#52 3/12/68

Memorandum 68-18

Subject: Study 52 - Sovereign Immunity (Plan or Design Immunity)

Attached to this Memorandum are three exhibits:

Exhibit I - Note from Hastings Law Journal criticizing the California Supreme Court's interpretation of Government Code Section 830.6 dealing with immunities for injuries resulting from the plan or design of public property.

Exhibit II - Decision of California Supreme Court in Cabell v. State.

Exhibit III - Decision of California Supreme Court in Becker v. Johnston, 67 A.C. 187 (July 1967).

You must read the attached materials for an understanding of the problems presented by Government Code Section 830.6.

The staff believes that the court has correctly interpreted the intent of the Commission in proposing and the Legislature in enacting Government Code Section 830.6. It was intended that the immunity provided by Section 830.6 should exist even if it has become apparent that the property is in a dangerous condition, even though the dissenting opinion and the law review note take a contrary view.

The justification for the immunity is this. If the shower glass involved in Cabell was not part of an unreasonable plan or design when installed, the public entity should not be required to replace all the glass when it becomes apparent that it is dangerous and safety glass has been developed. The decision on whether to expend public moneys to replace the glass is one that is made by the Legislature when it considers the budget for San Francisco State College. (One

can argue that the Legislature should have this freedom of choice only if it determines that the cost of replacement exceeds the benefit to be received, that is the cost of the injuries that will occur if it is not replaced. If this view is taken, liability should be imposed, at least in this type of case.) If the road involved in the Becker case was not part of an unreasonable plan or design when the road was constructed, the public entity should not be compelled to bring the road up to modern standards when it becomes apparent that it is dangerous. The decision whether to improve a dangerous road or to construct an alternative road or to expend the moneys in improving another road is the kind of policy decision the Commission left to the governing body concerned with the particular project. If the citizens in the area wish to have a particular road improved to bring it up to modern standards, they should make their views known to the appropriate governing body or take other action to require the public decision makers to correct the substandard road.

On its facts, however, we believe that Cabell is incorrectly decided. It does not seem an unreasonable burden on the public entity to install safety glass when the substandard glass is broken. In Cabell, the shower glass that injured the plaintiff had been recently installed after the glass in the same shower had previously broken and injured another student. As a minimum, the statute should be amended to incorporate a requirement that when substandard materials are replaced they should be replaced by materials that meet modern design standards. In addition, the immunity may not be appropriate when applied to a facility such as a college dormitory. How many students must be killed or injured before the dangerous glass will be replaced?

Perhaps the rule suggested by the dissenting opinion should be adopted for all cases.

Notwithstanding our view that this immunity should be reexamined, the staff suggests that action on this section be deferred pending consideration of the section in the course of the inverse condemnation study. We will necessarily consider the plan or design immunity in the course of that study since inverse condemnation liability creates a substantial loophole in the immunity provided by Section 830.6.

The law review note refers to and relies on the opinion in the Douglas case. The court granted a rehearing in this case and revised the opinion to delete the language relied on in the law review note and to substitute a brief statement consistent with the Cabell case.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 68-18 EXHIBIT I

SOVEREIGN LIABILITY FOR DEFECTIVE OR DANGEROUS PLAN OR DESIGN—CALIFORNIA GOVERNMENT CODE SECTION 830.6

In 1963 the California Legislature enacted the Tort Claims Act.[1] Government Code sections [illegible] govern public liability for dangerous or defective conditions of public property. The definition of dangerous condition and of public property [illegible] section 830,[2] while section 835[3] provides the [illegible]. The Government Code provides a number of [illegible] is found in section 830.6[4] dealing with [illegible] from the plan or design of public property. [illegible] provides:

> Neither a public entity nor a public employee is liable [illegible] for an injury caused by [illegible] the 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.

The purpose of this note is to examine the [illegible] and

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[1] Cal. Stats. 1963, ch. 1681, § 1, at [illegible], codified in Cal. Gov't Code §§ 810-996.6.

