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Memorandum 69-54

Study 52 - Sovereign Immunity (Immunity for Plan or Design of a Public Improvement)

The attached tentative recommendation implements the Commission's decision at the March, 1969 meeting to make the immunity conferred by Section 830.6 of the Government Code inapplicable once the dangerous nature of the plan or design of a public improvement becomes known. The recommendation as drafted does apply to all public improvements--no distinction is made between highways, buildings, or other improvements. However, the withdrawal of the immunity is limited to those instances where subsequent "injuries" demonstrate the dangerous character of the improvement. Thus, there would be no liability where knowledge of the danger is based solely upon changes in technology. This limitation removes the immunity in those cases where dangerousness is most flagrantly revealed but does not require the public entity to maintain constant surveilance over its public improvements to determine whether they have become outdated by changes in technology, changes in the nature and extent of use, or other changes rendering improvements dangerous. This consideration obviously bears more strongly upon liability for defects in highways than for defects in public buildings. If the Commission does not desire this limitation, the statute could be amended to provide that subsequent changes in technology may be a basis of liability for injuries caused by the plan or design of a public improvement, even though there were no prior injuries.

Upon reconsideration of the plan or design immunity in conjunction with drafting the attached recommendation, it appears that perhaps all the policy

aspects relative to this immunity may not have been sufficiently identified and analyzed. The rational for this immunity given in the Commission's 1963 recommendation is discussed in the attached tentative recommendation. However, Section 830.6 was an attempt to incorporate some aspects of the discretionary immunity doctrine into the chapter on dangerous conditions of property. Whether the section was soundly drafted to accomplish this end is questionable as the Cabell case underscores. Analysis of Section 830.6 solely in terms of preventing reconsideration in tort litigation of particular discretionary decisions indicates that the dissent in Cabell should be adopted. Nevertheless, the issue may be much more complex as will be indicated by the pertinent considerations identified below. The staff suggests, therefore, that the Commission reconsider this complex problem.

Although public entities should not be able to ignore and fail to correct demonstrated dangerous conditions solely because the original plan or design of the public improvement had been appropriately approved, it does not appear that the given rationale for the plan or design immunity completely identifies all the factors that must be considered. It is believed that the following discussion based on Professor Van Alstyne's governmental tort liability study indicates that not all the important considerations are suggested by the given rationale.

Among the legitimate objectives for imposing liability for dangerous conditions of property, loss-shifting, compensation, and deterrence are of central importance. However, these objectives are not always of equal significance; they may vary from one type of case to another, and may be subordinated to other overriding policies in certain circumstances. Variations of this sort suggest that practical alternatives to liability

can be identified, in some situations, which will substantially implement the basic objectives to be served by liability. If these objectives can be equally well served by other means, the justification for a rule of liability is at a minimal level.

It may be possible to identify situations in which the risk of loss from dangerous designs can be more equitably distributed by means other than imposing liability upon the public entity. In particular, automobile liability insurance may be a better vehicle for both compensating those injured in automobile accidents and distributing the loss. Although it is recognized that not all persons injured by defective highway designs will be compensated in this manner, perhaps a defensible argument could be advanced that the sounder public policy requires that these injuries go uncompensated in view of the possibly crushing cost which might result if public entities were liable for all such injuries. It is believed that compensation through insurance is not as commonly available for injuries caused by defective designs of public building.

Another principal justification for liability for dangerous conditions of property is that it tends to deter accident-causing conduct by providing an economic incentive to employ safety precautions. Everyone presumably would agree that prevention of harm is better than ex post facto redress. The policy of deterrence, however, does not operate with the same intensity in all situations. It is pertinent to inquire to what extent the prospect of tort liability may actually serve effectively as a spur to safety-promoting and accident-reducing precautions. If the range of liability is too wide, its impact upon safety measures may be weakened because the personnel and financial resources to do the job may not be politically

feasible. For example, must every highway be divided? Must every highway be illuminated at night?

A related consideration is the degree to which liability would interfere with discretionary planning of public improvements. Although the answer to these problems is unclear, it does appear that discretionary decisions are more likely to be made in planning a highway than in designing a building. Many decisions must be made in planning a highway which partake of a discretionary nature, such as whether to build a divided or undivided highway, whether to light the highway or not, and the placement of signs, posts, barriers, and other obstacles on or near the highway. Moreover, concepts of safety engineering of highways appears to be undergoing constant development. On the other hand, incorporation of safety features in the design of buildings may not be nearly so complex or so uncertain. In short, perhaps, a defensible argument could be made for extending tort liability to public buildings but not to highways.

The above analysis suggests that--on the basis of loss-shifting, compensation, deterrence, and the importance of insulating discretionary decisions from review in tort litigation--the earlier distinction suggested between public buildings and public roads may be a valid one. In any case, the staff requests that further thought be given to the basic policy sought to be implemented in this recommendation.

Respectfully submitted,

John L. Cook
Junior Counsel

52 Revised March 25, 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 11--REVISION OF THE GOVERNMENTAL LIABILITY ACT

Immunity for Plan or Design of Public Improvement

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: COMMENTS OF INTERESTED PERSONS AND ORGANIZATIONS MUST BE IN THE HANDS OF THE COMMISSION NOT LATER THAN AUGUST 4, 1969, IN ORDER THAT THEY MAY BE CONSIDERED BEFORE THE COMMISSION'S RECOMMENDATION ON THIS SUBJECT IS SENT TO THE PRINTER.

