Mtg.

10/11/62

Memorandum No. 64 (1962)

Subject: Study No. 52(L) - Sovereign Immunity (General Provisions Relating to Liability)

This memorandum relates to Part 1 of the proposed Division 3.6 (commencing at Section 810) of the general liability statute and Chapter 1 of Part 2 (commencing at Section 815) of the proposed statute. The Commission should also consider the pink portion of the recommendation.

Attached to this memorandum as Exhibit I, on pink paper, is an extract from a report of the State Bar Committee on Sovereign Immunity which relates to this portion of the Commission's work. Exhibit II consists of comments that were made or submitted to the Senate Fact-Finding Committee on Judiciary at its meeting in Los Angeles during the Bar Convention. Exhibit III is a letter from the Los Angeles County Counsel relating to liability generally. Exhibit IV is a letter from the underwriter's counsel of the Fireman's Fund relating to "agent".

Section 810.2. The State Bar Committee believes that the definition of "employee" should be expanded to include boards and commissions and other governmental groups that act as a unit. The staff does not believe that this would be a desirable change. One purpose that is achieved by making the liability of government dependent upon the liability of its employees is that the government may not be held liable because the court or the jury believes that the governmental entity has some duty that it has failed to discharge. This theory of liability has been asserted, usually without success, in several recent

cases and appears in several of the claims that have been filed with the State Board of Control. Many of these claims are disposed of by limiting the liability of governmental entities to those tortious acts for which an employee would himself be liable. This purpose would be frustrated in a considerable degree if the definition of "employee" were broadened to include the governing bodies of public entities. Then, too, when governmental boards, commissions, and similar groups act, they are "governing" in a fairly strict sense. It is questionable policy, therefore, whether their decisions should be reviewed by the courts, which are not politically responsible.

The Los Angeles County Counsel does not believe that the terms "agent" and "agency" should be included within the definition of "employee" and "employment." One problem the County Counsel raises in this connection is similar to that raised at the last meeting, i.e., to what extent should the liability of independent contractors be imposed upon the public entities that employ them.

At the present time, private persons are liable under certain circumstances for the tortious acts of independent contractors. Public entities are subject to similar liability. In Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959) the court stated:

> . . .[A] municipality is liable for the negligence or wrongful act of an employed independent contractor where the particular property or operation remains under the control of the municipality, where there is a positive duty imposed by law upon the municipality of such character that it cannot be delegated, or where the operations or work being performed are inherently dangerous. (See 18 McQuillin, Municipal Corporations (3d ed.) § 53.76, pp. 343-352; Mulder v. City of Los Angeles (1930), 110 Cal. App. 663, 668: "The city was not authorized to abdicate its powers or surrender to a private person its duty to exercise proper supervision of the work it permitted to be done.") [At pp. 703-04.]

It has been held in California that a private employer is liable for the acts of an independent contractor where the act to be performed under the contract is the one that occasions the injury. "In such a case the injury does not result from the manner in which the work is done, but from the fact that it is done at all." (Williams v. Fresno Canal & Irr. Co., 96 Cal. 14 (1892).)

There is an extensive discussion of the liability of persons who employ independent contractors in Snyder v. So. Cal. Edison Co., 44 Cal.2d 793 (1955). There the court said in part:

> This court recently stated: "The general rule of nonliability of an employer for the acts of an independent contractor is subject to numerous exceptions. . . . "It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings or structures thereon in reasonably safe condition. (See Rest., Torts, § 42.)". . .
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> * * *
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> [W]here an activity involving possible danger to the public is carried on under public franchise or authority the one engaging in the activity may not delegate to an independent contractor the duties or liabilities imposed on him by the public authority. . . and generally speaking there are many situations in which the person cannot absolve himself from liability by delegating his duties to an independent contractor. . . .The matter is discussed by Harper, as follows: ". . . one who employs an independent contractor is, as a general rule, not liable for the misconduct of the latter or of his servants while acting within the scope of the contract. The idea responsible for this general rule of nonliability is the want of control and authority of the employer over the work, and the consequent apparent harshness of a rule which would hold one responsible for the manner of conducting an enterprise over which he wants the authority to direct the operations. Again so far as the activity immediately causing the injury is concerned, it is the contractor rather than the contractee who is the entrepreneur and who should ordinarily carry the risk. . . .
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> "[There are] certain exceptions and apparent exceptions which, with increasing tendency, seem likely to overshadow in importance and scope the rule itself. . . . A number of situations exist, however, which are actual cases of vicarious liability, that is, liability for the misconduct of the independent contractor and his servants although the contractee has himself been free from personal fault. . . . [T]here is every reason to believe that sound social policy will induce

the courts to make further inroads upon the rule of nonliability in this class of cases.

"The first genuine case of liability for misconduct of an independent contractor or his employees is the case of the so-called 'nondelegable' duty. Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor . . . . It is immaterial whether the duty thus regarded as 'nondelegable' be imposed by statute, charter or by common law . . . .

"Another large group of cases predicate liability on the part of the employer of an independent contractor for the misconduct of the latter in the performance of certain 'intrinsically dangerous' work. The policy of allocating to the general entrepreneur the risks incident to his activity is obvious when the activity carries with it extraordinary hazards to third persons . . . . [T]he principle may be generalized that one who employs an independent contractor to perform work which is either extra-hazardous unless special precautions are taken or which is inherently dangerous in any event is liable for negligence on the part of the independent contractor or his servants in the improper performance of the work or for their negligent failure to take the necessary precautions . . . .

"In both of the above types of situation in which the employer of an independent contractor is liable for the negligence of the contractor or his servants, there is the limitation that such liability extends only to negligence in the failing to take the necessary precautions, failing to adopt a reasonably safe method, or in failing to produce a result which it is the duty of the employer-contractee to have attained. Such liability does not ordinarily extend to socalled 'collateral' or 'casual' negligence on the part of the contractor or his servants in the performance of the operative detail of the work. The negligence for which the employer is liable, as general entrepreneur, must be such as is intimately connected with the work authorized and such as is reasonably likely from its nature. Negligence in the doing of ordinary acts, not necessarily incidental, but only accidentally connected with the work, do not fall within the policy of the law which imposes the extraordinary liability upon the employer.

"The distinction between 'collateral' or 'casual' negligence and negligence of the contractor so intimately connected with the work to be done that the employer-contractee is liable therefor is a shadowy one at best." (Harper, Law of Torts (1933), § 292.) [44 Cal.2d 793, 797-801.]