[2] Cal. Gov't Code § 830 provides:

"(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property [illegible] is used with due care in a manner in which it is reasonably foreseeable that it will be used.

"(b) 'Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, and warning of a dangerous condition.

"(c) 'Property of a public entity' and 'public property' mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

[3] Cal. Gov't Code § 835 provides:

"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

"(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

"(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[4] Cal. Gov't Code § 830.6.

EXHIBIT I

SOVEREIGN LIABILITY FOR DEFECTIVE OR DANGEROUS PLAN OR DESIGN—CALIFORNIA GOVERNMENT CODE SECTION 830.6

In 1963 the California Legislature enacted the Tort Claims Act.[1] Government Code sections 830-40.6 govern public liability for dangerous or defective conditions of public property. The definitions of dangerous condition and of public property are found in section 830,[2] while section 835[3] provides the basis for and the requisites of liability. The Government Code specifies a number of immunities, one of which is found in section 830.6 dealing with immunities for injuries resulting from the plan or design of public property. Code section 830.6[4] provides:

> Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial 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.

The purpose of this note is to examine the legislative background and

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[1] Cal. Stats. 1963, ch. 1681, § 1, at 3267, *contained in* CAL. GOV'T CODE §§ 810-996.6.

[2] CAL. GOV'T CODE § 830 provides:

"(a) 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

"(b) 'Protect against' includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, and warning of a dangerous condition.

"(c) 'Property of a public entity' and 'Public property' mean the real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity."

[3] CAL. GOV'T CODE § 835 provides:

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(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[4] CAL. GOV'T CODE § 830.6.

policy of section 830.6, and to inquire whether recent judicial treatment of the section is commensurate with, or in excess of, the apparent legislative intent.

Judicial Treatment Prior to 1963

Under the California case law prior to the enactment of section 830.6 in 1963, the State was held liable for a dangerous condition regardless of its having had no opportunity to remedy the condition.[5] While the mere possiblity that public property could have been made safer by other means was not sufficient to hold the State liable,[6] the court made it clear in *Pritchard v. Sully-Miller Contracting Company*[7] that, whether or not the municipality (City of Long Beach) had notice, it would be held liable when, in accord with an original plan, a dangerous condition had resulted. Thus impliedly, even though a design might have been reasonable when it was approved by an administrative decision, if an injury occurred years later, the entity could be held liable on the basis that it had *created* a dangerous condition. It is probable that cases such as *Pritchard*[8] prompted the legislature to enact section 830.6.

Public Policy Behind Section 830.6

The policy and theory underlying section 830.6 were explained by the California Law Revision Commission as follows:

> There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.[9]

Numerous policy arguments have been advanced in support of section 830.6. It has been said that the provision represents an attempt by the legislature, by providing specific immunity, to keep public liability within ascertainable limits.[10] An entity may not have an

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[5] Fackrell v. City of San Diego, 26 Cal. 2d 196, 206, 157 P.2d 625, 630 (1945).

[6] Belcher v. City & County of San Francisco, 69 Cal. App. 2d 457, 463, 158 P.2d 996, 999 (1945).

[7] 176 Cal. App. 2d 246, 2 Cal. Rptr. 830 (1960). The court said: "The elements of notice and failure to exercise reasonable diligence ordinarily are essential to show culpability on the part of the city but where it has itself *created* the dangerous condition it is *per se* culpable and notice, knowledge and time for correction have become false quantities in the problem of liability." *Id.* at 256, 2 Cal. Rptr. at 836 (emphasis added).

[8] For similar cases, see Fackrell v. City of San Diego, 26 Cal. 2d 196, 157 P.2d 625 (1945); Wise v. City of Los Angeles, 9 Cal. App. 2d 364, 49 P.2d 1122, *rehearing denied*, 9 Cal. App. 2d 364, 367, 50 P.2d 1079 (1935).

[9] 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 823 (1963).

