36.60 5/1/69

Memorandum 69-67

Subject: Study 36.60 - Condemnation Law and Procedure (Moving Expenses)

At the April meeting, the Commission approved the general policy of having a uniform moving expense statute. At the same time, the Commission determined not to work further on this topic until the Executive Secretary could check with Assemblyman Lanterman to determine whether his bill (AB 1191) had a good chance of passage. If it does not, the Commission determined it would attempt to submit a recommendation on moving expenses to the 1970 Legislature.

The Executive Secretary checked with Mr. Lanterman. He states that he has heard rumblings of objections to his bill and that he has no idea as to what chance the bill has for passage in 1969. Under these circumstances, the staff suggests that the Commission examine the draft statute attached to Memorandum 69-55 (copy enclosed) at the May meeting, make any needed revisions, and authorize the staff to draft a tentative recommendation incorporating the revised statute which would be distributed for comment if Assemblyman Lanterman's bill does not pass. We would send the tentative recommendation to members of the Commission for review before we distributed it for comment. We make this suggestion because we fear that the decision on Mr. Lanterman's bill will be made at a time when the Commission will not have a scheduled meeting (July) and to defer getting comments on the tentative recommendation until after the September meeting (at which we must approve almost all of our recommendations to the 1970 Legislature) would make it impossible to submit a recommendation on this subject to the 1970 Legislature.

We recognize that the recommendation portion (as distinguished from the statute portion) of the tentative recommendation attached to Memorandum 69-55 needs a great deal of work. However, we do not want to devote resources to this portion of the recommendation until we know whether Mr. Lanterman's bill will pass.

We have included this in the material for the May meeting because we do not have a great deal of material for that meeting and we anticipate that the June meetings will require consideration of a substantial amount of material and it is unlikely that moving expenses could be considered in June.

Respectfully submitted,

John H. DeMoully
Executive Secretary

52.30 Revised May 2, 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--Immunity for Plan or Design of Public Improvement

CONFIDENTIAL--STAFF DRAFT
(Not approved by Law Revision Commission)

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.

52.30 5/2/69

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA LAW

REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 11--Immunity for Plan or Design of Public Improvement

BACKGROUND

Allegedly dangerous or defective conditions of public property constitute the largest single source of tort claims against the government.[1] Understandably, therefore, the comprehensive governmental tort liability statute[2] enacted in 1963 treats the subject in detail. Government Code Sections 830-840.6 undertake to state definitively the circumstances under which liability exists. Subject to defenses and immunities, a public entity is liable for an "injury"[3] caused by the "dangerous condition"[4] of its property if the public entity created or had actual or constructive notice of the dangerous condition and failed to take reasonable measures to protect against the risk of injury it created.[5] But, as one might expect, the exceptions and qualifications to the general rule of liability are numerous.

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1. See Governmental Tort Liability, Senate Fact Finding Committee on Judiciary (Seventh Progress Report to the Legislature, 1963); Van Alstyne, California Governmental Tort Liability 185 (Cal. Cont. Ed. Bar 1964).

2. Govt. Code §§ 810-996.6.

3. Govt. Code § 810.8.

4. Govt. Code § 830(a).

5. Govt. Code §§ 835-835.4.

One of the most pervasive exceptions is the so-called "plan or design" immunity conferred by Section 830.6.[6] Under that section, no liability exists for "an injury caused by the plan or design" of a public improvement if the plan or design was legislatively or administratively approved and the trial or appellate court (rather than the jury) determines that there was "any substantial evidence" to support the reasonableness of that official decision. This recommendation relates to a single, but apparently far-reaching, question that has arisen in applying Section 830.6. Once the immunity comes into play because of the reasonable adoption of the plan or design, does it persist notwithstanding changes of circumstance and the development of experience with the improvement? Two recent decisions of the California Supreme Court hold that, at least under the circumstances of those cases, the plan or design immunity persists despite the fact that actual experience after construction of the improvement proves that it creates a substantial risk of injury to a person using it with due care.[7] Cogent dissents from those decisions and several legal

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6. Government Code Section 830.6 reads as follows:

> 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.

7. Cabell v. State, 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); Becker v. Johnston, 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

writers[8] urge that the immunity should be considered dissipated once the plan or design is executed and the improvement itself proves hazardous.

