1/11/62

Memorandum No. 7 (1962)

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

Pages 418 through 449 of Professor Van Alstyne's study have been sent to you previously. These pages discuss a number of practical problems involved in formulating procedures for handling governmental tort liability. Also, they suggest the necessity for continued study and analysis of the problems arising from an expansion of governmental tort liability. This memorandum presents the problems raised in this material for decision by the Commission.

I. INDEMNITY OF EMPLOYEES VERSUS DIRECT LIABILITY OF PUBLIC ENTITIES.

As a general rule, should both the public entity and the responsible employee be procedurally liable to an injured claimant? Is a requirement of indemnification of the employee to the exclusion of direct liability of the entity a sufficient means of imposing public liability? Should direct liability of the entity be an exclusive remedy? (Study, pp. 418-21.)

Professor Van Alstyne suggests the desirability of formulating procedures which would permit an injured person to proceed against either the responsible employee or the employing entity. Restricting the injured person to either remedy to the exclusion of the other is an onerous burden laden with difficulties. Thus, the vagaries of jurors

regarding the size of judgments which might be awarded, the frequent difficulty of identifying and obtaining jurisdiction over individual tortfeasors, the possible variance in applying theories of tort liability (particularly the res ipsa loquitur doctrine), the varied time limits for prompt filing of claims--each of these matters dictates the propriety of permitting the injured person some discretion in choosing between pursuit of the individual and pursuit of the entity.

Adequate provision for this alternative approach in procedure does not preclude, however, the proper allocation of ultimate financial responsibility. Where the entity is to be financially responsible, adequate protection for the public employee can be secured by statutory requirements for its carrying insurance and for defense of personnel by the entity's legal counsel. (Study, p. 421.)

Policywise, therefore, does the Commission approve the suggestion that, as a general rule, both the public entity and the responsible employee should be procedurally subject to liability? It should be noted that the Commission already has discussed and tacitly approved this scheme in connection with its decisions regarding rules of general policy relating to liability. (Minutes, November 1961, pp. 17-22; Minutes, December 1961, pp. 10-11.)

II. ADMINISTRATIVE VERSUS JUDICIAL TREATMENT OF TORT CLAIMS.

Should an administrative body be created to process tort claims against local public entities? (Study, pp. 421-25.) Professor Van Alstyne suggests a careful blending of administrative and judicial authority to adjudicate tort claims against governmental entities. The

State Board of Control is successfully performing the administrative function at the state level. Should a similar statewide administrative tribunal be created to process claims against local entities? (Study, pp. 421-24.)

The consultant suggests that an administrative organization of this scope would unnecessarily duplicate existing successful procedures. A statewide tribunal would not be as familiar with the local circumstances and other conditions involved, nor would it be as strategically located, as would a local and somewhat informal, inexpensive administrative procedure provided by those persons politically responsible to the electorate of the locality concerned. Should general enabling legislation which authorizes the establishment of local administrative bodies be enacted? (Study, pp. 424-25.)

Should there be a statewide court of claims to adjudicate claims rejected at the administrative level? (Study, pp. 425-26.) Claims not settled at the administrative level should be judicially determined. General arguments in support of an independent court of claims to perform this judicial function include: the desirability of uniformity of decision divorced from local attitudes and prejudices, development of expertise, and relieving established courts from the burden of governmental tort litigation. The jurisdiction of courts of claims in those states in which they are established is limited to claims against the state; experience indicates that local courts handle unsettled claims against local entities. Professor Van Alstyne suggests that the established courts can adequately absorb any increased litigation arising out of an expansion of governmental tort liability. A court of

claims could be established in the future if the volume of litigation or other reasons indicate the necessity for such establishment. (Study, p. 426.)

III. REDUCTION OF PROBLEMS AND ALLOCATION OF EXPENSE IN HANDLING GOVERNMENTAL TORT CLAIMS.

Professor Van Alstyne suggests the following matters for consideration by the Commission (Study, pp. 426-445):

(a) Should local entities be given broader authority to compromise claims? Should local entities be given discretionary authority to delegate settlement of small claims? If so, within what limits? (Study, pp. 427-31.) Local entities are inclined to take a "legalistic" rather than a "practical" approach to administratively adjudicating tort claims. This is partially because of their fear that their action would be illegal if a compromise were reached in a doubtful or uncertain case. Should local entities be given broader authority to effect compromises in such cases? (Study, pp. 430-31.) Approval of this suggestion would not open the door to undisciplined exercise of power; but it would permit local entities to consider the "nuisance value" and other elements of expense involved in litigation. Should local entities be given discretionary authority to delegate to specified officers the authority to settle minor tort claims? (Study, p. 431.) Both of these suggestions are supported by favorable experience in insurance companies; and by the successful federal practice under the Federal Tort Claims Act and the Military Claims Act, both of which provide speedy, simple and inexpensive means for settling claims. The primary criticism of the federal Acts

is that the monetary limits are too low. What limits would be appropriate to impose upon local administrative bodies? Should this matter be left up to the individual entity involved?

