Place of Meeting

State Bar Building
1230 West Third Street
Los Angeles, California

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles — June 15-16, 1962

1. Minutes of May 1962 meeting (to be sent)
   Approval of Report of Subcommittee (Report is attached to minutes) (to be sent)

2. Administrative Matters

   Approval of Payment of George Brunn

   Memorandum No. 34(1962) (Authorization of Chairman to enter into certain research contracts) (to be sent)

3. Study No. 52(L) - Sovereign Immunity

   Memorandum No. 26(1962) (Mob and Riot Damage) (enclosed)
   Memorandum No. 30(1962) (Indemnity or Save Harmless Agreements) (enclosed)
   Memorandum No. 31(1962) (Liability Under Joint Powers Agreements) (to be sent)
   Memorandum No. 27(1962) (Comprehensive Claims Presentation Statute) (enclosed)
   First Supplement to Memorandum No. 27(1962) (Presentation of Claim as Prerequisite to Action Against Public Officer or Employee) (to be sent)
   Second Supplement to Memorandum No. 27(1962) (Protection of Public Entities and Public Officers and Employees Against Unfounded Litigation) (to be sent)

These will be considered in connection with Memo. No. 27(1962)

   1961 Cumulative Pocket Part-West's Annotated California Code-For Government Code Sections 1 to 11999 (please remove this from your set of the California Codes and bring to meeting)
   1959 Recommendation and Study Relating to Claims Against Public Entities (enclosed)
   1961 Recommendation and Study Relating to Claims Against Public Officers and Employees (enclosed)

Memorandum No. 33(1962) (Medical and Hospital Torts) (to be sent)
Memorandum No. 28(1962) (Payment of Claims Against Local Public Entities) (to be sent)
Memorandum No. 29(1962) (Payment of Debts of Dissolved Local Public Entities) (to be sent)
Memorandum No. 32(1962) (Funding Tort Judgments with Bonds) (to be sent)
Memorandum No. 23(1962) (Law Enforcement Torts Generally) (sent May 21, 1962)
Memorandum No. 24(1962) (Fire Fighting and Fire Protection Torts) (sent May 8, 1962)
Memorandum No. 25(1962) (Park and Recreation Torts) (to be sent)

Study - special attention to Part IX (Fire Fighting and Fire Protection Torts) (sent April 27, 1962) and Part X (Park and Recreation Torts) (sent June 1, 1962)

MINUTES OF MEETING

of

June 15 and 16, 1962

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on June 15 and 16, 1962.

Present: John R. McDonough, Jr., Vice Chairman
Honorable James A. Cobey
Honorable Clark L. Bradley (June 16)
Joseph A. Ball (June 16)
James R. Edwards
Richard H. Keatinge
Sho Sato
Angus C. Morrison, ex officio

Absent: Herman F. Selvin, Chairman
Thomas E. Stanton, Jr.

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

Mr. Benton A. Sifford, special research consultant to the Senate Fact Finding Committee on Judiciary, and the following persons were also present:

William A. Buckner, Office of Atty. Gen., Los Angeles (June 15)
Robert F. Carlson, Department of Public Works
John F. Foran, Farmers Insurance Company (June 15)
Richard Franck, Department of Public Works (June 15)
Joan Gross, Office of Atty. Gen., Los Angeles (June 16)
George Hadley, Department of Public Works (June 15)
Louis J. Heinzer, Department of Finance (June 15)
Holloway Jones, Department of Public Works
Robert Lynch, Office of the County Counsel, Los Angeles
Joseph A. Montoya, Department of Public Works (June 15)

Minutes of May Meeting. The Minutes of the May 1962 meeting were approved as submitted. The report of the subcommittee was approved as accurately recording the action taken by the subcommittee, but the subcommittee's action is not to be considered as Commission action.

ADMINISTRATIVE MATTERS

Travel by Staff. The Executive Secretary reported that the Senate Committee on Judiciary is planning to hold a hearing in Los Angeles on September 18 and 19, 1962, on the subject of sovereign immunity; the National Legislative Conference is meeting in Phoenix, Arizona, September 18 to 21, 1962; and a regular meeting of the Law Revision Commission is to be held in Los Angeles on September 21 and 22, 1962.

