9/23/60

Second Supplement to Memorandum No. 80 (1960)

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

The attached letters relate to this study.

We have made no general distribution of this recommendation. However, we have, in response to specific requests, distributed copies of the recommendation to:

George W. Wakefield, Chief Assistant County Counsel, Los Angeles County

Robert Reed, Chief of Division, Department of Public Works

J. D. Strauss, Chief Attorney, Judicial Council

Joan D. Gross, Deputy Attorney General, Department of Justice, Los Angeles

Respectfully submitted,

John H. DeMoully
Executive Secretary

THE CALIFORNIA STATE EMPLOYEES' ASSOCIATION

1315 K Street

Sacramento 14, California

September 21, 1960

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

Gentlemen:

The tentative recommendations of the California Law Revision Commission relating to the presentation of claims against public officers and employees, dated August 1, 1960, has just come to our attention.

It is our understanding that the Commission will act on the recommendations at its meeting at Los Angeles on September 26, 1960 and will ask the State Bar Association of California to include the recommended legislative enactments in the Bar Association's official legislative program for 1961.

We wish to advise you that we oppose your recommendation which eliminates the necessity for the filing of a claim as a prerequisite to the commencement of an action against a public officer, agent or employee to enforce his personal liability. I am sure that your Commission is aware of the basic public policy enunciated by the California courts in numerous decisions passing on the validity of claim statutes. By the very nature of his employment, the public officer and employee is daily placed in situations which may result in personal liability for damages arising out of the performance of his official duties.

The requirement of the filing of a claim within a reasonable time, as a condition precedent to the maintenance of the cause of action against the public employee, works no hardship on the claimant. It does provide justifiable protection for the employee directly related to the greater number of risks he takes as compared to private citizens.

We strongly urge that your Commission not approve the recommended legislation.

Yours very truly,

/S/ John W. McElheney

John W. McElheney
Chief Counsel

EDMUND G. BROWN
GOVERNOR OF CALIFORNIA

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PLEASE REFER TO FILE NO.

September 21, 1960

Mr. John H. De Moully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University, California

Dear Mr. De Moully:

Re: Comments on Tentative Recommendations and Proposed Legislation relating to Presentation of Claims against Public Officers and Employees.

I wish to thank you for your letter of August 12, 1960, which forwarded a copy of the Tentative Recommendation of the Law Revision Commission relating to the presentation of claims against public officers and employees, together with a copy of the Consultant's Study.

This Department, with approximately 14,000 civil service employees in its Division of Highways, is deeply interested and vitally concerned with the duties and liabilities of its personnel. The Division of Highways maintains approximately 13,000 miles of State highways, many miles of which are substandard and deficient due to lack of sufficient funds for their improvement and maintenance (Report of The Joint Interim Committee on Highway Problems, 1959). These highways must nevertheless be kept open to the traveling public under extreme conditions and varied circumstances, e.g., forest fires, snow storms, heavy rainfall, slides, high winds, construction, detours, etc. The maintenance of State highways includes not only the highways themselves, but trees, traffic signals, culverts, bridges, highway lighting, and warning and directional signs. The employees involved in this operation of keeping the highways open are undertaking duties which often expose them and the traveling public to dangerous risks which could result in substantial tort liability.

Figures of the Joint Interim Committee on Highway Problems show 65 billion miles of vehicle travel on our State highways per year. This is expected to increase to 200 billion miles in 1980. With this volume of use, it can readily be seen that there is no public or private property comparable to public streets and highways. Maintenance crews, unlike their counterpart in private industry, cannot close transcontinental and interstate highways when abnormal conditions occur. Private buildings and

areas can be closed to the public in time of repair or construction, but not so with public property. In short, the exposure of such public employees to tort liability is far greater than that of private persons.

Because of these facts, we are opposed to the proposed recommendation of the California Law Revision Commission that the claim-filing provisions applicable to public officers and employees be repealed. It is the general policy of the law to limit liability of public officers and employees and to require claims as a condition precedent to filing suit. Without such limitations and conditions responsible persons would hesitate to accept such offices and jobs with a danger of personal liability arising from remote conditions over which they often have little or no control.

The general good of the public justifies the regulations which have been enacted for the protection of such officers and employees. These regulations, such as the filing of a claim, should not be lightly set aside. The reasons for their original enactment are even more compelling today. (See Ham v. County of Los Angeles, 46 Cal. App. 148, 164; Douglass v. City of Los Angeles, 5 Cal. 2d 123, 127; Osborne v. Imperial Irrigation District, 8 Cal. App. 2d 622, 623; and Shannon v. Fleishhacker, 117 Cal. App. 258, 263).

