10/13/61

Memorandum No. 45(1961)

Subject: Study No. 52 - Sovereign Immunity

This memorandum consists of three parts. Part I contains certain information of a more or less administrative nature in connection with the sovereign immunity study. Part II is a statement of the Muskopf case and Lipman case and an explanation of the 1961 legislation relating to sovereign immunity. Part III is intended to give the Commission a general over-all view of the basic problems presented by a study of the doctrine of sovereign immunity.

Part I

Persons and Groups To Be Advised that Study Is Being Made.

The Senate Fact Finding Committee on Judiciary is going to consider the problem of governmental tort immunity and will report to the 1963 legislative session. A statement prepared for the September 26-27 meeting of the Committee includes the following:

> Because of the magnitude and effect this legislation will have on all public agencies throughout the State, the importance of a thorough investigation and series of hearings prior to the next Session of the Legislature, makes it advisable to appoint members of representative groups to function as an Advisory Committee to the Senate Fact Finding Committee on Judiciary in considering this subject and reporting back to the 1963 Legislature.
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> To date, the following persons have been appointed to serve, at their own expense, in this advisory capacity:
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> Ralph N. Kleps, Legislative Counsel, State of California
> Assistant Attorney General Charles A. Barrett

Robert E. Reed, Chief of the Division, Legal Section,
Department of Public Works
Richard Carpenter, Executive Director and Legal Counsel
for the League of California Cities
Reginald M. Watt of Chico, and
John H. Moskowitz of Santa Rosa

Other appointments to the Advisory Committee will be made in the very near future.

Your Executive Secretary has contacted the following persons and agencies indicating that representatives thereof may attend the Commission meetings as observers and that the Commission would appreciate receiving any written statements that they wished to submit concerning this study:

Department of Public Works (Robert E. Reed,
Chief of Division)
Office of Attorney General (Charles A. Barrett,
Assistant Attorney General)
County Supervisors Association (Jack M. Merelman,
Legislative Consultant)
League of California Cities (Lewis Keller,
Associate Counsel)
NACCA (Mr. Fitz-Gerald Ames, regional representative)
Association of Casualty and Surety Companies
(Perry H. Taft)
Department of Finance and Administration

Responses from the first five groups listed above indicate an intention to have a representative present at Commission meetings. We have not yet had responses from the last two.

Does the Commission have any suggestions as to other persons or groups that should be advised that the Commission is making this study and that observers are free to attend Commission meetings? We have about the same coverage as the Senate Fact Finding Committee on Judiciary. Note, however, that the Senate Committee has invited Mr. Reginald M. Watt, attorney for the plaintiff in the Muskopf case, to serve on its advisory committee.

The staff anticipates that the Commission will follow its usual procedure in connection with this study and will widely distribute its tentative recommendation to all interested persons. We are concerned here only with groups that might wish to observe our meetings to obtain the valuable background information concerning reasons for decisions and to provide the Commission with expert assistance at the time our tentative decisions are being made.

Research Consultants.

As you know, Professor Arvo Van Alstyne of U.C.L.A. Law School is our consultant on this study. Professor Van Alstyne has delivered two portions of the study. He plans to deliver prior to the November meeting a portion of the study relating to basic policy considerations that should be taken into account in determining what recommendations should be made concerning the revision of the law relating to sovereign immunity.

Our budget examiner and the counsel for the Department of Finance have tentatively approved the additional contract for $3,500 with Professor Van Alstyne.

In examining the material presented in Part III of this memorandum it is suggested that the Commission keep in mind the possibility of retaining additional consultants to assist it in this study. We may want to retain a consultant who is expert in insurance problems of public entities. In addition, we may want a consultant to prepare statistical studies on the experience of state agencies on claims against public officers and employees (for example relation of amount claimed to amount ultimately paid on settlement or judgment) and to prepare a

report on the experience of school districts (which are subject to almost complete liability now). In addition, it would be of interest to know the extent to which insurance provided by the entity for its public officers and employees permits recovery in cases where the entity itself is not liable.

I have discussed with Mr. Case, our budget examiner, the possibility of drawing on the personnel of the Department of Finance for assistance in the preparation of these statistical and insurance studies. He will advise me whether there is any possibility of the Department of Finance providing such assistance if the Commission wishes to avail itself of it.

Mr. Case and I also discussed budget revisions that would provide additional research funds to permit us to retain consultants to provide statistical studies on claims experience and on insurance problems. These budget revisions would make a limited amount of funds available for this purpose. You will also recall that Mr. Kleps advised us at the September meeting that additional funds could probably be obtained from other sources for such studies if the Commission believes them to be necessary.

Relationship with Senate Fact Finding Committee on Judiciary.

The staff suggests that it might be desirable to contact Senator Edwin J. Regan, Chairman of the Senate Fact Finding Committee on Judiciary. It would be helpful to us to determine what plans the interim committee has in this field. For example, does the Committee plan to make any statistical studies? We would not want to duplicate such studies.

Some time ago I received a letter from the interim committee requesting that the Committee be kept informed as to the Commission's plans and progress in this field.

In examining the material presented in Part III of this memorandum it is suggested that the Commission keep in mind the problem of coordinating our work with that of the interim committee.

Appointment of State Bar Committee on Sovereign Immunity.

At its August meeting, the Commission decided that the Chairman should write to the President of the State Bar suggesting that a special committee of the State Bar be appointed to work with the Commission on this study. We have not yet been advised as to whether such a committee has been appointed. What procedures should we follow in working with the State Bar Committee?

PART II

The present status of the problem of sovereign immunity in California is as follows:

On January 27, 1961, the Supreme Court decided Muskopf v. Corning Hospital Dist., 55 A.C. 216. The court there decided that the doctrine of sovereign immunity is no longer a bar to the liability of governmental entities in California. The court said, though, that certain actions of government would remain nontortious. "Basic policy decisions of government within constitutional limitations are necessarily nontortious."

On the same day, the court decided Lipman v. Brisbane Elementary Sch. Dist., 55 A.C. 229. The court there held the district not liable for defamatory statements of certain school officials. The court conceded that the officials themselves would be immune for discretionary acts within the scope of their authority, but held that the acts alleged were not within the scope of their authority. In discussing the issues, though, the court stated that a governmental entity is not necessarily immune from liability if its officers and employees are. As the matter was not involved in the Lipman case, the court did not indicate when liability would attach to the entity but not to the public employee. Indeed, the court stated that "it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials." The court indicated that various factors should be considered in determining "whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent

to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."