Upon motion by Commissioner Keatinge, seconded by Commissioner Edwards, the Commission unanimously approved the travel of the three staff members to each of these meetings to the extent possible.

Research Contracts. Upon motion by Senator Cobey, seconded by Commissioner Edwards, the Commission unanimously approved the payment of the balance of $200 to George Brunn for his research study on personal injury damages.

Upon motion by Senator Cobey, seconded by Commissioner Keatinge, the Commission authorized the Chairman to enter into a contract with Professor Jack H. Friedenthal of the Stanford Law School in the amount of $1,000 for the research study on the problems involved in Vehicle Code Section 17150. (Commissioner McDonough abstained from the vote on this matter because Professor Friedenthal is a member of the Stanford Faculty). This contract is to be financed by funds from the 1961-62 fiscal year.

Upon motion by Commissioner Sato, seconded by Senator Cobey, the Commission unanimously authorized the Chairman to enter into a

contract with Professor Marilyn-June Blawie of the State College of Alameda County to index the Fourth Bound Volume, including the hearsay study, in an amount not exceeding $1,000. This contract is to be financed with funds from the 1961-62 or 1962-63 fiscal year.

Upon motion by Commissioner Edwards, seconded by Senator Cobey, the Commission authorized the Chairman to enter into a contract with Professor Blawie to index the hearsay study and tentative recommendation in an amount of $300 if this amount is available from the appropriation for the 1961-62 fiscal year. This contract would be entered into only if the $1,000 contract cannot be financed with funds available for the 1961-62 fiscal year.

Commission Publications. The Executive Secretary reported the receipt of a number of requests for copies of the mimeographed portion of Professor Van Alstyne's research study on sovereign immunity. These were prompted by an article in the Los Angeles Daily Journal which stated that the study had been completed and was available for distribution. The Commission suggested that distribution of mimeographed studies be restricted to persons who are attending Commission meetings or submitting comments on tentative recommendations.

The Executive Secretary was authorized to establish a policy with respect to the distribution of completed printed pamphlets, including a charge therefor when necessary or desirable. The Executive Secretary is to submit a specific recommendation for approval by the Commission as to the general policy regarding distribution of printed publications.

These actions were taken in recognition of the costs involved in producing and distributing these mimeographed materials and of the limited supply of printed matter.

Future Meetings. The Commission agreed to change the beginning time of the first day of future meetings from 9:30 a.m. to 9:00 a.m.

The Commission agreed to change the date of the August meeting in San Francisco to August 17 and 18, 1962. Future meetings are now scheduled as follows:

July 20-21	Stanford Law School
August 17-18	San Francisco (State Bar Building)
September 21-22	Beverly Hills (State Bar Convention)

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

Mob and Riot Damage

The Commission considered Memorandum No. 26(1962) containing a draft statute and tentative recommendation relating to liability for mob and riot damage. The following actions were taken:

Section 905.1. The Commission approved the definitions in this section in the form submitted. A motion to strike the reference to "duty" in the definition of "local agency" was defeated. A motion to add the State as an entity subject to liability under the statute also was defeated.

Section 905.2. The Commission agreed that it was unnecessary to repeat in this section some of the language contained in the definition of "local agency". Accordingly, the words "its boundaries" were inserted for "an area where the local agency has the duty or has undertaken to maintain peace and order" in the first sentence of this section. Conforming changes are to be made in the remainder of the statute. It was noted that this will require a local agency that has undertaken to provide police protection for a lesser area than that included within its boundaries to exercise reasonable care and diligence to prevent or suppress a mob or riot that occurs anywhere within its boundaries, even though the mob or riot occurs in an area not ordinarily policed by the local agency.

The Commission agreed that the reference to "danger" in the second sentence of this section was ambiguous. Accordingly, it was

agreed to strike the word "danger" and to insert in place thereof "mob or riot and the inability or unwillingness of the local agency to prevent or suppress it." As revised this section would read substantially as follows:

> 905.2. A local agency is liable for death or for injury to persons or property proximately caused by a mob or riot within its boundaries if the local agency fails to exercise reasonable care or diligence to prevent or suppress the mob or riot. A county within which a mob or riot occurs is not liable under this section where the mob or riot occurs within the boundaries of another local agency that has the duty or has undertaken to maintain peace and order unless the county fails to exercise reasonable care or diligence to prevent or suppress the mob or riot after the county has notice, express or implied, of the failure or inability of the other local agency to prevent or suppress it.

Section 905.3. The second sentence of this section was revised to state affirmatively that contributory negligence is a complete defense. The proposed reference to negligently aiding and abetting is to be deleted. The Commission approved this section as so revised.

Section 905.4. A motion to delete the phrase "in an amount to be fixed by the court" failed for lack of a second. It was agreed, however, to insert this phrase immediately preceding "all costs . . ." to make it clear that the court is to fix the amount of damages for necessary costs and expenses, including attorneys' fees. This section was approved as revised.

Section 905.5. This section was approved as submitted.

Sections 2 and 3. The repeal mentioned in Section 2 and the amendment mentioned in Section 3 were approved.

Tentative Recommendation. The tentative recommendation containing the Commission's recommendation and draft statute as revised was approved for distribution for comment, subject to the staff's consideration of suggestions made by individual commissioners.

Presentation of Claim as Prerequisite to Action Against Public Officer or Employee

The Commission considered the First Supplement to Memorandum No. 27(1962). The following actions were taken:

(1) It was determined that Section 801 (blue statute attached to First Supplement to Memorandum No. 27) should be revised to make clear that in some cases the action is only temporarily barred--while the claim is being considered--and in other cases it is permanently barred.

(2) As thus revised, the statute and text of the tentative recommendation were approved for distribution to interested persons.

Indemnification or Save Harmless Agreements

The Commission considered Memorandum No. 30 (1962). The following actions were taken with respect to the draft statute (blue sheets) attached thereto:

Section 992.2. This section was revised to read substantially as follows:

> 992.2. Except as otherwise specifically provided by law, any public entity that has authority to enter into a contract may in its discretion provide in such contract that the other party or parties to the contract shall wholly or partially indemnify and hold harmless the public entity and its employees and third persons, or any of them, from liability for damages proximately resulting from or in connection with the performance of or failure to perform the contract, whether caused by the act or omission of (a) the other party or parties to the contract or their employees or (b) the public entity or its employees or (c) any other person.

Section 992.3. This section is to be revised to require the permittee to indemnify and hold harmless not only the public entity and its employees but also third persons. The indemnification is, however, to be limited to liability for damages proximately resulting from any act or omission of the permittee or his employees in connection with his operations or activities under the permit.

The statute as thus revised was approved. The tentative recommendation was approved for distribution to interested persons.

Comprehensive claims statute

The Commission considered Memorandum No. 27(1962). The following actions were taken with respect to the draft statute set out on the yellow sheets attached to Memorandum No. 27(1962):

Actions brought under Section 17000 of the Vehicle Code. A claim should not be required for an action brought under Section 17000 of the Vehicle Code. It is not necessary to have a claim in this case to provide notice since the officer or employee involved knows that he was involved in the accident. It is not necessary to provide an opportunity to settle the claim since (so far as the State is concerned) such claims are now automatically rejected and to the extent local public entities insure such liability the claim is ordinarily turned over to the insurance company for action. It was noted that Section 17000 claims are now given special treatment under the existing law applying to claims against the State.

Section 621. The Commission considered whether the phrase "claim against the State" should be used in the State claims statute. It was suggested that the phrase "cause of action against the State" be substituted for the phrase using the word "claim." The suggestion was not adopted

because the representative of the Department of Finance stated that the Board of Control recommends payment of "moral claims."

In connection with the last sentence of Section 621, it was noted that the Board of Control sets each claim for a hearing. In numerous cases, the hearing is waived by the claimant, however. The last sentence of Section 621 was deleted and a provision is to be added to Section 622 to give the board the power to make rules and regulations, not inconsistent with the law, to establish the procedure governing consideration and determination of claims.

As thus amended, Section 621 was approved.

Section 641. It was suggested that this section be drafted along the lines of Section 710.

Section 642. The amendment of this section was approved.

SEC. 4 to SEC. 12. All the repeals set out in these sections were approved except that Section 652 should not be repealed in this tentative recommendation. The problems presented by Section 652 will be dealt with in a separate tentative recommendation. Mr. Carlson of the Department of Public Works was requested to submit a redraft of Section 652 to the staff of the Commission as soon as possible after the meeting.