In Cabell v. State,[9] the plaintiff was injured when he accidentally thrust his hand through a glass door in the state college dormitory in which he lived. Noting that two similar accidents had recently occurred and that the college had responded by merely replacing the broken glass with the same breakable variety, he sued for damages. He alleged that his injury was caused by the state's negligent design of the door and by its continued maintenance of the "dangerous condition" thereby created, despite having had both knowledge of the condition and sufficient time to remedy it.

In Becker v. Johnston,[10] the plaintiff was injured in a head-on collision when an oncoming motorist did not see a "Y" intersection in a county highway and crossed the centerline into the path of the plaintiff's car. The defendant in turn cross-complained against the county of Sacramento. In support of her claim, she argued that, while the design of the intersection might have been adequate when plans for its construction were approved in 1927, its continued maintenance in its original condition--despite numerous accidents that had occurred there and its inadequacy by modern design standards--constituted actionable negligence.

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8. E.g., Chotiner, California Government Tort Liability: Immunity From Liability for Injuries Resulting From Approved Design of Public Property--Cabell v. State, 43 Cal. S.B.J. 233 (1968); Rector, Sovereign Liability for Defective or Dangerous Plan or Design--California Government Code Section 830.6, 19 Hastings L.J. 584 (1968); The Supreme Court of California 1967-1968, 56 Cal. L. Rev. 1612, 1756 (1968).

9. 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

10. 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

The defendant entities argued in both cases that not only had the plaintiffs failed to prove the existence of a "dangerous condition," but also that Section 830.6 provided a complete defense. The latter argument was twofold: first, that the section confers immunity with regard to injuries caused by a dangerous condition of public property constructed in accordance with a plan that was reasonable at the time of its adoption; and second, that the section relieves a public entity of any continuing duty to maintain property free of defects or shortcomings disclosed by subsequent experience.

The majority and dissenting opinions in both cases agreed that the evidence established the existence of a dangerous condition, the statutorily required notice of the condition on the part of the public entity,[11] and the reasonableness of the plan at the time it was originally approved. The court divided, however, as to whether Section 830.6 allows a public entity to permit the continued existence or operation of an improvement merely because there was some justification for its plan or design at the time it was originally adopted or approved where it has become apparent that the plan or design now makes the improvement dangerous. The majority held, under these circumstances, that the government has no duty to take reasonable measures to protect against the danger created by the now defective plan or design. In the view of the majority, Section 830.6 prevents judicial reevaluation of discretionary legislative or administrative decisions not only as to adoption or approval of original plans or designs but also as to the "maintenance" (i.e., continuance in existence or operation) of improvements constructed in accordance with such plans or designs

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11. See Govt. Code § 835.2.

even after experience demonstrates that they are dangerous.[12] The court noted, of course, that it dealt only with routine "maintenance" (i.e., upkeep, repair, or replacement), rather than reconstruction or new construction. In the latter case, as the court noted, the showing of reasonableness would have to relate to the plans for the reconstruction or new construction, rather than to the original plan or design of the improvement.

In dissent, Justices Peters and Tobriner noted that the New York decisional law, from which the plan or design immunity derives,[13] imposes upon the public entity "a continuing duty to review its plan in the light of actual operation,"[14] and expressed their view that:[15]

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12. The court quoted the seemingly accepted rationale of the plan or design immunity insofar as it exonerates the original planning decision:

> "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." [4 Cal. L. Revision Comm'n Reports 801, 823 (1963).]

For further development of this justification for the immunity, see Hink & Schutter, Some Thoughts on the American Law of Governmental Tort Liability, 20 Rutgers L. Rev. 710, 742 (1966); Kennedy & Lynch, Some Problems of a Sovereign Without Immunity, 36 So. Cal. L. Rev. 161, 179 (1963); Van Alstyne, Tort Liability--A Public Policy Prospectus, 10 U.C.L.A.L. Rev. 463, 472 (1963).

13. See Van Alstyne, California Government Tort Liability 556 (Cal. Cont. Ed. Bar 1964).

14. See Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 176 N.E.2d 63 (1960); Eastman v. State, 303 N.Y. 691, 103 N.E.2d 56 (1951).

15. 67 Cal.2d at 158, 430 P.2d at , 60 Cal. Rptr. at .