At the 1961 Session of the Legislature, the doctrines set forth in these cases were, in effect, suspended by Chapter 1404. This act is as follows:

SECTION 1. Section 22.3 is added to the Civil Code, to read:

22.3 The doctrine of governmental immunity from tort liability is hereby re-enacted as a rule of decision in the courts of this State, and shall be applicable to all metters and all governmental entities in the same manner and to the same extent that it was applied in this State on January 1, 1961. This section shall apply to matters arising prior to its effective date as well as to those arising on and after such date.

As used in this section, the doctrine of "governmental immunity from tort liability" means that form of the doctrine which was adopted by statute in this State in 1850 as part of the common law of England, subject to any modifications made by laws heretofore or hereafter enacted and including the interpretations of that doctrine by the appellate courts of this State in decisions rendered on or before January 1, 1961.

SEC. 2. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 3. Section 1 of this act shall remain in effect until the 91st day after the final adjournment of the 1963 Regular Session of the Legislature, and shall have no force or effect on and after that date.

SEC. 4. (a) On or after the 91st day after the final adjournment of the 1963 Regular Session of the Legislature, an action may be brought and maintained in the manner prescribed by law on any cause of action which arose on or after February 27, 1961 and before the 91st day after the final adjournment of the 1963 Regular Session, and upon which an action was barred during that period by the provisions of this act, if and only if both of the following conditions are met: (1) a claim based on such cause of action has been filed with the appropriate governmental body in the manner and within the time prescribed for the filing of such claims in Division 35 (commencing with Section 600) of Title 1 of the Government Code, and (2) the bringing

of the action was barred solely by the provisions of this act and is not barred by any other provision of law enacted subsequent to the enactment of this act.

(b) The statute of limitations otherwise applicable to the bringing of an action allowed pursuant to subdivision (a) of this section shall commence to run on or after the 91st day after the final adjournment of the 1963 Regular Session of the Legislature.

(c) Nothing in this section shall be deemed to permit an action on, or to permit reinstatement of, a cause of action that is barred prior to the effective date of this act or as to which a claim has not been filed with the appropriate governmental body as required by law.

PART III

In this part of the memo are set forth a review of some of the problems that must be resolved by the Commission in connection with its study of Sovereign Immunity. Some of these are discussed in detail in the portions of the study that the Commission has already received. Others will be discussed in portions that the Commission will receive later. They are set forth here so that the Commission may begin to think about the nature of the problems involved, so that the Commission may consider the need for field research in certain areas and so that the Commission may fully appreciate the magnitude of the entire study.

The problems are grouped into three major areas dealing with questions of (1) liability, (2) the determination of liability and (3) payment of liability. Although the problems are grouped, they are interrelated, and decisions in one area will have significant influence on the decisions that may be made in another area.

LIABILITY

Under this heading are presented some of the problems that must be resolved by the Commission which relate to the extent to which governmental entities should be liable for injuries caused by their activities. Underlying all decisions which the Commission must make will be the decision upon the question--what should be the basis for sovereign liability?

LIABILITY WITHOUT FAULT

One theory of liability is that "the state ought to be liable to the individual for the risks incurred by the functioning of the state services. Expressed in another way, the theory is that in the functioning of the state services, it is inevitable that individuals will be injured, and that compensation for such injuries is a legitimate expense of the state." (Blachly and Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 Law and Contemporary Problems 181, 211 (1942).) This is substantially the theory of governmental responsibility in France. (Schwartz, Public Tort Liability in France, 29 NYU L. Rev. 1432 (1954).)

Professor Davis states and evaluates the theory as follows:

> The time will come when we shall perceive more clearly that governmental units should often be liable where private parties would not be and should not be liable. After all, a governmental unit differs significantly from a private party: it is supported by taxation, and it is not dependent upon private investment or private profit. A large enough governmental unit is the best of all possible loss spreaders, especially, perhaps, if its taxes are geared to ability to pay. This basic fact, which so far has been given too little heed, will in time lead us to see that the basis for government liability should not be fault but should be equitable loss spreading. The ultimate principle may be that the taxpaying public should usually bear the fortuitous and heavy losses that result from governmental activity. The key idea will be neither comparison with private liability in the same circumstances, nor the extra-hazardous character of the activity, nor authorized use of a government vehicle or other such instrumentality, nor fault on the part of the governmental unit or its agents; the key idea will be simply that a beneficent governmental unit ought not to allow exceptional losses to be borne by those upon whom the governmental activity has happened to inflict them.
>
> A sample of the attitude which may become the law of the future is the assumption by the British government of liability for all damage done by German bombs during the Second World War, as well as the somewhat similar statute enacted by the United States Congress.

> The basic principle for which we are searching may turn out to have a good deal in common with the present principle concerning governmental liability in eminent domain cases: just as the government has to pay for the property it deliberately takes, it should have to pay for the deliberate choices it makes to engage in activities which it knows in advance are sure to cause exceptional losses to private parties. The basic principle may turn out to resemble the government's liability to its own employees under workmen's compensation legislation: if government activities cause human wear and tear on government employees, the cost of which should be borne by the taxpaying public, then when government activities cause exceptional loss to those who are not government employees, the cost similarly should be borne by the taxpaying public. Even the law with respect to liability of private enterprises is tending to move away from a fault basis and toward the principle that the enterprise should bear the losses it causes. The law with respect to liability of public enterprises may soundly, perhaps, go even further in the same direction.
>
> Of course, this is far from saying that governmental units should be liable for all private losses they cause. Most such losses, as now, will have to be regarded as a part of the necessary price for the benefits of living in organized society. Nearly all policy determination--legislative, executive, judicial, or administrative--hurts someone. The losses caused by policy choices are usually well spread, and even when they are not, as when a statute destroys a profitable business by prohibiting sale of a product deemed harmful, the governmental unit probably should usually be immune from liability. Many losses, as now, will have to be borne by those upon whom they fall even when the governmental unit is at fault in causing the loss; for instance, those whose property is reduced in value by a zoning ordinance probably should not have a cause of action against the city, even if a court finally holds that the adoption of the ordinance was an abuse of discretion. Yet governmental units should often be liable for exceptional losses that are not otherwise sufficiently spread and that equitably should be spread through the medium of damage suits.
>
> One may hope that future articles in legal periodicals will no longer restate the familiar reasons for governmental tort liability but will come to grips with the difficulties of trying to formulate a system of sovereign responsibility. [Davis, Governmental Tort Liability, 40 Minn. L. Rev. 751, 811-813 (1956) (hereinafter cited as "Davis") (footnotes omitted)]

