Minutes

4/10/62

Memorandum No. 18(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Indemnity of Public Officers and Employees)

At the March meeting, the Commission directed the staff to prepare a memorandum indicating the alternatives that are before the Commission in regard to the areas of liability that it will not be able to study prior to the 1963 Session of the Legislature. It is not the purpose of this memorandum to explore the ways of disposing of the claims filed under the legislation adopted in 1961; this memorandum discusses only what alternatives may be taken in regard to the basic issue of liability or immunity until the entire field can be studied.

Background

To refresh your recollections as to the present status of the law, you will recall that on January 27, 1961, the Supreme Court decided Muskopf v. Corning Hospital Dist., 55 Cal.2d 211. 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 Cal.2d 224. 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 some of the acts alleged were not within the immunity rule. 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:
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> 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 matters 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.
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> 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 3.5(commencing with Section 600) of Title I 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.

The meaning and effect of some parts of this legislation were clarified by the recent Supreme Court decision in Corning Hospital District v. Superior Court, Sac. 7370 (Metropolitan News, April 6, 1962; The Recorder, April 5-6, 1962). The court held that causes of action arising before

February 27, 1961 have been suspended by Chapter 1404; but the statute of limitations will continue to run. Therefore, claimants whose causes of action arose before February 27, 1961, must file their claims and actions as required by statute, but the suits will be continued until after the 1963 Session. The statute of limitations is tolled on causes of action arising on or after February 27, 1961; therefore, claimants whose causes of action arise on or after February 27, 1961, must file their claims as required by law but need not file their actions until after the 1963 Session.

Alternative Courses of Action for 1963.

It is clear from Chapter 1404 and the recent decisions interpreting it that the law stated in Muskopf and Lipman will become the law in 1963 unless legislation is enacted. The burden is thus placed upon those who do not want these cases to become the State law to come forward with proposals that can win the support of a majority of the Legislature.

In this situation, there appear to be at least six alternative courses of action that the Commission may follow:

(1) Recommend restoration of the law to its pre-Muskopf state until the specific areas of liability are studied.

(2) Recommend retention of the moratorium created by Chapter 1404 of the 1961 Statutes until the study is completed.

(3) Recommend the enactment of no legislation so that the Muskopf and Lipman cases will apply to the areas not studied.

(4) Recommend the assumption of public officer and employee liability until the study is completed.

(5) Recommend the enactment of legislation similar to the Federal

Tort Claims Act without study of the underlying problems.

(6) Make no recommendation as to the areas of liability not studied, in which case the Legislature will probably adopt the recommended legislation of some other interested group.

Each of these alternatives is discussed below.

Alternative (1). One advantage of restoring the law to its pre-Muskopf state is that, despite the "illogical and inequitable" (per Traynor, J., 55 Cal.2d at 217) results that are obtained under that law the rules are fairly well settled. Thus the Commission would know fairly precisely what it is that is being recommended. This is a safe course to follow, too, from a fiscal standpoint, for governmental entities have been operating under this law for a long period of time and know what the liability costs are under its standards.

The disadvantages of restoring the law to its pre-Muskopf condition include the fact that the pre-Muskopf law is illogical and inequitable. Professor Van Alstyne has a good review of the non-statutory law of governmental immunity at pages 279 through 302. (In the pages following 302 he discusses bases for immunity other than the doctrine of sovereign immunity.) Moreover, the restoration of the law to its pre-Muskopf state would probably make the passage of later legislation liberalizing the liability rules much more difficult. Because the Muskopf and Lipman cases will become the law unless legislation is enacted, any legislation proposed--even if it provides for more liability than the former law does--will have a more favorable reception because of the fact that passage of the legislation will probably result in a narrower range of

liability than there would be if no legislation were passed. Restoration of the pre-Muskopf law would remove this incentive to enact liberalizing legislation.

Alternative (2). The retention of the moratorium would, of course, retain the incentive for the enactment of equitable legislation. However, it would also postpone the recoveries of those who have been injured as the result of governmental fault for an additional two years. Thus, some claimants would have to wait for 4 years before they could even begin the legal processing of their claims. Recommending retention of the moratorium is a "safe" recommendation to make in that the Commission would not be placed in the position of making a recommendation the legal effect of which cannot be determined.

Alternative (3). An advantage of letting Muskopf and Lipman apply to the areas not studied is that the Legislature would have an even stronger incentive than the moratorium would provide for enacting fair and equitable legislation in 1965. Then, too, if public entities had to operate under the Muskopf and Lipman rules for two years, they might discover that the problems and the costs are not nearly so great as they thought they would be (or they might discover that they are).

