5/4/60

SECOND SUPPLEMENT TO MEMORANDUM NO. 37 (1960)

Subject: Study No. 37(L) - Claims Against Public Officers and Employees.

Attached is a reply by Professor Van Alstyne to the letter of Mr. Stanton contained in the First Supplement to Memorandum No. 37 (1960).

Respectfully submitted,

John H. DeMoully
Executive Secretary

5419 Taney Avenue
Alexandria, Virginia
May 1, 1960

Mr. Thomas E. Stanton, Jr.
c/o California Law Revision Commission
Stanford, California

Re: Claims Against Public Officers and Employees

Dear Tom:

Your letter of April 12 was forwarded to me here in Alexandria, and I only received it after the April meeting of the Commission. Hence, I was unable to reply in time to be of any help at that meeting. I hope that the present letter may be of some value if the matter there raised is further pursued.

As I understand it, your memorandum dated 4/6/60 urges, as its primary point, that the repeal of the present personnel claims provisions will leave public personnel exposed to suit after claims against the employing entity are barred, thereby exposing such personnel to additional risks of personal liability against which the personnel claims provisions now afford some procedural protection. This result, you suggest, is out of harmony with modern conditions of public employment (under which public personnel often are placed in a position with greater risks of creating injury, or of being responsible for injury, to others than is true of persons not in public employment) and with the basic policy of protecting such employees against undue litigation as reflected in the claims statutes.

I believe that your comments have focussed upon a very significant problem underlying the entire pattern of claims statutes. The heart of that problem, as I view the matter, however, appears to relate to the broader question of substantive liability and immunity of public entities and public

personnel. Your recommendation that provision be made requiring public entities to save their employees harmless against loss as a result of any claim against such employees (not otherwise barred for procedural reasons) would seem to go very far toward establishing, in practical effect, an abolition of the doctrine of sovereign immunity. I see little difference between a statute making public entities primarily liable, and one requiring them to save their employees harmless from such liability, so far as the net result is concerned. The money ultimately comes from the same place.

The situation of the public employee who may be subject to suit after the claim against the entity is barred, although not an enviable one, is after all not unlike that of a public employee today against whom a claim (and ensuing litigation) will lie even though the employing entity is wholly immune from liability under the sovereign immunity doctrine. The professional problems you perceive in your memorandum in the former case would seem to all be present in the latter also.

Finally, I think it is not inappropriate to recall that the Legislature has apparently never treated the employee claims statutes as devices to limit the substantive liability of public employees. Indeed, in my research I found no evidence that these provisions have ever been justified on that ground. In short, the propriety of personal liability where public officers and employees have engaged in tortious conduct or omissions has apparently been generally assumed, except in those relatively few instances in which protection has been given in some form (e.g. provision for "saving harmless," or for liability insurance at public expense). The personnel claims provisions have been deemed primarily a form of procedural device designed chiefly for the benefit of the employing entity, and only incidentally for the benefit

of the employee.

This is not to say, of course, that the claims provisions have not operated in fact as a significant protection against substantive liability. The report which I prepared seems to suggest that they have so operated. But, as your own memorandum impliedly concedes, where this has been the case, it usually has meant that the plaintiff (whose injuries may have been most serious and the result of grievous negligence or even intentional wrongdoing) has been left without a remedy. That is to say, the protection of such statutes normally has been meaningful only where the employing entity was not liable (either immune or with a good defense of non-compliance with a claims procedure).

Thus, if the foregoing observations do not entirely miss the point, I submit that the problem of extending further protection to public employees against unwarranted personal liability should await consideration of the overall problem of sovereign immunity. In my partially completed study of that subject for the Commission, I have already undertaken a complete survey of California statutes relating to employee liability - for I conceive that I cannot explore the problem of sovereign immunity without examining into the employee liability question. The two subjects are completely intertwined, of course, for most instances in which an injured person seeks to hold an entity liable are instances in which some officer or employee might equally well be held liable. The cause of action against the entity normally arises out of the acts or omissions of the latter.

The question of the employing entity's right of subrogation against its personnel, which was suggested in your letter, is also germane to the sovereign immunity study to a far greater degree than it is to the claims

procedures. Indeed, the very reason why (as you quite correctly point out) public entities will seldom seek to enforce such subrogation rights may help to explain why the repeal of the employee claims statutes may not necessarily give rise to the professional difficulties for public counsel which you envisage. My experience in the Los Angeles County Counsel's Office suggests that it is very much to the interest of public counsel to defend public personnel with vigor, and that considerations of expense of time and money are seldom such as to conflict with his duty to the employee-client. Indeed, to the extent that any such conflict might tend to be recognized at all (which I personally doubt), the legislature has resolved it by the statutory provision for counsel, thereby placing upon the attorney the duty of a full, vigorous and effective representation, irrespective of cost to the public treasury or to counsel's time and energy. Since most public counsel, in my experience, tend to regard the public officers and employees they represent as their "clients", and realize full well the importance in terms of morale and continued confidence of doing a lawyerlike job for them, the difficulties you suggest are in my opinion quite illusory.

In my opinion, therefore, it would be better to defer consideration of the very real problems which you have raised until such time as the Commission considers the broader issues of which they are a part - the issues of sovereign immunity and liability.

In the meantime, I think that the Commission's present tentative recommendation is a step in the right direction, and one which is consistent with previous legislative policy. In view of the broad powers vested in public agencies to provide insurance coverage, and the reinforcement to be given to the statutory duty to provide free defense in litigation, I believe

that public employees will not be unduly prejudiced in the interim period before a comprehensive program of recommendations are formulated relating to the problems of substantive liability.

To impose a broad-guage substantive liability on all entities now by means of a general "save-harmless" provision would, I believe, be unwise in the absence of a fuller study of all the ramifications involved. To retain a form of procedural protection against substantive liability in the form of the present personnel claims provisions would, I believe, be incongruous. To extend the protection of employee claims procedures to all public employees (thereby including many not presently covered) would, I believe, be an unnecessary expansion of a doctrine which has in the past tended to create grave injustices in the case of apparently deserving plaintiffs.

The more one delves into the problem of liability, and the procedures relating thereto, where public entities and employees are concerned, the more complex the issues seem to become. The key to the complexity, I suggest, relates to substantive issues more than procedural. There is some affirmative value in clearing up procedural issues first, before attempting to resolve the substantive ones.

Sincerely yours,

Arvo Van Alstyne