This theory has been adopted to a limited extent in most American jurisdictions, including California. Thus, one type of "legislation enacted by about half of the states provides for municipal liability for

mob damage, sometimes irrespective of fault on the part of the municipality." (Davis, Governmental Tort Liability, 40 Minn. L. Rev. 751, 762 (1956); Cal. Govt. Code § 50140). Many states also provide for compensation to one imprisoned for a crime he did not commit. (Cf. Penal Code § 4900 et seq.) The Commission must decide whether to extend this principle into other areas or whether it should be restricted. Professor James recognizes that it is unlikely that liability without fault will be recognized in this country as a basis of governmental liability. Nevertheless, he suggests that there is an appropriate area for the imposition of strict liability for certain governmental activities.

> A deeper question is whether government liability should be limited by the fault principle. If Miller's healthy horse is killed because a board of health mistakenly thinks it is diseased, why should Miller's compensation by the community depend on whether or not the mistake was reasonable? His injury is the same in either event and is a more or less inevitable result (given the likelihood of human failings) of activity carried on for the community's benefit. There is perhaps increasing recognition of a principle which would make this a basis of enterprise liability, without any regard to fault. Such a principle has found expression in constitutional guaranties of compensation where there is an exercise of eminent domain, and in workmen's compensation statutes. It has also a long tradition of recognition in our common law--a tradition far older indeed than the recognition of negligence as a tort. Ultimately all governmental liability may be put on some such basis--there is apparently a distinct tendency in this direction in France, and most of our own governmental employees are covered by workmen's compensation. But any over-all adoption of such a risk theory of liability is probably unlikely in the foreseeable future in this country. This is just as true in the field of government as of private enterprise. On the other hand, where that theory has already found expression in rules of strict liability for private enterprise, there seems to be no justification whatever for exempting government from the same rules. [James, Tort Liability of Governmental Units and Their Officers, 22 Univ. Chi. L. Rev. 654-655 (1955) (footnotes omitted).]

Professor Davis suggests that the principle of liability without fault is applied in the private laws for the payment of tort claims enacted by the United States Congress:

Through private laws the government is often assuming liability irrespective of fault. As the provocative studies by Messrs. Gellhorn and Lauer have shown, the committees and staffs that handle private bills tend to develop principles, and the tendency toward liability without fault is very pronounced in many cases, although it is too much to say that the government has fully adopted a principle of absolute liability. "A recurring test of governmental accountability, as one deduces it from the actions of the Judiciary Committees, is not whether a federal employee caused loss while acting within the range of his assigned responsibilities, but is, rather, whether the United States controlled or was connected with the physical instrumentality through which damage was done."

Some of the claims recently paid through private laws were for such acts as these: a deputy sheriff was run over by an Army truck driven by a soldier attempting to escape from the custody of the deputy sheriff; the claimant was struck by an Army vehicle operated by an enlisted man who, according to a finding of the Department of the Army, "was not acting within the scope of his employment at the time of the accident;" the claimant was shot by an insane member of the Army.

* . . * *

Apparently no information is readily available as to how far state legislatures have moved toward absolute state liability through special acts. [Davis, 40 Minn. L. Rev. at 757-759 (footnotes omitted).]

Liability Based on Fault

Where liability exists in the United States, it is usually based on fault. The Federal Tort Claims Act (28 U.S.C.A. § 1346) creates liability for injury or loss caused by "the negligent or wrongful act or omission" of a governmental employee. The act then specifies several far-reaching exceptions (discussed below) to this general rule. Several states have waived immunity and in these states liability is based on fault. Thus, New York (N.Y. Ct. Claims Act § 8) and Washington (Laws 1961, ch. 136) have completely waived immunity. Illinois, too, has

completely waived its immunity (insofar as the State is concerned), but limits liability to $25,000 (Smith-Hurd Ill. Ann. Stat. C. 37 § 439.8). The other states recognize the doctrine of sovereign immunity and most, if not all, make a distinction, in this respect, between governmental and proprietary activities. Some states undertake very little responsibility for negligence, some go as far as California and some are in between.(Leflar and Kantrowitz, Tort Liability of States, 29 NYU L. Rev. 1363 (1954).)

Need for limits on liability.

If fault is to be the underlying basis for most governmental liability the Commission must decide the extent to which fault is to result in liability. Professor Davis has pointed out the importance and difficulty of this decision:

> Clearly, governmental units should not be liable for all damage caused to private parties by their action. Indeed, they often should be immune from liability even when their action is negligent, faulty, mistaken, or based upon abuse of discretion.
>
> The general realization of the truth of these propositions explains why both legislators and judges have so long resisted the chorus of the commentators in favor of abolition of sovereign immunity. The gap between the uniform view advanced by the commentators and the prevailing attitude of both legislators and judges is a strikingly wide one. Something more than inertia accounts for it. The commentators have gone all out for sovereign responsibility, giving insufficient heed to problems of marking the outer limits of liability. Judges and legislators have rightly sensed that governmental units often should be immune from liability, even when their officers or agents are at fault.
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> The plain fact is that if sovereign responsibility is to win legislative or judicial adoption, someone at some stage is going to have to think through the extremely difficult problems of what the limits should be.

Limits on Liability under Federal Tort Claims Act.

Many of the exceptions to the Federal Tort Claims Act involve claims for which the government is otherwise liable. Professor Davis states:

> The exception for loss of mail should be read in the light of a provision for liability with respect to registered mail. 29 Stat. 559 (1897), 39 U. S. C. § 381 (1952). The exception with respect to admiralty is limited to claims for which remedies are otherwise provided. The exception concerning the Trading with the Enemy Act is at least to some extent offset by other remedies. The Panama Canal exception is offset by provisions of the Canal Zone Code allowing suit against the Governor of the Canal Zone.
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> Claims arising in a foreign country are taken care of by other statutes, including especially 49 Stat. 1138 (1936), 31 U. S. C. § 224a (1952).
>
> According to a district court, the TVA was exempted from the Act "at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome." Atchley v. TVA, 69 F. Supp. 952, 955 (N.D. Ala. 1947). The TVA has been held immune from liability for damage done by setting off explosives, on the theory that the acts were "in the performance of a discretionary governmental duty." Pacific Nat. Fire Ins. Co. v. TVA, 89 F. Supp. 978 (W.D. Va. 1950).

The major exceptions under the Federal Tort Claims act are for certain specified intentional torts and for "discretionary acts."

Intentional torts exception. One of the major exceptions is for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." (28 U.S.C. § 2680(h).)

Professor Davis states with reference to this provision:

> Although statements have been often made that the Act does not subject the government to liability for willful or deliberate torts, the statements are inaccurate, for the list does not include such important torts as trespass and conversion. An illegal search and seizure by federal agents

> may involve both trespass and conversion, for which the government may be liable. The government may be liable for the willful tort of invasion of privacy when federal agents unlawfully tap wires. The government may be liable for violation of a copyright. Plaintiffs' attorneys, with a little imagination, may discover a good many willful torts that are outside the exceptions.

Commentators suggest that the "intentional torts" exception is not justified:

> The legislative history contains a thoroughly unpersuasive reason for excepting the specified willful torts. These torts were called "a type of torts which would be difficult to make a defense against, and which are easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts, and those should be settled on the basis of private acts." Negligent acts are as hard to defend and are as easily exaggerated. Juries are not used in any claims against the government. A remark of commentators about the excepted willful torts seems fully justified: "No persuasive reason has even been advanced for their having been excluded from the reach of the Tort Claims Act."

Discretionary acts exception. The other exception, and by far the most important presents the primary problem of governmental tort liability:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The most difficult problems under the Federal Tort Claims Act involve the interpretation of the last part of this exception. The two leading cases are Dalehite v. United States and Indian Towing Co. v. United States. Professor Davis has summarized the principles of these cases as follows:

> Ten guiding principles seem to emerge from a synthesis of the Dalehite and Indian Towing cases. The principles are in some measure uncertain because of lack of clarity in the

Court's opinions, and they are in some measure unreliable because the two cases are inconsistent and because the Court divided four to three in one case and five to four in the other. Assuming that the view taken in the later Indian Towing case will endure and that that view prevails to the extent that it is inconsistent with the Dalehite opinion, the ten guiding principles are:

1. The government probably is not liable for negligence in planning "at a planning rather than operational level."

2. The statutory concept of "a discretionary function," with respect to which the government is not liable whether or not the discretion involved be abused, probably is limited to the planning level and probably does not include functions at the operational level even if those functions involve discretion.

3. The location of the line between the planning and operational levels is yet to be worked out, but the government is probably immune from liability for negligence in "a plan developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department."

4. The line between the planning and operational levels may depend not merely upon the position of the actor in the government hierarchy but may depend in part on whether the negligence is "in policy decisions of a regulatory or governmental nature" or whether the negligence relates to "actions akin to those of a private manufacturer, contractor, or shipper."

5. "When an official exerts governmental authority in a manner which legally binds one or many," the government probably is not liable.

6. The test of government liability does not depend upon the governmental-proprietary distinction. The government may be liable for negligence at the operational level, even if the function performed is governmental.

7. Negligence in regulating or in failing to regulate through resort to legislative power probably does not subject the government to liability.

8. Absolute liability without fault does not arise even if the government handles an inherently dangerous commodity or engages in an extra-hazardous activity.

9. The government may be liable for negligence in performing a function even if the function has no counterpart in the activities of private persons.

10. The government may be liable for negligence in performing a service which neither the government nor the agency nor the officers have an obligation to undertake.

Professor Cornelius J. Peck has suggested another analysis of the discretionary act exception, based on an analysis of mandamus actions and private tort actions against public officials, that would recognize the proper allocation of responsibility for decision making in a system of government in which the judiciary, legislature and executive are coordinate and equal branches. His analysis gives meaning to the cliche that it is not a tort for the government to govern. Although his analysis may result in some harsh decisions, it may be that some such results are inevitable so long as liability is predicated upon fault.

> The proof required of the Government to establish the defense should be that the acts and omissions of which the plaintiff complains were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so, for the advancement of a governmental objective and pursuant to discretionary authority given him by the Constitution, a statute, or regulation--that is, authority to make a decision that the act, omission, or risk involved was one which it was necessary or desirable to perform or encounter in order to achieve the objectives or purposes for which he was given authority. So long as the act or omission is one which a Government employee was authorized to direct, and did direct, it is within the exception; so long as the risk involved is one which he was authorized to encounter in furtherance of the governmental objective, and did, it forms a necessary part of the discretionary function. It makes no difference, if the matter was within the employee's authority, that a judge would have decided to do otherwise, because the exception applies ". . . whether or not the discretion involved be abused." But where there is no authority to make such a decision in furtherance of a governmental objective--such as the mail truck driver's decision to further a policy of expediting the mails--the exception does not apply. Even where there might have been authority--as in failing to give warnings of an atomic

bomb test for purposes of national security or establishing a schedule of infrequent inspection of lighthouses as a deliberate choice between fewer lighthouses or fewer inspections--if it was not in fact exercised, the act or omission would not be within the exception.

* * *

As lawyers are well aware, the process of determining what is negligent conduct is a process of weighing a variety of factors in determining upon a desirable social result; the extent of the risk, and the gravity of the harm which will occur if the risk eventuates are weighed against the utility of the actor's conduct, the possibilities that the interests for which the actor acts will be advanced by his particular course of conduct, the alternative courses of conduct available to the actor, and the expense to the actor and the public of requiring a different course of conduct. When the courts are called upon to achieve a desirable social result or a sound public policy it is unlikely that they would substitute their judgment for that of the legislature in the enactment of a statute, or, with less certainty, the decision of an authorized administrative official issuing a regulation or determining upon a course of conduct he believed necessary to achieve governmental objectives with respect to which he was given authority and discretion. In such cases argument as to what is the just social result or sound public policy is foreclosed by the decisions of the legislature or official that certain acts, omissions, or risks must be performed or encountered to achieve the governmental objective. There is no need for the court to weigh the factors involved; that has already been done by one authorized to do so. But where the act or omission involved is not one which was directed, or a risk knowingly, deliberately, or necessarily encountered in the furtherance of the objectives or purposes for which authority was given, there has been no prior determination or weighing, and the courts are free to use the ordinary principles of negligence in determining whether it is a desirable social result or sound public policy to impose liability for such acts or omissions.

* * *

The analogies of mandamus actions and private damage suits against public officers, analyzed in light of their reasons, and the ordinary principles of tort law furnish a satisfactory construction for the exception. Liability cannot be imposed when condemnation of the acts or omissions relied upon necessarily brings into question the propriety of governmental objectives or programs or the decision of one who, with the

> authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives. But if the acts or omissions were not directed or necessarily a consequence of what was directed they form no part of the discretionary determination. Imposition of liability in such a case does not involve a questioning of the propriety of the discretionary action.
>
> Allowing the defense on the basis suggested will, of course, result in the rejection of many claims which appear to be meritorious. The objection would appear to run however, not to the construction given the exception, but to adoption of a statute which limits compensation to those claims sustainable on tort principles developed in suits between private parties. Orthodox tort principles reach their limits as a system of compensation at that point where the award calls into question and condemns a public policy decided upon by one who had the authority to do so. [Peck, Federal Tort Claims--Discretionary Function, 31 Wash, L. Rev. 207, 225-226, 230-231, 240 (1956).]

Thus, the heart of the problem is the question of the extent to which the courts should be deciding what the government should do and what the government should not do, thus taking these decisions from the hands of the officials elected or appointed to make these decisions. Professor Davis has also recognized this problem:

> Courts are not the only authority of government with competence to make final determinations of government policies and government action. Sometimes decisions made in the legislative or executive branches of the government should be beyond the area of judicial review. If an oil company wants to prove in a damages action against the government that the State Department was negligent in failing sufficiently to press its claim for compensation for a foreign government's expropriation of its oil property, the court probably should refuse to consider the evidence. If the Federal Reserve Board restricts or expands credit by adjusting interest rates, thereby causing inflation or deflation and injuring the plaintiff, a court probably should refuse to inquire whether the Board was negligent or mistaken in making its calculations.
>
> We must avoid the fallacy of Miller v. Horton. The Massachusetts court succumbed to that fallacy when it assumed that the horse did not have glanders because the jury so found, even though the members of the board of health who destroyed

> the horse and who may have been better qualified than the jury found that the horse did have glanders. The second guess of a court in a damages suit is about as likely to be wrong in an absolute sense as the first guess of the Federal Reserve Board in adjusting interest rates or of the President and State Department in conducting foreign relations. Much business of governmental units is beyond the competence of courts. [Davis, Governmental Tort Liability, 40 Minn. L. Rev. 751, 798-799 (1956).]

Limits on Liability in New York

Even in New York, despite the complete statutory waiver of immunity, the courts have declared the state not liable for certain activities. The following is based on Herzog, Liability of the State of New York for "Purely Governmental" Functions, 10 Syracuse L. Rev. 30 (1958).

In New York where damages result from a legislative act as such, rather than from a failure to execute a legislative policy with due care, the state is not liable. Thus the state of New York was held not liable for the destruction of a claimant's trees by beavers--the beaver infestation having occurred as a result of legislation protecting beavers and appropriating money for restocking them in the vicinity of the claimant's property.

In New York immunity exists for acts of the judiciary and for actions taken in quasi-judicial administrative proceedings. With a few exceptions, the state has generally been found not to be liable for failure to inspect or for negligent inspection, as, for example, in inspecting banks, shops, construction cites, etc. The state has been held not liable for the death of a prizefighter resulting from a failure to discover that he was not fit to participate in the bout. The court indicated that the state had, by examination, attempted to make a dangerous

sport less dangerous, but had not thereby assumed responsibility for the safety of the fighters. Apparently, as far as municipal activities relating to public peace and safety are concerned, there is liability for negligent acts of commission, but not for negligent acts of omission.

Thus, the New York courts, despite a complete waiver of immunity, have nonetheless retained an immunity for certain activities that are classified as "inherently governmental."

Senate Bill No. 651 (1961)

At the 1961 Session of the Legislature, an attempt was made to wrestle with some of these problems. S.B. No. 651 proposed to establish sovereign liability for torts by public officers and employees. At one stage, liability for intentional torts was deleted. Most of the exceptions of the Federal Tort Claims Act were stated. In its final amended form (it did not pass), however, the bill created sovereign liability for all torts, except that "a basic governmental policy decision shall not be considered a tort for purposes of this chapter."

Task of Law Revision Commission

In drafting statutes to deal with these problems, the Commission will have to decide whether it is better to draft comprehensive liability statutes such as the Federal Tort Claims Act or whether the problems inherent in that statute and in the New York statute may be avoided by statutes defining specific areas of liability.

The State of California has already embarked to a certain extent on the latter course. Professor Van Alstyne has collected in the portions of the study you have received a great variety of statutes creating governmental liability. (Study, pp. 32-119.) Of California's legislative

assumption of liability, it has been said, "the overall situation is still limited and confusing." (29 NYU L. Rev. 1369). Negligence in the operation of motor vehicles results in liability. School districts are liable generally for the negligence of their employees.

Certain entities only are liable for dangerous and defective conditions in public property that they negligently fail to repair. Reclamation districts are liable for the negligence of their trustees and employees and flood control districts are liable for the negligence of their trustees. Several agencies assume responsibility for judgments against their officers and employees. The study reveals no consistent underlying policy of liability or non-liability in these statutes.

Whatever the Commission decides to do, it will have to adjust the statutes pointed out in the study.

At pages 120-278, Professor Van Alstyne has collected statutes creating immunities of various sorts for public entities, officers and employees. Many of these statutes create immunities only for specified officers; for prior to Muskopf, the officer was the only one who could be held liable. The Commission must determine, therefore, whether the policy which results in immunity for the public officer or employee should also create an immunity for his employer. These statutes, too, will have to be adjusted to reflect the decisions of the Commission.

In this connection, the Commission will need to weigh the effect of liability of public officers as a deterrent to official excesses against the possibility such liability will make such officers careful to the point of doing nothing. The Commission will also have to consider what, if any, activities should be conducted with immunities for the public

officers involved even though the entity itself may be liable. Many statutes waiving immunity--such as the Federal Tort Claims Act--are based exclusively on respondeat superior.

