5/11/60

THIRD SUPPLEMENT TO MEMORANDUM NO. 37 (1960)

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

Attached is a Third Supplement to Memorandum No. 37 (1960).

Respectfully submitted,

John H. DeMoully
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

May 9, 1960

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear John:

I would like to have this letter serve as an additional supplement to Memorandum Number 37 (1960) on the subject of claims against public officers and employees.

Tom Stanton has posed some exceedingly difficult problems in his memorandum of April 6, 1960. Nevertheless, I think that the Commission's proposed recommendation is the best that can be made under the circumstances.

Tom is worried about the personal liability of a public employee (that is, the possibility of being required to pay a judgment out of his own pocket). As a practical matter, a private employee need have no worry about personal liability for acts committed in the performance of his employment. Action is almost invariably brought against the employer. If recovery is had from the employer, the employer never seeks to recover from the employee. If, in some rare case, only the employee is sued and judgment is had against the employee, insurance purchased by the employer usually exists and assures that the employee will not be forced to use his own funds to satisfy the judgment.

There are situations, nevertheless, in private employment where the employee can be, and sometimes is, forced to use his own funds to pay a judgment arising from an act committed in the course of his employment for another.

The private employer may not have any insurance and may be bankrupt. In that situation any judgment against the employee will be paid by the employee, if paid at all. And I suppose there are rare occasions when an employer will seek to recover from the employee that amount which the employer has been forced to pay to a third person under the doctrine of respondeat superior.

The public employee has always been exposed to a greater probability of personally paying for his misdeeds than a private employee. The reason is simply that under the doctrine of sovereign immunity the employer has no liability. Tom cites these two cases to illustrate that it is the employment which exposes the employee to the risk of liability: "A policeman is exposed to the risk of liability for the negligent use of firearms because his duties in public service require him to carry such firearms and to use them on occasion. A fireman is exposed to the risk of liability for negligence in putting out a fire because his duties in public service require him to put out fires." However, it should be remembered that the public employer is not now and never has been, so far as I know, liable for the policeman's negligent shooting of an innocent person or a fireman's negligent damage to property in putting out a fire. In each situation only the employee is legally liable.

All the Commission has said is that the injured person need not file a claim either with the employee or with the employer as a condition precedent to suit. I certainly cannot understand why the injured person should be required to file a claim with the employer in cases where the employer has no liability in the first instance. As far as filing a claim with the employee is concerned, I see no reason why the negligent public employee requires such notice any more than the negligent private employee.

Tom suggests legislation which would require "the entity to save the

employee harmless against loss as a result of such claim." This would in effect abolish the doctrine of sovereign immunity. I don't think it should be done in this manner. That is a separate problem which we should consider when we get the report of our consultant.

In the situation where the public employer is liable (sovereign immunity having been waived), our recommendation could result in a situation where suit against the employer would be barred for failing to file a claim, but there would still be time within which to sue the employee. Tom feels that it is unfair to leave only the employee liable for acts done in the course of his employment. I don't see that this is any worse than the situation where the fireman or the policeman alone is liable from the very beginning. Where the public employer does have some liability, it will be the rare case when an attorney will neglect to file a claim within the time prescribed because the advantage of having a governmental entity as the defendant is so much greater than when an individual alone is the defendant.

Tom recognizes that if suit against an employee were barred at the same time as suit against the employer, there may be injustices created by situations where the injured person does not know of the public employment of the tort-feasor. Tom would invoke a special rule for such cases preserving the cause of action. I think this would cause needless and endless litigation. Moreover, I think it is unfair to condition an injured person's recovery against a negligent wrongdoer on whether the wrongdoer is publicly or privately employed.

The inequity of the present law is illustrated by Bossert v. Stokes (1960), 179 A.C.A. 492. A county supervisor, driving his own car, injured the plaintiff. Within six months plaintiff filed a claim against the county, but this was too late. Plaintiff then sued the county and the supervisor's estate (the supervisor

having died in the accident). The county, of course, received judgment because of the failure of plaintiff to file a claim within 90 days. When plaintiff amended to omit allegations of the supervisor's employment so that recovery could be had against the estate of the supervisor for his personal negligence, the court refused to accept the amended complaint and entered judgment for the defendant.

In the ordinary situation, how would an injured party know whether a person driving his own personal car is then on business for some public employer? If Tom Stanton is driving his own car to a Law Revision Commission meeting, how would an injured person know that at that particular moment Tom was acting within the scope of his employment as a public officer? I think it is an unreasonable burden to place upon an injured person. Moreover, I cannot understand why it should make any difference whether Tom was going to a state meeting or not. If his personal negligence injured the plaintiff, he should be responsible to the plaintiff regardless of whether a public employer will or will not hold him harmless.

Tom says that the repeal of sections 801 and 803 of the Government Code will "increase rather than diminish the risk of personal liability of public officers and employees for acts or omissions within the scope of their employment." I do not agree. Their liability for their acts will not be affected. The law which we would repeal does not now render the public employee immune from liability, but merely requires the injured person to follow certain procedural steps in filing claims as a condition to enforcing the liability against a public employee. By removing the claim filing requirements, we prevent an injured person from being deprived of recovery for failure to follow a procedure which has no demonstrably useful purpose.

I do not mean to say that Tom has not raised some extremely serious questions and I certainly feel that the ultimate answer must be along the lines that he suggests, that is, that the employing public agency be financially responsible for damages caused by an employee in the course of his duties. I simply feel that the claims study is not the place to accomplish this drastic change in the policy of our law.

Sincerely yours,

S/Roy A. Gustafson

ROY A. GUSTAFSON

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