52 2/24/69

Memorandum 69-40

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

The attached tentative recommendation attempts to solve a problem reflected by two recent California Supreme Court decisions interpreting Section 830.6 of the Government Code. These decisions and an article critical of the Court's application of Section 830.6 in Cabell v. State were reproduced for Commission consideration early in 1968. See Memorandum 68-18 (copy attached).

At the April 1968 meeting, the Commission considered alternative solutions to the problem and the following suggestions were made: (1) retain the immunity as is; (2) adopt exceptions to the immunity for special circumstances; (3) adopt the dissent in the Cabell case; (4) develop adequate defenses other than complete immunity so that public entities would not be unduly burdened but recovery could be had in cases such as Cabell.

The attached tentative recommendation adopts the dissenting view in Cabell but only in special circumstances (known dangerous conditions in a building open to the public).

Other approaches to the problem are possible, including:

(1) The statute could be amended to incorporate a requirement that when substandard materials are replaced they should be replaced by materials that meet modern design standards. This provision could be in place of or in addition to the amendment set forth in the tentative recommendation.

(2) The tentative recommendation could be broadened by deleting the restriction that the amendment applies only to dangerous conditions in public buildings.

(3) The statute could be amended to provide that there is no liability if the public entity reviews the allegedly dangerous plan or design and determines that (a) the design is not dangerous, or (b) that the impracticability or cost of protecting against the risk of injury outweighs the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury. Such determinations and review thereof could be conformed to the procedure for obtaining immunity for the original plan or design. The present statute requires either that the plan or design be approved by the body authorized to exercise discretionary authority to approve the design or that it was prepared in conformity with current standards. Review of this determina- is a question of law and the administrative decision is binding if it is supported by some substantial evidence.

Respectfully submitted,

John L. Cook
Junior Counsel

52 February 24, 1969

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

NUMBER 10--REVISION OF THE GOVERNMENTAL LIABILITY ACT

Immunity for Plan or Design of Public Improvement

STAFF DRAFT

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

LETTER OF TRANSMITTAL

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with the liability of public entities and their employees. See Cal. Stats. 1963, Chs. 1681-1686, 1715, 2029. This legislation was designed to meet the urgent problems created by the decision of the California Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

The Commission reported in its recommendation relating to the 1963 legislation that continued study of the subject of governmental liability was needed and that the Commission would continue to review the 1963 legislation. In 1965, the Commission recommended to the Legislature certain revisions of the Governmental Liability Act; the recommended legislation was enacted. See Cal. Stats. 1965, Chs. 653, 1527. In 1969, a recommendation relating to the statute of limitations in actions against public entities and public employees was submitted to the Legislature.

The 1965 and 1969 recommendations did not deal with the provisions of the 1963 legislation relating to the substantive rules of liability and immunity of public entities and their employees because the Commission concluded that additional time was needed to appraise the effect of these provisions. The Commission has reviewed the experience under the provisions of the 1963 legislation that deal with dangerous conditions of public property and this recommendation is concerned with that area of governmental liability. In preparing this recommendation, the Commission has considered both the decisional law and other published materials commenting on these provisions. See A. Van Alstyne, California Government Tort Liability (Cal. Cont. Ed. Bar

1964); Chotiner, Tort Liability Resulting From Design of Public Property, 43 Cal. S.B.J. 233 (1968); Note, Sovereign Immunity for Defective or Dangerous Plan or Design--California Government Code Section 830.6, 19 Hastings L. J. 584 (1968).

52 2/24/69

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

NUMBER 10--REVISION OF THE GOVERNMENTAL LIABILITY ACT

Immunity for Plan or Design of Public Improvement

BACKGROUND

Comprehensive legislation relating to the liability of public entities and their employees was enacted in 1963. Under that legislation a public entity is directly liable for the dangerous condition of its property.[1] A dangerous condition of property is one which creates a substantial risk of injury when the property is used with due care in a reasonably foreseeable manner.[2] If only a minor, trivial, or insignificant risk is created, it is not a dangerous condition of public property.[3] The essential prerequisites of entity tort liability for dangerous conditions of public property are that (1) the property was in a dangerous condition; (2) it proximately caused injury to the plaintiff; (3) the kind of injury that occured was reasonably foreseeable as a consequence of the dangerous condition; and (4) the dangerous condition was created by a public employee's negligent or wrongful act or omission within the scope of his employment, or the entity must have had actual or constructive notice of the condition a sufficient

---

1. Govt. Code § 835.

2. Govt. Code § 830.

3. Govt. Code § 830.

time before the injury occurred to have taken measures to protect against it.[4]

The basis of the liability of public employees for dangerous conditions of public property is the same as the public entity's, but with three additional elements. First, the employee must be personally responsible for creating the dangerous condition or permitting it to remain after notice.[5] Second, the employee must have had authority, funds, and other means immediately available to take appropriate action.[6] Third, the employee is chargeable with constructive notice of the dangerous condition only if he had responsibility to see that the property was inspected and he had the funds and other means to do so.[7]

Even where a dangerous condition of public property exists, liability does not necessarily follow. A number of special defenses and immunities are available to the public entity and the public employee in addition to the defenses normally available to private defendants in similar situations.[8] Only two of these special defenses need be mentioned here. One is that there is no liability if the act or omission that created the condition was reasonable.[9] The issue of reasonableness is to be determined by "weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create