Professor Davis has suggested that the personal liability of public employees might be abolished entirely in some areas:

> Somewhere a line supposedly separates the performance of judicial, legislative, executive, and other "discretionary" functions from manual, clerical and other "ministerial" work. The officer who exercises what the courts call discretionary power is immune from tort liability, but the public employee whose tasks are regarded as ministerial is liable.
>
> Even if an attorney general acts maliciously, he is immune. But even if the truck driver is guilty of nothing more serious than the kind of momentary human misjudgment that is common to all drivers, he is personally liable.
>
> The reasons for immunity of officers exercising discretionary power are impressive and probably sound, as we have seen. The provocative question, on which the law may be in process of basic change, is whether the immunity should attach to the employee who commits an unintentional tort in the performance of ministerial functions. This question is becoming more important than it used to be, for the increased incomes of this class of workers mean that they are less often judgment-proof. We have reason to inquire whether the common-law tradition is quite at variance with the realities.
>
> Judicial opinions may say, the Restatement may provide, and most lawyers may assume that employees are legally liable for their unintentional wrongs. But the plain facts of business are otherwise. When the typical corporation is held vicariously liable for an employee's negligence, the corporation does not seek indemnity from the employee, whatever may be its theoretical legal right to indemnity. If the typical corporation were to do so, the problem would no doubt be quickly taken care of through a collective agreement; the union would force the corporation to protect the employees through insurance (or through self-insurance). The overwhelming judgment of businessmen is that the enterprise, not the individual employee, should bear the losses that result from unintentional harms in carrying on business activities. Corporate managements assume this, and they have typically acted voluntarily in obtaining the requisite insurance, protecting not only the corporation but also its employees. The traditional notion

of the common law that any individual must be ultimately liable for his own wrong has been undercut by the more fundamental principle--apparently felt by businessmen more than by judges and lawyers--that the enterprise, not the employee, should assume the responsibility for the natural and normal consequences of business activity.

If a governmental unit is the employer, the realities are the same, except to the extent that the government is an even better loss spreader than the corporate enterprise. Under the Tort Claims Act the government is now liable for most unintentional torts resulting from ministerial work. When the government is liable, a plaintiff is unlikely to seek recovery from the employee. The most important practical question is therefore whether or not the government should be entitled to indemnity from the employee after the government has been held liable for the employee's negligence. Another way to put the question is to ask whether the loss should be borne by the government, which is best able to bear it, or by the employee, who is least able to bear it.

A set of hypothetical facts will contribute to an appreciation of the realities. A driver of a mail truck drives ten years before his first accident. The government is held liable for $5,000. The driver earns $4,000 a year, has three children in school, but still has managed to accumulate savings of $5,000. Should the $5,000 be absorbed as a part of the cost of carrying the mail, or should it come out of the driver's savings? The common-law theory, as stated by Professor Seavey, is that "indemnity should be granted under the ordinary rules of restitution because the employee caused a loss which in equity and good conscience should be paid by him. The theory is deeply entrenched, and doubtless most lawyers still believe in the legal principles which have long been familiar to them. Professor Seavey generalizes that "warm hearts, even in the breasts of able and conscientious judges, may make bad law." In this, Professor Seavey is surely right. Warm hearts may make bad law. But warm hearts may also discover bad law and correct it. The time may be ripe for judges and lawyers to catch up with the attitudes of businessmen and of governmental administrators and to give serious consideration to the question of whether an enterprise should absorb many or most or all of the losses that are normal and expected in carrying on its activities. [Davis, Officers' Tort Liability, 55 Mich. L. Rev. 201, 206-208 (1956).]

In connection with the problem of determining the extent of liability, the following is of interest:

The common-law rule that the state must be immune from tort liability involves no "inherent principle of sovereignty." In a series of articles written shortly before the adoption of governmental liability for torts in New York, Professor Borchard

has demonstrated that the principle is not required by any inexorable logic inherent in the legal system, but that sovereign immunity is rather due to historical causes. It is not astonishing that most legal writers dealing with the subject, desiring mainly to do away with a doctrine considered obnoxious, gave little thought to the question to what extent it was possible to equate governmental and private liability. While the existence of the problem was sometimes recognized, little attempt was made towards a solution. When the State of New York made itself liable for the torts of its officers and agents the avoidance of the inequities to the state as well as to the claimants, which were inherent in the private bill system, seemed to have been the main purpose of the proponents of the measure. The lack of guidance on the part of legal authors may explain why the New York Court of Claims Act, the pioneering statute in the field, provides no statutory solution to the problem of liability for purely governmental acts.

The fact that governmental liability cannot, in all situations, be analogized to private liability has found more recognition in several statutes enacted after New York assumed tort liability in 1929. When the Crown Proceedings Act, by which the government of the United Kingdom assumed liability for torts, was introduced in the British Parliament, a memorandum prepared by its draftsman stated:

> "Part I of the Bill seeks, so far as practicable, to put the Crown in its public capacity in the same position, for the purposes of the law of torts as a private person . . . . But in regard to certain matters . . . the analogy breaks down, for in these spheres the functions of the Crown involve responsibilities of a kind which no subject undertakes."

Accordingly, the act attempts to define the scope of the Crown's tort liability in considerable detail, though occasionally poor draftsmanship may create difficulties of interpretation.

The Federal Tort Claims Act also defines the limits of governmental responsibility much more precisely than does the New York Court of Claims Act, but it contains no express exception for governmental acts generally, though certain "inherently" governmental functions are specifically excepted. The United States Supreme Court at one time apparently took the position that such functions were excepted by implication, but reversed itself later. Actually, there seems to be no need for <u>implying</u> any exception for governmental acts in the Federal Tort Claims Act, since most of those functions if not already specifically exempted, are covered by the "discretionary functions" exception of the act. It must be admitted though, that the term "discretionary functions" is itself rather vague and subject to varying intrepretations.

Perhaps a jurisdiction intending to accept tort liability for the first time or to increase its liability may do well to study carefully the extent to which financial liability for governmental functions may, or may not, interfere with the performance of essential public services by consulting the experience of jurisdictions such as New York where governmental liability has been a factor for a long time. It has been said that any such interference will usually be quite negligible, though some court decisions have expressed a different viewpoint. Probably any such interference will be serious in some areas but negligible in others. A statute based on real knowledge of the extent of such interference could provide for liability in the case of governmental functions not seriously hampered by an assumption of liability, and maintain immunity as to those state functions which would be impaired if made the basis of tort liability. Such a statute would go a long way toward insuring fairness to individual litigants, who ought not to bear a disproportionate share of the burdens of government, without sacrificing the public interest.

