

Minutes
December 12, 1961

First Supplement to Memorandum No. 58(1961)

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

Pages 377 through 417 of Professor Van Alstyne's study have previously been forwarded to you. These pages discuss a number of the practical problems involved in the financial administration of governmental tort liability. These problems must be solved in order to assure that the tort liability system eventually conceived will result in the actual payment of meritorious claims.

I. Authority to pay claims.

Professor Van Alstyne suggests five avenues for legislative action:

(1) General statutory provisions should be enacted requiring all governmental bodies with the power to raise funds through taxes and assessments to satisfy tort judgments out of any otherwise appropriated and unencumbered funds in its treasury. Such entities should be required to include in the tax assessment levy for the next fiscal year a rate sufficient to satisfy all unsatisfied judgments.

(2) Entities which raise their funds by specific lien assessments according to benefits rather than by general ad valorem assessments should also be authorized to pay tort judgments out of the proceeds of specific lien assessments and should be required to levy assessments for that purpose when other funds are not available.

(3) In regard to public entities which are dependent upon other public entities for their financial resources, general statutory provisions should

be enacted authorizing them to satisfy tort judgments from their available funds and a duty should be imposed upon the supporting public entities to include in the next appropriation of funds for the purposes of the dependent entity a sum sufficient to pay any unsatisfied judgments.

(4) General statutory provisions should be enacted, applicable to all types of public entities, providing that if a public entity is absorbed into another upon dissolution, the latter entity assumes the liabilities of the former. If a public entity upon dissolution merely ceases to exist, the Board of Supervisors or the governing board of some other appropriate agency or entity should be authorized to levy taxes within the territory of the dissolved entity to satisfy any otherwise unpaid tort liability.

(5) General statutory provisions should be enacted indicating that liabilities on tort judgments are not included in those liabilities which are void if incurred under circumstances not expressly authorized in the particular statute or if they exceed the income and revenue provided in the entity's current fiscal year. Similarly, there should be a general statutory declaration removing tort liabilities from the scope of statutory tax limits.

II. Minimizing financial consequences of tort liability.

Professor Van Alstyne suggests five techniques for minimizing the adverse financial consequences of tort liability:

(1) Insurance. Statutory authority should be enacted for all public entities to purchase insurance against the personal liability of their officers, employees and agents for all types of torts committed in the course and scope of their employment.

Authority should also be enacted for all types of public entities to insure themselves against liability for all types of torts.

Express authority should be enacted for all entities to insure either by purchasing commercial insurance or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of these methods.

Public entities might be authorized to provide insurance that covers several entities.

(2) Official bonds. The scope of existing statutes relating to official bonds should be expanded to cover both employees and officers of public entities. These statutes providing for official bonds should inure to the benefit of the public generally as well as to the employing entity. Bonds should be obtained to cover only liability for which the officer should be ultimately financially responsible (such as malice, corruption, fraud or dishonesty on the part of the officer or employee covered by the bond) and the officer or employee should be protected by insurance against personal liability for other torts.

(3) Installment payment of judgments. Statutory authorization for all public entities (or all local public entities) to spread the payment of judgments over a period of years (possibly ten or fifteen) should be enacted. At the same time a statutory declaration that such judgments are legal investments for trustees and fiduciaries to the same extent as bonds for other obligations of the public entity should be enacted to provide some assurance as to the availability of a market for the sale of such judgments.

(4) Financing tort judgments. Authority to issue and sell general obligation bonds to fund tort judgment indebtedness should be extended to all public entities that have the authority to sell bonds. Authority to use promissory notes and certificates of indebtedness for the same purpose should also be created.

(5) Controlling or shifting the incidence of tort liability. Professor Van Alstyne has suggested several methods by which the potential amount of tort liability may be controlled to a certain extent. The Commission should consider the desirability of these various methods.

(a) Consideration should be given to a statutory limitation upon the extent to which damages are recoverable from a public entity. Such a limitation might be achieved in either of two ways. A monetary limitation may be imposed. Some states have done this. An alternative approach would be to limit recoverable damages to actual pecuniary losses or to a fixed multiple of actual pecuniary losses. Kentucky, which has waived its immunity for negligent torts, does not permit recovery for pain and suffering.

(b) Consideration should also be given to a statutory limit upon attorneys' fees.

(c) A general statutory provision should be enacted authorizing the insertion of indemnity or "save harmless" clauses into any contracts which the governing board of a public entity deems appropriate.

III. Legislative goals.

Professor Van Alstyne suggests certain goals to be achieved in a sound legislative program. Some of these suggestions are presented in more detail in the preceding questions. Some are developed more fully in the questions that follow.

(1) The financial impact of tort liability should be minimized by making available to all types of public entities a wide variety of techniques for shifting the economic burden to other responsible persons and distributing the losses as widely as possible over a broad financial base and over substantial periods of time. (See legislative suggestions mentioned above under II.)

(2) The economic consequences of tort liability should be made as predictable as they may be by adopting reasonable expedients to reduce as much as possible the variables and uncertainties inherent in ordinary tort litigation. In addition to the specific legislative suggestions mentioned in II (5), above, as a general goal an effort should be made to avoid placing risks upon governmental entities which cannot be protected against by reasonable administrative precautions.

(3) A flexible means should be placed at the disposal of all public entities by which the cost of tort liability may be borne in advance through insurance and bond premiums. The cost should be borne primarily by the particular segment of the community which is especially benefited by the particular activity. Thus, governing bodies should be empowered to decide whether the cost of funding tort liability should be imposed upon the general funds or upon the benefited area as part of the cost of the project. Adequate liability insurance might be required in the contract specifications for public improvement projects financed by direct lien special assessments. Joint powers agreements should be required to specify which of the contracting public entities are to be liable for torts arising in the course of performance of the agreement and how the tort liabilities are to be funded.

(4) Means must be developed for relieving small public entities without adequate financial resources from the full burden of funding tort liability expense. This might be accomplished by formulating statutory standards for the minimum level of tort liability coverage which must be provided either through commercial insurance or self-insurance funds and by formulating maximum standards of financial effort which may be expected from public entities in an effort to conform to the minimum standards of protection against tort liability. Entities too small to achieve the minimum level of protection with the maximum financial effort that might be reasonably expected should be able to shift the excess liability which they are unable to protect against to the State or some other larger entity. (See the example on pages 414-16 which is given for illustrative purposes only.)

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary