



Office of the Attorney General

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LEGAL MEMORANDUM

REF.: LEG 08-0851

TO: Senator Benjamin J. F. Cruz
I Mina' Bente Nuebi Na Liheslaturan Guåhan

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Superintendent
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FROM: Attorney General *ALC*

SUBJECT: Guam Public School System; Tort Liability

INTRODUCTION

Pursuant to your request, below is a short discussion of the possible liability in tort of the Guam Public School System ("GPSS") and the government of Guam for injuries sustained by persons, students and GPSS employees, as a result of the conditions at the schools and other GPSS facilities.

It is important to this analysis that the GPSS is on notice of not only the findings of the Attorney General's GPSS Health and Safety Task Force but also of the assessments made by an independent architectural-engineering consultant.

SOVEREIGN IMMUNITY

Before discussion about the theories of liability can proceed, it must be observed that the government of Guam enjoys broad sovereign immunity. *Sumitomo Construction Co., Ltd. v. Government of Guam*, 2001 Guam 23, ¶ 8. (citations omitted). Section 1421a of the Organic Act of Guam provides in pertinent part:

The government of Guam shall have the power set forth in this Act, shall have the power to sue by such name, and, with the consent of the legislature evidenced by

enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to the exercise by the government of Guam of any of its lawful powers.

42 U.S.C. § 1421a. Under the Organic Act, sovereign immunity can only be waived by duly enacted legislation. *Sumitomo*, at ¶ 9. Unless such legislation exists, the government cannot be sued. *Id.* Accordingly, the Guam Legislature has established two broad measures which waive sovereign immunity and set the parameters within which a suit against the government of Guam may be maintained: the Procurement Act¹ and the Government Claims Act.² *Wood v. Guam Power Authority*, 2000 Guam 18, 2000 WL 760572 at *3. The Government Claims Act provides:

Pursuant to Section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided: . . . (b) for claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam, even though occurring in an activity to which private persons do not engage.

Id. (citing 5 GCA § 6105(b)). The Act waives sovereign immunity only for the negligent acts of government employees. *Id.* See also *Munoz v. Government of Guam*, 1978 WL 13511 (D.Guam A.D.). Finally, the Act applies to the entire government of Guam. See 5 GCA § 6102.

TORT LIABILITY

A.

The following discussion regarding the general principles of tort liability for government entities is obviously applicable to the GPSS. "Under a cause of action for negligence, an injured party must prove the following elements to prevail: a) that the tortfeasor had a duty to act in a manner that does not place others in an unreasonable risk of harm; b) that duty was breached; c) as a result of that breach it is the cause; d) of harm or damages suffered by a party." *Guerrero v. DLB Const. Co.*, 1999 Guam 9, ¶ 14 (citing RESTATEMENT (SECOND) OF TORTS §§ 281 and 282). Thus, the run-of-the-mill suit against the government as a result of the negligent act of a government employee involves establishing the elements above.

Because the inquiry involves the conditions of the GPSS schools or facilities, it might be helpful to review the tort liability of a possessor or owner of land. In that regard, the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitee by a condition on the land if, but only if, he

¹The Guam Procurement Act is found in Chapter 5 of Title 5 Guam Code Annotated.

²The Government Claims Act is found in Chapter 6 of Title 5 Guam Code Annotated.

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (2008). An “invitee” is defined as:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

RESTATEMENT (SECOND) OF TORTS § 332 (2008). As explained by the commentary:

Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception. Such persons fall generally into two classes: (1) those who enter as members of the public for a purpose for which the land is held open to the public; and (2) those who enter for a purpose connected with the business of the possessor. The second class are sometimes called business visitors; and a business visitor is merely one kind of invitee.

RESTATEMENT (SECOND) OF TORTS § 332 comment a. *See e.g., Kolaniak v. Board of Education*, 610 A.2d 193, 196 (Conn. App. Ct. 1992) (student was a public invitee because she was invited to enter or remain on land as a member of the public for a purpose for which the land was held open to the public).

To establish a *prima facie* case in an action against a governmental entity for personal injury caused by a public building's condition, the plaintiff must prove: (1) a duty owed by the defendant to the plaintiff to exercise reasonable care to provide a safe building; (2) the dangerous or defective condition of the building; (3) the defendant's actual or constructive notice of the building's condition; (4) the defendant's failure to exercise reasonable care in constructing, operating, or maintaining the building; and (5) a proximate causal connection between the defendant's failure to exercise reasonable care and the plaintiff's injury. *See* 1 CAUSES OF ACTION 2d 603 (2007) (footnotes omitted).