(b) Because the operation of government results in complex integration of activities which cross functional and organizational lines, it is often difficult to specifically identify a particular employee's employing entity. In turn, this works procedural hardships upon a deserving claimant who may be barred from later proceeding on a legitimate claim after an unsuccessful foray against the wrong entity. For tort liability purposes, Professor Van Alstyne suggests the following scheme for consideration by the Commission (Study, pp. 431-36):

(1) As a general rule, should public officers and employees (and their agents) be conclusively presumed to be employed by the entity whose funds are used to pay their compensation? (Study, p. 436.)

[The consultant indicates that the numerous problems involved in determining the exact entity for whom a particular employee is employed could be easily solved by application of this general rule. There are several classes of persons, however, which would require more definitive treatment to determine the employing entity.]

(2) Should judges of justice, municipal and superior courts be presumed to be employed by the county in which the judge was performing judicial service at the time of the alleged tortious conduct, while justices of appellate courts (and persons temporarily assigned thereto) are presumed to be employed by the State? [By whom should a judge or justice be considered employed while he is en route to or from different places in which judicial service is performed?] (Study, pp. 433-34.)

[The consultant indicates that this special rule for application to judicial officers would clarify much ambiguity which presently exists in the law; and, the proposed rule very nearly conforms to existing practice with respect to payment of compensation.]

(3) Should ex officio personnel be presumed to be employed by the entity in whose service the officer or employee was acting at the time of the alleged tortious conduct? [Is the phrase "ex officio personnel" sufficient to identify all persons who perform secondary service by reason of their primary office? Is it possible to differentiate in time the varied duties performed by ex officio personnel, such as the State Controller?] (Study, p. 434.)

(4) Should persons who serve without compensation be presumed to be employed by the entity whose funds are the source of reimbursement for expenses or, alternatively, by reference to the appointing authority? (Study, pp. 434-35.)

(5) Should persons performing services pursuant to a joint powers agreement be presumed to be employed by each of the contracting entities? If so, should each entity be jointly and severally liable? (Study, pp. 435-36.)

[The consultant suggests the evident fairness of this solution. Ultimate financial responsibility can be shifted to the appropriate entity or entities assuming such liability under the joint powers agreement. The assumption of financial responsibility is a proper subject for agreement; in the absence of specific agreement, the special rule enunciated above could also control ultimate financial responsibility.]

(c) Should substitution of an independent for a nonindependent entity be made as a matter of law? (Study, pp. 436-37.) The consultant suggests this procedure to avoid pitfalls to the unwary who initiate action against a public district, subdivision or agency, which is later determined to be nonindependent, such as an administrative or taxing authority, and therefore not liable. The independent entity of which the other is a part could be substituted as a matter of law. With adequate regard for ensuring notice, could not this same procedure be expanded to permit substitution of the proper entity in every case where a claimant, acting in good faith, files a claim against the wrong entity? In this latter case, involving two or more independent entities, the substitution could be conditioned upon a judicial finding of "no prejudice" to the entity to be substituted. What should be the nature of the prejudice involved?

(d) Should general legislation be enacted which authorizes the maintenance of suits against local public entities? (Study, pp. 25-30, 437-38.) The authority may exist already by implication, but it should be made explicit.

(e) The objective of a claims procedure is to provide early notification to the entity so that it has the opportunity to investigate, to take precautions against additional harm, and to settle without litigation. Technical defenses not thoroughly justified by this objective should be abandoned since their continued existence will frustrate the legitimate purposes for the rules governing procedures relating to governmental tort liability. Professor Van Alstyne suggests several reforms in this area (Study, pp. 438-44):

(1) Should the present widespread variance between state and local time limits and other conditions for the presentation of claims against public entities be eliminated? (Study, pp. 439-40.) The following diagram briefly describes this variance:

Event	Local Entities	State
Claims for death or for injury to persons or personal property	Must be filed within 100 days	Timely if filed within 2 years (except vehicle torts--1 year)
Other claims	Must be filed within 1 year	Timely if filed within 2 years (except vehicle torts--1 year)
Requirement of claims presentation	Does not toll period of limitations which would apply if claim were against private person	Period of limitations may be tolled for up to 2 years beyond normal expiration time
Claim by person under disability	With court permission, may extend filing time up to 1 year after normal expiration	Filing period extended up to 2 years after removal of disability [which could total many years]

Professor Van Alstyne suggests these matters for the Commission's consideration (Study, p. 440):

1. Should the time limits for the presentation of claims against the State be modified to conform to the limits for the presentation of claims against local entities? (Study, p. 440.)