Section 705. This section was approved as drafted.

SEC. 14. This section, which repeals Article 2 (commencing with Section 710), was approved.

Section 710. This section was approved.

Section 730. This section was approved.

Section 731. This section was approved with the following revision: "written order" was substituted for "requisition".

Section 732. This section was approved.

Section 750. This section was approved.

Section 751. This section was approved.

Section 752. This section was approved.

Section 760. Professor McDonough reviewed the background on the 1959 recommendation of the Law Revision Commission. In 1959, the Commission originally recommended a prior rejection requirement but during the legislative session the Commission reconsidered this recommendation and recommended that prior rejection not be required in the case of a claim against a local public entity. Professor McDonough stated that local public entities did not support the prior rejection requirement in 1959. The State Bar objected to the prior rejection requirement on the ground that it would delay the plaintiff in commencing the action and in obtaining an early trial. By way of justification for the proposed prior rejection requirement, the following

statements were made: (1) The proposed statute will provide one uniform procedure covering all claims and such a requirement already exists for claims against the State. (2) A representative of a local public entity attempted in 1961 to insert such a requirement in the law--thus indicating that experience since 1959 has indicated the need for such a provision. (3) The 1963 recommendations of the Commission will create more liability than now exists. Accordingly, many claims that formerly were summarily denied because of sovereign immunity will now have to be considered on the merits. This will require careful consideration of the claim and the proposed provision will provide time to do this before a complaint is filed. (4) We have authorized local public entities to set up claims boards similar to the Board of Control. (5) Many small claims in fact are considered and settled within a relatively short time after the claim is filed. (6) The prior rejection requirement will tend to reduce the amount of litigation. (7) Many contingent fee contracts provide that the attorney gets a higher percentage if suit is filed. Thus, once suit is filed, the plaintiff will want a higher settlement to cover the higher attorney fee.

Professor McDonough stated that the 1959 recommendation does not support a prior rejection requirement because the

Commission changed its mind in 1959 after the report was printed.

It was noted that the decision of the Commission to eliminate the requirement that claims be filed in motor vehicle tort cases will make the prior rejection requirement a reasonable one considering the claims that will be covered by the comprehensive claims statute.

Section 760 was approved as drafted. Professor McDonough was recorded as voting "No."

A provision should be added to the public entity claims statute to provide that the plaintiff need not comply with the claim presentation requirements if he pleads and proves that he did not know, nor did he have reason to know, within the time prescribed for presenting a claim that the death or injury to person or property was caused by an act or omission of a public officer, agent or employee.

Section 761. The requirement of verification was deleted from this section. The requirement of verification is about the most hollow requirement that one can write into a statute. Nothing demonstrates this more than the cavalier attitude that lawyers take with respect to verification of complaints. The statutory verification provisions accomplish nothing. The trend is to eliminate this requirement. For

example, Rule 11 of the Federal Rules eliminates the requirement of verification. The local public entities claims statute eliminated this requirement so far as local public entities are concerned. Often a claim will be in the form of a letter and it is a needless technical requirement to require the claimant to verify his claim. Such a requirement does not bring honesty into claims procedures. Penal Code Section 72 provides a criminal penalty for false claims. The claimant may not, however, be conscious of the criminal penalty. But this objection can be met by permitting the public entity to place on the claims form the text of the criminal statute (or by providing in the claims statute a special criminal penalty for presenting a claim with intent to defraud). Mr. Sifford stated that insurance companies are gradually dispensing with the requirement of making claims under oath. Now insurance companies are using federal statutes preventing the use of the mails to defraud to take care of cases of outright fraudulent claims.

The representative of the Department of Finance stated that, in his opinion, a printed statement of the provisions of the statute providing a penalty for a false claim would deter fraudulent claims and that the verification requirement could be eliminated. Moreover, the claimant could be placed

under oath at the time of the hearing on the claim. He suggested, however, that a specific criminal penalty be provided in the claims statute to cover false claims.

Section 761 was approved with paragraph (b) deleted.

Section 762. The phrase "in conformity with" was substituted for "in the form prescribed by" and as thus revised the section was approved.