It is also important that a copy of such claims be filed with the public employer, as well as the officer or employee. The reasons are clearly defined in Huffaker v. Decker, 77 Cal. App. 2d 383, at pages 388-389:

> " * * * Aside from the fact that the public is interested in saving its officers and employees from the harassment of vexatious litigation, it is directly and peculiarly concerned in any action against its employees in suits against them for damages occasioned through their negligence while acting as such employees and within the scope of their employment. This is so because section 2001 of the Government Code casts the duty upon the attorney for the municipality to act as counsel in defense of such action against the employee and the fees and expenses incurred therein are a lawful charge against the municipality. Furthermore, section 1956 authorizes a municipality to insure its employees against the liability for such negligence and the premium for such insurance is therein declared to be a proper charge against the treasury of the municipality. It is thus seen that the city has a financial liability in any action brought against its employee under the above-stated conditions, though perhaps the liability is not usually as great as it is where the city is sued. In either situation the difference in the liability is merely a matter of degree.
>
> "The city is concerned with the expenditure of its funds regardless as to whether those expenditures are great or small."

Substantially these same reasons were advanced in the earlier case of Jackson v. City of Santa Monica, 13 Cal. App. (2d) 376, involving a statute similar to Government Code Section 801, formerly Section 1981. The Court said at page 385:

> " * * * The fact that claims against officers must also be filed with the city in cases arising out of the dangerous condition of streets means no more than that the city shall be notified of the claim against the officer, . . . it still was the intention, as we construe the various acts, that the city (or the state) should have notice of the claim against the officer, even though no demand was being made against the city (or the state). There are reasons why it should be so. It is the duty of city attorneys (and the attorney for the state) to defend suits on all claims against officers based upon their negligence, and cities have authority to insure their officers against liability therefor. It is unquestionably to the interest of cities that they be advised of damage claims against their officers. These reasons are sufficient for the requirement that cities receive the claims as well as the officers." (Emphasis added)

Although the Huffaker and Jackson cases deal with the liability of city employees, it should be observed that the principles involved apply with equal force to State officers and employees. Government Code Section 1956 authorizes the State to insure its officers against liability for negligence and for injuries resulting from dangerous or defective conditions of public property, and the premium for such insurance is a proper charge against the Treasury of the State. Government Code Section 2001 requires the attorney for the State to defend such suits against State officers, and the fees, costs and expenses involved are a lawful charge against the State. Obviously, then, the State is interested in all actions against its officers and employees and for this reason Government Code Section 801 requires a claim to be filed with the Governor as well as with the officer or employee.

The rationale of the Huffaker and Jackson cases was approved by the Supreme Court in Veriddo v. Renaud, 35 Cal. (2d) 263, an action against a State employee for negligence. The Court stated at pages 264-265:

> "Division 4 of title 1 of the Government Code deals with 'Public Officers and Employees' and chapter 6 of division 4 treats of the 'Liability of Officers and Employees.' Study of the sections (1950-2002) which make up chapter 6, and of the prior statutes upon which such sections are based, clearly indicates the intention of the Legislature to (1) define certain conditions of, and to prescribe pro-

cedural requirements for enforcing, the liability of public officers and employes for acts performed or damages arising in connection with performance of the duties of their office or employment (see Sections 1953, 1953.5, 1954, 1955, 1981); (2) permit the public agencies involved (the state, school districts, counties and municipalities) to provide liability insurance to officers and employes at agency expense (Sec. 1956); (3) specifically, to require the filing of a claim with the public officer or employe and with the public agency (in the case of a state employe the filing is to be with the employe and with the Governor) in the cases specified in section 1981, quoted hereinabove; and (4) provide for the defense at public expense of certain damage actions brought against specified public officers and employes (Sections 2000, 2001, 2002), including this action against the state employe who is defendant here (sub. (b) (1) of Sec. 2001)."

In addition, the reasons and necessity for filing claims against public officers and employees are substantially the same as the reasons and necessity for filing claims with public agencies when the claimant desires to hold the agency liable. In Abrahamson v. Ceres, 90 Cal. App. 2d 523, the court held that the principal purpose of the claim requirements of Government Code Section 801 (formerly Section 1981) is to provide the public agency with full information concerning the rights asserted against its employee so that it may settle the claim without litigation if it is meritorious. Another reason advanced in Stewart v. McCollister, 37 Cal. 2d 203, is the opportunity for an early and effective investigation of the facts giving rise to the claim. To repeal the claims procedure applicable to public officers and employees would, in effect, undo the previous work of the Commission in obtaining a uniform claims statute for all public agencies. There would be no need to comply with the new uniform claims statute for public agencies as the claimant could proceed directly against the public officer or employee without filing a claim and thus affording no opportunity for early investigation or settlement without litigation. The public agency would suffer, as it normally stands behind its employees with insurance and must provide its employees with a defense at public expense. This absurd result points to the conclusion that the claims procedure for suit against the agency and the employee should be substantially the same. One must be a counterpart of the other. In practice, the same insurance policy usually covers the agency as well as its employees and the defense is generally conducted by the same attorneys.

