Memorandum No. 65 (1962)

Subject: Study No. 52(L) - Sovereign Immunity (Tort Liability Under Agreements Between Public Entities)

Attached to this memorandum are two exhibits. Exhibit I (on pink paper) contains the comments of the State Bar Committee. Exhibit II contains the comments of the Los Angeles County Counsel. Refer also to the letter of the Los Angeles County Cousel attached as Exhibit III to Memorandum No. 64: the last page of that letter contains further comments on this subject.

The portion of the statute involved is Chapter 21 of Part 2 beginning with Section 895. The recommendation relating to this subject should also be considered. It appears at page 84.

Section 895.2. The County Counsel of Los Angeles questions the desirability of joint and several liability where Lakewood plan agreements are in effect. He recommends that the agency receiving the service be fully liable. He also questions the desirability of such liability where an independent entity is created that the creating entities cannot control.

One problem the Commission's solution avoids and the above suggestion would create is the problem of who is the responsible employer at the particular time. The Commission's statute makes it unnecessary to determine, and the parties to the agreement may determine the ultimate incidence of

liability by the terms of the agreement. Then, too, the Commission's recommendation prevents entities from creating an underfinanced entity to shield themselves from potential liability.

Section 895.6. The State Bar expresses concern with the equal division of the liability when the relative assessed valuations of the entities are grossly disproportionate. The Commission considered this subject in drafting the legislation and concluded at that time that equal division is fairer than proportionate division based on assessed valuation. Under proportionate division, a particular city's potential liability under a Lakewood plan type of agreement would always be small and the great bulk of the liability would fall on the general county taxpayers.

The State Bar suggests a different wording for Section 895.6. See Exhibit I, page 2. The problem with the cross-reference to the Code of Civil Procedure that is suggested is that the contribution procedure contained in the Code of Civil Procedure is very defective. Contribution cannot be obtained under its terms except from other joint judgment tortfeasors. That is, the plaintiff must join the parties as defendants and obtain judgments against both before the right of contribution exists. Under some circumstances, the defendant might be able to compel joinder of another tortfeasor as a codefendant so that the judgment would be against both tortfeasors, but there is no right

to such joinder.

Section 895.8. Both the County Counsel and State Bar Committee are concerned with making the statute applicable to agreements entered into prior to the effective date of the statute. The State Bar sees a constitutional problem involving the impairment of contracts. The County Counsel sees a practical problem in that existing agreements have not contemplated this change in the law; hence, adjustments in the agreements will have to be made which cannot be accomplished before the end of the fiscal year on June 30, 1964.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

EXTRACT

from

SECOND REPORT OF

STATE BAR COMMITTEE ON SOVEREIGN IMMUNITY

(Meeting of September 20, 1962)

1. TORT LIABILITY UNDER AGREEMENT BETWEEN PUBLIC ENTITIES

The Section had two questions and one recommendation with respect to this proposed draft statute. Under Section 993.4 it is noted that each participating public entity is to contribute pro rata toward any judgment for damages that may be granted against the joint venture. It is also noted that this is the identical criterion for contribution used in Code of Civil Procedure, Section 876. However, where a very minor local public entity enters into an agreement, for example, with the County of Los Angeles for it to furnish fire and police protection, should any consequent tort judgment be divided equally between the entities, or would it be more equitable and practical to provide for contribution on the basis of the relative assessed valuation of property within the boundaries of the respective entities?

Section 2 would make the Act applicable to any agreement entered into before as well as after its effective date. The Section questions whether this may raise a constitutional question of impairment of obligation of contract.

It is noted that Section 993.4 is adapted from the Code of Civil Procedure, Sections 875 through 880. In the interests of consistency and brevity of draftsmanship consideration might be given to rewriting Section 993.4 as follows:

993.4 Unless the public entities that are parties to an agreement otherwise provide in the agreement, if a public entity is held liable upon any judgment for damages caused by a neglignnt or wrongful act or omission occurring in the performance of the agreement and pays in excess of its pro rata share in satisfaction of such judgment, contribution from other parties to the agreement may be had in accordance with Title 11, Part 2, of the Code of Civil Procedure commencing with Section 875.

Memo 65 (1962) Exhibit II

HAROLD W. KENNEDY
COUNTY COUNSEL

MADISON 5-3511

OFFICE OF THE COUNTY COUNSEL

648 HALL OF ADMINISTRATION
LOS ANGELES 12, CALIFORNIA

August 28, 1962

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

Gentlemen:

We have carefully reviewed the tentative recommendations of your Commission dated August 1, 1962 relating to the funding of judgments against local public entities with bonds and tort liability under agreements between public entities and have the following comments to offer:

FUNDING JUDGMENTS AGAINST LOCAL PUBLIC ENTITIES WITH BONDS

We agree with the statement of the commission that the expansion of tort liability of governmental agencies requires that these agencies have clear statutory authority to manage the fiscal liability imposed upon them.

There is a particular need in the cases of small public agencies with a limited tax base or limited tax levying capacity to have some means to satisfy large judgments which otherwise might bankrupt them. The amount of damage suffered in a particular incident will be the same whether the defendant is a large public agency with ample means to pay the amount of the judgment or whether it is a small agency to whom such a judgment would be a catastrophe.

Insofar as the specific recommendations proposed by the Commission, we have no specific comments to make.

TORT LIABILITY UNDER AGREEMENTS

BETWEEN PUBLIC ENTITIES

The provisions for pro-rata sharing of liability between public agencies appear to be appropriate in the case of a true joint powers contract but may cause problems where a Lakewood Plan type of agreement is used under which county officers and employees perform some or all of the functions of city officers. Under this latter type of agreement the cities have total fiscal control of the work performed. Such control includes the mode of performing the services, the level of services to be provided, repairs to be made to property or to be left undone and any other matters requiring the expenditure of city funds. Such a degree of control by the city may well leave the county officers who are performing duties for the city open to liability without means to avoid it, as for example where a city refuses to finance needed repairs to property used by these officers or for which these officers are responsible or where the city refuses to provide adequate personnel or equipment to carry out the duties imposed on these officers. We believe that specific provision should be made for these types of agreements providing that, absent an agreement to the contrary, the agency receiving the services should be liable for the full amount of the damages.

Proposed Section 2 makes the Commission's proposed legislation applicable to any agreement between public entities whether entered into before or after the effective date of the legislation.

Los Angeles County has at present some 1300 contracts outstanding for services to other public agencies. These contracts contain provisions for termination providing that they can only be terminated by giving notice on January 1st, effective July 1st. These early notice provisions are inserted to allow the agency receiving the services to recruit personnel and fund these services for the next fiscal year in the event of termination of county services. We understand that some of these contracts do not contain indemnity provisions. If this proposed legislation should become law, it would take effect in the middle of September of 1963 thus leaving this County with a ten-month period of liability before these contracts could be terminated. While we intend to take action as of January 1st, 1963 to insert indemnity provisions into these contracts or take other appropriate action, other public agencies may have similar problems and we would recommend that Section 2 be amended to have an effective date of July 1, 1964 which would coincide with the commencement of the fiscal year of most public agencies.

Very truly yours,

HAROLD W. KENNEDY
County Counsel

by Robert C. Lynch
Robert C. Lynch
Deputy County Counsel

RCL:hv