In New York the courts, in the absence of statutory guidance, have had to work out an adjustment between the public interest in the untrammelled performance of governmental functions and the interest of the individual claimants in fair compensation by classifying certain duties as inherently governmental, and others as not. It is fairly obvious that not all judges will agree on where to strike a balance in such a situation and thus the inconsistencies and sometimes tenuous distinctions in the New York cases may find an explanation.

DETERMINATION OF LIABILITY

Even when the extent of liability has been determined, many problems will remain as to the manner in which liability should be determined. There are two primary considerations that should be taken into account. First, will the extension of liability (assuming the Commission decides to extend liability) result in any considerable increase in the number of actions against public entities. As pointed out subsequently, it is not unlikely that waiver of immunity would result in only a relatively few additional actions against public entities. Second, assuming that there will be no substantial increase in the volume of litigation involving public entities if immunity is waived, does the fact that a public entity is involved in the action justify a special manner for determination of liability? Are the courts doing a satisfactory job with respect to present litigation involving public entities?

The answer to these questions will determine whether claims should be decided by an administrative body such as the Board of Control, a quasi-judicial body such as the Industrial Accident Commission, a Court of Claims or the ordinary courts.

> Of all deserving tort claims against federal, state and local governmental units, probably far more are paid today than are unpaid, despite the persistence of the basic doctrine that the sovereign cannot be sued without consent.
>
> This somewhat startling statement is based upon a survey of the many methods, some rather subtle or concealed, of collecting on tort claims against governmental units; the statement is not based upon or susceptible to proof, for no one has collected statistics, and the limits of "deserving" claims are far from clear. Even so, sovereign responsibility for tort probably has already become the rule rather than the exception.
>
> True, the Federal Tort Claims Act falls considerably short of compensating all deserving claimants. And the majority of

the states have failed to enact general tort claims statutes that go even as far as the federal act. Legislation imposing liability upon municipalities and other local units is less common than legislation imposing liability upon states. Furthermore, such legislation as has been enacted to broaden liability of the various governmental units has often been construed away by the courts.

How, then, is it possible to say that far more deserving claims are paid than are unpaid?

The answer is that the payment of tort claims by the various governmental units is governed only in part by general statutes exemplified by the Federal Tort Claims Act. In addition to such general statutes are (1) private laws enacted as a matter of legislative grace, (2) special or limited public legislation, (3) indirect liability through such means as insurance, subsuming tort claims under constitutional provisions requiring compensation for the taking of property, indemnification of public employees, and (4) liability of municipalities under the judge-made doctrine concerning proprietary functions. [Davis, Governmental Tort Liability, 40 Minn. L. Rev. 751-752 (1956).]

John W. MacDonald, formerly clerk of the New York Court of Claims and now Chairman of the New York Law Revision Commission, has concluded as follows:

> 2. The system of making awards by specific legislative enactment, as is done in Congress, or of conferring jurisdiction in specific cases on a court or board of claims as was done in New York prior to 1929, is undesirable and ineffective.
>
> 3. Jurisdiction over suits against the state should be conferred on a special state tribunal,
>
> (a) because of the specialized knowledge it will acquire in contract and land appropriation cases
>
> (b) because it does not subject the state as a defendant to the prejudices of particular localities
>
> (c) because it insures a uniform point of view on unliquidated damage cases arising throughout the state.
>
> 4. This tribunal should be a court, rather than an administrative agency, with judicial powers, a court of record, of equal dignity with the major court of original jurisdiction in private law cases in the state.
>
> 5. The court so created should have a constitutional, rather than a legislative status.
>
> 6. The tenure of office and salary of its judges should be

equal to those of the major court of original jurisdiction in private law cases in the state.

* * *

8. A means should be found to enable the state to settle, below a specified figure, claims made against it, upon which liability may be conceded. [9 Law and Contemporary Problems 280-1.]

On the other hand, the advantages of an administrative system of adjudicating claims have also been pointed out:

> There are certain advantages which are inherent in the administrative system.
>
> (a) Because of the fact that these boards operate on a relatively continuous basis, claims may be presented and investigated within a short time after they arise rather than only during a limited period each biennium, as is the case under the legislative method.
>
> (b) Since these boards function the year around, they (especially the ad hoc type) have sufficient time to give each claim adequate consideration.
>
> (c) The same body handles all claims. That feature increases efficiency and tends to produce uniform results.
>
> (d) The board may be authorized to provide prompt payment.
>
> (e) The administrative cost of the ex officio type of board is negligible because in most instances the members perform their duties without additional compensation. [State Bar Report, Claims Against the State, 32 Minn. L. Rev. 539, 549 (1948).]

It is apparent that there has been concern among writers and legislators concerning the prejudices of particular localities. Hence, New York and Illinois do not provide for determination of state liability in the ordinary courts, but in a special court of claims. No jury is provided. In addition, Illinois limits the recoverable damages to $25,000. The Federal Government permits suit in local federal courts, but does not provide for a jury. Kentucky and North Carolina determine state liability by their Industrial Accident Commissions; Kentucky does not permit recovery for pain and suffering; and both Kentucky and North Carolina limit recoveries to $10,000. (Ky. Rev. Stat. § 44.070; N.C. Gen'l Stat. § 143-291.) Apparently, under the Washington statute liability will be determined

under the same rules that apply to actions against private persons or corporations.

There are a number of other questions involved in the manner of determining liability. Professor Borchard has stated some of these questions as follows:

> Should there be separate Acts for the administration of state liability through a state board or court, and for municipal liability to be administered by the city alone on its own responsibility? Is it feasible to include both state and political subdivision in one statute to be administered under the supervision of a central state administrative board, with the state assuming some of the liability of the small towns beyond a certain amount? . . . .
>
> Shall a jury be permitted? In the administration of federal and state liability, whether through administrative channel or courts, juries are excluded. In the matter of municipal liability, corporation counsel from New York and Chicago regard the jury as a protection against a possibly weak judge and see no danger of exaggerated verdicts because the government is a defendant.
>
> Pain and Suffering. The Boston experience has led the Boston investigators to recommend that this element of liability in personal injury cases be eliminated. This is justified on the ground that pain is an unknown and precarious element in damages and that its exclusion would protect the city against exaggerated claims. While everyone would protect the city against excessive claims, not all experts agree that pain and suffering should be excluded as an element of damage. Perhaps if the jury were eliminated it would be unnecessary to exclude it. [9 Law and Contemporary Problems 284-285.]