Section 763. The Commission directed the staff to revise the provisions relating to amendment of claims to make it more difficult to amend a claim. This may involve consideration of a change in the time for objecting to an insufficient claim and consideration of other related provisions, especially Section 764(c).

It was noted that where the board objects because of insufficiency, the statute provides no limit on the time for amendment of the claim to cure the insufficiency.

It was suggested that the staff consider what amendments should be permitted when no notice of insufficiency is given, what amendments should be permitted if notice of insufficiency is given, and the times for such amendments.

Section 764. Subdivision (c) should be revised to add "or 762" at the end of the subdivision.

The section was not approved because the revision of Section 763 will have an effect on the provisions of Section 764.

Section 765. This section was approved.

Section 766. Subdivision (b) (2) was revised to read:

> (2) Mailing the claim to the State Board of Control at its principal office not later than the last day of such period.

A general provision relating to mailing of claims and notices under the proposed statute should be included in the statute. It was suggested that the provision be drafted along the lines of Code of Civil Procedure Sections 1012, 1013 and 1013a.

The section was approved as revised.

Section 767. The phrase "injury to persons" was substituted for "physical injury to the person" in Section 767(a).

The section was approved as revised.

Section 768. This section was revised to read:

> When a claim that is required by Section 767 to be presented not later than the one hundredth day after the accrual of the cause of action is not presented within such time, an application may be made to the public entity for leave to present such claim. The application must be made not later than one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim and shall be verified in the same manner as a complaint in a civil action. A copy of the proposed claim shall be attached to the application.

The section was approved as revised. Professor McDonough voted against the approval of this section.

Section 769. This section should be placed in a more logical position. The language of the section relating to when the cause of action accrues should be revised to use the language used in the 1959 recommendation.

With the above revision, the section was approved.

Sections 770 and 771. The phrase "stating with particularity the reasons for the denial" was deleted from Section 770. These two sections should be revised so that if the claimant is not notified within 50 days of the filing of his application that the application is granted, the application is deemed to be denied. The applicant may not proceed under Section 772 until the application is denied or deemed to have been denied.

Section 772. It was noted that this section establishes, in effect, a one year statute of limitations for all actions against public entities covered by the claims statute. (Actions under Section 17000 of the Vehicle Code and certain other actions are excluded from the claims presentation requirement.) No provision is made for tolling the time presentation requirement beyond one year in case of disability. The Commission considered whether a person should be permitted to file a claim after one year in a case of disability. It was noted that a claim may be filed after the 100-day period

in a case of disability even where the entity is prejudiced, but such a claim must be filed not later than one year. It was also noted that insurance is often written on an experience basis and an amount would have to be included in the premium to cover potential claims that might be filed many years later because of disability of the claimant. A motion to extend the period for filing a claim in case of disability so that the time for filing would begin to run when the disability ceases did not receive a second. A motion to extend the period for filing a claim in case of physical or mental disability to two years from the date the cause of action accrued was not adopted.

Section 772 was approved as drafted. Professor McDonough was recorded as voting "No" on the approval of this section.

Section 773. This section was revised to restrict its application to local public entities. As so revised, the section was approved. This action was taken so that the practice of the Board of Control in recommending payment of "moral claims" would not be affected by the proposed statute.

Section 774. In the first line of Section 774, after "Section 773" the following was inserted "or 622". The section was approved as revised.

Section 775. This section should be revised so that the board and the claimant or his representative may by written agreement extend the time for action on the claim to a definite time after the expiration of the period prescribed by law for consideration of the claim. The written agreement must be made prior to the expiration of the period prescribed for consideration of the claim.

The time limit was changed from 80 days to 45 days with appropriate adjustments to be made in provisions providing for objections as to the insufficiency of the claim, etc.

As thus revised, Section 775 was approved.

Section 780. It was suggested that a provision be inserted in the provisions of the Code of Civil Procedure which establish statutes of limitation to indicate the statute of limitation which applies to actions against public entities brought after a claim is rejected. See proposed Section 342 on page A-16 of the 1959 report of the Commission.

It was also suggested that language be added to Section 780 to indicate that it is an exclusive statute of limitation provision and that the statute of limitations set out in the Code of Civil Procedure does not apply to the actions covered by Section 780.