A basic objection to making a recommendation of this sort is that the Commission is in no position to know what the legal effect of its recommendation would be for it has not completed its study. From a Commission policy standpoint, it seems undesirable to submit any recommendation that cannot be supported by the Commission's own study and research.

From a practical standpoint, it seems doubtful that such a

recommendation would be approved by the Legislature. Too many groups and public agencies are interested in having laws passed wiping out Muskopf and Lipman and substituting a more certain standard of liability. In a letter to the Commission office forwarding a proposed liability statute upon which public law officers are working, the Los Angeles County Counsel said:

> This office and other public law offices throughout the State feel that perhaps the most important single problem which must be met is the solution to the problem raised by the Lipman case which holds that a public agency may be liable in certain cases for the discretionary acts of its officers even though the officer himself is not liable. This decision not only provides no clear basis upon which to evaluate claims made against public agencies, but opens up a vast number of procedural problems. No indication was given in that case as to whether the standards set forth by the court would be questions of law, questions of fact or mixed questions of law and fact. Lawyers have no assistance from the court in determining at what stage of the proceedings these matters are to be resolved, whether at the pleading stage, at trial, or on appeal.

At the 1961 Session of the Legislature, a bill patterned after the Federal Tort Claims Act--S.B. 651--was prepared by certain public entities and introduced. The draft statute forwarded by the Los Angeles County Counsel is also patterned after the FTCA. The County Counsel's draft was the subject for discussion at a meeting of public law officers from several counties held in Los Angeles in November. It seems likely, therefore, that these entities will be pressing for the enactment of comprehensive legislation again at the 1963 Session. It also seems likely, therefore, that a recommendation that Muskopf and Lipman be permitted to govern areas of potential liability where statutes are not enacted would have little chance of approval.

Alternative (4). To recommend the assumption of public officer and

employee liability until the study is completed would carry out a policy decision already made by the Commission (Minutes, December, 1961, pp. 10-11) and which will have to be implemented in some way by statute at some time before the study is completed. Such a recommendation would also be one the results of which, in terms of liability, would be fairly predictable. Professor Van Alstyne discusses the common law of officer and employee liability and immunity at pages 318 through 329. Although there are many anomalies in the law of officer liability and discretionary immunity, nonetheless, Professor Van Alstyne points out that an "extensive body of case law has developed" in this field. The additional cost of such a recommendation should also be ascertainable. Many entities insure their employees against a large portion of their personal liability. Other entities are required to assume responsibility for judgments against their employees. Of course, entities are liable in many instances where employees are personally liable. Thus, the additional cost to entities would be the cost of employees' personal liability which the employee now insures against or pays out of his own pocket.

Although assumption of officer liability should not be considered a final solution, until the study can be completed such a recommendation would have the advantage of picking up the "run-of-the-mill" case of active tort liability for which governmental entities should be liable. Thus, there would be liability for the janitor who pokes his broom in a citizen's eye. And there would be no "governmental" function immunity because he happened to be cleaning the courtroom at the time of the accident. This recommendation would solve many of the simple problems and would leave the difficult ones--which involve "discretionary"

acts--for solution in the normal course of the study.

Assumption of officer and employee liability for torts committed in the scope of the office or employment is not novel. All private employers are required to do so. Many public entities are required to do so. Statutory techniques vary. At pages 53-61 of the study, Professor Van Alstyne discusses some statutes that impute the negligence of employees to the public employer. The study collects several statutes that require the public employer to pay tort judgments recovered against its employees at pages 61-70.

The statutes collected include several general authorizing acts as well as several special district acts. The entities to which they are applicable comprise a large group of governmental entities engaging in a variety of functions; hence, their experience under these statutes should provide a useful guide to the amount of potential liability that would be assumed by extending the principle of these statutes to all governmental entities. For example, the State Controller reports (for 1959-60) that there are 85 community services districts with a total assessed valuation of $150,000,000 and an income of $2,500,000. There are 168 county water districts with a total assessed valuation of $1,600,000,000 and an income of $19,000,000. There are 45 municipal water districts with an assessed valuation of $5,800,000,000 and an income of $15,000,000. There are 112 irrigation districts with a total assessed valuation (land only) of $394,000,000 and a total income of $50,500,000. Community services districts may provide water, collect and dispose of sewage, waste and storm water, collect garbage and refuse, provide fire protection, provide recreational facilities such as parks,

playgrounds, swimming pools, etc., light streets, abate mosquitoes, provide police protection and maintain libraries. (Gov. C. § 61600.) County water districts may supply water, generate and sell (at wholesale) hydroelectric power, drain and reclaim lands, maintain and operate sewage and storm water disposal facilities and provide fire protection. (Water Code §§ 31020 et seq., 31100 et seq., 31120.) Irrigation districts have powers similar to county water districts and, in addition, may operate an airport or aviation school. (Water C. § 22145.)