> There is nothing in the language of section 830.6 of the Government Code that would immunize governmental entities from their duty to maintain improvements free from dangerous defects or that would permit them to ignore, on the basis of a reasonable decision made prior to construction of the improvement, the actual operation of an improvement where such operation shows the improvement to be dangerous and to have caused grave injuries.
>
> Undoubtedly section 830.6 granted a substantial extension of the immunity of public entities for the dangerous condition of public improvements compared to the liability which existed under prior law. This was its intent. [Citation omitted.] Under the former Public Liability Act, it was held in numerous cases that where a municipality in following a plan adopted by its governing body had itself created a dangerous condition, it was per se culpable, and that lack of notice, knowledge, or time for correction were not defenses to liability. [Citations omitted.] It is clear that the enactment of section 830.6 abrogates this rule by limiting liability for design or plan. This is a substantial change in the law. But it does not follow that merely because an improvement is constructed according to an approved plan, design, or standards, the Legislature intended that no matter what dangers might appear from the actual operation or usage of the improvement, the public agency could ignore such dangers and defects and be forever immune from liability merely on the ground that the improvement was reasonably adopted when approved without regard to the knowledge that the public entity has that the improvement as currently and properly used by the public has become dangerous and defective, or a trap for the unwary. Such an interpretation is so unreasonable that it is inconceivable that it was intended by the Legislature. . . .

Notwithstanding the strong arguments that can be made with respect to the proper interpretation of Section 830.6, the problem presented by the Cabell and Johnston cases is one of unresolved legislative policy, rather than statutory construction. As the decisions and dissents in those cases indicate, there is no demonstrably correct construction of the existing language.

RECOMMENDATION

The immunity provided by Government Code Section 830.6 is justified to the extent that it provides immunity for discretionary decisions in the planning or designing of public improvements. The recent Cabell and Johnston decisions are beyond criticism in holding that the reasonableness of these discretionary decisions must be guaged as of the time of the original adoption or approval of the plan or design, rather than as of the time of the injury. However, as a matter of sound public policy and simple justice, the plan or design immunity provided by Section 830.6 should terminate when the trial or appellate court that determines the reasonableness of the original plan or design also determines that prior injuries, known to the public entity, have occurred that demonstrate the dangerous condition of the property. To facilitate proof by the tort claimant that the public entity had knowledge of previous injuries, the California Public Records Act[16] should be amended to make clear that public records needed for this purpose will be available to the claimant.

The recommended revision of Section 830.6 would eliminate the plan or design immunity only if the plaintiff can prove the occurrence of prior injuries that demonstrate the existence of a dangerous condition and that the public entity had knowledge that those injuries had occurred. Under the existing statutory definition of "dangerous condition," the prior injuries would have to demonstrate 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."[17]

16. Govt. Code §§ 6250-6259.

17. Govt. Code § 830(a)(emphasis added). The plan or design immunity aside, the court may determine as a matter of law that a condition of public property is not "dangerous." See Govt. Code § 830.2; Pfeifer v. San Joaquin, 67 Cal.2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967).

If the plaintiff is unable to prove the occurrence of such injuries, his effort to recover damages resulting from an admittedly dangerous condition created by a faulty plan or design will be defeated even though he can prove that a long-forgotten plan or design decision has not recently been reviewed, that changed circumstances have made the improvement hazardous to those using it with due care, that technological advances have provided a means for eliminating the hazardous nature of the improvement at a modest cost, or that protection could have been afforded with slight effort, such as posting a warning sign.

In addition to their retention of the substance of the plan or design immunity, the public entities would also remain shielded from liability by other broad statutory immunities or preconditions to liability.[18] In connection with dangerous conditions of public property and specifically in connection with the failure to update hazardously obsolescent improvements, the most important of these other protections is provided by Section 835.4. Even if the plaintiff proves the existence of a dangerous condition, whether caused by a faulty or obsolescent plan or design or otherwise, the public entity is not liable if it establishes that "the action it took to protect against the risk of injury created by the condition or its failure

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18. See Govt. Code §§ 830.2 (court determination that condition is not dangerous); 830.4 (immunity for failure to provide traffic signs and signals); 830.5 (accident itself does not show dangerous condition); 830.9 (immunity for traffic signals operated by emergency vehicles); 831 (immunity for weather conditions affecting streets and highways); 831.2 (immunity for unimproved public property); 831.4 (immunity for certain unpaved roads); 831.6 (immunity for tidelands, school lands, and navigable waters); 831.8 (immunity for reservoirs, canals, drains, etc.); 835.2 (requirements of notice or knowledge of dangerous condition); and 835.4 (immunity for "reasonable" action or inaction).

to take such action was reasonable." Moreover, the reasonableness of action or inaction on the part of the public entity is to be "determined by taking into consideration the time and opportunity it had to take action and 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 protecting against the risk of such injury."