[10] Hink & Schutter, *Some Thoughts on the American Law of Governmental Tort Liability*, 20 RUTGERS L. REV. 710, 742 (1966).

adequate budget to meet the demands of sporadic liability from lawsuits it has lost.[11] It is thought that the spirit of public employees may be so dampened by threats of lawsuits that programs urgently needed by the general public would not be developed with anticipated promptness.[12] Furthermore, it has been contended that to submit the issue of negligence to a jury would as a practical matter, "make the public entity an insurer despite the best efforts of responsible officials to eliminate every known condition posing a reasonable probability of injury."[13]

The legislature, therefore, sought to protect the integrity of the governmental decision process in the areas of planning and design, future improvement, and construction of public property. Stated otherwise, the objective of the legislation was "to locate the specific boundaries within which tort liability may be imposed upon public entities without unduly frustrating or interfering with the accomplishment of the other accepted ends for which the entities exist."[14] In its construction of section 830.6 the California Supreme Court has recognized the need to protect the public official,[15] but in doing so the court may have granted broader immunity than was intended by the legislature or than is consistent with public safety.

Judicial Treatment of Section 830.6

Two recent California cases which illustrate conflicting approaches to section 830.6 are *Cabell v. State*[16] and *Douglas v. State*.[17] In *Cabell*, notwithstanding the State's having had notice and opportunity to remedy a dangerous condition, the supreme court granted the State immunity.

While Cabell was residing in a San Francisco State College dormitory, he received serious injuries when his hand slipped through a glass lavatory door he was opening. The glass was not of the safety variety, but had been approved in 1957 when the original design for state dormitories had been adopted. The door recently had been replaced with the same quality of glass following a similar mishap involving another student. In addition, a lavatory door on the same floor a month earlier and a lavatory door on another floor the previous year had been replaced after contact with students' hands caused the doors to break.[18]

The trial court sustained the State's motion for summary judgment.[19] On review the intermediate court overturned the summary proceeding and held the State liable, declaring, "While section 830.6

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[11] Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161, 179 (1963).

[12] Van Alstyne, *Tort Liability—A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 472 (1963).

[13] 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 348 (1963).

[14] Van Alstyne, *supra* note 12, at 472.

[15] Cabell v. State, 67 A.C. 174, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

[16] *Id.*

[17] 252 A.C.A. 478, 60 Cal. Rptr. 694 (1967).

[18] 67 A.C. at 177-78, 430 P.2d at 36-37, 60 Cal. Rptr. at 478-79.

[19] 67 A.C. 174, 430 P.2d 34, 60 Cal. Rptr. 476.

of the Government Code may bar a cause of action based on a faulty plan or design, it should not bar a cause based on the negligent maintenance of the door in its original condition after the State had notice of its dangerous characteristics."[20] Cabell's vindication, however, was short-lived. In reversing, the supreme court held: "We are persuaded that there is no merit in this contention [the alleged maintenance of a dangerous condition]. . . . [T]he plan or design is to be judged as of the time it was adopted or approved."[21] Thus, the State, with knowledge of and an opportunity to remedy the dangerous condition, avoided liability for a present defective condition of public property because the design for the building had been approved years before plaintiff's accident.[22] Justice Peters, with whom Justice Tobriner concurred, wrote a strong dissent arguing that the legislature had indicated its intent to adopt an approach to liability similar to New York's and that the State should be held liable after notice because of its continuing duty to maintain the property in a safe condition.[23]

Legislative Intent

Accompanying section 830.6 is a Law Revision Commission Comment. As a general rule only the Legislative Committee Comments are valid sources for legislative intent,[24] but the Senate Committee on the Judiciary and the Assembly Committee on Ways and Means formally adopted the Law Revision Comments as indicating legislative intent.[25] The germane comment provides that the immunity of section 830.6 is to be similar to the immunity described in the New York case, *Weiss v. Fote*.[26]

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[20] Cabell v. State, 55 Cal. Rptr. 584, 597 (1966), *vacated*, 67 A.C. 174, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

[21] 67 A.C. at 178-79, 430 P.2d at 37, 60 Cal. Rptr. at 479.

