1/15/62

First Supplement to Memorandum No. 4(1962)

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

Dangerous and Defective Conditions

Enclosed is a large portion of Professor Van Alstyne's study of governmental liability for dangerous and defective conditions. This part of the study is not complete. However, it is being sent to you at this time so that you may have an opportunity to read most of this part prior to the meeting. An additional portion of the dangerous and defective conditions part of the study will be distributed as soon as it is received and prepared. Because of the great need for you to have the text of the study it is being sent to you even though the footnotes are not fully prepared as yet. The footnotes, too, will be sent to you at a later time.

The questions presented by this portion of the study are as follows:

(1) Should liability for dangerous and defective conditions be extended to all public entities? (Study, pages 452-56.)

(2) The standard of care (pages 456-466):

(a) Should liability for injuries caused by dangerous and defective conditions exist only when the plaintiff has proved that his use of the public property was of a kind which was normal and reasonably foreseeable? (Study, pages 460-462.)

(b) Should liability for injuries caused by dangerous and defective conditions exist only when the injured person did not know or could not reasonably have been expected to know that his use of the property was

unlawful or forbidden? (Study, pages 462-463.)

(c) Should the attractive nuisance doctrine be applicable to public entities or should the liability of public entities for dangerous and defective public property be based solely on the terms of the public liability act? (Study, pages 464-466.)

(3) The actionable defect. (Study, pages 466-477.)

(a) Professor Van Alstyne suggests the amendment of the public liability act to define "dangerous or defective conditions" in order to focus attention on the relevant elements of liability and particularly upon the question of whether the potentiality of injury from the condition was not merely a remote possibility but one which should have been guarded against. The following language should be considered by the Commission:

> "Dangerous or defective condition" means a condition of public property which, viewed in the light of its nature, use, location, and other surrounding circumstances, unreasonably exposes persons or property to probable injury.

(b) Should the minor defect rule, developed in sidewalk cases, be extended to all cases coming within the public liability act? Professor Van Alstyne suggests the following language which should be considered by the Commission:

> The issue whether a condition of public property is "dangerous or defective" within the meaning of this act shall not be treated as a question of fact if the trial or appellate court is satisfied upon all the evidence, viewed most favorably to the plaintiff, that the condition is of such a minor, trivial or insignificant nature

in view of the surrounding circumstances that a reasonable person would not conclude that it unreasonably exposes persons or property to probable injury.

(c) Should there be a statutory declaration that the mere happening of the accident is not evidence that the property was in a dangerous or defective condition? Should the court be required to instruct the jury that the happening of the accident is not evidence of the dangerous or defective condition of the property?

(4) The nature of prior notice. (Study, pages 477-495.)

(a) Should the Public Liability Act be amended to require actual notice of the dangerous and defective condition, or is constructive notice sufficient? Professor Van Alstyne suggests the addition of the following language to the statute:

> "Actual notice" means express information, whether derived from written or oral communication to, personal observation by, or the doing of work or the performance of an act in person or under the direction or supervision of, the person to be charged with such notice.

If the defect exists because of negligent acts by public officers or employees, should actual notice be required?

(b) Should the Public Liability Act be amended to require public entities to maintain all written notices of defective public property? Professor Van Alstyne suggests the following statute:

> The clerk or secretary of the governing body of every public entity subject to the provisions of this act shall keep an indexed record, in a separate book, of all written notices which said entity or any of its officers or employees shall

receive of the existence of any allegedly dangerous or defective condition of public property. The record shall state the time and date or receipt of the notice, the nature and location of the condition claimed to exist, and the name and address of the person from whom the notice is received, so far as such information is known. The record shall be a public record open to inspection by any member of the public, and the record of each notice shall be kept and preserved therein for a period of five years after the date it is received. Every officer and employee of the entity who receives a written notice of an allegedly dangerous or defective condition or public property shall cause the notice or an exact copy thereof to be delivered to the clerk or secretary for entry in the record. Upon proof in any action brought under the terms of this act that the clerk or secretary has failed or refused to keep the record required by this section, the entity shall not be permitted to introduce evidence for the purpose of proving that written notice of the condition involved in said action was not received; and if the plaintiff therein successfully establishes that written notice of said condition was in fact received by said entity prior to the incurring of the injury sued upon, said plaintiff may recover from said clerk or secretary, and upon his official bond, the costs and expenses, including a reasonable attorney's fee, incurred by him in making proof thereof.

(5) Should the plaintiff in a defective condition case have the burden of proving that he was free from contributory negligence? Should the plaintiff have such a burden, or should the defendant have the burden of showing contributory negligence, in wrongful death cases? (Study, pages 495-503.)

(6) Limitations upon liability for defective property.

(a) Should the public liability act be amended to grant public agencies any greater rights against third parties whose concurring negligence has been a cause of the injury complained of? Should the injured party be required to proceed against the third party tortfeasor first? Should the injured party be required to join the third party tortfeasor as a party defendant? Should the public entity have the right to join the third party tortfeasor as a party defendant for the purpose of obtaining contribution? (Study, pages 504-509.)

(b) Should the public liability act be amended to provide that evidence relating to lack of funds, insufficient numbers of employees or equipment, the magnitude of the problem and of administrative difficulties arising therefrom and the general reasonableness of the defendant entity's conduct after receiving notice of the dangerous or defective conditions complained of is admissible by way of defense? (Study, pages 509-512.)

(c) Should the public liability act be amended to provide an exception from the general rule of liability for dangerous and defective conditions when the injury complained of results from a natural accumulation of snow and ice upon public streets, sidewalks or other

public property? (Study, pages 512-513.) Professor Van Alstyne has suggested the following provisions which should be specifically considered:

> A public entity shall not be liable for damages sustained by reason of natural accumulation of snow and ice on public streets, sidewalks or other public property, if the property was at the time of the sustaining of the damage otherwise reasonably free from any dangerous or defective conditions which contributed thereto.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary