

MINUTES OF MEETING

OF

December 15 and 16, 1961

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on December 15 and 16, 1961.

Present: John R. McDonough, Jr., Vice Chairman  
Honorable Clark L. Bradley  
Joseph A. Ball  
James R. Edwards  
Sho Sato  
Thomas E. Stanton, Jr.  
Angus C. Morrison, ex officio

Absent: Herman F. Selvin, Chairman  
Honorable James A. Cobey  
Richard H. Keatinge

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

During the discussion of Study No. 52(L) - Sovereign Immunity, Professor Arvo Van Alstyne, the Commission's research consultant, and the following persons also were present:

Charles Barrett, Assistant Attorney General (December 15)  
J. F. Brady, Department of Finance (December 15)  
Robert Carlson, Department of Public Works  
Burton J. Goldstein, NACCA (December 15)  
Louis J. Heinzer, Department of Finance (December 15)  
Holloway Jones, Department of Public Works (December 15)  
Robert Lynch, L. A. County Counsel  
Perry Taft, Ass'n of Casualty & Surety Companies (December 15)

Minutes. The Minutes of the November meeting were approved.

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Election of Officers. By unanimous consent, the election of officers was deferred until the January meeting so that more members of the Commission might participate.

It was suggested that the Commission's procedures regarding succession in office of the Vice Chairman be modified so as to permit a Vice Chairman to succeed himself in any situation where a Chairman is elected to office for a full term following his serving for a substantial period (possibly one year or more) of less than a full term. No final action was taken with respect to this matter.

STUDY NO. 46 - ARSON

In its consideration of Memorandum No. 59(1961) and the supplements thereto relating to the study of arson, the Commission returned to its initial approach of determining the standards of arsonous conduct in terms of culpability. It was recognized that one of the purposes of defining these standards is to differentiate bad conduct from that which is worse so that increased punishment may be imposed for the greater offense.

The Commission agreed upon a statutory scheme that would treat arson which involves risk to life as a greater offense than arson which creates a risk to property only.

Simple arson. Proposed Section 447, the statute defining and proscribing arsonous conduct generally, was revised to read as follows:

Any person who wilfully and unjustifiably burns property of the value of 50 dollars or more is guilty of arson which is punishable by imprisonment in the state prison for not less than one nor more than 15 years.

The property value provision, a de minimis provision included in the statute by the research consultant to raise the policy question relating to the sufficiency of malicious mischief statutes to proscribe offenses involving the burning of property of little value, was raised from \$25 to \$50 to coincide with the minimum amount included in the definition of grand theft.

The upper limit of the prescribed punishment is intended to coincide closely with the maximum imprisonment now provided in the Penal Code for serious injury to property. Thus, the maximum of 15 years provides a sufficient punishment to fit the most severe

risks created to property. The span of years between one and 15 is intended also to be of sufficient breadth to permit the Adult Authority to exercise wide discretion in fixing sentences, thus according a measure of discretion in fitting the punishment to the severity of the crime.

Aggravated arson. Proposed Section 448, the statute proscribing arsonous conduct which creates a risk to human life, was revised to read as follows:

Any person who, in committing arson, consciously disregards a substantial risk that his conduct may jeopardize human life is guilty of aggravated arson which is punishable by imprisonment in the state prison for not less than 5 years.

By operation of Section 671 of the Penal Code, the maximum imprisonment for this offense would be life imprisonment (with parole). Because of the severe punishment imposed and the obvious seriousness of the offense, the Commission favored the requirement that the actor's specific mental state be shown as an element of the crime. Thus, the prosecution must show that a defendant charged with this offense was aware that his conduct might create a substantial risk to human life and that he consciously disregarded that risk.

Presumption. The Commission disapproved the presumption proposed by the research consultant which would aid the prosecution in proving that a defendant possessed the requisite mental state. The research consultant had indicated that the presumption was included as a statement of the maxim that every person intends

the consequences of his acts. At least one commissioner, however, was of the opinion that proof of resulting personal injury or death is no indication that the actor was aware of any risk to life and, hence, there is no factual basis for creating the proposed presumption. Some concern was also expressed as to the effect of the presumption in shifting the burden to the defendant of going forward with evidence as to mental state, although the burden of persuasion remains with the prosecution.