It was suggested that Code of Civil Procedure Sections 341 and 313 be examined in connection with the statute of limitation problem.

Section 780 was approved in principle.

Section 781. This section was approved.

Section 782. This section was approved.

Section 783. This section was not approved, but it is to be considered in connection with the revisions to be made concerning amendment of claims. The reference to Section 776 should be to Section 781. See Legislative History of 1959 legislation in connection with this section.

Sections 784 and 785. These sections are to be the subject of a separate tentative recommendation.

Section 786. This section was considered to be too narrow. It was suggested that state agencies be given authority to settle claims before they are presented to the Board of Control and that state agencies have authority to settle claims after the Board of Control has rejected them. The staff is to draft something along the lines suggested above and is also to include in the accompanying memorandum a discussion of the provisions of the 1961 Shaw bill.

Section 787. This provision should be placed in a more logical position in the statute. The section was approved.

Section 788. This section was approved.

SEC. 21. This provision should be considered in connection with the provisions relating to compromise of claims.

SEC. 22. This effective date provision was approved.

SEC. 23. This section was approved.

Protection of Public Entities and Public Officers and Employees Against Unfounded Litigation

The Commission considered the Second Supplement to Memorandum No.27(1962). The following actions were taken:

Undertaking by plaintiff who brings action against public entity or public officer or employee. The Commission considered proposed Sections 790 and 791 and made the following decisions. The proposed statute should cover all public entities. The undertaking should be discretionary with the public entity. The minimum amount of the undertaking should be $100. The undertaking should cover only allowable costs (not reasonable attorneys' fees). The recovery of the public entity for costs should be $50 or actual allowable costs, whichever is the larger amount.

The provision of the existing law stating when interest runs should be revised so that interest runs from the date of a judgment against a public entity but the plaintiff who recovers a judgment against a public entity should be entitled to recover his costs. The interest provision was changed because a provision will be added to the claims statute that a claim is deemed to be rejected after a specified period.

Section 793 was approved in principle.

Limitation on amount that plaintiff may pay his attorney. The Commission considered the provisions of the Federal Tort Claims Act. Several Commissioners indicated that they believed on the basis of their own experience that the 20 percent fee provided under the federal law was adequate. They also indicated that they believe that the federal limit is working satisfactorily.

The Commission determined that a limitation on attorneys' fees was justified because the public should be assured that most of the public money expended to pay for a death or personal injury resulting from public activities will go the the injured party.

A motion was made that the amount of the attorneys' fee in case of a settlement or compromise or judgment would be subject to court approval. The same procedure would be used as is used in the case of approval of attorneys' fees where a minor is involved. A substitute motion was made that the above procedure be used but the maximum amount of fees be limited to 20 percent. Under the substitute motion, the limitation would apply only if the amount of the settlement or judgment is $500 or more. The substitute motion was adopted. Professor McDonough was recorded as voting no.

It was suggested that the statute be drafted so that it provides a procedure for the fixing of reasonable attorneys' fees by the court. The 20 percent maximum limit on the amount of attorneys' fees should be in a separate sentence following the procedure for fixing the reasonable attorneys' fees.

It was suggested that the plaintiff might be given an action for treble damages in a case where the attorney overcharges. The action might be for three times the overcharge with a $50 minimum.

It was suggested that the word "physical" be deleted from the second line of Section 794.

A motion that out-of-court settlements be subject to a 20 percent maximum, but that court approval not be required in such a case was not adopted.

Liability in Hospital and Medical Activities

The Commission considered Memorandum No. 33(1962). The following actions were taken:

The scheme of the proposed statute on medical and hospital torts was discussed. It was pointed out that the statute as drafted does not deal comprehensively with the problem of discretionary immunity of public officers and employees. Instead the statute is written with the assumption that the discretionary immunity of officers and employees of public entities will continue to exist. Where the doctrine is modified, a specific statutory provision is included. Otherwise the doctrine is not mentioned.