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 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 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 which were subsequently 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 additional time was needed to appraise the effect of these provisions. The Commission has reviewed the experience under Section 830.6 of the Government Code which provides an immunity for injury resulting from the plan or design of a public improvement if the plan or design was not unreasonable when adopted and this recommendation is concerned with that section. 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).

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3/25/69

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

NUMBER 11--REVISION OF THE GOVERNMENTAL LIABILITY ACT

Immunity for Plan or Design of Public Improvement

Legislation relating to the liability and immunity 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] However, even where a dangerous condition of public property exists, liability does not necessarily follow. Under the 1963 legislation, 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.[3] Section 830.6 of the Government Code is one of these special defenses. It did not exist under the law prior to 1963. This section 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

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1 Govt. Code § 835.

2 Govt. Code § 830.

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

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 any 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.[4] To accept a jury's verdict, based on the same data considered by public officials, as to the reasonableness and safety of a public improvement and prefer it over the judgment of the governmental body which originally considered and passed on the matter could obstruct normal governmental operations and place in inexpert hands decisions normally entrusted to experts.

It cannot be too strongly emphasized, however, that this rationale does not apply to reexaminations in tort litigation based upon the actual operation or usage of the improvement if, subsequent to approval, injuries have occurred which demonstrate that the improvement was in a dangerous condition.

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[4] 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).

Failure to observe this distinction has led to harsh results which cannot be justified by the rationale for this section. For example, in Cabell v. State[5] plaintiff, a paying resident of a college dormitory, received serious injuries when his hand slipped through a glass lavatory door he was opening. Recovery was denied on the sole ground that the glass door had been approved when the original design for the dormitory was adopted and that the immunity provided by Section 830.6 precluded recovery. The court refused to permit reexamination of the reasonableness of the use of such glass based upon facts arising after the plan was approved although the summary judgment declarations disclosed that several accidents involving breaking or shattering of the same quality of glass in lavatory doors of the dormitory had occurred prior to plaintiff's injury. Moreover, the glass in the door involved in plaintiff's accident had recently been replaced with the same quality of glass following a similar mishap involving another student.

Upon reviewing the experience under this section, the Commission has concluded that an exception should be carved out of this immunity. Merely because a building or other public improvement, including a public highway, is constructed according to an approved plan, design, or standard, the public entity or public employee should not be able to ignore accidents occurring subsequent to the approval of the plan or design. The immunity granted by this section should not apply if, subsequent to the approval of

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5 67 Cal.2d 150, 60 Cal. Rptr. 476, 430 P.2d 34 (1967). See also Becker v. Johnston, 67 Cal.2d 163, 60 Cal. Rptr. 485, 430 P.2d 43 (1967). In that case, the court held that the immunity provided by Section 830.6 precluded recovery by a plaintiff who was injured in an allegedly dangerously designed "Y" intersection. There was evidence of prior accidents in the intersection and that the "Y" intersection design is a classic example of bad engineering. The opinion notes that following the accident the intersection was changed and the head-on collision area was eliminated.

the plan or design or standards therefore, injuries had occurred which demonstrated that the construction or improvement was in a dangerous condition.

The cost of correcting dangerous and defective designs can involve substantial amounts of money particularly where the defective design has been widely used. The Commission has been advised that the quality of glass involved in the Cabell case has been used in many state college dormitories. Replacement of this glass is estimated to cost approximately one million dollars. However, this consideration does not vitiate the essential justice of requiring public entities to correct dangerous and defective designs. The more widely the dangerous and defective design has been used, the more danger it creates and hence it is more deserving of special corrective attention.

Moreover, it is not always the duty of the public entities to incur substantial costs to correct dangerous defects of which it has notice, rather it is to either repair them or warn the public of the danger. Action sufficient to protect against liability may simply consist of warning signs, flares, or barricades--that is, steps which are ordinarily not costly and do not involve any large commitment of funds, time, or personnel.

If a warning may not be sufficient to protect the public, the public entities and public employees may assert a limited statutory defense based in part upon the cost of correcting the dangerous condition. Government Code Sections 835.4(b) and 840.6(b) provide that 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 must be taken into consideration and 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.[6] As the Commission emphasized in its 1963 recommendation, "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."[7] Conversely, failure to correct demonstrated dangerous conditions should be actionable.

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6 Govt. Code §§ 835.4(b), 840.6(b).

7 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).

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:

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, and 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 from liability for an injury proximately caused by the dangerous condition of the construction or improvement if, prior to such injury and subsequent to the approval of the plan or design or the standards therefor, injuries had occurred which demonstrated that the construction or improvement was in a dangerous condition.

Comment. The last sentence has been added to Section 830.6 to adopt the view taken in the dissenting opinion in Cabell v. State, 67 Cal.2d 150, 60 Cal. Rptr. 476, 430 P.2d 34 (1967). The immunity provided by Section 830.6 does not apply if the actual operation or usage of the construction or improvement results in injuries which demonstrate that the plan or design has created a dangerous condition. However, liability for an injury resulting from such dangerous condition will exist only if the other pre-requisites to liability can be established.