The foregoing rules are applied to public entities as well as to private persons. (See Shea v. City of San Bernardino, 7 Cal.2d 688 (1936); Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959); Mulder v. City of

Los Angeles, 110 Cal. App. 663 (1930); Dick v. City of Los Angeles, 34 Cal. App. 724 (1917).) Hence, the staff believes that it would be unwise to delete "agent" from the definition of "employee" or to indicate in any way that public entities are not to be liable for the acts of independent contractors. To do so would curtail a large amount of existing liability.

There is an obvious problem, though, as to how the liability of public entities for the acts of independent contractors should be expressed in the statute. The present scheme of the statute is unsatisfactory. Although public entities are liable under some circumstances for the acts of independent contractors there are many circumstances under which public entities are not liable for the tortious acts of independent contractors. This area of nonliability is not provided for in the general liability statute. Moreover, if the broad definition of "employee" includes independent contractors, the indemnity, insurance, and defense provisions intended to be applicable to public employees in the strict sense become applicable also to independent contractors. One way to meet the problem would be to exclude independent contractors from the definition "employee" and to spell out in detail the extent to which public entities are to be liable for the acts of independent contractors. This solution appears to be unsatisfactory, though, for as the Supreme Court indicated in the Snyder case the law is developing in this field and a statutory statement of the rules might be found to be too inflexible as the law develops. In addition, as the Supreme Court also indicated, there are many shadowy areas in this field where it would be extremely difficult to articulate a statutory rule.

In Canada, the Canadian equivalent of the Uniform Law Commissioners worked out a solution to this same problem. (See Ch. 207 of the Revised

Statutes of Manitoba (1954).) In the Canadian Proceedings Against the Crown Act "agent" is defined to include an independent contractor employed by the government. The provisions of the Act relating to substantive liability state: "[T]he Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject . . . in respect of a tort committed by any of its officers or agents . . . ." There is another provision in the Act, then, that states that "nothing in this act shall . . . subject the Crown to greater liability in respect of the acts or omissions of an independent contractor employed by the Crown than that to which the Crown would be subject in respect of such acts or omissions if it were a private person . . . ."

With this scheme the Canadian Act preserves the liability of the government for the acts of independent contractors to the same extent that private persons are subjected to such liability. The law is not frozen, though, in a particular manner. The staff believes that it would be desirable to adopt some comparable scheme in the Commission's proposed statute.

The staff suggests that the definition of "employee" be revised to exclude independent contractors. Another provision should be placed in the statute imposing liability upon public entities for the tortious acts of independent contractors to the same extent that a private person would be liable for the acts of an independent contractor. As a suggestion, the following might be added to Section 815.2:

> 815.2. (b) A public entity is liable for injury proximately caused by a negligent or wrongful act or omission of an independent contractor of the public entity to the same extent that it would be subject to such liability if it were a private person.

Another method of accomplishing the same result would be to revise Section 815.2 to read:

> 815.2. A public entity is liable for injury proximately caused by a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment or of an independent contractor of the public entity if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative, or against the independent contractor.
>
> Nothing in this section subjects a public entity to greater liability for the acts or omissions of an independent contractor of the public entity than that to which the public entity would be subject for such acts or omissions if it were a private person.

Section 810.6. The State Bar suggests adding "or other provision having similar effect" after the word "regulation".

The State Bar also suggests the addition of the words "including this Division 3.6" at the end of the Section. The staff believes that this latter revision is unnecessary.

Section 810.8. The State Bar Committee was uncertain as to the meaning of "estate". If the word adds anything to the section, it is to insure that the word "property" in the second line is not given a restrictive meaning. The purpose of the definition is to include all injuries to legally protected interests. These change from time to time as the courts recognize that additional types of injury are actionable. This definition is intended to keep abreast of the court's definitions of actionable injuries.

The Committee recommended the deletion of "of such nature that it would be actionable if negligently or wrongfully inflicted by a private person". The Committee has misinterpreted the purpose of the definition. It seems to think that the definition will exclude governmental liability for injuries inflicted during the course of activities that private persons do not engage in. The purpose of the qualifying language, though, is to make sure that public entities are not held liable for types of injuries--emotional distress at seeing a stranger run over, etc.-- that the courts have not as yet recognized as actionable in litigation between private parties. In other words, this definition is merely to make sure that the types of injuries for which governmental entities are going to be liable are the same types of injuries for which private persons are liable. This can be pointed out in the note which will be appended to this section, but perhaps the section should be amended to make this clear. The staff believes though that the section now is adequate in that it refers only to the type of injury suffered, not the type of act which inflicted the injury.

Section 811. In regard to the State Bar's comments on page 2 of Exhibit I, public entity is defined where it is because the definitions are in alphabetical order. The inclusion of "city and county" in the definition of local public entity is unnecessary in view of Government Code Section 20 which says that the word "city" includes "city and county" and Government Code Section 19 which says that the word "county" includes city and county. The Bar suggests that the word "other" be inserted before agency in the fourth line of the section. This would have no substantive effect on the section. The existing language, however, is drawn from Government Code Section 700, which is in the local entity claims statute.

Article 1. Liability of Public Entities. The State Bar suggests that the scheme of liability contained in this article abandons the "closed end" approach to liability advocated by the Commission. Although we adopt such a policy by Section 815, the State Bar Committee suggests that we have abandoned the policy in Section 815.2. The same point has been made by other persons who appeared before the Senate Fact Finding Committee on Judiciary. (See Exhibit II.) See for example the statement of the Department of Public Works on page 4 of Exhibit II. The staff does not believe that this characterization of Section 815.2 is quite true. Sections 815 and 815.2 will preclude public entities from being held liable for the failure to perform many things that some people think that they ought to have a duty to perform. Thus, these two sections go a long way toward keeping policy making in the hands of officials who are politically responsible for their policy making.

The State Bar suggests that it may be necessary to add a provision under Article 2 to the effect that

> Except as otherwise provided by any enactment, a public employee is not liable for injury proximately caused by his negligent or wrongful act or omission within the scope his employment.

This would be an extreme change in existing law, for except as his liability is qualified by his discretionary immunity, a public employee is now liable just as private persons are. The staff does not believe that we are adequately informed to change this existing law. If we enacted such a provision, we would then be compelled to write statutes reimposing all of the existing liability that we could possibly think of. We might complete the task in time for 1965, but we would certainly not complete it in time for 1963. Section 815.2 is a fairly conservative provision, more conservative than the Federal Tort Claims Act and the New York Court of Claims Act. It has been the rule of liability in England and in most of the Canadian provinces for a considerable period of time. There is no reason to believe that California courts will have any difficulty with the provision or that public entities will be subjected to an undue amount of liability because of the provision.

In connection with this same topic the League of California Cities' statement to the Senate Fact Finding Committee suggests that public entities be liable only for special damages for intentional torts. We would gather from this that they are suggesting that the public employees involved be personally liable for the general damages involved. As Professor Van Alstyne pointed out in his study the line between intentional and negligent torts is extremely hazy. Many an intentional tort is classified as such although it was committed because of a negligent determination by the tortfeasor.

Section 815. The State Bar Committee suggests that this section be revised to make clear that this title deals with monetary recovery for tort, not with injunction, mandamus, or breach of contract. The staff believes that the suggestion is a good one and that appropriate language should be added to indicate that nothing in this part has any effect upon the availability of equitable relief or upon remedies for the enforcement of contracts.

Section 815.2. The State Bar suggests that the "if" clause be revised to read: "if such employee or his personal representative would be liable therefor".

Section 815.6. In Exhibit II, the Los Angeles County Counsel objects to this provision. The State Bar feels that there is a superficial inconsistency between this section and Section 816.8. In the interests of clarity it suggests that 815.6 be amended to read:

> Where a public entity is under a duty imposed by an enactment that establishes mimimum standards of safety and performance designed to protect against the risk of a particular kind of injury . . . .

To Section 815.8, the Committee suggests adding the language, "that is for the governance of others than the public entity and its employees."

Section 815.8. The County Counsel of Los Angeles suggests that the nuisance section be modified to provide for cases where there is no way to control the conditions causing the nuisance. See the comment on page 2 of Exhibit III.

Section 816. The State Bar Committee suggests that the reference to "appointing power" is inappropriate. See the comment on page 5 of Exhibit I.

Section 816.2. The State Bar Committee and the Los Angeles County Counsel both object to this section and think it will stimulate a great deal of unmeritorious litigation. They both suggest eliminating the section. As an alternative, the State Bar Committee suggests a revision that appears on page 6 of Exhibit I.

Section 816.4. The State Bar Committee points out that we use "out of personal animosity, ill will or corruption" in contrast with "with actual malice, actual fraud or corruption" that we use in other sections. Section 821.6 has "even if he acts maliciously and without probable cause." The State Bar suggests that a consistency in the phraseology would be of value. The Commission consciously adopted a differing phraseology in Section 816.4.

The County Counsel at page 3 of his letter, suggests the deletion of this section entirely for the reasons that public officers have been held immune from this kind of liability until now.

Section 817.2. The State Bar Committee believes that Section 815.6 should be an exception to Section 817.2.

New Section. The staff believes that a new section should be added to this article and a comparable section to the article on the liability of public officers and employees. The sections should immunize public entities and employees from liability for the adoption of or the failure to adopt any enactment. This immunity is now implicit in the discretionary immunity that appears in both articles. Wherever possible, though, we have made discretionary immunities explicit so that there would be no doubt as to what was discretionary or not. It was the Commission's hope that eventually all immunities should be explicit and should not be left to

a general statement of discretionary immunity. It would seem appropriate, therefore, to make the immunity for the enactment of or the refusal to enact statutes, regulations and other laws explicit.

Article 2. Liability of Public Officers and Employees. The State Bar Committee suggests the addition of a specific provision indicating that public employees are liable for injuries caused by their negligent or wrongful acts or omissions. This has not been included in the statute because public employees are liable under the general law applicable to everyone. Civil Code Section 1714 states the general rule that applies:

> Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.

This section is applicable to public employees unless there is some immunity to remove them from the general rule. This article states a number of immunities. The courts have declared others. It seems unnecessary, therefore, to state again that public employees are liable for their negligence or wrongful acts.

Section 820.2. The State Bar Committee suggests qualifying this section with the language "that is for the governance of others than the public entity and its employees".

Section 820.4. The State Bar also suggests that the words "inapplicable for any reason" should be deleted from this section. The section should be confined to those situations where an officer has acted pursuant to an erroneous but good faith misinterpretation of an enactment. See the comment on page 8 of Exhibit I.

Section 821.6. The State Bar Committee believes that a public employee should be liable for malicious prosecution. To so provide would require a positive statement in this article, for the courts have held public employees immune from such liability. Deleting the words "maliciously and" would not accomplish the result sought.

Article 3. Indemnification of Public Officers and Employees.

Section 825.6. The State Bar Committee suggests a revision of subdivision (b) which would change the burden of proof on scope of employment where the public entity is seeking to recover the amount it has paid on a judgment against the employee. The purpose of subdivision (b) is to preserve the relationship of the parties where the public entity has conducted the employee's defense pursuant to an agreement reserving its rights. Its rights would not be very well reserved if the burden of proving scope of employment shifted from the employee to the public entity in the type of action contemplated by subdivision (b).

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Memo. No. 64(1962)

EXHIBIT I

EXTRACT

from

SECOND REPORT OF

STATE BAR COMMITTEE ON SOVEREIGN IMMUNITY

(Meeting of September 20, 1962)

PART 1. DEFINITIONS (page 63 of draft)

810.2. The definition of "employee" should be expanded to include the action of a board or group acting as a unit, as there may well be occasions where claimed tortious action is that not of any single officer or employee but of a board, council, commission or group acting as a unit.

810.6. The term "regulation" in administrative law has come to have a restricted and well-defined meaning. Thus, for example, a regulation to become effective must generally be published, as opposed to other forms of directives and written instructions for the governance of employees. It is therefore suggested that there be added after the word "regulation" the following: "or other provision having similar effect".

It is also recommended that it be made clear that the definition of the term "enactment" includes the new proposed Division 3.6 to the Government Code. As revised the definition would read:

> "'Enactment' means a constitutional provision, statute, charter provision, ordinance or regulation or other provision having similar effect, including this Division 3.6."

810.8. The Committee was uncertain what was meant by the term "estate" in the expression "or any other injury that a person may suffer to his

person, character, feelings or estate". Does the inclusion of the word "estate" add anything to "damage to or loss of property"?

810.8. The Committee recommends the deletion of the concluding phrase "of such nature that it would be actionable if negligently or wrongfully inflicted by a private person". It was not considered that the phrase added anything to the definition, and there are a number of potential tortious activities that may be embarked upon by a public entity or employee for which a private person would not be liable because they are activities in which private citizens, as opposed to governmental bodies, do not engage; e.g. confinement and jailing of prisoners, maintenance of public highways, etc.