The gravamen of all arguments against a limitless plan or design immunity is that these other immunities are ample to protect the government even if the plan or design immunity should be considered to be limited to "initial discretionary judgment."[19] Nevertheless, in the Cabell and Johnston cases, the defendants and amicus curiae[20] suggested, and the court seemed to accept, the view that the scope of governmental responsibility is almost without limit, and that a public entity must therefore be allowed to weigh the priorities and decide what must be done first. If judicial review of such questions in tort litigation were allowed, the judge or jury might merely superimpose their values without considering the entity's concomitant responsibility for other areas of public concern. This argument also urges that public budgets may well be insufficient to bring all public facilities up to modern standards. The argument does not make clear, however, why Section 835.4--which expressly requires weighing of the probability and gravity of the potential injury against the practicability and cost of protecting against the risk of injury--does not afford a just and feasible solution to the problem of hazardous obsolescence.

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19. See the articles in note 8, supra.

20. See Brief for State Department of Public Works as Amicus Curiae at 14-17, Becker v. Johnston, 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

With respect to the spectre of crippling governmental costs, it should be noted that, long before enactment of the comprehensive government tort liability statute in 1963, cities, counties, and school districts were liable for dangerous conditions of their property, and all other public entities were liable for dangerous conditions of property devoted to a "proprietary" function.[21] Yet, the defense of the plan or design immunity was not recognized in California until enactment of Section 830.6 in 1963. Also, as Justice Peters points out, New York has imposed general sovereign tort liability since 1918 but its judicially created plan or design immunity has never barred liability where experience has shown the dangerous character of the improvement.[22] It is further notable that Illinois, another leading sovereign liability state, has recently amended the plan or design section of its statute to provide that the public entity "is liable, however, if after execution of such plan or design it appears from its use that it has created a condition that is not reasonably safe."[23]

Admittedly, the cost of updating improvements that have proven or grown dangerous can involve substantial sums of money. For example, the Commission is advised that the variety of glass involved in the Cabell

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21. See the so-called Public Liability Act of 1923, Cal. Stats. 1923, Ch. 328, p. 675. See also Van Alstyne, California Government Tort Liability 35-37 (Cal. Cont. Ed. Bar 1964).

22. See Cabell v. State, 67 Cal.2d 150, 155, 60 Cal. Rptr. 476, , 430 P.2d 34, (1967)(dissenting opinion). For a discussion of the New York experience with this and other problems of government tort liability, see Mosk, The Many Problems of Sovereign Liability, 3 San Diego L. Rev. 7 (1966).

23. See Ill. Ann. Stats., Ch. 85, § 3-103 (Smith-Hurd 1966).

case has been used in many state college dormitories. Complete replacement of this glass is estimated to cost approximately one million dollars. However, the cost consideration alone does not vitiate the essential justice of requiring the government either to take reasonable measures to protect against conditions of public improvements that create a substantial danger of injury where used with due care or to compensate the innocent victims. The more widely the dangerous plan or design has been used, the more danger it creates and hence the more deserving it is of corrective attention. Moreover, correction often will not require replacement or rebuilding but simply warning. For example, warning signs, lights, barricades, or guardrails--steps that ordinarily are not costly and do not involve any large commitment of funds, time or personnel--may be sufficient.[24]

Of all the myriad types of public property, it appears to be state and county highways that most concern the public entities in the present connection. In Becker v. Johnston, for example, the highway was built at a time when it was intended for travel by horses and buggies and long before the advent of homes, schools, and shopping centers in the area. Public officials are also quick to point out the existence of thousands of miles of mountainous highways in this state that are of questionable safety. But here it is vital to notice that the successful tort claimant must not dwell upon the obviously dangerous condition of the property by which he allegedly is injured. The plan or design immunity entirely apart, a public entity has the same defenses--including contributory

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24. Subdivision (b) of Government Code Section 830 expressly defines the key phrase "protect against" to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." In Becker v. Johnston, it was estimated that a $5,000-island would have reduced head-on collisions by 70 or 90 percent. 67 Cal.2d at 170, 430 P.2d at 47, 60 Cal. Rptr. at 489.

negligence and voluntary assumption of the risk--that are available to a private defendant.[25] As New York decisions succinctly put the matter:[26]

> Proof of the condition of a highway over a considerable distance is generally double-edged because while it may show notice to the state that the highway is in need of repair it also shows that the claimant driver should have been on guard for his own safety.