Justifiable burning. Although no final action was taken with respect to Section 450 as proposed by the consultant, the Commission modified the language of subdivision (a) to read as follows:

(a) If a person burns his own property, his conduct is justifiable if he did not consciously disregard a substantial risk that his conduct might jeopardize human life or cause damage to the property of others and if his intention was not to defraud another person.

The Commission neither approved nor disapproved subdivision (a) as modified. The words "that his conduct might jeopardize human life" were substituted for the language suggested by the consultant so that the language of the subdivision would more nearly parallel the language of Section 448. "Another person" was substituted for "an insurer" at the end of the subdivision because there is no reason to distinguish between defrauding an insurer and defrauding anyone else; the unlawful intent is the same in either case.

During the discussion of subdivision (a), some commissioners indicated that the burning of one's own property with intent to defraud should not be treated as unjustifiable burning under the arson

laws. There is no reason to single out fraud accomplished by burning one's own property for special treatment under the arson laws; in the absence of risk to the person or property of another, this type of conduct should be treated under the penal laws relating to fraud. On the other hand, it may be argued that the purpose of the arson laws is to proscribe the starting of large fires, with their attendant risks, whenever such burning is done for wrongful purposes. It is difficult to see why different treatment should be given the person who burns down a neighbor's house because he wishes to deprive his neighbor of his house and the person who burns down his own because he wishes to deprive the insurer of his money. In either case, he seeks to deprive another of his property wrongfully; in either case, he seeks to accomplish his wrongful purpose by burning; and in either case, the potential danger to the community from the conflagration is the same. Thus, it may be argued that the essence of the crime of arson is wrongful burning, and burning to defraud is just as deserving of condemnation under the arson laws as any other wrongful burning. The Commission did not reach any conclusions concerning the question.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memorandum No. 58(1961), the Supplement to Memorandum No. 58(1961) and the study prepared by Professor Van Alstyne relating to sovereign immunity.

Professor Van Alstyne stated that Part IV of the study has been completed although all of it has not yet been received by the Commission. A small portion--about fifteen pages--dealing with some of the basic policy considerations relating to procedural administration will be distributed in the near future. Professor Van Alstyne stated that he is now developing the experience in substantive tort liability of the federal government and of those states where there has been a waiver of sovereign immunity. The purpose of this research is to identify as much as possible the kinds of problems which have arisen elsewhere and are likely to arise in this state under an extension of governmental liability. This portion should be completed in time for the next meeting of the Commission. On the basis of this research the Commission can focus its attention on a lot of specific areas of potential liability. Professor Van Alstyne stated that he would bring before the Commission for consideration at the next meeting problems relating to dangerous and defective conditions of public property and the operation of public custodial and medical institutions. The potential liabilities in the field of law enforcement may also receive some attention.

A letter from Robert E. Reed, Chief of the Legal Division of the Department of Public Works, was considered. Mr. Reed suggested that it is essential that legislation be introduced in 1963. In view of this fact he suggested that the field of inquiry be limited to exclude certain matters which do not require an immediate legislative solution. These matters are inverse condemnation, public utility relocation and police power. Mr. Reed then suggested that the only practical way to proceed in the preparation of a legislative program would be to reenact the doctrine of sovereign immunity and to specify the exceptions to the doctrine.

The Commission discussed the need for legislation in 1963. Consideration was given to deferring any recommendation for legislative action until study of the entire field of governmental liability is completed. Professor Van Alstyne indicated, though, that there is a pressing need for legislation, not only in the field of substantive liability, but in the field of procedural administration of liability. Even under existing law, there is inadequate authority to procure insurance and official bonds and to fund liabilities to protect local entities from financial ruin. In many instances there is inadequate authority to pay tort judgments or inadequate authority to levy taxes for the purpose of paying tort judgments. The Commission concluded that it is necessary to introduce a legislative program on this subject at the 1963 session.