During the discussion it was pointed out that the case law on discretionary immunity may not develop in the future along the same lines that it has developed in the past. Probably one major reason for the discretionary immunity has been the fact that, because of sovereign immunity, the officer has been the only one liable for the torts he commits. His employing public entity has never had to bear the responsibility for its servants' torts as is the case with private employers. If public entities are liable whenever their employees are liable for torts committed in the scope of their employment, and if public entities are required to pay judgments recovered against their employees for acts done in the course of their employment, this reason for the discretionary immunity will no longer exist. Hence, it is possible that the courts may begin to retreat from the position they had

reached in regard to discretionary immunity. In recognition that the case law may change the last sentence at the bottom of page 4 of the recommendation was modified to read:

> Where the statutes are not explicit, the discretionary immunity developed or to be developed by the cases in regard to the liability of public personnel will be the standard of immunity for governmental entities.

The foregoing change was made also in order to make clear that it is not the Commission's intent to freeze the law of discretionary immunity in the condition in which it has presently been developed by the cases. The Commission's legislation will neither be a directive to the courts to retain the doctrine in its present form nor a direction to the courts to modify it in any particular manner.

A motion then carried directing the staff to add language to the recommendation indicating that a principal reason for the discretionary immunity has been that the fear of personal liability may unduly inhibit public officers from carrying out their duties and that, inasmuch as this reason will be removed in large part by the proposed statutes, the courts may not follow the previous cases and may restrict the doctrine of discretionary immunity so that more liability may be placed on public entities. The added language is to indicate that the Commission intends to study the doctrine of discretionary immunity in some detail at a future date. Commissioners Bradley, Keatinge and McDonough voted against this motion.

Section 903.1. In subdivision (a) a comma was substituted for the word "and" in the first line of the subdivision, and the word "and" was

substituted for the word "or" at the beginning of the second line of the subdivision. With these modifications Section 903.1 was approved.

Section 903.2. The word "and" appearing after the semicolon at the end of subdivision (a) was changed to "or". In subdivision (b) the staff was directed to add language to reflect that diagnosis of human ailments is also covered. Commissioner Bradley voted against the motion to include diagnosis. Subject to the modifications to be made in language Section 903.2 was approved.

Section 903.3. The words "under this article" were added following the words"a public entity is liable" in order to make clear that the liability imposed by the section is only for torts arising out of medical and hospital activities. As modified the section was approved.

Section 903.4. In the first paragraph, the last three lines beginning with the word "if" were revised to read:

> . . . if such failure is caused by the failure of the public entity to comply with any statute or regulation of the State Department of Public Health governing equipment, personnel or facilities.

In the second paragraph, the last five lines beginning with the words "its failure" were revised to read:

> . . . its failure to provide equipment, personnel or facilities substantially equivalent to those required by statutes or regulations of the State Department of Public Health which are applicable to institutions of the same character and class.

The language of Section 903.4 was approved as modified. Section 903.4 was then renumbered Section 903.3 so that the section relating to entity liability would appear first in the article and the sections relating to employee liability would appear thereafter.

Section 903.5. Section 903.5 was approved. This section, and the following sections, speak in terms of employee liability because under Section 903.3 the public entity is liable whenever its employee is liable for acts done within the scope of his employment. If these sections spoke in terms of entity liability, it would be necessary to refer repeatedly to the employee's scope of employment.

Section 903.6. In the last line of the section the words "by law" were deleted and the word "legally" was inserted between the words "is" and "required". This section does not impose an absolute liability for failure to admit; it only imposes liability for a negligent or a wrongful failure to admit. Hence, in epidemic situations, if facilities are so strained that, even though there may be a legal requirement to admit a particular patient, the public hospital is physically unable to accommodate him, there would be no liability for the refusal to admit as such refusal would be neither negligent nor wrongful. Section 903.6 was approved as amended.

Section 903.7. The first two sentences of Section 903.7 were combined to read as follows:

> No employee of a public entity is liable for negligence in diagnosing or prescribing for mental illness or in determining the terms and conditions of the confinement, parole or release of persons who are mentally ill while acting within the scope of his employment.

The third sentence of Section 903.7 was made a separate paragraph of the same section. The two paragraphs in Section 903.7 are to be designated (a) and (b). As amended, Section 903.7 was approved.

Section 903.8. The two sentences of Section 903.8 were made into separate paragraphs to be designated (a) and (b). As revised the Section was approved.