Under the recommended solution to the problem of dangerous obsolescence, no circumstances other than the occurrence of previous injuries will deprive the public entity of its immunity from liability for an injury allegedly caused by the defective plan or design of a public improvement. But, in cases where injuries have occurred, the public entity will be encouraged to examine the injury-causing improvement to determine whether corrective action is reasonably required to protect persons and property against a substantial risk of injury. Because the immunity will be eliminated only in cases where prior injuries have been caused by the improvement, the recommended solution will permit consideration on the merits of those claims most likely to be worthy of consideration, and the immunity will continue to protect public entities against having to try cases on the merits where the claims are more likely to be without substance.

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25. Govt. Code § 815(b).

26. E.g., Luriev v. State, 282 App. Div. 913, 125 N.Y.S.2d 299 (1953). These and other New York highway cases are discussed in Mosk, The Many Problems of Sovereign Liability, 3 San Diego L. Rev. 7, 21-23 (1966).

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

An act to amend Section 830.6 of, and to add Section 6254.5 to, 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. (a) 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)~~ (1) a reasonable public employee could have adopted the plan or design or the standards therefor or ~~(b)~~ (2) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

(b) Nothing in subdivision (a) exonerates a public entity or public employee from liability for an injury caused by a dangerous condition of public property if the trial or appellate court determines that:

(1) Prior to such injury and subsequent to the approval of the plan or design, or the standards therefor, other injuries had occurred which demonstrated that the plan or design created a dangerous condition; and

(2) The public entity or the public employee had knowledge that such injuries had occurred.

Comment. Subdivision (b) has been added to Section 830.6 to preclude application of the "plan or design immunity" in cases where previous injuries have demonstrated the existence of a dangerous condition (notwithstanding the reasonable adoption or approval of the original plan or design) and the occurrence of those injuries has been made known to the public entity. See Cabell v. State, 67 Cal.2d 150, 60 Cal. Rptr. 476, 430 P.2d 34 (1967); Becker v. Johnston, 67 Cal.2d 163, 60 Cal. Rptr. 485, 430 P.2d 43 (1967); the dissenting opinions in those decisions; and see pages ___ of this tentative recommendation.

"Injury" is defined for the purpose of this part in Section 810.8, and "dangerous condition," as used in this chapter, is defined by subdivision (a) of Section 830.

Under subdivision (b), the court will determine whether the entity had knowledge of the occurrence of injuries and whether those injuries demonstrate the existence of a dangerous condition. Both determinations mentioned will be made by the trial or appellate court as a matter of law, rather than by the finder of fact. Contrast the procedure for determining notice under Section 835.2. Whether the entity had knowledge of the occurrence of injuries should be determined under the usual rules governing imputation of knowledge

of an employee to his employer. "Knowledge" is used in its generally accepted sense of actual knowledge rather than with the normative connotation of "notice." (See Section 6254.5 for the availability of public records to prove knowledge on the part of the public entity.)

Elimination of the plan or design immunity by operation of subdivision (b), of course, does not relieve the plaintiff of the basic evidentiary burden of proving the existence of a dangerous condition (see Pfeifer v. San Joaquin, 67 Cal.2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967)) or preclude the public entity from establishing (under Section 835.4) the immunizing reasonableness of its action or inaction (see Cabell v. State, supra). Nor does it affect any other immunity that may be available to the public entity under the circumstances of the particular case.

§ 6254.5

Sec. 2. Section 6254.5 is added to the Government Code to read:

6254.5. Nothwithstanding Section 6254, any person injured while using public property shall be entitled to inspect public records that may establish knowledge on the part of a public entity of previous injuries which demonstrate that the plan or design of a public improvement created a dangerous condition of such property.

Comment. Section 6254.5 is added to facilitate proof of knowledge on the part of a public entity of previous injuries related to the plan or design of a public improvement. Proof of such knowledge may be necessary to overcome the "plan or design immunity" conferred by Section 830.6. See subdivision (b) of that section. See also discussion at pages ____ of this tentative recommendation.