4/11/60

Memorandum No. 37 (1960)

Subject: Study No. 37(L) - Claims Against Public Officers and Employees.

Attached is a memorandum prepared by Commissioner Stanton relating to this study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

37(L) 4/6/60

To: The Commission.

From: Commissioner Stanton.

Subject: Claims against Public Officers and Employees.

1. My purpose in writing this memorandum is to explain more fully the reasons for my belief that the tentative recommendations of the Commission on the above subject fall short of "bringing the law of this state into harmony with modern conditions."

2. In my opinion the defects in these recommendations are as follows:

a. The repeal of Sections 801 and 803 of the Government Code will leave the public officers and employees presently within the protection of these sections liable to suit after suit against the employing entities has been barred, thereby increasing the risk that such officers and employees will be subjected to personal loss by reason of acts or omissions in the course of the performance of their duties.

As a practical matter, where a plaintiff can sue both the employing entity and the employee, he will go after the employing entity because it has a greater ability to pay, presumably carries insurance and evokes less sympathy before a jury. If suit against the employing entity is barred, however, the plaintiff must proceed against the employee or be remediless.

Under modern conditions it is no answer to say that this is a just

result, because the employee, being the actor, is by common law rules the person primarily liable on the claim. If the act or omission giving rise to the claim was within the course and scope of the employee's employment, it was the employment that exposed the employee to the risk of liability. A policeman is exposed to the risk of liability for the negligent use of firearms because his duties in public service require him to carry such firearms and to use them on occasion. A fireman is exposed to the risk of liability for negligence in putting out a fire because his duties in public service require him to put out fires. A teacher is exposed to the risk of liability for the negligent supervision of children because his duties in public service require him to supervise children. The public officer or employee may have in fact exercised the highest degree of care, but if a badly-injured plaintiff is involved, the unreasoning sympathy of a jury could subject him to a judgment which would ruin him.

I am advised that in New York and New Jersey statutes have been enacted which require a school board "to save harmless and protect all teachers and members of supervisory and administrative staff from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person . . . provided [the teacher or staff member] was acting in the discharge of his duties within the scope of his employment." In California substantially the same result is achieved by Section 1044 of the Education Code which makes it mandatory for a school district board to insure against "the personal liability . . . of the officers and employees of the district, for damages to property or damage by reason of the death of, or injury to, any person or persons, as the result of any negligent act by . . . any

officer or employee when acting within the scope of his office or employment." Other approaches to the basic problem of protecting public officers and employees from the risk of personal liability for acts or omissions within the scope of their employment are the statutes cited in note 98 of the consultant's report and Section 2002.5 of the Government Code, noted by the staff.

The repeal of Sections 801 and 803 of the Government Code would go counter to the policy reflected in the statutes referred to above, since it would increase rather than diminish the risk of personal liability of public officers and employees for acts or omissions within the scope of their employment. In my opinion, this is an inequitable result and one which is out of harmony with modern conditions. The Commission has gone to great pains to make the law governing the filing of claims against public entities readily available for all to read. A plaintiff who has slept on his rights until his claim against the public entity is barred is now entitled to little sympathy, except in a case where the circumstances surrounding the accident did not place him on notice that the tort feasor was acting within the scope of public employment. The excepted case could be covered by a special provision preserving the cause of action against the public officer or employee (and possibly against the public entity) without depriving public officers and employees of their present protection in the normal case, where the public employment is known to the plaintiff.

b. If Sections 801 and 803 of the Government Code are repealed, thereby leaving a public officer or employee liable to suit after suit against the employing entity is barred, Section 2001 of the Government Code destroys to some extent the protection of the Claims Statute, imposes an

illogical and uneconomic obligation upon the employing entity and creates serious professional problems for public law officers.

Section 2001 is in keeping with the public policy, already noted, which imposes the cost of defending against claims arising out of the discharge of public duties upon the employing entity. As long as both the employing entity and the employee are liable on a claim, there is logic and equity in requiring the appropriate public law officer to defend both the entity and the employee. Once the claim is barred as against the employing entity, however, the requirement that the employee be defended by the entity's attorney means:

(i) The entity loses the protection of the Claims Statute to the extent of the cost of the defense.

(ii) Litigation is promoted because the entity cannot settle the claim and the employee may not have the financial ability to settle or he may feel that since the defense is free, he might as well gamble on a favorable verdict.

(iii) The entity's attorney is placed in an untenable position professionally. A settlement would be in the interest of his principal client, the entity, since it would avoid the cost of a trial, but it might not be in the interest of his other client, the employee. A court trial would be in the interest of the entity, because less costly than a jury trial, but it might not be in the interest of the employee. A perfunctory defense would be in the interest of the entity, since such a defense would permit the attorney to devote more time to other services for the entity, whereas such a defense would be against the interest of the employee.

I believe that Section 2001 should be retained and amended to protect

all public officers and employees, but I submit that to justify a recommendation to such effect the Commission must also recommend a statute which will bar suit against the public officer or employee as soon as suit against the entity is barred.

c. The repeal of Sections 801 and 803 of the Government Code will destroy completely the effectiveness of the Claims Statute in all cases governed by the statutes cited in note 98 of the consultant's report, Section 1044 of the Education Code, Section 2002.5 of the Government Code and any other similar statute. Thus, instead of achieving uniformity, we will have created an illogical diversity in the treatment of public officers and employees in the State.

3. In the light of the foregoing comments I propose that the Commission consider recommending legislation which will do the following:

a. Bar a claim against a public officer or employee for acts or omissions within the course and scope of his employment at the same time as the claim against the employing entity is barred.

b. Require the entity to save the employee harmless against loss as a result of such claim.

4. Such a proposal might involve a study of the "save-harmless" statutes of New York and New Jersey, and any similar legislation in other states. If so, I recommend that we make appropriate arrangements with our consultant for such a study.

5. Some members of the Commission have expressed concern that such a proposal would go beyond our present assignment. I do not share this concern.

Our assignment is to determine:

"Whether the various provisions of law relating to the filing of claims against public bodies and public employees should be made uniform and otherwise revised."

When this assignment is read in the light of the general direction to the Commission to "recommend such changes in the law as it deems necessary to bring the law of this State into harmony with modern conditions," our course is clear.

The statutory provisions discussed in this memorandum are all found in subdivisions of our law dealing with claims against public entities and their employees. These subdivisions should be analyzed, the best, most equitable and most modern approach to the basic problem should be distilled from them and the end result should be presented to the Legislature as our recommendation in response to the assignment. If we do anything less, we have failed the assignment and, in my frank opinion, we will merely be spinning our wheels.