conditions of public property.

Professor Van Alstyne's materials on dangerous and defective conditions have not been received as yet. A supplement to this memorandum will be sent as soon as these materials are received.

Respectfully submitted,

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January 8, 1962

PLEASE REFER TO
FILE NO.

California Law Revision Commission
School of Law
Stanford University, California

Attention John H. DeMoully

Gentlemen:

The Commission at its last meeting in San Francisco indicated that it would consider on January 19 and 20 the subject of the liability of public agencies for the dangerous or defective conditions of public property. You requested that this department present its thoughts to the Commission on this subject in the form of a letter.

As we indicated in our letter to you of December 8, 1961, we believe that the subject of the dangerous or defective conditions of public property should be considered separately inasmuch as it involves a different legal relationship in addition to a different degree or standard of care.

The State Division of Highways maintains approximately 13,000 miles of state highways, many miles of which are substandard and defective due to lack of sufficient funds for their modernization (Report of the Joint Interim Committee on Highway Problems 1959). These highways must, nevertheless, be kept open to the traveling public under extreme and varied conditions, notwithstanding forest fires, snowstorms, ice, heavy rainfall, slides, high winds, construction work, detours and other hazards. The Division of Highways attempts to provide, as funds are available, the best facilities to serve the greatest number of vehicles possible. Highways, particularly those across mountainous areas, are not as safe as they might be if there were an unlimited amount of money that could be spent thereon. These circumstances bring us to the question of the duty of the State Division of Highways. Should it close a highway

entirely because of conditions which might require extreme care in using it? For example, it is physically impossible to prevent iciness on highways where freezing temperatures are encountered. Any prudent driver knows that the pavement is apt to be slippery. There are also mountain passes and other areas where the grades and curvatures of the highway are not up to present design standards. Should all such highways be closed until funds are available to reconstruct them? If liability is to result from such conditions, it may be necessary to do so. These questions clearly indicate that the most important consideration of this Commission should be to define the standard of care owed by the State, and particularly the Division of Highways, to the traveling public in connection with its activities where the public should assume some of the risks.

Considering the difference in the degree of care and the fact that the duty of care of the State must be implicit in any statute which purports to impose liability for the dangerous or defective condition of public property, we have drafted for the Commission's consideration the following statute on this subject:

> "Section _____. The State or a local agency shall be liable for damage or injury to person or property resulting from the defective and dangerous condition of any public property but only when all of the following are specifically alleged and proved:
>
> (a) The dangerous and defective condition was the direct and proximate cause of the injury.
>
> (b) The State or local agency had actual notice of such defective and dangerous condition, or such defective and dangerous condition was directly attributable to work done by an employee of the State or local agency in a negligent, careless or unworkmanlike manner.
>
> (c) The State or local agency had authority and a duty to remedy such condition at the expense of the State or local agency and that funds, men, material and equipment were available to do so.

(d) Within a reasonable time after receiving such notice and being able to remedy such condition the State or local agency failed to do so or failed to take reasonable steps to give adequate warning of such condition.

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

This statute is drafted as an exception to the doctrine of sovereign immunity by providing for a waiver of liability for the dangerous or defective condition of public property. This is in accordance with the Commission's action at its last meeting that sovereign immunity would be re-enacted with special statutes providing for a selective waiver of immunity. We have not attempted to draft the general section reinstating sovereign immunity, but will of course be glad to assist if requested.

In addition there should be a definition section covering "person", "public property", "State", "local agency" and "dangerous and defective condition". We suggest the following:

"Section _____. As used in this chapter:

(a) 'Person' includes any person, firm, association, organization, partnership, business trust, corporation or company, and any pupil attending the public schools of any school or high school district.

(b) 'Public property' means public street, highway, freeway, bridge, building, park, grounds, works or property.

(c) 'State' means the State of California, its agencies, departments, divisions, bureaus and authorities or subdivisions thereof.

(d) 'Local agency' means any city, county, city and county, district or subdivisions thereof."

We have not attempted to draft a definition of what constitutes a dangerous and defective condition in this statute. After the next Commission meeting we will give the Commission our thoughts on a definition.

The above sections were patterned and adopted from Government Code Sections 800 and 1953 pertaining to the liability of public officers for the creation or maintenance of a dangerous or defective condition of public property. It is our opinion that all of the safeguards contained in Section 1953 must be included in any draft of a statute on this subject for the reason that the State or local agency should not have a broader or different liability than that imposed upon the State's officers for the very same cause of action, otherwise there would be hopeless confusion in the trial of said actions. This draft of the statute is also an expansion of Government Code Section 53051 pertaining to the liability of certain public agencies for the defective or dangerous condition of public property and we believe it remedies many of the deficiencies that now exist in that statute. The enactment of this proposed statute would, of course, require the repeal of Section 53051.