In view of the need for legislation in 1963 the Commission then decided to defer consideration of inverse condemnation and public

utility relocation. These matters will be given a low priority and will be considered after the more pressing problems of governmental liability have been considered. They will not, however, be totally excluded from the scope of the study at the present time. The Commission recognized that it is possible that no recommendation will be made upon these subjects until after the 1963 session. The most pressing problems in the field are those where there is a potentiality for personal injury. The areas of potential liability where only property damage may be involved will be given a lower priority.

Action upon Mr. Reed's recommendation as to the form of the legislative program was deferred until Memorandum No. 58(1961) was considered.

The Commission then considered Memorandum No. 58(1961). The statement of the principles adopted at the November meeting was reviewed and revised to read as follows:

(1) A public officer or employee should not be liable for injuries or damage caused by his conduct, whether or not erroneous or mistaken, where he conducted himself honestly and in good faith with due care within the scope of his authority.

[Recognizing that cases have often construed "scope of authority" strictly to impose personal liability upon public officers and employees for doing acts which reasonably appeared to be within their authority, the Commission indicated that "scope of authority" in the context of these principles has a broad meaning analogous to that which "scope of employment" has attained in relation to the doctrine of respondeat superior.

Thus, "authority" is not used here in its ordinary agency meaning of "power . . . to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent]" (Restatement of Agency 2d § 7). Conduct within the "scope of authority" as used here is "conduct . . . of the same general nature as that authorized, or incidental to the conduct authorized." (Restatement of Agency 2d § 229; see generally Restatement of Agency 2d §§ 228-237 (defining "scope of employment").)]

(2) A public entity should not be liable for injuries or damage caused by its officers and employees where they have conducted themselves honestly and in good faith within the scope of their authority.

(3) A public officer or employee should be liable for injuries or damage caused by his negligence in the performance of his duties but the public entity rather than the officer or employee should bear the ultimate financial responsibility for this liability.

(4) A public entity should be directly liable to the injured party for the injuries or damage negligently caused by its officers and employees in the course and scope of their authority.

(5) Where a public officer or employee commits one of the traditionally recognized intentional torts--false imprisonment, trespass, assault, defamation, etc.--and where he acted honestly and in good faith and with due care within the scope of his authority, the officer should be liable for the injuries caused; but the public entity, not the public officer or employee, should bear the ultimate financial responsibility

for this liability.

(6) Where a public officer or employee commits one of the traditionally recognized intentional torts while acting honestly and in good faith and with due care within the scope of his authority, the public entity should be directly liable to the injured party for the injuries or damage.

(7) A public officer or employee should be liable and should also bear the ultimate financial responsibility for injuries caused by his malicious, corrupt, fraudulent or dishonest conduct.

(8) A public entity should be liable to the injured party for injuries and damage caused by the malicious, corrupt, fraudulent or dishonest conduct of its public officer or employee in the scope of his authority, but this liability should be for compensatory damages only and the public entity should be able to enforce indemnification from the guilty officer or employee or his surety.

(9) There should be no general immunity from liability for public entities or their officers and employees on the ground that the act which resulted in the injury was a discretionary act.

The Commission next proceeded with its identification of relevant policy considerations to be taken into account in determining the form of the Commission's legislative proposals and in determining whether or not liability should exist in particular situations. The following principles were agreed upon:

(1) Differences in the degree of risk of harm should be considered

in determining the tort liability consequences of various governmental actions. If an activity is carried on with great risk to the public an occasion may arise for the imposition of liability without regard to negligence. For example, the degree of risk to the public involved may indicate a need for liability to a person injured by a policeman's stray bullet whether or not the policeman shot carefully. On the other hand, where the risk of harm from an activity is relatively slight the need for liability may well be outweighed by other considerations.

