

4/9/62

Moules

Memorandum No. 17(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Insurance)

Attached (blue pages) are two copies of a draft of a tentative recommendation relating to insurance for public entities and public officers and employees. We suggest that you make your revisions of the text of the recommendation on one copy so that the staff will have it available after the meeting.

Perhaps the most important policy decision in the insurance problem is whether insurance should be required of all public entities. It is believed that the Commission would not want to recommend that insurance be required unless it had more information concerning the availability and cost of insurance, the extent to which insurance is now purchased, the extent to which the rules of liability will be changed, etc. Moreover, if insurance were to be required, many difficult problems would arise as to the procedure that should be established to determine whether a public entity has met the insurance requirement. It is recommended that we do not take up these complex problems at this time. But at the same time it is strongly urged that the Commission adopt the attached tentative recommendation so that the 1963 Legislature can enact a statutory authorization to insure so that the authority to insure will be as broad as the potential liability.

The recommendation proceeds on the assumption that the Commission will not recommend to the 1963 Legislature that insurance be made mandatory; but, at the same time, the recommendation indicates that this matter may be the subject of a recommendation to the 1965 session.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Insurance Coverage for Public Entities and Public Officers and Employees

A number of California statutes either authorize or require public entities to insure against their own tort liability and against the personal tort liability of their officers and employees.

The principal statute authorizing local public entities to purchase insurance against their own tort liability is Section 1956.5 of the Government Code. This section provides local public entities with ample statutory authority to insure against both negligent and intentional torts. There is no similar general provision expressly authorizing the State to insure against tort liability; but such authority may exist, by implication, under Government Code Section 624. Other statutes that apply to particular types of local public entities or to particular kinds of activities are inconsistent with these general provisions and provide for a more limited authority to insure. For example, Vehicle Code Section 17003 authorizes public entities to insure themselves against liability arising out of the negligent--but not the intentionally tortious--operation of motor vehicles. It is not clear whether special statutes like Section 17003 will be construed to restrict the authority to insure given by Section 1956.5 which purports to authorize insuring against all forms of tort liability.

The principal statute authorizing public entities to insure their officers and employees against personal liability is Section 1956 of the Government Code. This section authorizes any public entity to insure its personnel against liability for negligence, false arrest and false imprisonment, but does not authorize insuring public personnel against other intentional torts. Thus, for example, a city park director who is required by the terms of his employment to maintain order in a city park, and who acts in good faith but with excessive force in removing a rowdy from the park area, would personally have to pay a tort judgment based on such assault.¹ On the other hand, Education Code Section 1044, which applies only to school districts, makes it mandatory for every school district governing board to insure its officers and employees against personal liability for negligence and makes it permissive for the board to insure them against personal liability for intentional torts.² There are a number of other statutory provisions relating to insurance for public personnel: Some of these permit extremely broad insurance coverage; others are limited to relatively narrow types of personal liability.

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1. Although not authorized to insure him against personal liability, the city apparently would be required by Section 2001 of the Government Code to provide counsel and pay the other costs of defending the action brought against him. Section 2001 requires the public entity to provide for the defense of an action against an employee for "any damages caused by any act or failure to act by such employee occurring during the course of his service or employment." The cost of the defense can be recovered from the employee only if he "acted or failed to act because of bad faith or malice." See 39 Ops. Cal. Atty. Gen. 71 (1962), No. 61-246.
 2. Insurance may be provided under Section 1044 to cover personal liability "for any act or omission performed in the line of official duty."

Some statutes that authorize or require insurance to be purchased out of public funds explicitly provide that such protection may be in the form of a self-insurance system. But most of the statutes do not mention self-insurance, thereby possibly implying that self-insurance is not permissible.

The Law Revision Commission believes that insurance purchased at public expense is a highly desirable method of mitigating the impact of liability on both public entities and public officers and employees for all torts, whether negligent or intentional. Accordingly, the Commission recommends that legislation be enacted to achieve the following objectives:

1. All types of public entities should be expressly authorized to insure themselves against any tort liability which may be imposed upon them by law. All public entities may have this authority now, but an express statutory provision is desirable to make clear that a public entity's authority to insure is as broad as its potential liability.

2. All types of public entities should be expressly authorized to purchase insurance to cover the personal liability of their officers, agents and employees for all types of torts committed during the course of their public employment. All public entities now have authority to insure public personnel against personal liability for negligent acts and omissions and for false arrest and false imprisonment. But authority to provide public personnel with insurance protection against their personal liability for other intentional torts is presently enjoyed only by school districts and a few other public entities. Giving all public entities authority to provide their officers,

agents and employees with adequate insurance coverage will enable a public entity, if it so chooses, to encourage its personnel to diligently perform their duties without fear of personal liability.

3. All public entities should be expressly authorized to insure either by purchasing commercial liability insurance or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of the two methods. Full insurance coverage may be deemed practically indispensable by many entities. Others, however, may determine that adequate protection at the lowest possible cost can be provided through a program of self-insurance, or a combination of self-insurance plus an excess coverage policy purchased from a commercial underwriter.

