12/6/61

Memorandum No. 58(1961)

Subject: Study No. 52(L) - Sovereign Immunity

At the November meeting, the Commission considered certain basic policy problems in connection with the sovereign immunity study. These problems were considered for the purpose of developing some tentative general principles to use as guides when specific functions of government are considered. Principles developed were as follows:

(1) A public officer or employee should not be liable for injuries or damage caused by his erroneous or mistaken conduct where he conducted himself honestly and in good faith with due care and reasonably believed himself to be acting within the scope of his authority.

(2) A public entity should not be liable for injuries or damage caused by the erroneous or mistaken conduct of its officers and employees where they have conducted themselves honestly and in good faith with due care and in the reasonable belief that they were acting within the scope of their authority.

(3) A public officer or employee should be liable for injuries or damage caused by his negligent actions in the performance of his duties but the public entity rather than the officer or employee should bear the ultimate financial responsibility for this liability.

(4) A public entity should be liable for the injuries or damage negligently caused by its officers and employees while carrying out their duties.

(5) Where a public officer or employee commits one of the traditionally recognized intentional torts--false imprisonment, trespass, assault, defamation, etc.--and where he acted honestly and in good faith and with due care and reasonably believed himself to be acting within the scope of his authority, the officer should be liable for the injuries or damages caused; but the public entity, not the public officer or employee, should bear the ultimate financial responsibility for this liability.

(6) A public officer or employee should be liable and should also bear the ultimate financial responsibility for injuries and damage caused by his malicious, corrupt, fraudulent or dishonest conduct.

(7) A public entity should also be liable for injuries and damage caused by the malicious, corrupt, fraudulent or dishonest conduct of its public officer or employee in the course of his employment, but this liability should be for compensatory damages only and the public entity should be able to enforce indemnification from the guilty officer or employee.

(8) There should be no general immunity from liability for public officers and employees on the ground that the act which resulted in the injury was a discretionary act.

It is suggested that the Commission continue to formulate and identify relevant policy considerations for determining liability or nonliability in specific situations. Professor Van Alstyne has suggested certain relevant considerations at pages 357 et seq. of his study. The Commission considered a portion of this material at the November meeting. The remaining questions would appear to be as follows:

(1) Should differences in the degree of risk of harm be a relevant consideration in fixing the tort liability consequences of various governmental actions? (Study, pp. 360-62.)

[The study points out that the existence of great risk of harm now results in absolute liability in many cases. Private citizens are liable without fault for damages caused by ultrahazardous activities and breach of warranty. Government has already accepted a certain amount of liability without fault in particular situations.]

(2) Should the existence of practical alternatives to liability be considered as relevant in determining the tort liability consequences of particular governmental actions? (Study, pp. 362-68.)

[The consultant points out that in some areas the public entity involved is able to spread the risk of the loss over the particular beneficiaries of the activity through fees and charges. Moreover, the taxpayers are not always the same persons as those benefited by the governmental activity out of which the injury arose. Hence, it may be more desirable to permit distribution of the loss through fees and charges or some other means than through a general obligation to be met through taxes. Again, a more equitable distribution of the loss may possibly be achieved in some areas if the persons subjected to the risk insure themselves instead of compelling the public entity to assume the risk for them. Thus, for example, it may be that the risk of fire losses is more equitably distributed through fire insurance premiums than through the imposition of liability on fire fighting agencies. Again, in some cases nonpecuniary remedies may more adequately protect a person against the risks of governmental action than do civil suits for

damages (see discussion page 368).]

(3) Should variations in the deterrent effect of tort liability be relevant in determining the tort liability consequences of particular governmental actions? (Study, pp. 369-72.)

[The consultant points out (at pages 369-70) that there may be some situations in which too wide a range of liability may have little impact upon safety measures since the personnel and financial resources to meet the responsibility are not politically feasible. Then, too, there are other effective incentives to care and diligence--as, for example, in the case of legislators and judges. Again, the exposure or nonexposure of the public employee involved to the particular risks may have some bearing on the incentive of such employees for safe conduct.]

(4) Should public assumption of the risk involved be a relevant consideration in determining tort liability consequences of particular governmental actions? (Study, pp. 372-73.)

[The consultant points out that the public may well be expected to bear the risk of injury resulting from the condition of riding or hiking trails or public beaches.]

(5) Should the potentiality of tort liability to act as a deterrent to or interference with desirable governmental activities be considered as a relevant factor in determining the tort liability consequences of particular governmental actions? (Study, pp. 373-75.)

(6) Should the statutory statement of the tort liability consequences of governmental action be formulated upon the foundations of existing law--with such alterations as may be necessary to promote clarity, consistency and uniformity? (Study, pp. 375-76.)

[The consultant suggests that many public administrative procedures, much planning and various other procedures and programs have probably developed in response to existing statutes and judicial decisions relating to governmental tort liability. The existing law, therefore, should be the starting point for a legislative program. From this starting point, though, attention should be directed to the elimination so far as possible of sources of unnecessary litigation and avoidable uncertainty. At page 376 of the study, the consultant suggests eight ways of clarifying the law and achieving certainty.]

The foregoing material merely gathers and presents the matters contained in the latter part of the study. Before the meeting, we expect to have another portion of the study in your hands together with a supplemental memorandum presenting certain questions in connection with the additional portion. Discussion of these problems at the meeting will be more profitable if you will again read at least the last portion of the study beginning on page 279. The problems relating to sovereign tort liability are interrelated to a considerable extent; hence, a familiarity with the discussion in the portions of the study you have already received will not only be beneficial so far as the discussion of the above listed questions are concerned but will also be beneficial insofar as the discussion of the further problems to be presented are concerned.

Respectfully submitted,

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