[22] Becker v. Johnston, 67 A.C. 157, 430 P.2d 48, 60 Cal. Rptr. 485 (1967), illustrates the extreme to which the court will carry the rule of *Cabell* that the original date of adoption provides the standard whereby the reasonableness of a present known dangerous condition is to be assessed. Against Sacramento County, a cross-defendant, Becker alleged negligent design and failure to maintain a county highway in a safe condition. There had been prior accidents; the highway was admittedly in a dangerous condition; the government had notice of the condition; but there was no liability. The court relied on the approval of the highway design, July 11, 1927. The highway had remained in the same design until the accident in 1963. A portion of the substantial evidence, which under section 830.6 is necessary to establish the reasonableness of the original design, revealed that when the highway was built horses and buggies traveled the road at a time well before the advent of schools, shopping centers and homes throughout the immediate area. Thus, the State was allowed to ignore significant changes in conditions which affected the appropriateness of the highway design to meet the modern needs of safety. The State was allowed to ignore a series of accidents adequate to apprise it of the existing dangerous condition.

[23] Cabell v. State, 67 A.C. 174, 179, 430 P.2d 34, 37, 60 Cal. Rptr. 476, 479 (1967).

[24] A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 120 (Cal. Cont. Educ. Bar, 1964).

[25] 1963 JOURNAL OF THE SENATE, Reg. Sess. 1855; 1963 JOURNAL OF THE ASSEMBLY, Reg. Sess. 5439.

[26] "The immunity provided by Section 830.6 is similar to an immunity

In *Weiss v. Fote*[27] plaintiff alleged that because the City of Buffalo negligently designed traffic signals, he had sustained injuries in an automobile collision. Regarding the negligence in the design, the court held in favor of the city in deference to a long-established tradition of noninterference with the "ordinary performance of planning functions by the officials to whom those functions were entrusted."[28] But more significantly, while also finding that there had been no previous accidents or changed conditions such as would have alerted the city to a defective condition, the court observed that "[i]t is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government, for instance, the garden variety injury resulting from the negligent maintenance of a highway . . . ."[29] Judge Fuld, in distinguishing an earlier decision,[30] made it clear that although the State would be immune for the plan or design function, it would be subject to a continuing duty to keep public property safe:

> [It is] the rule that, once having planned the intersection, the State was under a continuing duty to review its plan in the light of its actual operation and that the proof established a breach of such a duty. More particularly, the court considered, as sufficient to demonstrate a violation of the State's continuing obligation to maintain the safety of the highways, evidence that physical conditions had changed at the intersection and that a number of accidents had occurred after the stop sign had been removed. In the case before us, however the situation is quite different; there is no showing that the continuing obligation which rested on the municipality was violated. There is no proof either of changed conditions or of accidents at the intersection which would have required the city to modify the signal light "clearance interval."[31]

Thus, the opinion of the New York court resolves a fundamental conflict. By preserving the policy of noninterference with public planning, it insures that the discretion of governmental officials may be freely exercised. But the case also stands for the complementary conclusion that a state may be liable for negligence in the operation of an approved plan after the state has had adequate notice of an unsafe condition.[32]

It would appear that the majority in *Cabell* failed to apply the principles of *Weiss* to circumstances which the New York court specified as grounds for possible liability. Cabell's injury occurred after a series of similar accidents; the State had actual notice of the

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that has been granted by judicial decision to public entities in New York. See *Weiss v. Fote*, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960)." CAL. GOV'T CODE § 830.6 Law Revision Comm'n Comment.

[27] 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

[28] *Id.* at 584, 167 N.E.2d at 65, 200 N.Y.S.2d at 411.

[29] *Id.* at 585, 167 N.E.2d at 65-66, 200 N.Y.S.2d at 413.

[30] Eastman v. State of New York, 303 N.Y. 691, 103 N.E.2d 56 (1951).

[31] 7 N.Y.2d at 587-88, 167 N.E.2d at 67, 200 N.Y.S.2d at 415.

[32] *See Court of Appeals, 1959 Term*, 10 BUFFALO L. REV. 48, 209-10 (1960) where it was said, "[n]or is there any question that the State is liable for the negligence of its employees on the purely operational level. . . . A municipality owes the public a duty of keeping its streets in a reasonably safe condition for travel. Included in this duty is the subordinate duty to plan intersections and for failure to plan or to review a plan when it is shown to be unsafe the municipality may be liable." And *see* 35 CORNELL L.Q. 366 (1950).

danger; and the State failed to correct the condition.[33] Particularly, the majority disregarded the *Weiss* decision by holding that immunity under section 830.6 attaches with respect to "ordinary routine maintenance of public property,"[34] whereas, the New York court had prescribed liability for dangerous conditions in "day-by-day maintenance."[35]

Given the apparent legislative intent to adopt the reasoning of *Weiss v. Fote*, which is still followed in New York,[36] it is interesting that the majority in *Cabell* did not mention *Weiss* but instead relied upon the views of Professor Van Alstyne:

> The reasonableness of adoption or approval of the design, plan, or standards is measured as of the time the adoption or approval occurred. A plan or design now judged to have been reasonable when adopted is not actionable even though its defective nature is considered wholly unreasonable under present circumstances and conditions.[37]

While the Professor's opinion is of course entitled to great respect, it must be observed that his views were neither supported by judicial authority nor reflective of the legislative intent found in the comment to section 830.6.[38]

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[33] Cabell v. State, 67 A.C. 174, 178-79, 430 P.2d 34, 37, 60 Cal. Rptr. 476, 479 (1967).

[34] *Id.* at 179, 430 P.2d at 37, 60 Cal. Rptr. at 479.

[35] 7 N.Y.2d at 585, 167 N.E.2d at 65-66, 200 N.Y.S.2d at 418.

[36] In clarification of *Weiss*, subsequent New York cases have reiterated the same principles of liability. In Warda v. State, 48 Misc. 2d 385, 256 N.Y.S.2d 1007 (Ct. Cl. 1964), the court reaffirmed the liability possible for maintenance or operation, after holding that the State was not liable because of plaintiff's contributory negligence. The court said, "This is not to say that . . . the State does not have the continuing obligation to restudy, to redesign, to continually search for better and safer highways and to make those already constructed better and safer where needed." *Id.* at 386, 256 N.Y.S.2d at 1011. In Natina v. Westchester County Park Comm'n, 49 Misc. 2d 573, 268 N.Y.S.2d 414 (Sup. Ct. 1966), the contention that the state has a duty to keep its property safe was supported when the court labeled a case, with no prior accidents nor any change in conditions as "an attempt to get beyond the purview of *Weiss*." *Id.* at 575, 268 N.Y.S.2d at 416. This lack of notice situation was distinguished from the liability attaching to everyday operation of government facilities. Where the state fulfilled its continuing duty to keep property safe, by testing periodically to insure that it was safe and all was working properly, it was within the scope of the immunity in *Weiss v. Fote*. Squadrito v. State, 34 Misc. 2d 758, 229 N.Y.S.2d 540 (Ct. Cl. 1962).

[37] Cabell v. State, 67 A.C. 174, 177, 430 P.2d 34, 36, 60 Cal. Rptr. 476, 478 (1967), *quoting* A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 556 (Cal. Cont. Educ. Bar, 1964).