811. The definition of "public entity" which includes "local public entity" now contained in 811.4 should normally precede the definition of "local public entity" in 811.

In order that there be no question about the inclusion of San Francisco, "local public entity" should be defined as including "any County or City, City and County and any District, etc.".

In the fourth line it is suggested that the word "other" be inserted before "agency".

ARTICLE 1 - LIABILITY OF PUBLIC ENTITIES

The Committee noted that the policy approach adopted by the Law Revision Commission is that of reinstating defense of sovereign immunity, except as otherwise provided in Division 3.6 or by other enactment. This so-called closed-end approach (as it was characterized in the hearings before the Senate Judiciary Committee) seems preferable from the point

of view of legislative draftsmanship. However, it should be noted that in the immediately succeeding section, 815.2, the public entity is made vicariously liable for the delicts of its employees acting within the scope of their employment. As a public entity can act only through its agents and employees, this is tantamount to an "open-end approach" so far as concerns entity liability for acts of its employees. The Committee has no quarrel with broad imposition of vicarious liability, but merely calls the inconsistency of the two drafting philosophies to the attention of the Commission. If the closed-end approach were to be adopted in both instances, it would be necessary to add under Article 2 a provision to the general effect that

> "Except as otherwise provided by any enactment, a public employee is not liable for injury proximately caused by his negligent or wrongful act or omission within the scope of his employment."

The foregoing would, of course, broaden the area of immunity, because it would preclude the recovery against public employees where, under case law, that has been permitted where the employing entity has been held not liable by reason of sovereign immunity.

815. The definition of "injury", which includes damage to or loss of property, might result in this section being construed as applicable to breach of contract as well as tort liability. This possibility could be obviated by changing the title of Part 2 to read: "TORT LIABILITY OF PUBLIC ENTITIES AND PUBLIC OFFICERS AND EMPLOYEES."

As the draft statute addresses itself to monetary recovery for tort, it should be made clear that this section is not also addressed to non-

monetary remedies, such as injunction, mandamus, etc. This could be ensured by having the section read in part:

"* * * a public entity is not liable in damages for injury arising, etc."

815.2. The phrase "if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative" seems to the Committee to be somewhat cumbersome, and it is suggested that the following be substituted therefor:

"if such employee or his personal representative would be liable therefor".

815.6. At first blush, this section appeared to be directly in conflict with Section 816.8. However, reference to the Commission's comments on pages 11 and 12 indicate that the section is addressed to the failure to comply with enactments which establish minimum standards of safety and performance, and that Section 816.8 purports to exempt an entity from liability for failure to enforce any enactment designed to regulate the conduct of others (see page 14 of the Commission's comments). In the interests of clarity, therefore, it is recommended that an addition be made to 815.6 as follows:

"Where a public entity is under a (mandatory) duty imposed by an enactment that establishes minimum standards of safety and performance (is) designed to protect against the risk of a particular kind of injury * * *."

Similarly, it is recommended that there be added to 816.8 the following:

"Notwithstanding Section 815.6, a public entity is not liable for an injury caused by the failure to enforce any enactment that is for the governance of others than the public entity and its employees."

816. Reference to the "appointing power" of the public entity in this section seems inappropriate. For example, the appointing power, i.e. the hiring officer or board, may not be the same officer or board that has the power to discharge an employee or to decide upon his retention. Furthermore, the "appointing power" may not be the one having authority to "eliminate the risk" referred to in subparagraph (b). It is therefore suggested that the words "of the appointing power" in the third line of the section be deleted and that subsection (b) be revised to read:

"(b) Exercise due care to eliminate the risk of such injury after (the appointing power had) acquisition of knowledge or notice that the conduct, or the continued retention, of the employee in the position to which he was assigned created an unreasonable risk of such injury."

816.2. The Committee was of the opinion that imposing liability for failure of an entity to exercise due care in supervising an employee imposes an extremely broad area for potential litigation against a public entity. In short, in connection with almost any injury arising from tort it could be alleged (and frequently proven) that the injury would not have occurred had the employee been more carefully supervised. The purpose of the proposed legislation is not only to define areas of governmental liability or immunity, but to reduce, as far as may be practical, the prosecution of unmeritorious actions against governmental

bodies. 816.2 as drafted appears to the Committee to be an open invitation to litigation. Either the section should be eliminated or there should be added a provision comparable to the second sentence of 831.2 covering dangerous conditions of public property. Such addition might read somewhat as follows:

> "The exercise of due care of the public entity in supervising its employees shall be determined by taking into consideration the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury arising out of the absence of adequate supervision against the practicability and cost of protecting against the risk of such injury by additional or more complete supervision."

816.4. The concluding phrase of this section "out of personal animosity, ill will or corruption" should be compared with the Commission's comments on page 13, where reference is made to the responsible public officer acting "with actual malice, actual fraud or corruption". Compare this with the phrase in 825.6 (a) and (b), where the expression used is "actual fraud, corruption or actual malice". 821.6 uses the expression "even if he acts maliciously and "without probable cause". The Committee calls attention to this varying phraseology, in the interests of achieving consistency of expression throughout the proposed statute.

817.2. The Committee is of the view that the duty to comply with minimum standards, as required by Section 815.6, should be an exception and not eliminated from the section. It recommends that the section be revised to read in part:

> "Except as otherwise provided in Chapter 2 (commencing with Section 830), (notwithstanding) and except as provided in Section 815.6, * * *."

ARTICLE 2 - LIABILITY OF PUBLIC OFFICERS AND EMPLOYEES

The Committee discussed, but makes no recommendation upon, the possibility of eliminating by statute causes of action against public employees for tort liability when acting within the scope of their employment. (cf. the abolition of causes of action for breach of promise to marry, and note that any such statutory abolition could affect only causes of action arising after the effective date of the enactment.) If public entities are to be made generally liable, with limited statutory exceptions, for tortious injuries, the question arises whether any good purpose is served by permitting the joinder of public employees as defendants, and certainly the drafting problems would be greatly reduced by eliminating causes of action in tort against public employees.

Upon the assumption that the Commission will retain Article 2, however, it is to be noted that every section in the Article is an exemption from liability. It seems highly desirable that there should be an affirmative statutory declaration somewhat as follows:

> "Except as herein provided and except as otherwise provided by statute, a public employee (and pursuant to Section 815.2, a public entity) is liable for injury proximately caused by his negligent or wrongful act or omission within the scope of his employment."

The word "statute" is purposely employed in lieu of "enactment", because "enactment" embraces municipal ordinances, and California cities would promptly exonerate their employees from tort liability by the enactment of appropriate municipal ordinances.

Without such a general statutory imposition of liability, the tort liability of public employees would continue to be governed by decisional precedent, many of which are conflicting and confusing, rather than statutory certainty.

820.2. As in the case of 816.8, there should be added to this section the following:

"that is for the governance of others than the public entity and its employees".

Without the addition, the public employee could justify his failure to perform any duty that might be required of him by law. The use of the words "inapplicable for any reason" in this section appear to the Committee to be unduly broad. Thus, for example, a public employee could excuse himself from any false arrest liability by pleading that he in good faith thought he was acting within the provisions of Penal Code Section 836. On the other hand, if a public employee in good faith misinterprets a statute or ordinance and acts upon it, a subsequent judicial determination that it was inapplicable should not result in the imposition of liability on the employee. In short, "inapplicable" should be confined to erroneous but good faith misinterpretations of an enactment and not to its application to any particular set of facts. It is suggested that the section be confined to enactments subsequently held to be unconstitutional or invalid, and that if necessary a separate sentence be added exonerating an employee from liability where he has erroneously but in good faith misinterpreted an enactment.

821. For the reasons expressed in 820.2, the same addition should be made to this section.

821.6. The Committee was of the view that a public employee should not be exonerated from liability where he is proven to have acted maliciously, and accordingly recommends that the words "maliciously and" be deleted from the third line of the section.

ARTICLE 3 - INDEMNIFICATION OF PUBLIC OFFICERS AND EMPLOYEES

825.6 (b). This section permits the public entity to recover the amount of any claim or judgment paid by it from the employee, unless the employee sustains the burden of proving that the act or omission upon which the claim or judgment is based occurred within the scope of his employment. In short, the section imposes the same affirmative burden on the employee as in 825.2 (b), which provides for recovery by an employee from the public entity of the amount of any claim or judgment paid by him. It is believed that the concluding phrase in Section 825.6 (b) should read:

> "the public entity may recover the amount of such payment from the employee (unless the employee) if it establishes that the act or omission upon which the claim or judgment is based occurred (within) outside the scope of his employment for the public entity (and) or if the public entity (does not) establishes that the employee acted or failed to act because of actual fraud, corruption or actual malice."

CONCLUSION

Time did not permit the Committee to consider and comment upon Chapter 3, police and correctional activities, Chapter 5, fire protection, or Chapter 6, medical, hospital and public health activities. These will

be considered by both the Northern and Southern Sections of the Committee in the near future, and when the comments of the two Sections have been correlated a report thereon will be made to both the Board of Governors and the Law Revision Commission.

Other Chapters, notably Chapter 2, dangerous conditions of public property, Chapter 4, damage by mobs and riots, Chapter 21, tort liability under agreements between public entities, and Chapter 22, indemnity agreements, have heretofore been reported on.

Respectfully submitted,

C. H. B. Cox, Chairman
Frank C. Newman, Vice Chairman
Joseph W. Diehl
John U. Edwards
Knox Farrand
Robert J. Foley
S. B. Gill
Thomas E. Heffernan
James H. Krieger

Memo 64(1962)

EXHIBIT II

EXTRACTS FROM STATEMENTS PRESENTED TO THE

SENATE FACT FINDING COMMITTEE ON JUDICIARY

BEVERLY HILLS, SEPTEMBER 17 - 19, 1962

Los Angeles County Counsel:

GENERAL LIABILITY RECOMMENDATIONS OF

THE CALIFORNIA LAW REVISION COMMISSION

In its general provisions relating to liability the California Law Revision Commission has recommended that in certain cases local agencies be required to provide equipment, personnel or facilities as required by the regulations of state agencies or be subject to liability for failure to do so. Illustrations of this include the recommendation that county hospitals provide equipment, personnel and facilities as required by the State Department of Public Health and that county jails follow the regulations of the State Department of Corrections in these matters. We believe that it is basically unsound to give an outside agency power to make rules as far reaching as those contemplated by the Law Revision Commission recommendations. Matters such as the level of service to be given by government in a public facility, reflected in the personnel, equipment and facilities provided therein is a matter of government governing, and involves the highest order of discretion and we believe there should be no liability for failure to provide any certain level of equipment, personnel and facilities unless it could be shown that the level which was provided was so inadequate as to be fraudulent or an abuse of discretion.

Decisions as to the level of public services are policy decisions made by the governing bodies of the various local agencies, who must consider what funds are available and what the local needs are. This can be done more effectively by the governing body of each agency than by a state agency which does not have the familiarity with the financial condition and need for services in each local area.

In the event that the Legislature does not see fit to provide for a complete immunity in this matter, it is essential that local agencies be relieved of liability if they have used reasonable diligence to comply with the regulations of the state agencies, rather than to make them absolutely liable for failing to comply with these regulations.

Some illustrations of the problems that Los Angeles County would face in their hospital and jail services if there were a mandatory requirement to meet the standards of outside agencies for equipment, personnel and facilities are shown by our recent experience. This county

has never been able to recruit sufficient nurses, laboratory technicians, therapists and physicians in certain specialties at the County General Hospital to fill the available positions. Much of the advanced medical equipment used at the General Hospital is not available for immediate purchase on the open market but must be ordered well in advance of the date it will be needed. Insofar as the construction of facilities is concerned, the voters appear to be more and more reluctant to support bond issues for their construction. In case of a disaster, epidemic or other emergency in which hospitals would suddenly be faced with a tremendous case load, these agencies would have to make a choice of turning away persons in need of treatment or be absolutely liable if they did not have sufficient personnel, equipment or facilities to meet this sudden load.

In the case of the county jail, the sheriff is required by law to receive all prisoners committed to him by competent courts and has no control over the number which he must accept. Even if the county had adequate facilities for its current prisoner load, it might suddenly be subjected to a much greater number of prisoners without being able to do anything to prevent this sudden increase as happened when the Legislature rewrote Penal Code Section 647 resulting in all of the drunks who were formerly kept in city jails being committed to the county jail and by the action of the California Supreme Court in the Carol Lane case which resulted in having the prostitutes transferred from city to county jails.

To require public agencies to constantly be prepared to deal with the maximum possible number of patients or prisoners would result in continuously idle equipment, personnel and facilities, all at the expense of the public.

Some of the other recommendations of the Law Revision Commission include a recommendation that no public agency be liable for punitive or exemplary damages. We support this recommendation since there seems to be no good reason to punish the taxpayers for the acts of an employee over whom they have no control. The Law Revision Commission also proposes to immunize public agencies and public officers from the results of their legislative and judicial acts. We strongly support this for the same reasons that we have given for the necessity of discretionary immunity, but believe that these provisions should be expanded to cover quasi-judicial and quasi-legislative acts.

We also support the Commission's recommendations to the effect that no public employee be liable for enforcement of any law, ordinance or other regulation which may be held unconstitutional or invalid for any reason or be liable for any act or omission while exercising reasonable care in the execution of any law.

In this enumeration of our comments on the general liability provisions recommended by the Law Revision Commission we have not attempted to comment on each or all of their recommendations but will have comments at a later time as their overall plan develops.

League of California Cities Committee on Governmental Immunity:

Other matters discussed by the Committee and on which there was agreement concerned themselves with the liability for the acts of officers and employees. We believe and we urge that public entities should be immune for the discretionary acts of their officers and employees. You will recall that the Lipman case, decided the same day as the Muskopf case, implies at least that public entities are liable for the discretionary acts of their officers and employees. The Committee was of the view that whenever a public official makes an adjudication or a legislative or quasi-judicial determination, he should not be liable for the determination, and the public entity should not incur any liability.

The position was adopted by the Committee that if any liability is imposed on a public entity for intentional torts of its employees, such liability should be uniform as to all public entities and cover only special damages incurred by the plaintiff. This latter may seem to be a departure from established precedent on this question of damages. However, I call your attention to the libel laws as they affect newspapers. In such an instance, if a newspaper publishes a retraction, the newspaper is liable only for special damages, that is, actual out-of-pocket expenses. The Committee feels that where there is an intentional tort by one of an entity's officers or employees, it should not be liable, but if liability is to be imposed, then the maximum liability of the public entity should be the special damages, that is, out-of-pocket expenses actually incurred by the plaintiff.

The Committee further went on record that police officers, other public officials, and public entities should not be liable when acting in good faith under an un-Constitutional statute, ordinance, law, or other regulation. This broadens the present law which applies only to un-Constitutional statutes. The Committee feels that this should be enlarged to include ordinances and regulations.

State Department of Public Works:

1. Tentative Recommendations of Law Revision Commission Relating to Tort Liability of Public Entities, Officers and Employees

The subject of sovereign immunity is an exceedingly broad one. It seems to us that the most practical way to proceed in the preparation of a legislative program is to re-enact sovereign immunity and then specify the additional situations in which the immunity rule shall not apply. This is in accord with the report of the State Bar Committee on Sovereign Immunity to the Board of Governors of the State Bar. The consultant, in his study, has succinctly listed the objections to a blanket waiver of sovereign immunity and points out the logic of the selective waiver approach. By the selective approach, specific statutes can be tailored and fitted in to the existing statutory framework. We feel that this approach to the problem is desirable and is compatible with past legislative action in this field, which has been a selective waiver of sovereign immunity.

Undoubtedly many governmental agencies, and probably most of the smaller ones, will desire to obtain insurance to protect themselves from liability. From our experience with insurance companies in the tort field, we feel sure that only by the selective waiver approach can we expect that insurance coverage at a reasonable premium would be available. Insurance company underwriters, of course, have to attempt to evaluate risks and this is usually done by analyzing specific fields of liability. We doubt that, as a practical matter, insurance companies would insure against undefined and unlimited risks.

The Commission has, in a fashion, attempted to follow this procedure, which is in accordance with the recommendation to the Commission by its consultant. However, in the proposed draft of the statute they have effectively made the public entities liable for virtually all torts by a provision which makes the entity liable for all negligent or wrongful acts of the officers and employees. Since public employees have always been liable for their own tortious acts, the inclusion of the provision nullifies the basic selective waiver approach.

In making this suggestion of a selective waiver of immunity, we feel we should make it clear to this Committee that there are fields in which the State was formerly immune from suit, but in which, with appropriate and workable limitations, we would recommend the assumption of tort liability and the waiver of immunity.

The State, prior to the Muskopf decision, could not be sued for a dangerous or defective condition of state highways, whereas certain local agencies were liable under the Public Liability Act. This is one area in which we believe the State, with reasonable safeguards, should assume liability.

Memo. 64(1462) EXHIBIT III

HAROLD W. KENNEDY
COUNTY COUNSEL

MADISON 5-3611

OFFICE OF THE COUNTY COUNSEL

648 HALL OF ADMINISTRATION
LOS ANGELES 12, CALIFORNIA

October 1, 1962

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Re: Comments on Tentative Recommendations

Gentlemen:

We have carefully examined the tentative recommendations of your Commission on the subjects of liability of public agencies for ownership and operation of motor vehicles and for tort liability of public entities and public officers and employees and submit the following comments:

LIABILITY OF PUBLIC ENTITIES FOR OWNERSHIP AND OPERATION OF MOTOR VEHICLES.

We have no comment to make on this subject.

LIABILITY OF PUBLIC ENTITIES AND PUBLIC OFFICERS AND EMPLOYEES.

Sections 810.2 and 810.4.

We do not believe that the terms "Agent" and "Agency" should be included within the definition of "Employee" and "Employment". These terms appear to be unduly burdensome to public agencies since it would extend their liability to a very indefinite class of persons apparently not regularly employed by these agencies. This may well create a problem when public agencies are seeking to insure themselves against liability

since insurance companies are likely to substantially raise their rates to cover this very indefinite liability. These definitions could well lead to considerable litigation in cases of damage caused by contractors on public works where a plaintiff would seek to bring such contractors under the definition of an employee.

Of course we strongly support the provisions of Section 815 and 815.4 providing the so called "closed end" liability and discretionary immunity for public agencies. These are the two most important matters to be provided for in the entire statute so far as we are concerned.

Section 815.8 making public agencies liable for injuries caused by the maintenance of a nuisance should be modified to provide for cases where there is no way to control the conditions causing the nuisance. As an illustration, we are thinking of the recent Supreme Court decision holding the operator of an airport liable for damage caused by the noise of planes taking off and landing. Under this proposed section a court might say that the operation of a public airport such as the Los Angeles Municipal Airport made the City liable for damage caused by the noise of planes arriving and departing.

Section 816.2,making a public entity liable for an injury caused by an employee if the injury was caused by the failure of the agency to use due care in supervising, appears to be vague and subject to abuse. It is difficult to see how the agency itself could supervise or fail to supervise an employee. Under the provisions of Section 815.2, the agency is liable for the negligent or wrongful act or omission of an employee, so if the employee was guilty of a wrongful or negligent act or omission, the agency would be liable under Section 815.2 whether or not the wrongful or negligent act was caused by a failure of supervision.

We believe that this section could be the subject of considerable litigation wherein plaintiffs would attempt to proceed on the theory of improper supervision even where they did not have a case against the employee.

Section 816.4, making public agencies liable for the acts of employees instituting or prosecuting judicial or administrative proceedings without cause and out of personal animosity, is likely to be made the subject of abuse and to give rise to costly litigation. Even though your Commission has specifically provided that the employee himself will be immune from liability, the fact that the agency may be sued, and the employee will be the principal witness in the case and may be subjected to scrutiny or investigation by his superiors, may well be sufficient to deter public officers from effective administration of the law. The Supreme Court of California in White vs. Towers 37 Cal. 2d 727 sets forth at length the many reasons why public prosecutors and law enforcement officers should be absolutely immune from any sort of harassment in the performance of their duties. There are few matters which will be as much the subject of vindictive and groundless law suits as the matter of instituting and prosecuting judicial actions. If the door is opened to the liability of the agency for the acts of its employees in this area, we can be certain that a vast number of lawsuits will be filed harassing public employees with groundless charges of bad faith, ill will, animosity and corruption in hopes of getting a judgment against the governmental body employing them.

This office has not as yet decided what position to take relating to the proposed provisions of indemnification of public officers and employees by the public agency where the agency conducts the defense of the employee against a claim or action arising out of his duties.

These provisions are contained in in 825 et seq. They provide a substantial departure from the basic principle that an employee owes to his employer the duty of care in performing his duties. We understand the problem of the conflict of interest between the agency and the employee that your Commission is attempting to cope with in drafting these provisions, but we have not yet completed our study as to the possible result of their enactment.

In many cases physicians at the County Hospital carry malpractice insurance and county employees who use their own cars in the performance of their duties and who are reimbursed by the county on a mileage basis are required to carry their own insurance. In the event of an action against such physicians or driver employees, we feel that the insurance companies who carry the malpractice and automobile liability insurance should be primarily liable. In the past this county has looked to such carriers to satisfy any judgments taken against their insured up to the amount of the policy limits.

We feel that no public agency should be obligated to pay a judgment for an employee who has been held liable for damages caused by his intentional wrongful act. The present provisions proposed by your Commission require the agency to show that the employee was guilty of actual fraud, corruption or malice before it can recover from the employee for any judgment it may have paid. This is a long step from the usual right of subrogation but if the step is to be made at all, it should at least provide that the agency be able to recover from the employee in cases of an intentional tort even if the agency makes no showing of actual fraud, corruption or malice.

We have in the past commented at some length upon your Commission's proposals relating to the dangerous conditions of public property. The only additional suggestion which we have at this time, and which we did not include in our recent letter to you relating to areas of discretionary immunity for the dangerous conditions of public property, is the suggestion that there should be a discretionary immunity for public officers for decisions whether or not to put up traffic signs. While the sign must be reasonably maintained when it has been put up, there should be no liability if the officers determine not to put up any sign at all.

Section 840.4 which is included in Chapter 3, relating to police and correctional activities, provides that a public employee be liable for injury

caused by his intentional and unjustifiable interference with any right of a jail inmate to obtain judicial determination or review of the legality of his confinement. Our experience in recent years has shown that this is one of the most abused areas of the law. We are constantly receiving groundless complaints from jail inmates making all sorts of claims of brutality, deprivation of rights, refusal of jailers to transmit documents to court and like charges. For two recent examples of this sort of situation, see In Re Riddle 57 A.C. 897 and In Re Jones 57 A.C. 908 in which inmates of the State Prison made charges of cruelty and brutality against prison officials, which charges were found to be completely groundless by the Referee appointed by the Supreme Court to make findings of fact.

If jailers are to be made liable as provided by Section 840.4, we can be certain that jail inmates who do not have much else to occupy their time will be constantly bombarding the courts with groundless petitions and filing constant claims and lawsuits against jailers, particularly since there is a possibility of getting judgment against them for money which would have to be paid by the employing agency. We believe that the Federal Civil Rights Act already gives these inmates sufficient protection and that proposed Section 840.4 should be deleted.

We believe a provision should be added to Chapter 3 relating to police and correctional activities that a public employee be not liable for failure to make an arrest if the person whom the officer might have arrested may later injure a plaintiff. In this connection, please see Tomlinson vs. Pierce 178 Cal. App. 2d 112 where an officer did not arrest a person who was intoxicated and who later operated a motor vehicle in such a condition and injured the plaintiff.

Penal Code Section 836 sets forth the conditions under which a public officer may make an arrest and it would be unfair to such an officer to hold him civilly liable for failure to make an arrest, particularly where he might not have been entitled under Penal Code Section 836 to make the arrest.

We understand from your Commission's action at its September meeting that you do not intend to proceed with your former recommendations relating to damage caused by mobs and riots. We are not clear, however, as to whether your Commission has decided to recommend repeal of the present statute on this subject or to allow it to remain as the existing law.

We well appreciate the problem that your Commission has had in attempting to draft a statute on this subject since we have given this matter considerable thought ourselves and have concluded that a proper definition of "mob" and "riot" is extremely hard to formulate. We are in agreement with the sentiments expressed at your September meeting that neither of these definitions as formerly proposed really spell out the situation of a general breakdown of law and order which should be the only rational basis for assessing damage.

We also concur with the comments of the State Bar Committee that extending liability for mob and riot damage to personal injury and wrongful death could unduly burden public agencies since it is in these areas rather than in the area of property damage where large judgments might be expected.

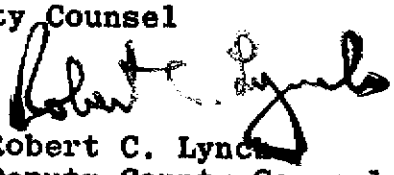
We have in the past commented on the recommendations of your Commission on the subject of medical, hospital and public health activities.

With respect to Section 855.2 making public employees liable for injuries caused by intentional and wrongful interference with the right of public hospital inmates to obtain judicial review of the legality of their confinement, please see our comments relating to jail inmates and proposed Section 840.4. We have not had the problem with hospital inmates upon this subject that we have had with jail inmates.