4. Other statutes authorizing or requiring public entities to insure against their liability or the liability of their personnel should not limit or restrict the broad authority to insure given by the new general insurance statute. The recommended legislation contains a provision--Section 990.5--to make this clear. Thus, special statutes which authorize purchase of only limited coverage insurance will not be construed to prevent a public entity from securing full insurance coverage pursuant to the new statute.

5. The Commission does not recommend at this time that all public entities be required to provide insurance covering their own liability or the personal liability of their officers, agents and employees. The Commission has not had an opportunity to give this matter sufficient study to be prepared to make a recommendation concerning it. The Commission plans to continue its study of the

public entity insurance statutes and may submit a recommendation relating to this matter to a later session of the Legislature. The Commission does recommend, however, that Education Code Section 1044 and other similar statutes that require insurance coverage be retained. It would be a step in the wrong direction to make insurance discretionary in those cases where it is now required by law.

6. Various statutory sections that now authorize the purchase of insurance by public entities will be superseded by the new general insurance statute and should be repealed.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 5 (commencing with Section 990.1) to Division 3.5 of Title 1 of the Government Code, to amend Section 1959 of, and to repeal Sections 1231, 1956, 1956.5 and 53056 of, the Government Code, and to repeal Section 17003 of the Vehicle Code, relating to insurance for public entities and public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Chapter 5 (commencing with Section 990.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 5. INSURANCE

990.1. As used in this chapter:

- (a) "Employee" includes an officer, agent or employee.
- (b) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

990.2. Except for a liability which may be insured against pursuant to Division 4 (commencing with Section 3201) of the Labor Code, a public entity may:

- (a) Insure itself against any liability.
- (b) Insure its employees against personal liability for death, injuries or damages resulting from any negligent or wrongful act or omission during the

course of their service or employment or against any part of such liability.

990.3. The insurance authorized by this chapter may be provided by:

(a) Self-insurance.

(b) Insurance in any insurer authorized to transact such insurance in this State.

(c) Any combination of insurance authorized by subdivisions (a) and (b).

990.4. The premium for the insurance authorized by this chapter is a proper charge against the public entity.

990.5. The authority provided by this chapter to insure does not affect any special insurance statute. No special insurance statute shall be construed to limit or restrict the authority to insure under this chapter. "Special insurance statute" means a law, other than this chapter, that authorizes or requires a public entity to insure against its liability or the liability of public personnel.

SEC. 2. Section 1959 of the Government Code is amended to read:

1959. Each county may insure the officers and attaches of its superior, municipal, and justice courts against any liability, other than a liability which may be insured against under the provisions of Division 4 (commencing with Section 3201) of the Labor Code, for death, injuries or damages resulting from [~~their-negligence-or-carelessness~~ any negligent or wrongful act or omission during the course of their service or employment. Such insurance may be provided by self-insurance, or by insurance in any insurer authorized

to transact such insurance in the State, or by any combination thereof. The premium for the insurance is a proper charge against the [treasury-of-the] county.

SEC. 3. Section 1956 of the Government Code is repealed.

[1956.--(a)--The State, a county, city, district, or any other public agency or public corporation may insure its officers, deputies, assistants, agents, and employees against any liability, other than a liability which may be insured against under the provisions of Division 4 (commencing with Section 3201) of the Labor Code, for injuries or damages resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property, including public property as defined in subdivision (b) of this section, and due to their alleged negligence or carelessness, and for injuries or damages resulting from false arrest or false imprisonment, either by self insurance, or in any insurer authorized to transact such insurance in the State (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code).--The premium for the insurance is a proper charge against the Treasury of the State, county, city, district, public agency or public corporation.]

[(b)--In addition to the definition of public property as contained in Section 1951, "public property" includes any vehicle,

~~implement or machinery whether owned by the State, a county, city, district, or any other public agency or public corporation, or operated by or under the direction, authority or at the request of any public officer.]~~

~~[(e)--"Officers"--includes any deputy, assistant, agent or employee of the State, a county, city, district, or any other public agency or public corporation acting within the scope of his office, agency or employment.]~~

SEC. 4. Section 1956.5 of the Government Code is repealed.

~~[1956.5.--A county, city, district, or any other public agency or public corporation may insure itself against any liability, other than a liability which may be insured against pursuant to Division 4 of the Labor Code, either by self-insurance or in any insurer authorized to transact such insurance in the State.--The premium for such insurance is a proper charge against such county, city, district or other public agency or public corporation.]~~

SEC. 5. Section 1231 of the Government Code is repealed.

~~[1231.--Each county, city, district, or other political subdivision of the State may purchase and maintain in force and pay the premiums for malpractice insurance policies to protect all of its medical and dental personnel employees against liability for any claims or actions for malpractice that may be filed or brought against such employees.]~~

SEC. 6. Section 53056 of the Government Code is repealed.

[53056.--A local agency may insure against liability, except a liability which may be insured against pursuant to Division 4 of the Labor Code, for injuries or damages resulting from the dangerous or defective condition of public property by self-insurance, or insurance in an admitted insurer (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code).--The premium for the insurance is a charge against the local agency.]

SEC. 7. Section 17003 of the Vehicle Code is repealed.

[17003.--Any public agency may insure against liability under this chapter in any insurance company authorized to transact the business of such insurance in the State of California, and the premium for the insurance shall be a proper charge against the general fund of the public agency.]