As we pointed out earlier in this letter, the present condition of some highways makes them dangerous for persons who drive with anything but due care and attention. Should the State be liable for injuries to persons who attempt to negotiate such highways in the event they are not closed? It is our belief that no liability should attach with respect to the use of any highway unless there is an actual failure of the highway itself which leads to the creation of the dangerous and defective condition. We do not believe that the State should be liable where an injury occurs on a highway which is in substantially the same condition to which it was originally improved. There are literally thousands of curves on the state highway system which cannot be negotiated within the maximum legal speed limit. There are also thousands of miles of comparatively narrow roads on which the operator must exercise more than the ordinary care. The Legislature has already recognized that no special downard signing is necessary under such condition, providing in Vehicle Code Section 22358.5:

"It is the intent of the Legislature that

physical conditions such as width, curvature, grade and surface conditions, or any other condition readily apparent to a driver, in the absence of other factors, would not require special downward speed zoning, as the basic rule of section 22350 is sufficient regulation as to such conditions."

To hold that such conditions would form the basis of liability would be an entirely unreasonable burden to place upon the State in view of the limitation of funds available to correct such conditions. Therefore, it is our proposal that no liability should attach unless the highway has physically deteriorated or become less safe than it was in its original condition. This proposal has been accomplished in the statute by the use of the word "and" between the words "dangerous" and "defective".

It should be noted that subsection (a) above is worded somewhat differently than subsection (a) of Section 1953. We believe the transposition of the words more accurately states the legal theory of this type of liability and better portrays the fact that the dangerous and defective condition must exist before the injury occurs. The courts generally speak in terms of "proximate cause" rather than "proximate result" and this change in phraseology would be consistent with the rules applied in civil actions generally.

Subsections (b) through (d) are patterned after Government Code Section 1953 except for the adaptation to the State and local agencies. These provisions are desirable since they are the same limitations that have been prescribed by the Legislature for the liability of a public officer for the creation or maintenance of a dangerous or defective condition of public property.

It has been judicially determined that a public agency is not the insurer of persons using public property. Therefore, it is necessary to require in subsection (e) that persons using the public property use it carefully in order to allege a cause of action against a public agency for a dangerous and defective condition of public property. In most actions arising out of the dangerous and defective condition of public property the only witnesses to the

accident are the parties involved who are making the claim against the public agency. It should therefore be incumbent upon them to prove that they were using the public property carefully, since the public agency is at a serious disadvantage in being unable to prove contributory negligence of the plaintiff where there are no other witnesses to the accident other than the plaintiff. Subsection (e) constitutes a necessary protection to the public agency, particularly where the action is founded upon a claim of wrongful death, for the presumption that the decedent was employing due care for his own safety is not available to aid the plaintiff in satisfying the statutory burden of proof (see Consultant's Study, page 136).

An additional reason for requiring proof that due care was being exercised to avoid the danger and the public property was being carefully used occurs where a guest-passenger sues the public agency for an alleged defective and dangerous condition of public property. If the driver sued for the same condition he could not recover where he was negligent. However, a guest-passenger could recover since ordinarily the driver's negligence is not imputed to the guest. We believe that in this situation the guest-passenger as well as the driver should be precluded from a recovery where the driver is negligent, i.e., not using the public property with due care.

In addition to the safeguards which have been included in the statute, other existing safeguards should be retained in our law. Government Code Section 647 as amended at the last session of the Legislature providing for a cost bond in certain cases should be continued in existence. Also, Government Code Sections 643 and 644 should be retained but should be amended to provide for a 100-day claim filing period for all negligence claims against the State, whether or not they involve the operation of a State-owned motor vehicle. This time period would be consistent with the period now prescribed in the uniform claim statute applicable to all other public agencies and would thus be in accord with the legislative policy on this matter.

If this Commission decides to provide that this type of action is to be tried in a court of law, then the right of jury trial should be preserved. Also, we believe

that very serious consideration should be given to a limitation on the amount of damages that can be awarded, as has been done in several other states.

The above are some of the ideas that we have on this matter. We will be pleased to provide you with our further views and thoughts as the Commission delves deeper into this subject.

Sincerely,

Robert E. Reed

ROBERT E. REED
Chief Counsel