(2) The existence of practical alternatives to tort liability as a risk-spreading device or as a means of protecting the personal or property rights involved should be considered in determining the tort liability consequences of particular governmental actions. For example, in Lipman v. Brisbane Elem. School Dist., 55 Cal.2d 224, (1961), one reason given by the Supreme Court for holding the school district immune from liability for acts of its trustees within the scope of their official duties in maliciously defaming the plaintiff and forcing her from her position of public employment was the existence of other legal remedies to vindicate herself and to protect her position. Her interest in continued employment was adequately protected by her right to seek mandamus or to bring an action for breach of contract. Again, for example, it may be that the risk of loss by fire may be spread more equitably by relying on property owners to purchase adequate insurance than by imposing liability on governmental entities through tort litigation.

(3) Variations in the deterrent effect of tort liability upon careless conduct should be considered also. The need to impose tort liability to deter careless conduct may be slight in some cases where there are other incentives for careful conduct which are more effective. Tort liability can be so extensive, too, that it provides no incentive for careful conduct because the standard of care imposed may be impossible to meet.

(4) In some cases it may be necessary to require the public to assume any risk of injury flowing from a particular governmental activity in order for the activity to be carried on at all.

(5) The potentiality of tort liability to act as a deterrent to or interference with desirable governmental activities should be considered in determining the tort liability consequences of particular governmental actions.

(6) The statutory formulation of the tort liability consequences of governmental actions should be based upon existing law. In other words, there should be a general statement of sovereign immunity with stated exceptions covering the areas where, under the previously stated policy considerations, liability should be imposed. Although the ultimate result, after the entire field of sovereign liability or immunity has been studied, would likely be the same whether the underlying statutory base were one of immunity or liability, the Commission believes that it would be impossible to make a meaningful recommendation to the 1963 session of the Legislature unless the underlying statutory

base is one of immunity. It was recognized that governmental operations are essentially different from the operations of private enterprise. The government exercises authority over others in many different ways as no private person can. The government has duties which private enterprise does not have. Under a general waiver its liability for the exercise or the failure to exercise its authority in a particular way would be impossible to predict. Private persons do not operate prisons, military establishments or insane asylums, nor do private persons maintain thousands of miles of streets, highways, roads and sidewalks to which the public has a right of access. A general waiver of immunity would necessarily turn over to the courts the function of determining the extent of governmental liability and defining its limits. The Commission does not believe that it is either necessary or desirable to leave this determination to the courts. If the recommended legislation is based upon the principle of immunity, exceptions may be proposed to cover the major areas of governmental activity where there is a potentiality for harm and where it is desirable from a policy standpoint to impose liability. These areas would include dangerous and defective conditions of governmental property, the operation of institutions, operation of motor vehicles, law enforcement, etc. In each area limits on the extent of liability can be thoroughly considered. Statutory exceptions to the principle of immunity may then be recommended in additional areas after recommendations have been made in regard to the principal ones.

In regard to the areas of potential liability which will not be covered by the time the Commission's recommendation is submitted to the 1963 legislative session, Mr. Stanton suggested that the Commission bear in mind the possibility of retaining a moratorium on claims falling within these areas, thus providing an incentive to the Legislature to adopt meaningful legislation in these additional areas at a later time.

Professor Van Alstyne pointed out that even though existing legislation is to be the basis for legislative proposals, much existing legislation will have to be modified to eliminate inconsistencies and anomalies. For instance, the governmental-proprietary distinction has created a great deal of inconsistency in the cases in analogous situations and should therefore be eliminated. Much existing legislation, however, has been formulated on the basis of the governmental-proprietary distinction; and to the extent that it is it will have to be modified.