We have already commented on the Commission's proposals relating to tort liability under agreements between public entities but have an additional comment to make. In cases where a new agency is formed by existing public agencies and the new agency is given powers and discretion, we believe that the liability for damages should be with the new agency and that the liability should follow the power and discretion to act and should not remain with the creating agencies who cannot control the acts of the new agency.

Respectfully submitted,

HAROLD W. KENNEDY
County Counsel

by 
Robert C. Lynch
Deputy County Counsel

RCL:hv

MS-126

FOR INTER-OFFICE USE

The FUND Insurance Companies

FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

C Memo. 64 (1962) EXHIBIT III

Date October 2, 1962

To: Mr. Sifford

From: Mr. Comstock

Replying to: yours of September 26, 1962

Subject: Proposed Legislation - State of California

In considering any statute dealing with governmental immunity or liability, defense of claims or suits against governmental bodies or the purchase of insurance for the protection of such entities, although it may be logical to extend the application of such a statute to employees of the governmental entity involved, it is hardly consistent with the theory of such legislation to invoke its privileges and benefits for independent contractors whose connection with the concept of government is slender at best. This is the unfortunate result when the word "agent" is included in the definition of employee in these types of statutes.

In Title 9 of the Civil Code dealing with agency in general, Section 2295 defines an agent as one who represents another, called the principal, in dealings with third persons. This is a very broad definition and can apply to any type of entity for any period of time. An agency may be created for a specific purpose of short duration. Whether or not an agency exists is a question of fact and can only be determined in the light of the circumstances surrounding the particular activity at the time of the accident. With the broad definition in the code, the likelihood that an independent contractor performing a particular service at the direction of the governmental entity will be found, for the purposes of that activity, to be an agent of the entity is quite extensive. There are numerous citations in the Civil Code dealing with many different concepts of agency - the principal's responsibility for an agent's negligence or omission is of course well known. Where the Civil Code establishes these precepts of liability, it is a statutory translation of common law principles to the same extent. It is clear in reading these annotations that an organization that may be an independent contractor for the general prosecution of a specific activity may still for a particular phase become an agent if the right of control and direction as to details of the specific function are retained or exercised by the principal. Accordingly, although a municipality may engage an independent contractor to perform a certain construction or service operation, at any time in the course of such operation it seems to me it is possible for one particular purpose that an agency be created, for example, a direction by a representative of the city to an employee of the independent contractor to perform a certain errand not necessarily in the specific pursuit of the job operations, but in connection therewith in some manner. For this limited purpose, an agency may well have been created.

The inclusion of the word "agent" in the definition of employee therefore will extend the benefits and privileges of statutes under consideration to entities that may become agents of the governmental body for limited purposes and for merely a short period of time. It would seem to me that in any claim against such an independent contractor it would be to their advantage to immediately attempt to establish the fact of agency. This would open up litigation to a great extent on this point alone before a final determination could be made as to the disposition of a legitimate claim or suit against the independent contractor.

Immunity of a governmental entity is an expression of sovereignty. There seems to be no logical reason to grant such status to an independent contractor whose connection with the concept of sovereignty is extremely remote and purely temporal. There is no lasting relationship or logical connection such as exists in the case of a true employee of the governmental body. An independent contractor who performs services for a public body is a separate independent businessman and has no real connection with the concept of government at all. Yet to offer him the possibility of immunity would place a premium upon the identity of his contracting party, not on the nature of the work he performs. In the true concept of immunity, it is the nature of the work as an expression of sovereignty that determines the question, not the identity of the person for whom the work is being done. The same independent contractor performing the exact same services for a third party will not have the benefit of immunity in that particular case.

At one time when the then Section 1029 of the education code was amended, the requirement of mandatory insurance on the school district's policy included agents of the school district. It was soon evident to the legislature that the broad application of the word agent produced inequities of the type above discussed and in a subsequent amendment, the legislature corrected this illogical application of the statute by deleting the word "agent".

There is still a further thought for consideration. To require a governmental body to include the type of agent now under discussion in its insurance policies or to provide defense of claims or suits against such agents necessitates an expenditure of public funds for entities which are only connected with the governmental body in this slight and tenuous manner. It is one thing for a statute to authorize or require the expenditure of public funds for the purchase of insurance which will protect a truly governmental entity, again an expression of the act of governing. It is quite another to use these same public funds for the benefit of persons, firms or corporations whose everyday business activity is not an act of governing but who for a particular purpose for a limited time may fall within the scope of a statute that provides an unexpected windfall for them. A question comes to mind as to whether the expenditure of public funds for these purposes is justifiable. Is it a proper expenditure of public monies for the benefit of particular independent persons, firms or corporations whose connection with the public entity is slight and temporary. It is conceivable that such an expenditure is illegal.

From an insurance point of view, there are additional problems. In any policy issued by an insurance company to a public body and to the employees of such body the identity of the insured is known and a reasonably accurate estimate of the cost of such protection may be made. This, then, is the premium charged by the insurance company for the protection it offers. With the absolutely undefinable and unidentifiable type of agent contemplated by such a statute as is being discussed, the identity of the insured is in part unknown and a reasonably accurate estimate of the possible exposure to the insurance company and the possible application of insurance for the benefit of unknown entities cannot be made. This can have no other alternative but a reflection in the premium that must be charged to take care of such contingencies. The result would naturally be a higher priced policy for the public entity involved. This is further testimony on the question of whether the governmental body may legally incur such obligations for the benefit of such third persons.

Also in the area of insurance arises the question of why the public entities insurance

policy should be exposed for the acts of independent contractors. The liability of the public entity will always be covered for if a true agency exists and the public entity is liable on the theory of agency, its liability will be covered by the policy it purchases. But why should such policy also protect an independent contractor? Without the benefit of such protection, the insurance company may find itself in the position of paying a claim against the public entity but with right of subrogation against the independent contractor - third party who is the real party at fault. This is the very nature of subrogation. If the independent contractor is also insured under the public entities policy, subrogation would of course be impossible and the true party at fault winds up insured under what I believe to be the wrong policy. Since losses ultimately affect premiums paid, the net adverse effect on the public entities policy can only have future adverse affects on the premiums it must pay.

For all of these reasons, the word "agent" should be eliminated completely from the type of statute under consideration. Any attempt at modification or definition would in my opinion create only further problems of interpretation and litigation would ensue to determine the application on non-application of the statute. The word "employee" by itself serves all the necessary purposes - nothing is gained at all by inclusion of "agent".

HMS:wn