Also involved in the manner of determination of liability is the matter of the procedure for presenting claims. California presently requires that claims be presented as a prerequisite to bringing an action against a public entity or against a public officer or employee on his personal liability. California provides for a preliminary audit of claims against the State by the Board of Control and permits actions in the ordinary courts by claimants dissatisfied with the action of the Board of Control. This procedure imposes certain hardships on plaintiffs, for venue appears to be in Sacramento, San Francisco and Los Angeles. (C.C.P. § 401; Gov. C. § 651.) Claims against local entities are initially presented to

local governing boards and are eventually presented to local courts if not settled. The Federal Tort Claims Act permits the heads of federal agencies to settle claims under $2,500 (28 U.S.C.A. § 2672) and permits the Attorney General to settle other claims, with the approval of the court, after action is filed (28 U.S.C.A. § 2677). The Commission should consider whether a statutory authorization to settle claims is needed or desirable. Moreover, the Commission may wish to review the claims filing requirements to determine if they can be improved.

Professor Van Alstyne points out in the portions of the study you have already received that a number of public entities may be immune from liability not because of a lack of substantive liability but because of the lack of consent to suit. See pages 5 to 30 of Study. It may be possible to take care of this matter by a general statute providing consent to suit for all public entities.

PAYMENT OF LIABILITY

The problems involved in enforcing the liability of governmental entities and the expense involved must also be considered by the Commission.

In the Study (pp. 258-272), Professor Van Alstyne collects a group of statutes that relate to the legal capacity of governmental entities to pay judgments. Some entities are merely authorized to expend funds for damages "incurred through the negligent conduct" of entity personnel. Some entities have no independent fund raising authority and are dependent upon appropriations by other agencies for their financial resources. The ability of such entities to pay large judgments may well be doubted. There are other debt limitation provisions that cast doubt on the ability of

certain entities to satisfy judgments. Some entities have tax rate limitations.

The Legislature has met some of these problems in the past by permitting the payment of judgments in installments or the issuance of bonds that are repayable over a period of years.

The Commission should determine the availability and cost of commercial insurance and should, perhaps, consider the desirability of State assumption of certain excess liabilities. A large judgment might be of no great concern to a large county or city, but could easily bankrupt a county or city of 400 population

Of course, the Commission must consider the extent to which a waiver of immunity will impose additional expenses on governmental entities. Professor Borchard has indicated

> that possibly five sixths of community tort liability is already covered by the statutes or judicial law . . . . The gaps to be filled by an extension of tort liability would involve mainly what has been known as governmental activity, namely, police and fire administration, recreation and public education, public health and hospitalization, transportation facilities like airports, and similar public services. [9 Law and Contemporary Problems 282, 284 (1942).]

In California, most liability arising out of educational activities has already been assumed. Many of the remaining "gaps" are filled by the assumption of personnel liability by the employing entities--either by assuming responsibility for judgments against personnel or by providing personnel with insurance. Hence, it is not unlikely that waiver of immunity will actually result in little additional cost to the principal public entities.

Judge David, in a recent article in the U.C.L.A. Law Review, after pointing out that municipal liability in Los Angeles for motor vehicle

and other claims for the year 1956-57 represented .0083 % of the total assessed valuation and .00145% of the total general fund budget, concludes:

> It is obvious that the day-to-day liabilities in this large city to not support the premise that tort immunities are needed to protect its financial structure, and to permit it to discharge the basic necessary and convenient municipal functions. Another St. Francis Dam disaster, or something of like magnitude, would bring about fiscal problems. [David, Tort Liability of Local Government, 6 U.C.L.A. L. Rev. 1, 14 (1959).]

The amount of awards of the New York Court of Claims "does not exceed even one percent of the state budget." (9 Law and Contemporary Problems at 280.)

Chapter 1404 of the Statutes of 1961 provides that claims may be filed for causes of action arising after the date of the Muskopf decision but that no action can be maintained on such claims until after the 1963 Session of the Legislature. One purpose of this provision is to obtain figures indicating the cost to the State of the waiver of sovereign immunity. Judge David's article, though, indicates that

> One thing seems certain; that in terms of the amount demanded upon the claim, and in the prayer of complaints filed, the bulk of claims are greatly overvalued. [6 U.C.L.A. L. Rev. at 13.]

Figures he has collected from the Los Angeles City Attorney's office indicate that for the year 1957, the ratio of payment to the amount claimed upon claims (other than vehicle claims) settled before suit was 2.8%. The ratio of payment to the amount claimed upon claims settled after suit was 4.5%. 11% of the claims and suits filed were dismissed (the amounts claimed were not stated in the article). In litigated cases, the ratio of awards to the amount claimed was 3.4% in jury cases, and 1.6% in non-jury cases. In motor vehicle cases, $1,221,012 was claimed (including

both litigated and non-litigated claims) and a total of $108,160 was paid in satisfaction of all claims. The ratio was 8.9%.

The Commission may wish to consider procedural devices for the payment of judgments. In regard to New York, John MacDonald reports:

> There is no way possible to estimate the amount of awards of the Court of Claims during a prospective fiscal year. Hence the budget bill of the state carries a lump sum appropriation annually for judgments of the Court of Claims. Invariably the amount of the judgments have exceeded the appropriation. When the amount appropriated is exhausted, the Comptroller purchases the judgment, thus paying the claimant, as an investment for the sinking funds of the state pursuant to law, and when a new appropriation is available, these sinking funds are reimbursed with interest as allowed by law when computing interest for the payment of judgments. This procedure meets effectively the problem of enforceability of a judgment against the state, since payment by this method may be compelled by the claimant, whereas no remedy could be available to a judgment creditor to compel an appropriation. [9 Law and Contemporary Problems 279-280.]

Kentucky law requires the Commissioner of Finance to draw warrants upon the funds of the agency against whom the award is made. The administrative costs of determining the claims are also charged to the agencies upon a pro rata basis. In California, present practice calls for the Controller to draw his warrant upon appropriated funds or upon special funds for the payment of judgments on vehicle claims. The Controller is also required to draw his warrant to pay any other judgment if a sufficient appropriation for payment exists. Judgments upon other claims are reported to the Legislature at each session so that an appropriation may be made for payment.

There are undoubtedly other procedural devices for ensuring the payment of judgments which the Commission may wish to consider.

The foregoing are some of the problems the Commission will encounter

in its consideration of the doctrine of sovereign immunity. They will undoubtedly be discussed in considerably more detail in the portions of the Study yet to be received.

Respectfully submitted,

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