As a matter of policy, it seems that public entities ought to be liable for torts committed by their employees within the scope of their employment. To the extent that public entities are not liable, the public employee is in a far worse position than is his counterpart in private industry. The private employer is liable whenever the employee is and may be expected to respond in damages when the employee cannot. Thus, a plaintiff has a solvent defendant to look to for compensation other than the employee himself. As a result, recovery will usually be sought from the employer. If a public employee is acting to further the interests of the public entity for which he works, there is no reason to apply a different rule. The public entity should accept the burdens of the employment relation as well as the benefits. This alternative, then, would accomplish the Commission's objective of imposing the ultimate financial responsibility on the public entity rather than on the public officer or employee.

Of course, there are disadvantages to such a recommendation as well. It would create a large area of immunity--for officers' and employees' discretionary acts and for tortious acts which could not be attributed

to a particular employee--which might be difficult to remove by future legislation. Then, too, some claimants will go uncompensated for injuries which may eventually be determined to be compensable. These disadvantages, though, seem to be more than offset by the advantages, particularly when it is remembered that legislation of some sort is likely to be enacted--either that prepared by the Law Revision Commission or that prepared by other agencies with an interest in curtailing liability.

The statutes discussed in the study take the following forms:

> 1. When a director, officer, agent or employee is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the agency shall pay the judgment without obligation for repayment by the director, officer, agent or employee.
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> 2. If an officer, agent, or employee of the district is held liable for any act or omission in his official capacity, except in case of actual fraud or actual malice, and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer, agent or employee.
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> 3. When an officer of a district is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer.

As Professor Van Alstyne points out, these statutes seem to preclude a negotiated settlement without litigation. At the minimum they would require a stipulated judgment. Moreover, there does not appear to be anything in these statutes permitting the entity to control the defense of the action. Some of the statutes do not permit the entity to seek reimbursement even if the officer or employee acted with malice.

Two statutes, on page 54 of the study, impute the negligence of officers or employees to entities:

> 1. The negligence of a trustee in his official capacity or any employee or servant of a district shall be imputed to the district to the same extent as if the district were a private corporation.
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> 2. The negligence of a trustee or trustees of a flood control and water conservation district shall be imputed to the district to the same extent as if the water conservation and flood control district were a private corporation . . . .

Vicarious liability is also imposed on school districts in two ways: (1) districts are made liable for the negligence of their officers and employees (Educ. C. § 903) and (2) districts are required to insure (either commercially or through self-insurance) their officers and employees against liability for negligence and are permitted to insure them against liability for intentional torts. (Educ. C. § 1044)

The problem with these statutes for present purposes is that they do not limit the potential liability to situations where the officer or employee involved would himself be liable. Thus, if these statutes were made generally applicable, areas of liability would be opened up without any study or knowledge of how extensive these areas of liability might be. Another difficulty with these statutes is that they impose a vicarious liability only for negligence and not for other torts committed in the scope of the office or employment.

The staff recommends that the Commission recommend the enactment of a statute taking a middle position. The statute should provide that a public entity is vicariously liable for any act or omission done or omitted by an officer, agent or employee of the entity within the scope of his office, agency or employment for which the officer, agent or employee could be held personally liable. The statute should also provide that the entity may recover from the officer or employee involved

upon proof of actual malice, fraud, dishonesty, etc.. A draft statute to effectuate this staff recommendation will be submitted in a supplement to this memorandum.

Alternative (5). It is difficult to see how it would be possible to recommend the enactment of an FTCA type statute. Although it is not difficult to say that public entities are liable for the negligent or wrongful acts of their employees, it would be very difficult to articulate the exceptions to this general rule. There does not appear to be enough time left before the 1963 Session to do this. Even the general rule would merely ask the courts to determine the difficult problems during the interim until the Commission has time to complete its study. Here, too, the Commission would not be in a position to base its recommendation upon its own study and research. It would be impossible to predict what its result would be in terms of liability.

Alternative (6). The Commission may make no recommendation as to the areas not studied. But, it seems likely that the Legislature will enact legislation in order to prevent Muskopf and Lipman from becoming the law. The majority of proposed statutes that public entities have proposed so far have been fairly limited in effect. For example, the draft statute forwarded by the L.A. County Counsel's office (not to be considered a recommendation of that office) imposed liability only for negligent torts and, in addition, contained many exceptions to this liability. If such legislation is enacted, the difficulty of enacting liberalizing legislation at a later date will be substantially increased. Therefore, it seems desirable for the Commission to propose the legisla-

tion to govern until the study is completed instead of, by default, permitting other agencies with a biased interest in the matter to propose the legislation that is to be enacted.

Respectfully submitted,

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