The Commission then considered whether it would want to hire its own consultant to do statistical research and to provide information concerning the availability and cost of insurance coverage for governmental entities and their employees. Professor Van Alstyne indicated that available statistics indicate that the experience of other governmental entities in regard to the insurance field is not too helpful to the State of California because most governmental entities in the country are immune from liability. Insurance availability and cost cannot be determined until the law imposes liability. Mr. J. F. Brady, Insurance Advisor for the Department of Finance, corroborated

this information and stated that the State of California now insures many of its employees against liabilities which could not be imposed upon the state itself. For example, the officers of the California Highway Patrol are insured against false arrest as are certain other enforcement officers in the state service. The Commission concluded that it was still interested in obtaining information concerning insurance costs, insurance coverage and existing practices with regard to insurance. The Commission further indicated that information from out of state concerning insurance cost coverage would probably not be too helpful and would not be worth the cost of obtaining such information. No decision to procure the services of an insurance expert was made; however, the Commission indicated it would be receptive to any constructive efforts the Executive Secretary might be able to make in procuring the services of an expert who would be of assistance to the Commission.

The Commission then considered the Supplement to Memorandum No. 58(1961). This memorandum deals with the ways in which governmental entities may be empowered to solve the fiscal problems arising out of increased tort liability. The Commission approved the following principles or took the following actions:

I. Authority to pay claims.

(1) General statutory provisions should be enacted authorizing all governmental bodies with the power to raise funds through taxes and assessments or fees and charges to satisfy tort judgments out of any otherwise unappropriated and unencumbered funds from their treasuries. Such entities should be required to include in the tax assessment levy for the next fiscal year or in the levy of fees and charges for services provided for the next fiscal year a rate sufficient to satisfy all unsatisfied judgments--subject to a right to spread the payment over a period of years (see II (3)).

(2) Entities which raise their funds by specific lien assessments based on benefits rather than by general ad valorem assessments or through fees and charges should also be authorized to pay tort judgments out of the proceeds of specific lien assessments and should be required to levy assessments for that purpose when other funds are not available.

(3) In regard to public entities which are dependent upon other public entities for their financial resources, general statutory provisions should be enacted authorizing them to satisfy tort judgments from their available funds and a duty should be imposed upon the supporting public entities to include in the next appropriation of funds for the purpose of dependent entity a sum sufficient to pay any unsatisfied judgments.

(4) General statutory provisions should be enacted, applicable to all types of public entities, providing that if a public entity is

absorbed into another upon dissolution the latter entity assumes the tort liabilities of the former whether or not such liabilities are reduced to judgment. If a public entity upon dissolution merely ceases to exist, the board of supervisors or the governing board of some other appropriate agency or entity--the governing board of the entity which exercises jurisdiction over the dissolved entity--should be required to levy taxes within the territory of the dissolved entity or to make some other provision for payment of any otherwise unpaid tort liability.

(5) General statutory provisions should be enacted indicating that liabilities on tort judgments are not included in those liabilities which are void if incurred under circumstances not expressly authorized in the statutes governing the particular entity involved or if they exceed the income and revenue provided in the entity's current fiscal year. Similarly, there should be a general statutory declaration removing tort liabilities from the scope of statutory tax limits.

II. Minimizing financial consequences of tort liability.

(1) Insurance. Statutory authority should be enacted authorizing all public entities to purchase insurance covering the personal liability of their officers, employees and agents for all types of torts committed in the course and scope of their employment.

Authority should also be enacted authorizing all types of public entities to insure themselves against liability for all types of torts.

All public entities should be authorized by statute to insure either

by the purchase of commercial insurance or by self-insuring through the creation of financial reserves, or by any combination of these methods.

Public entities should be authorized to participate in the procurement of insurance covering several public entities.

(2) Official bonds. A motion to broaden the scope of existing statutes relating to official bonds to authorize coverage of both officers and employees of public entities failed to pass. The Commission deferred further consideration of official bonds.

(3) Installment payment of judgments. Statutory authorization for all local public entities to spread the payment of tort judgments over a period not to exceed ten years should be enacted. A suggestion that similar authority be enacted to permit installment payment of approved claims was rejected because of the constitutional limitation on the power of most local public entities to contract indebtedness. Professor Van Alstyne suggested that the governing board of the public entity be authorized to invoke the installment payment procedure upon making the findings required by the present statute authorizing school districts to extend payment of judgments over a period of years.