Section 903.9. The words "and permits" at the end of the first line of Section 903.9 were deleted. These words were deleted to avoid any implication that the public entity actually has to provide a defense before it may be held liable on the judgment against the employee. Section 903.9 was approved as modified.

The staff was directed to add a provision to the statute permitting an employee who has paid a judgment against himself arising out of acts done within the scope of his employment to recover the amount paid from the employing public entity.

Section 903.10. Section 903.10 was approved.

Section 903.11. Section 903.11 was approved.

Tentative Recommendation. The Tentative Recommendation containing the Commission's recommendation and draft statute as revised was approved for distribution for comment, subject to the staff's consideration of suggestions made by individual Commissioners as to language changes in the Tentative Recommendation.

Payment of Claims

The Commission considered Memorandum No. 28(1962) containing a tentative recommendation and draft statute relating to the payment of tort judgments for which local public entities are liable. The following actions were taken.

Section 740.1. The definition of "tort judgment" was revised to make it clear that the statute is intended to include situations where the local public entity is liable for the payment of judgments against its officers, agents and employees. Conforming changes are to be made as required in the remainder of the statute.

It was noted that settlements of claims are included within the definition of "tort judgment" because of the Commission's previous decision to require consent judgments in cases of settlement where the entity desires to avail itself of the authority to spread payment over an extended period.

This section was approved as so revised.

Section 740.2. The words "against it" were deleted from this section because of the change in the definition of "tort judgment". As revised this section was approved.

Section 740.3. This section was approved as submitted.

Section 740.4. The words "in full" in paragraphs (a) and (b) were deleted as being unnecessary.

A motion to delete "immediately upon the obtaining of sufficient funds for that purpose" from paragraph (a) failed. [Commissioners McDonough,

Bradley and Edwards voted for the motion; Commissioners Cobey, Ball, Keatinge and Sato voted against the motion.]

It was suggested that a public entity should be permitted to pay off a tort judgment in a lesser time than was originally contemplated by prepayment of any one or more annual instalments. Accordingly, it was agreed that the second sentence of paragraph (b) should be revised to make it clear that a local public entity has the authority to prepay any instalment.

As revised this section was approved. [Commissioner McDonough voted against approval of this section.]

Section 740.5. This section was approved as submitted with the addition of the words "or both" immediately following the phrase "levy taxes or assessments or make rates or changes" to make it clear that the entity may utilize any authorized means of raising funds to pay tort judgments.

Section 740.6. This section was approved as submitted.

Section 740.7. This section was approved as submitted.

Section 740.8. The phrase "against which the judgment was recovered" should be revised because of the change in the definition of "tort judgment". It was agreed to delete the word "particular" from this section and in Sections 740.9 and 740.10. As revised this section was approved.

Section 740.9. It was agreed to delete the State as a public entity permitted to invest in tort judgments for which local public entities are liable. The reason for this deletion is to foreclose pressure on the State by numerous local entities to invest in such judgments.

The phrase "against which the judgment is recovered" should be revised

in light of the change in the definition of "tort judgment", although some identification is necessary to distinguish between the public entity liable for the payment of the tort judgment and the public entity seeking to invest in the tort judgment. It was noted that the theory upon which this section is now based permits local public entities to invest in tort judgments for which other public entities are liable to the same extent as bonds of these public entities. As revised this section was approved.

Section 740.10. With the deletion of the word "particular" this section was approved as submitted.

Ability to Mandate.

The Commission agreed to include specific language in the statute to make clear that a tort judgment creditor has a right to obtain mandate (1) to force the local public entity to decide upon the means of financing a tort judgment and (2) to force the local public entity to levy taxes and assessments or make rates and charges or both to pay the tort judgment in the manner decided upon.

Section 904. It was agreed to revise Education Code Section 904 as follows:

(1) The references to "three" in Section 904(b) should be changed to "ten" to eliminate any inconsistency between this section and the provisions of the draft statute.

(2) The reference to 4 percent as the interest charged upon judgments was eliminated because of its inconsistency with the draft statute and its probable unconstitutionality.

Tentative Recommendation. The tentative recommendation containing the Commission's recommendation and draft statute as revised was approved for distribution for comment, subject to the staff's consideration of suggestions made by individual Commissioners.