[38] Accepting the reasoning of *Weiss v. Fote*, it is still possible that the court misintrepreted Professor Van Alstyne's statement. It is consistent with *Weiss* that if the public entity had no notice of the dangerous condition, the reasonableness of the condition would be judged as of the time of adoption, even though the dangerous condition was wholly unreasonable under present conditions. It is interesting to note that Professor Van Alstyne, as the research consultant for the Law Revision Commission, elsewhere applied the reasoning of *Weiss* in a discussion of liability for failure to adopt police regulations or precautions. In this area of nonfeasance he said, "In the absence of known physically dangerous or defective property conditions—with respect to which negligent failures to remedy or warn have long been

Weiss, as contended by Appellant in *Douglas*, is

> an official gloss upon the intentions of the draftsmen of the new code provision . . . . Thus, the similarity between *Weiss v. Fote* and *Government Code* Section 830.6 derives from their common, central concern with an institutional problem, namely, the demarcation line between the executive and judicial spheres in relation to professional decision making by engineers.[39]

The *Weiss* rule endeavors to guarantee an unfettered environment in which experts can plan and design public property, by allowing experts the freedom to contrive schemes for future construction and improvements of state property; simultaneously, it attempts to promote public safety by imposing a continuing duty to inspect and remedy dangerous conditions of state property. Accordingly, it is submitted that the California Supreme Court should have applied the principles of the *Weiss* case to the facts in *Cabell* in its determination of the immunity under 830,6. Allowing a determination of the negligence issue would have been more consistent with the expressed intention in the comment. Presently, California furnishes the designer of public property with an unfettered environment, but what of the complementary duty to provide safe public property?

An Alternative to Cabell v. State

In *Douglas v. State*[40] the plaintiff brought an action against the State for injuries suffered by him in a collision occurring upon a public freeway. The basis of plaintiff's claim was that the State, by its negligent design of the highway, had created a hazardous condition. The court of appeal for the fourth district, in an opinion by Associate Justice Whelan, developed an approach to section 830.6 that is similar to the view expressed in *Weiss*. The State would be excused from liability for the reasonable adoption of a plan or design, but it would encounter liability for a breach of the continuing duty to maintain and operate public property in a safe condition.

According to *Douglas* a dangerous condition resulting from an executed design would be grounds for liability, provided that the State had adequate notice of the condition.[41] The court distinguished two classes of liability: one based upon the design and another based upon the placing of the design into operation.[42] Liability of the latter category is predicated upon a continuing duty to operate the design in a safe manner.

As viewed by Justice Whelan, section 835 of the Government Code provides the limits and conditions of liability for dangerous and

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actionable under the Public Liability Act—it would seem that the New York court's reasoning [in *Weiss v. Fote*] constitutes a persuasive basis for rejecting liability for such inaction." CAL. LAW REVISION COMM'N, *supra* note 13, at 442-43. Impliedly then, Professor Van Alstyne would condone liability for such nonfeasance when the entity had knowledge of the danger. If notice here would confer liability, why should it not have the same effect for dangerous public property?

[39] Appellant's Closing Brief at 4-5, Douglas v. State, 252 A.C.A. 477, 60 Cal. Rptr. 694 (1967).

[40] 252 A.C.A. 477, 60 Cal. Rptr. 694 (1967).

[41] *Id.* at 485, 60 Cal. Rptr. at 699.

[42] *Id.*

defective public property.[45] Plaintiff, under 835, must establish either a negligent or wrongful act, or that the public entity had actual or constructive notice of the danger under section 835.2.[44] Yet, after a court has found substantial evidence of a reasonable basis for approving the original design, section 830.6 would provide immunity for the State where liability is predicated upon a negligent or wrongful act.[45] Likewise, the State would not be liable under 835(b) for notice in creating the plan, since mere adoption, protected by section 830.6, would not provide actual or constructive notice.[46] Thus, the State could not be liable for the reasonable adoption alone. Justice Whelan stated in summary, the well-reasoned rule:

> Where an initial case of exemption under section 830.6 had been established, subsequent liability under section 835 must rest upon constructive notice as defined by section 835.2(b) by proof that the demonstrated hazard had been made manifest for a sufficient period of time to charge defendant with notice, or upon proof of actual notice of such demonstrated hazard under subdivision (a) of section 835.2, Government Code.[47]

Douglas presents a sound construction of section 830.6 that is consistent with the policy of protecting the State from liability where the defect arises from a mere error of judgment and where the plan is not patently defective as a matter of law. Further, in its practical result, *Douglas* serves as an example of a case in which the State was not liable. The court found that plaintiff failed to prove that the freeway design was demonstrably dangerous in its operation.[48] Plaintiff proved no facts to support actual or constructive notice. He was left with only the allegation of an inherent defect,[49] for

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[43] 252 A.C.A. at 487-88, 60 Cal. Rptr. at 700-01.