There should be a statutory declaration that such judgments are legal investments for trustees, fiduciaries and public entities in order to provide a market for the sale of such judgments.

(4) Financing tort judgments. Authority to issue and sell general obligation bonds to fund tort judgment indebtedness should be extended to all public entities that have the authority to sell bonds. This

authorization should be granted in the form of amendments to the specific statutes authorizing particular entities to issue and sell bonds. Authority to sell promissory notes and certificates of indebtedness to finance tort judgment liability should be extended to those entities having the power to sell such paper for the general purposes of the entity.

(5) Controlling or shifting the incidence of tort liability.

(a) There should be no monetary ceiling upon the extent to which damages are recoverable from a public entity. As a general rule, the tort damages recoverable from public entities and employees should not be more limited than the tort damages recoverable from private persons, except that in cases where there is a strong policy justification for a limitation, some limitation--such as excluding damages for pain and suffering--might be warranted.

(b) There should be appropriate provisions in the statutes to be proposed limiting the attorneys' fees that are recoverable. It was pointed out that the Federal Tort Claims Act limits the amount of attorneys' fees to 20% of the amount recovered. Other jurisdictions have adopted similar limitations. Many private attorneys charge from 33% to in excess of 40% of the gross award in personal injury cases. The government has a legitimate interest in determining that the bulk of compensation it gives to persons injured by its activities is actually used to compensate the persons injured and is not diverted to other purposes.

(c) A statute should be enacted authorizing the insertion of

indemnity or "save harmless" clauses into any contracts which the governing board of a public entity deems appropriate. This device will, in many cases, make the cost of insuring against potential liabilities growing out of public improvements part of the cost of the improvement. Where the beneficiaries of the project are assessed for its costs, the liability insurance costs will thus be paid eventually by the contractor or the beneficiaries of the project rather than by the taxpayers generally.

III. Other legislative goals.

(1) Joint powers agreements. The statutes relating to joint powers agreements should require that such agreements specify which of the contracting public entities shall be liable for torts arising in the course of performance of the agreement and how such tort liabilities are to be funded, and the contracting entities should be jointly and severally liable, with a right of contribution, where no provision allocating responsibility for tort is included in the agreement. Professor Van Alstyne pointed out that the public entities of the state are now authorized by joint powers agreement to create new, independent public entities. By creating such entities, the contracting entities may effectively insulate themselves from many liabilities. The recommended legislation would assure responsibility for tort on the part of a financially responsible entity.

(2) Relieving small entities from excessive liabilities. Professor Van Alstyne suggested the establishment of minimum standards of liability coverage for public entities. Then, maximum standards of financial effort

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to meet this coverage would be established. Agencies too small to achieve the minimum level of protection with the maximum financial effort might be provided with excess coverage by the State. A State agency would be needed to supervise the program. The Commission discussed some of the problems of detail that would be involved in working out the proposal and concluded that it would be impossible to come up with a solution by 1963. Hence, further consideration was deferred until the basic problems of liability and immunity are worked out.

STUDY NO. 53(L) - PERSONAL INJURY DAMAGE AWARDS

The Commission considered Memorandum No. 60(1961) and the attachments thereto relating to the study of personal injury damage awards to married persons. The following matters should be particularly noted.

Annual Report. The Commission considered revised Exhibit I containing an excerpt from the Commission's 1962 Annual Report. The proposed language relates to expanding the study relating to personal injury damage awards to embrace a separate but related study regarding whether Vehicle Code Section 17150, insofar as it imputes the contributory negligence of the driver of a vehicle to its owner, should be revised or repealed. This is in accord with the Commission's previous decision to request such authority at the next Legislative Session.

The title of the proposed study was amended to read as follows:  
"A study to determine whether Vehicle Code Section 17150 insofar as it imputes the contributory negligence of the driver of a vehicle to its owner should be revised or repealed."

On page 2 of Exhibit I, the word "a" was deleted from line 8 immediately preceding "legislative solution."

The Commission directed the staff to revise the explanatory comments relating to this study so as to use "vehicle" uniformly instead of car, auto, automobile, etc., when referring to matters covered by the statute.

The Commission substituted the following for the final paragraph beginning on page 4:

A primary purpose of Section 17150 would appear to be to protect innocent third parties from the careless use of vehicles by

financially irresponsible drivers. This protection is achieved by its provision that a vehicle owner is liable to an innocent third party for its negligent operation. This policy is not, of course, furthered by depriving innocent vehicle owners of all rights of action against negligent third parties. However, another purpose of Section 17150 may be to discourage vehicle owners from lending them to careless drivers. This policy would be furthered by denying the owner the right to recover against negligent third parties.

The Commission believes that a study should be made to determine what policies Section 17150 should seek to accomplish. It may be that better ways can be found to control the lending of vehicles and to allocate the risk of injury to the owner of a vehicle by another than to impose the entire risk on the one person involved who is not negligent. Accordingly, the Commission recommends that it be authorized to study whether Vehicle Code Section 17150 insofar as it imputes the contributory negligence of the driver of a vehicle to its owner should be revised or repealed.

Resolution. The Commission considered revised Exhibit II containing the draft of a proposed resolution requesting Legislative approval for the Commission to study a portion of Vehicle Code Section 17150. Making the change in the title of the study as noted above, the Commission approved the resolution as proposed.

Additional Authority. The result of the Commission's preliminary consideration of the problems involved in the study relating to personal injury damage awards indicates that a better solution might be reached by revision of the contribution statute and expansion of a third party practice. However, an acceptable solution to the instant study can be reached without these additional considerations and a formidable agenda militates against requesting additional authority to study these matters, either in time for the 1963 legislative program of the Commission or in time for some action in 1965. A motion by Commissioner Sato, seconded by Commissioner Ball, to request authority to undertake

these additional studies was defeated by a three to three vote.

Recommendation. The Commission considered the substance of Memorandum No. 60(1961) containing proposed statutory changes relating to personal injury damage awards recovered by married persons. This material was drafted to effectuate the Commission's previous determination to make such awards community property, to eliminate the imputation of contributory negligence between spouses insofar as it is based upon the community property nature of the recovery, and to reduce the liability of a negligent defendant by the amount the contributorily negligent spouse would be liable to contribute if he were adjudged a joint tortfeasor with the defendant.

Following a full consideration of the several problems raised in the proposed solution, the Commission approved the proposition that a married person bringing a personal injury action should recover from a negligent defendant the entire damages suffered by him or her and that a plaintiff's contributorily negligent spouse should be liable for contribution to the defendant for an amount up to one-half the judgment. This action modifies the previous action taken by the Commission. It recognizes the fact that a negligent spouse is ordinarily insured against the consequences of his negligent acts and there is no reason to adopt a legislative scheme that would prevent a spouse from utilizing insurance to protect him from the consequences of his negligence in this situation.

The following matters are to be included in the legislation to effectuate this proposition: (1) The injured spouse is to recover all damages which arise as a result of the injury, including loss of

earnings, medical expenses, etc. Because there is some doubt as to the present law with respect to which spouse must bring the action for certain items of damage, the staff was directed to submit a report which names the items of damage included in personal injury actions and identifies the spouse who must sue to recover each. (2) The entire recovery is to be the community property of the spouses. The recovery is liable, however, for reimbursement of the property (separate and/or community) which supplied funds for the payment of expenses arising out of the injury and for payment of any judgment for contribution against a contributorily negligent spouse where funds are not otherwise available for payment of such liability. The balance of the recovery is to be under the management and control of the injured spouse. (3) The procedure for permitting a negligent defendant to recover from a contributorily negligent spouse was not specifically determined, although the Commission favored a procedure, such as a cross-complaint, which would permit joinder of the spouse in the primary action. Whether joined in the original action or sued in a separate action, the contributorily negligent spouse should not be permitted to interpose a defense based upon spousal tort immunity or the guest statute.