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8/12/62

First Supplement to Memorandum No. 46(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Liability for Dangerous Conditions of Public Property)

Attached (Exhibit I - pink pages) is an extract from the Minutes of a meeting of the State Bar Committee on Sovereign Immunity. These comments supersede the suggestions of the Southern Section which are included in Memorandum No. 46(1962).

The State Bar Committee has the following comments:

Section 901.1. The State Bar Committee approves this section provided that subsequent proposed legislation will authorize injunctive relief and other types of civil actions for non-monetary relief against public entities.

Section 901.2(a). Suggests that this subdivision be revised to read:

(a) "Dangerous condition" means a condition of public property that exposes persons or property to a substantial (as opposed to a minor, trivial or insignificant) risk of injury when the public property is used in a manner in which it is reasonably foreseeable that the public property will be used.

The State Bar Committee suggests that if this change is made Section 901.3 becomes unnecessary. There is considerable merit to the position of the State Bar Committee since 901.3 merely codifies the directed verdict rule and the definition of dangerous condition will provide a standard upon which a nonsuit or directed verdict will be based.

Section 901.2. The State Bar Committee suggests the definition of property as contained in Memorandum No. 46(1962) (page 10).

Section 901.3. The State Bar Committee suggests that this section be deleted in view of the change in the definition of "dangerous condition." This suggestion would supersede the views of the Southern Section (See Memorandum No. 46(1962) page 10-11).

Section 901.4(c). The State Bar Committee suggests that subdivision (c) be revised to read:

(c) The dangerous condition was created by the negligent, illegal or wrongful act of an . . . .

We have uniformly used "negligent or wrongful act or omission" in our proposed legislation. We are concerned in Section 901.4 with active negligence on the part of an employee--not an omission. And the negligence must "create" the condition. We would suggest that the Commission not adopt the suggestion of the State Bar Committee.

Section 901.6. The State Bar Committee suggests that the existing case law on constructive notice be codified and that it be provided for the severance of this issue and its predetermination by the court without a jury, in advance of a trial on the merits. See suggested draft language on page 21 of Memorandum No. 46(1962).

The State Bar Committee also recommends the addition of a new subsection (c) to impute notice where the plaintiff pleads and proves that the public entity failed to maintain a reasonable inspection system which would have been adequate to charge it with notice of the defective condition.

The Committee also favors the use of the word "establishes" throughout the draft legislation rather than "pleads and proves."

Respectfully submitted,

John H. DeMouly  
Executive Secretary

EXHIBIT I

LIABILITY FOR DANGEROUS CONDITIONS  
OF PUBLIC PROPERTY

Section 901.1. This section states that "except as otherwise provided by statute, this article exclusively governs the liability of public entities \* \* \* for injuries caused by a dangerous condition of public property \* \* \*". The Committee has no criticism of the section, provided that subsequent proposed legislation will authorize injunctive relief and other types of civil actions for non-monetary relief against public entities.

Section 901.2(a). The Committee recommends the elimination of Section 901.3, which purports to except liability when the risk is created by a condition of such a minor, trivial or insignificant nature that no reasonable person would conclude that the condition exposed persons or property to a substantial risk of injury. It was felt that the minor and trivial defect exception in Section 901.3 detracted from the limitation which the Commission obviously favored in Section 901.2(a), where it defines "dangerous condition" as meaning a condition of public property that exposes persons or property to a substantial risk of injury. In lieu of Section 901.3, the Committee recommends that in the definition of "dangerous condition", after the word "substantial", there be added "as opposed to a minor, trivial or insignificant" risk of injury, etc.

Section 901.2. The Committee recommends that there be added to the definitions in this section a definition of "property" to exclude foodstuffs, beverages, drugs and medicines which more properly would seem to be the subject of other proposed legislation (see, for example, the draft statute relating to governmental liability for Hospital, Medical and Public Health activities). It is accordingly recommended that there be added to Section 901.2 a new subsection as follows:

(e) "Property" includes both real and personal property but does not include foodstuffs, beverages, drugs, medicines or other consumable or therapeutic agents."

Section 901.4. The Committee recommends extending to Section 901.4 actions the affirmative defenses available to the public entity under Section 901.7, as well as 901.8. Where the public entity is to be charged with liability arising out of a dangerous condition created by the negligent act of an employee, no good reason is apparent why the public entity should not be permitted to justify the existence of the condition 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".

Section 901.4(c). The Committee recommends the addition of the word "illegal" to this subsection, so that it would read in part:

(c) The dangerous condition was created by a negligent, illegal or wrongful act of an officer, agent or employee \* \* \*.

The addition is recommended to make it clear that a recovery may be had not solely for negligent or tortious conduct, but also for refusal of a public officer to perform the duties imposed on him by law. The

word "wrongful" in the same context as "negligent" might be construed as being limited to solely tortious conduct.

As anticipated, the most troublesome section of the draft legislation was the imputed notice provision in Section 901.6(b). The Committee is of the opinion that imposing upon a plaintiff the burden of proving what would be an inspection system reasonably adequate to inform the public entity, considering the practicality and cost thereof against the magnitude of the potential danger from failure to inspect, is impractical and probably unworkable in practice.

The Committee is of the view that limiting notice to actual notice, as in New York and as recommended by Professor Van Alstyne (Study, pages 490-495), would result in frequent cases of hardship, and the difficulty of providing that the entity had actual notice would in many instances be insuperable.

The Committee recommends that there be substituted for Section 901.6(b) a codification of the existing case law on constructive notice and proving for the severance of this issue and its predetermination by the court without a jury, in advance of a trial on the merits. It is believed that this approach will result in the elimination of much needless and expensive litigation, and by separating the issues will cast the question of constructive notice in sharper relief than where it is confused with evidence on all other issues in the case.

The Committee recommends the substitution for Section 901.6(b) of the following:

or (b) The dangerous condition is sufficiently obvious in the course of routing inspection and has existed for such a period of time that knowledge of its existence should be imputed to the public entity. Whether or not notice is to be imputed under this subsection shall be determined by the court, without a jury, in advance of any trial upon the merits.

Section 901.6. The Committee also recommends the addition of a new subsection (c) to impute notice where the plaintiff pleads and proves that the public entity failed to maintain a reasonable inspection system, which would have been adequate to charge it with notice of the defective condition. Incidentally, the Committee favors the use of the word "establishes" throughout the draft legislation rather than "pleads and proves".

Section 901.7. It is recommended both in this section and in Section 901.12 that the double negative "was not unreasonable" be changed to "was reasonable".

Section 901.8(b). It is not apparent to the Committee why in subsection (b) reference is made to "the plaintiff or his decedent", while subsection (a) refers to "the person who suffered the injury". It is accordingly recommended that subsection (b) be revised to read:

(b) The person who suffered the injury was contributorily negligent.

Sections 901.13, 901.14, 901.15, 901.16 and 901.17. These sections become unnecessary and redundant in view of the subsequent draft statutes covering defense of actions, insurance and presentation of claims.

Section 3 of the draft statute. No reason is apparent for failing to provide for the repeal of Government Code Section 53050 which, if not repealed, would leave an article in the Government Code denuded of all substance with the exception of definitions.