However, unlike some jurisdictions, Guam's tort claims act does not contain an explicit waiver of governmental immunity for injury caused by the negligence of public employees in the operation or maintenance of any public buildings. *See e.g., Williams v. Central Consolidated School District*, 952 P.2d 978 (N.M. Ct. App. 1997) (Tort Claims Act, NMSA 1978, Section 41-4-6 (1977)). Nor does Guam's tort claims act explicitly waive governmental immunity for defective buildings. *See e.g., Bush v. Oscoda Area Schools*, 275 N.W.2d 268 (Mich. 1979) ("Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building." citing M.C.L. § 691.1406; M. S. A. § 3.996(106)). Notwithstanding the absence of the explicit waivers described above, the Government Claims Act is sufficiently broad to make the government of Guam amenable to suit on a variety of theories of negligence liability.

B.

As stated earlier, in order to maintain an action against the government of Guam, a plaintiff must allege and prove a claim in tort arising from negligent conduct of government employees acting for and at the direction of the government of Guam. *See* 5 GCA § 6105(b). The argument could be made that Guam's waiver of sovereign immunity applies to *any* claim in tort that involves negligent conduct by its employees while in the scope of their employment for the government. It would include torts that involve injury to person or property. The theory of liability described above could, therefore, serve as a basis for liability against the government of Guam.

C.

It is anticipated that the most contested issue in proceeding with an action is identification of the duty owed by the defendant to the plaintiff to exercise reasonable care to provide a safe building.

The traditional common law duty of local public entities concerning public property is to maintain that property in a reasonably safe condition. *Vesey v. Chicago Housing Authority*, 583 N.E.2d 538, 542 (Ill. 1991)(citation omitted). *See also Durrance v. City of Jacksonville*, 532 So.2d 696, 697 (Fla. Dist. Ct. App. 1988) ("once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property."). "An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." RESTATEMENT (SECOND) OF TORTS § 343 comment d. However, the Restatement also recognizes that:

- (1) A possessor of land is not liable to his invitee for physical harm cause to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

RESTATEMENT (SECOND) OF TORTS § 343A (2008). As articulated by the commentary:

The word “known” denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. “Obvious” means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

RESTATEMENT (SECOND) OF TORTS § 343A comment b. Whether the possessor of land should expect harm to an invitee notwithstanding the known or obvious character, the commentary notes:

There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render a service to members of the public, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

Even such defendant, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which a reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid.

RESTATEMENT (SECOND) OF TORTS § 343A comment g.

D.

Another important consideration in establishing a *prima facie* case in an action against a public entity is the defendant’s actual or constructive notice of the building’s condition. A local public entity is not liable for an injury unless it is proved that it has actual or constructive notice of the existence of the condition that is not reasonably safe and sufficient time prior to the injury to have taken corrective action. *See Tracy v. Village of Lombard*, 451 N.E.2d 992, 998-9 (Ill. App. Ct. 1983) (citing Ill.Rev.Stat. 1979, ch. 85, par. 3-102). Constructive notice is established “where a condition has existed for such a length of time, or was so conspicuous, that authorities, by exercising reasonable care and diligence, might have known of it.” *Buford v. Chicago Housing Authority*, 476

N.E.2d 427, 435 (Ill. Ct. App. 1985) (citations omitted). *See also Bush v. Oscoda Area Schools*, 275 N.W.2d 268, 273-4 (Mich. 1979) ("A governmental agency is not subject to liability for a dangerous or defective condition unless it had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.").

E.

Turning to the instant inquiry, the GPSS and, consequently, the government of Guam, has a common law duty to operate and maintain its property in a reasonably safe condition. As a result of the findings made by the GPSS Health and Safety Task Force and the independent architectural-engineering consultant, the GPSS and the government of Guam have actual knowledge or notice that several of the campuses and facilities therein are in such condition so as to render them dangerous for use by students, teachers and staff. The government and GPSS is then under a duty to exercise reasonable care in not only warning the students, teachers and staff of the dangerous conditions but to also take steps to protect them from the danger. Failure to do either will constitute a breach of that duty.

Therefore, assuming all other elements of a cause of action for negligence are proven, the GPSS and the government of Guam are liable in tort for the injuries proximately caused by the breach of that duty.

CONCLUSION

The government of Guam enjoys broad sovereign immunity; however, the Guam Legislature enacted the Government Claims Act, Chapter 6 of Title 5 of the Guam Code Annotated, which waives sovereign immunity for claims in tort arising from the negligent acts of its employees acting for and at the direction of the government of Guam. The GPSS and, consequently, the government of Guam, has a common law duty to operate and maintain its property in a reasonably safe condition for the students, faculty and staff that utilize the facilities. Breach of this duty, especially if the government of Guam or GPSS has actual or constructive knowledge or notice of a dangerous condition in those facilities, renders them liable in tort for any injuries sustained thereby.


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