[The consultant suggests that the State is in as good a position as the entities to investigate, avoid additional harm, and the like.]

2. Should the presentation of claims against the State have the same affect upon the period of limitations as a claim against a private person? (Study, p. 440.)

[If so, this would put the State on a par with local entities. There is no reason for treating the State in this regard any differently than local entities or private persons.]

3. Should other conditions regulating the presentation of claims against the State be modified to conform to the presentation of claims against local entities? (Study, p. 440.)

[For example, claims against the State by persons under disability should not extend the claims presentation period for extended periods of time without judicial control.]

(2) Should claims presentation periods be flexible to meet extenuating circumstances? (Study, pp. 440-42.) To complement the elimination of unnecessary differences between state and local claims presentation periods, Professor Van Alstyne suggests that the uniform limits adopted should be flexible enough to meet quasi-emergent situations. The inflexibility of existing claims periods should be discarded in favor of adopting the present practice regarding the presentation of claims against local entities by persons under disability. Since this requires a finding of absence of prejudice to the entity, there is no reason for not using this procedure in every case where a claim is filed after expiration of the normal claims presentation period. In this regard, what should be the nature of the prejudice involved? The absence of prejudice ordinarily presupposes that the entity received adequate and prompt notice of the injury which forms the basis of the claim or that more prompt notice would not have improved the entity's ability to defend. (Study, p. 441.)

(3) Should the requirement of presenting a claim as a condition precedent to maintaining an action against a public officer or employee

be repealed? (Study, pp. 442-44.) Professor Van Alstyne suggests that the existing statutory requirement should be repealed or, at least, substantially overhauled for reasons similar to those suggested by the Commission in its recommendation to the Legislature on this subject.

(f) Should jury trials of governmental tort claims be eliminated? Or, should jury fees be a nonrecoverable item of expense to a claimant? (Study, pp. 444-45.) Professor Van Alstyne suggests that delay in trial, increased costs of trial, possible liberality of awards, and the like, demonstrate the desirability of adopting at least one of the suggested alternatives.

(g) Does the Commission approve of other procedural devices designed to effect improved administration of claims procedures? (Study, p. 445.) These include (Study, pp. 336-38):

1. A requirement of an undertaking for payment of costs and attorney's fees if the litigation is unsuccessful in order to discourage the litigation-prone claimant from pursuit of procedures designed to effect speedy, inexpensive and fair remedies to deserving claimants. (Study, pp. 336-37.)

2. The limitation of recovery to actual damages (to the exclusion of exemplary or punitive damages) in order to discourage claims of doubtful merit. (Study, p. 337.)

3. The requirement of detailed evidentiary pleading in a verified complaint to discourage unwarranted claims. (Study, p. 337.)

4. The placement of a clear burden upon the claimant to rebut the presumption of legality and regularity of official conduct. (Study, pp. 337-38.)

IV. THE NEED FOR CONTINUING STUDY OF GOVERNMENTAL TORT LIABILITY.

Does the Commission approve the recommendation that an independent body be created to make a continuing study of the problems inherent in expanded governmental tort liability? (Study, pp. 446-49.) Professor Van Alstyne suggests that the extreme breadth of the concept of expanded governmental tort liability creates a need for continued study and analysis of the entire field. The probability of liability in areas of the law which are presently unexplored, and in new and important areas of the law which are likely to be formulated as governmental operations react to the future needs of society, indicates the desirability of continuing statistical and field research into the actual operation of governmental tort liability. He suggests that this task might be assigned to a commission organized along the lines of the New York Joint Legislative Committee on Municipal Tort Liability. This commission should have an adequate staff to analyze trends in the law. It should remain alert to the need for procedural changes and reforms to improve the methods of handling existing liability as well as for substantive innovations which reflect appropriate solutions to changing conditions. It should recommend needed legislation to the Legislature. Since this commission would be required to deal with much factual data in addition to strictly legal matters, he suggests the need for creating a new organization to conduct these "watchdog" activities; the Law Revision Commission is not an appropriate organization for dealing with primarily factual instead of legal problems and is already too busy with other important matters.

Respectfully submitted,

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