---

4. Govt. Code § 835.

5. Govt. Code § 840.2(a).

6. Govt. Code § 840.2(a).

7. Govt. Code § 840.2(b).

8. See, e.g., Govt. Code §§ 830.6, 830.8, 831, 831.2, 831.4, 831.6, 831.8.

9. Govt. Code § 835.4.

the risk of injury or of protecting against the risk of injury."[10] Another special defense is that there is no liability for injuries caused by a dangerous condition of property if the injury was caused by the plan or design of the improvement or structure.[11]

The Commission has reviewed the impact of the legislation enacted in 1963 creating immunity for injuries resulting from dangerous and defective designs of public improvements and buildings upon a citizen's redress for injuries caused by known dangerous conditions of property. It has also considered the effect of judicial decisions that have construed that legislation. As a result, it submits this recommendation.

---

10. Govt. Code § 835.4(a).

11. Govt. Code § 830.6.

RECOMMENDATION

Section 830.6 of the Government Code creates an immunity for injuries caused by a dangerous condition of public property if (1) the injury was caused by the plan or design of the improvement or structure, (2) that plan or design was approved in advance of construction or improvement by the legislative body of the entity or other authorized body exercising discretionary authority to approve it, or it was prepared in conformity with standards previously so approved, and (3) the court (trial or appellate) determines as a matter of law that some substantial evidence exists on the basis of which the plan, design, or standards for the plan or design could reasonably have been adopted or approved.

The rationale for this immunity is that, 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. A plan or design judged to have been reasonable when adopted is not actionable even though its defective nature is considered wholly unreasonable under present circumstances and conditions.

Upon reviewing the experience under this section, the Commission has concluded that a limited exception should be carved out of this immunity. Section 830.6 of the Government Code should not immunize public entities or public employees from their duty to maintain public buildings free from known dangerous defects. Where the dangerousness of the design of a public

building becomes known or should be known, failure to correct such defect should be actionable. It does not follow that, merely because a building is constructed according to an approved plan, design, or standard, the public entity or public employee can ignore accidents occuring subsequent to the approval of the plan or design. Where the public entity or public employee has gained or should have gained knowledge that the public building as currently and properly used by the public has become dangerous and defective, the immunity granted by this section should not apply. Ordinarily the public entity will gain knowledge of the dangerousness of the condition through an accident or series of accidents. While it is recognized that the rationale of this exception to the immunity created by Section 830.6 of the Government Code would apply to all public property, the Commission does not advocate that this additional burden be placed upon public entities and public employees.

When a public entity or public employee is sued for a dangerous condition on the theory of negligent failure to protect against injury after notice, a limited defense is provided by Government Code Sections 835.4(b) and 840.6(b). There is no liability if the action or lack of action in seeking to protect against injury was reasonable. In determining the reasonableness of the action or inaction, the time and opportunity to take action must be considered.[12] Moreover, the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury must be weighed against the practicability and cost of protecting against the risk of such injury.[13] As the Commission emphasized in its 1963 recommendation,

---

12. Govt. Code §§ 835.4(b), 840.6(b).

13. Govt. Code §§ 835.4(b), 840.6(b).

"A public entity should not be an insurer of the safety of its property. When its action or lack of action is all that reasonably could have been expected of it under the circumstances, there should be no liability."[14] Conversely, failure to correct known dangerous conditions in buildings open to the public should be actionable.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Section 830.6 of the Government Code relating to the liability of public entities and public employees.

The people of the State of California do enact as follows:

---

14. Recommendation Relating to Sovereign Immunity: Number 1--Tort Liability of Public Entities and Public Employees, 4 Cal. L. Revision Comm'n Reports 801, 826 (1963).

Section 1. Section 830.6 of the Government Code is amended to read:

830.6. 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. Nothing in this section exonerates a public entity or public employee for failure to maintain or correct dangerous conditions in public buildings open to the public if 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.

Comment. This amendment restricts prior law under which there was no liability for injuries arising out of the design of a public building even where the public entity or public employee had knowledge that a dangerous condition existed. Cabell v. State, 67 Cal.2d 150, 60 Cal. Rptr. 476, 430 P.2d 34 (1967). Cf. Becker v. Johnston, 67 Cal.2d 163, 60 Cal. Rptr. 485, 430 P.2d 43 (1967)(dangerous design of public road).

It was even held that the immunity extended to improvements made in accord with the original design or plan but no longer considered safe. Cabell v. State, 67 Cal.2d 150, 60 Cal. Rptr. 476, 430 P.2d 34 (1967). This amendment changes these results in special circumstances. Liability may arise out of defective designs in buildings open to the public if the dangerous condition was or should have been discovered. See Govt. Code §§ 835, 835.2, 840, 840.2, 840.4. It does not follow that merely because an improvement is constructed according to an approved plan, design, or standards, the public entity or public employee can ignore accidents occuring subsequent to the approval of the plan or design and forever be immune from liability. Where the public entity or public employee has gained knowledge that the public building as currently and properly used by the public has become dangerous and defective, the immunity granted by this section does not apply. When a public entity or public employee is sued for a dangerous condition on the theory of negligent failure to protect against injury after notice, a limited defense is provided by Sections 834.4(b) and 840.6(b) if the action or lack of action in seeking to protect against injury was reasonable.