Aside from the protection afforded to public officers and employees, as well as the public employer, the requirement for filing such claims also operates to protect the general public using the property by providing an opportunity to remedy the alleged

dangerous or defective condition. In highway accident cases, for example, claims filed with maintenance employees are sometimes the first notice received of the condition and enable prompt repairs to be made to prevent similar accidents.

The Commission in its Recommendation has made certain statements to support its conclusion, which we regard as inaccurate and in need of clarification.

First, the Commission fails to recognize the difference in the personal liability of a public employee and a private individual. As pointed out above, a public employee, and particularly an employee directly engaged in the construction or maintenance of highways, has by virtue of his duties a greater exposure to liability than do private individuals. This is undoubtedly one reason why the Legislature saw fit to enact a claims procedure for public officers and employees.

Second, the Commission states that the claims procedure is ineffective because it provides no protection against "substantitive liability" in cases where a claim is presented within the prescribed time. This is not the purpose of the claims procedure, and therefore is no reason to repeal such statutes. As noted above, the purpose is to afford an opportunity for early investigation, settlement without litigation, and prompt repair of dangerous or defective conditions. Claims statutes do not, nor are they intended to, affect substantive liability.

Third, as a reason for the conclusion that the claims procedure is not necessary to give notice to the public employee, the Commission in Recommendation No. 2 states that "Ordinarily the injury involved arises directly out of an act or omission of the public officer and employee and he is immediately aware of it.". Our experience is directly to the contrary. Highway personnel are not, in cases of dangerous or defective highway conditions, usually aware of the injury or accident until such a claim is filed. The importance of and useful purpose served by such early notice cannot be overemphasized. We also disagree with the Commission's statement on page 3 that "the public officer's liability is no greater than that of his counterpart in private employment.". As demonstrated above, certain public employees are exposed to a much greater hazard of potential liability because of their official duties. In fact, it is unfair and unrealistic to imply that a public officer or employee, particularly a highway construction or maintenance employee, even has a counterpart in private employment.

The last and perhaps most important reason against the repeal of Government Code Section 801 is recognized and succinctly stated in the Commission's own recommendation as follows:

> " . . . the repeal of the personnel claims statutes will negate the protection given the public entity by the General Claims Statute enacted in 1959."

It was pointed out above that in order for the General Claims Statute to be useful and effective, it is necessary that there also be a claims statute applicable to the officers and employees of that entity. The basis for the liability and the facts giving rise to the claim are substantially the same (Huffaker v. Decker, supra).

Although we are opposed to a repeal of Government Code Section 801, we do feel that certain amendments should be proposed to clarify the statute and have it accord as nearly as possible with the General Claims Statute enacted in 1959. These changes are:

(1) Inclusion of intentional torts: The same reason for a claims statute for negligent acts or dangerous or defective conditions applies to intentional torts. In fact, there is sometimes little difference between them, and in those situations the cause of action can be pleaded both as a negligent act and an intentional tort;

(2) Statement of Contents of Claim: The contents of the claim should be explicitly stated in the statute and should conform to the General Claims Statute;

(3) Exception for Disabilities: Legal disabilities such as minority, and insanity, should be incorporated into the claims statute to prevent undue hardship and to bring about uniformity between the general claims statute and the Board of Control claim procedure.

We have received a copy of the letter dated September 6, 1960 from the Los Angeles County Counsel's Office to the Law Revision Commission. We are in accord with their proposed amendments to the personnel claims statute and join with the Los Angeles County Counsel's Office in recommending them to the Commission. We believe this is in agreement with the Commission's thinking on this subject in its Recommendation and Study of January, 1959 relating to the Presentation of Claims against Public Entities. In that Report, on page A-11, it is stated:

> "If it is determined that such provisions (Personnel Claims Statute) should remain in existence as to some or all entities, they should be amended to eliminate existing ambiguities and overlaps."

We suggest that the following provision be added to the draft of the statute proposed by the Los Angeles County Counsel's Office:

> "Sec. 4. The disability provisions of this act apply only to causes of action heretofore or hereafter accruing that are not barred on the effective date of this act."

The necessity for this provision is recognized in the Commission's proposed draft of legislation in Section 4. Its purpose is to prevent the revival of barred or stale claims.

If you or the Commission desires further comments from this office on this subject, please do not hesitate to call upon us. We would appreciate being kept advised of the Commission's action on this Study.

Very truly yours,

Robert E. Reed

ROBERT E. REED
Chief Counsel

(enc. 25)