[44] CAL. GOV'T CODE § 835.2 provides:

"(a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

"(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

"(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

"(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."

[45] 252 A.C.A. at 488, 60 Cal. Rptr. at 701.

[46] *Id.*

[47] *Id.* at 488-89, 60 Cal. Rptr. at 701.

[48] 252 A.C.A. at 490, 60 Cal. Rptr. at 703.

[49] Justice Whelan distinguished "inherent hazard" from "demonstrable hazard," the former being a "possible innate but undiscovered hazard in an

which section 830.6 provided immunity in view of the prior reasonable approval.

Justice Whelan's approach in *Douglas* is not unlike Cabell's argument that the State, after approving a plan of design had a duty to "maintain" public property in a safe condition.[50] One difference which may be significant is that the *Douglas* view is not susceptible to the semantic argument made by the State in its answer to Cabell's petition for a rehearing in the supreme court.[51] There, the State argued that its duty to "maintain" public property was fullfilled by preserving the property in conformity with the original plan or design.[52] If that design was shown to be dangerous in its operation, the State might nevertheless "maintain" it according to the approved specifications. This latter argument clearly subverts the spirit of *Weiss*. While it would only be conjecture whether the supreme court gave credence to the State's argument, it is clear that the court disregarded the principle in *Weiss* pertaining to a continuing duty to keep property in an operable, safe condition.

The *Douglas* approach, supported by authority in other jurisdictions,[53] would establish no new liability for governmental agencies in California; it would correspond to the apparent intent of the legislature. Such an approach would provide liability for a breach of a con-

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approved design," and the latter being "a hazard that has been demonstrated in the use of an improvement executed according to the approved design." 252 A.C.A. at 485, 60 Cal. Rptr. at 699.

[50] 67 A.C. at 178-79, 430 P.2d at 37, 60 Cal. Rptr. at 479.

[51] State's Answer to Petition for Rehearing at 1-2, Cabell v. State, 67 A.C. 174, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

[52] *Id.*

[53] Pierce v. United States, 142 F. Supp. 721, 731 (S.D. Tenn. 1955), "Once the decision was made to construct substations and bring in power, all of the discretion required has already been exercised . . . . [I]t became the duty of the government and its agents and employees to exercise due care in carrying out the program decided upon." In Perrotti v. Bennett, 94 Conn. 533, 541, 109 A. 833, 836 (1920), where plaintiff alleged the negligent construction and maintenance of a highway, it was said: "The court should not attempt to control the decision of the municipal authorities in their choice of a plan of public improvement. It should not penalize an error of judgment . . . . But it should hold the municipality liable for the continued operation and maintenance of the improvement under the defective plan after it had reasonable notice of the defect and of the imminence of the injury." In Johnston v. East Moline, 405 Ill. 460, 465, 91 N.E.2d 401, 404 (1950), it was said: "A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner." Further support is found in Paul v. Farley, 228 Minn. 264, 274, 37 N.W.2d 427, 433 (1949), where the court said that the adoption of the original plan was immune from liability, but that after the plan had been executed the city had to keep the improvement in a reasonably safe condition. Recently, the Supreme Court of Wisconsin in Eaisanen v. City of Milwaukee, 35 Wis. 2d 394, —, 151 N.W.2d 139, 134 & n.5 (1967), stated: "Lawfully authorized programing of signal lights by a city should not give rise to tort liability by a jury second guessing the reasonableness and safety of the plan. . . . [F]ailure to maintain a traffic sign may give rise to a cause of action against a municipality."

tinuing duty to operate in a safe condition, whether the defective condition arises from the daily use of government property or from a structural defect of the property.

Conclusion

While the Law Revision Commission was conducting the study on sovereign immunity it received many letters from district attorneys and other concerned parties throughout the State. Although various parties were opposed to state liability for diverse reasons, the minutes of the Commission's meetings as well as the communications from interested parties clearly disclose that they assumed and accepted imposition of some liability for the designed and approved construction and improvements.[54] A few parties expressed particular apprehension of liability arising from an unexpected event (*e.g.*, an extraordinary flood).[55] As to such fears an approach to section 830.6 consistent with *Weiss* would protect the integrity of the reasonable design decision, while the traditional process whereby the jury weighs the relative risks and burdens in a negligence case would eliminate liability for the unforeseeable event.

One purpose of the specific immunities in the California Tort Claims Act was to eliminate unfounded litigation and the expense which would accrue from speculative litigation if the terms of immunity were generally stated.[56] Yet, it would be unreasonable in view of the comment to 830.6 to expect that the claims of all litigants

[54] Letter from California Department of Finance to California Law Revision Commission, June 7, 1962, attached to Memorandum 46 of the California Law Revision Commission, 1962 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University): "Some state property is acquired, improved and maintained for use by members of the public who are expressly or impliedly invited to use particular areas of such state property for specified purposes. . . . highways, colleges, hospitals, parks, state office buildings. The State, in common with other property owners, should operate and maintain such property so as to provide reasonably safe places for proper use by those who are invited to use such property." Letter from the League of California Cities to the California Law Revision Commission, August 2, 1962, attached to Memorandum 46, at 2, of the California Law Revision Commission, 1962 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University): "It would appear desirable to limit liability for negligence of public officers and employees to maintenance. . . . Imposing liability for design would, in our opinion, result in an almost complete inability to pinpoint individual responsibilities." In Minutes of the California Law Revision Commission meeting, September 21-22, 1962, on file at the office of the California Law Revision Commission, School of Law, Stanford University, at 11, "Liability will exist under section 830.6 because of the improper performance of some functions."

[55] Letter from County Counsel of Los Angeles County to California Law Revision Commission, September 28, 1962, attached to Memorandum 63 of the California Law Revision Commission, 1962 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University).

[56] See Minutes of the California Law Revision Commission meeting, November 10-11, 1961, at 27, on file at the office of the California Law Revision Commission, School of Law, Stanford University.

would be silenced. Through the enactment of 830.6 it was recognized that the State is not on equal footing with private entities and should have some immunities. The faultless citizen, however, should not be left without remedy for injuries received after the public entity had notice of the defective nature of its property and failed to remedy the condition, merely because of prior approval of the plan. There must be a limit on the immunity for plan or design; an individual must not be forced in all cases to table his claims of negligence and relinquish all compensatory redress.

The *Cabell* decision represents a determination that the worth of protecting the integrity of plans or designs approved upon reasonable grounds at an earlier date, outweighs the responsibility to provide adequate redress to a citizen who through no fault of his own is injured due to a known dangerous condition of public property. This policy decision does not merely tip a delicate balance between two conflicting meritorious public policies; it abrogates the policy that the state must provide reasonably safe premises for its citizens.

The rationale of *Weiss v. Fote* as implemented and made workable through the construction of 830.6 in *Douglas v. State* should be sustained. The liability should attach by reason of the failure to correct and not by reason of the adoption of the plan. The plan or design, as Cabell said in his reply, should not be thrust into perpetuity; "[t]he State should not be allowed to use the shield given to the architect in his lonely office. When the State maintains [operates with knowledge of] its property, it should not be allowed to disregard the public safety."[57]

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[57] Appellant's Reply Brief at 7, Cabell v. State, 67 A.C. 174, 430 P.2d 34, 60 Cal. Rptr. 473 (1967).

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