7/13/62

Memorandum No. 38(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Payment of Costs in Actions Against Public Entities)

Attached (blue pages) are two copies of a tentative recommendation relating to the payment of costs in actions against public entities and public officers, agents and employees. The recommendation and statute have been revised to incorporate the substance of the decisions made at the June meeting.

In addition to consideration of general questions relating to the recommendation and statute, the Commission might want to consider several additional problems in connection with the statute.

1. The reference to the Vehicle Code has been deleted. At the June meeting, Mr. Carlson of the Department of Public Works indicated that the Vehicle Code reference was the result of a compromise involving the more desirable elimination of all actions founded upon insured risks and that the compromise was reached because of the almost impossible burden which a plaintiff would otherwise have in determining at the time the complaint is filed whether the cause of action was based upon an insured risk. While this is a problem when the statute requires an undertaking in every case, it is not a problem when the public entity has discretion with respect to requiring an undertaking. Thus, in light of the Commission's recommendation with respect to the grant of broad authority to insure against any risk, this does not seem to be a reasonable basis upon which to found an exception. Accordingly, the Vehicle Code reference, founded upon the insurance aspect, has been deleted from the proposed statute.

2. The Commission agreed to reduce to $100 the minimum sum to be posted by the plaintiff at the demand of the public entity. Since it is quite possible that more than one plaintiff would be joined in a single action, it is likely that the same sum might be required of each plaintiff. While this is not unreasonable and presents no particular problems with respect to the undertaking itself, it does present a problem in terms of the minimum amount of $50 which the public entity can recover upon winning the case, since it is probable that the Commission intended only a single minimum to be collected. Should the statute be revised to reflect this intention more clearly or is it intended that $50 might be collected from each plaintiff?

3. The same problem involving joint plaintiffs applies with equal force to joint defendants, i.e., more than one entity, more than one employee, etc., or a combination of entities and employees, etc. This is a problem only where there is a split judgment, e.g., a judgment for the employee (in which case the entity might be entitled to a minimum of $50) and against the entity (in which case the entity would be responsible for costs). Again, in the interest of simplicity, the statute has not been drafted with all the clarity and detail that might be required to cover all possible situations, since it is believed that existing practice with respect to division of costs in joint judgment situations would be sufficient to handle this problem. In any event, the possible difficulty should be noted.

4. With respect to the award of costs, the liability of the public entity for costs has not been conditioned upon the entity's demanding an undertaking of the plaintiff since Sections 1028 and 1029

of the Code of Civil Procedure clearly state the policy with respect thereto, namely, that costs shall be awarded against the State (Section 1028) and local public entities (Section 1029) the same as against private parties. Thus, Section 652 of the Government Code is clearly inconsistent with the express language of Code of Civil Procedure Section 1028. Since costs could be validly assessed against public entities without regard to whether there has been a demand for an undertaking, there is now no possible adverse consequence flowing from a public entity's demanding an undertaking. (It will be recalled that the Commission approved deleting the payment of plaintiff's counsel fees as a possible consequence.) Accordingly, the Commission might consider whether the theory upon which discretion is given to the public entity to demand an undertaking should be changed since an entity can make such demand in every case with impunity. The staff believes that it would not be unreasonable to include a fixed amount, such as $50 (equal to the entity's minimum for costs) or $100 (equal to the statutory amount fixed for defamation actions, see Code of Civil Procedure Section 836), to be paid the plaintiff toward the cost of counsel fees where judgment is rendered against the plaintiff who has been required to post an undertaking.

It should be noted also that the proposed statute omits any reference to the public entity's liability for costs where the plaintiff recovers a judgment against an officer, agent or employee in an action defended by the public entity. This is thought to be unnecessary because it is a subject properly covered under the Commission's distributed recommendation regarding the defense of public officers and employees. (And it is presently covered under Code of Civil Procedure Section 1028. See Exhibit I.)

With respect to the over-all question of interest and costs, it would be entirely appropriate to make no reference to either in this statute, since Code of Civil Procedure Sections 1028 and 1029 govern the cost situation and Section 1033 governs the interest matter. The only remaining matter would be the necessity of fixing the minimum amount recoverable by the entity at $50.

It should be noted that no specific reference has been made to the fact that allowable costs do not include counsel fees. This is thought to be unnecessary, particularly in light of Code of Civil Procedure Section 1021 which specifically excludes such fees in cost computation unless otherwise provided by law.

Attached as Exhibit I (yellow pages) is the text of present and past statutes relating to the award of costs against public entities and a brief comment with respect thereto.

Respectfully submitted,

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EXHIBIT I

The following discussion bears upon the question of costs which may be awarded against public entities, particularly the State.

Government Code Section 652 now provides as follows:

> 652. If judgment is rendered for the plaintiff, it shall be for the legal amount actually found due from the State to the plaintiff, with legal interest from the time the claim or obligation first arose or accrued, and without costs.

This section is identical with former Government Code Section 16051 (formerly Political Code Section 688, enacted in 1929).

The final phrase "and without costs" is wholly inconsistent with the plain language of Code of Civil Procedure Section 1028, which provides:

> 1028. Notwithstanding any other provisions of law, when the State is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the appropriation for the support of the agency on whose behalf the State appeared.

The above form of this section was enacted in 1943. Prior to this date, the section was in the identical form in which it was enacted in 1872, and read as follows:

> When the State is a party, and costs are awarded against it, they must be paid out of the State Treasury.

This latter form had been uniformly interpreted by the district courts of appeal as a mere direction to the source from which

costs would be paid if assessed, and not as authority for the assessment itself. (And, since no other statutory authority existed, no costs were allowed against the State.) See, e.g., People v. One Plymouth Sedan, Etc., 21 Cal. App.2d 715 (1937). In its amended (and present) form, however, such costs are clearly awarded. Boland v. Cecil, 65 Cal. App.2d Supp. 832 (1944); and see People v. One 1957 Ford, Etc., 160 Cal. App.2d 797 (1958)(dictum). There is a conspicuous absence of authoritative appellate opinions on the subject of costs against the State, believed by the staff to be due to the plain, unambiguous language in Section 1028, which clearly permits such costs to be awarded against the State.

Code of Civil Procedure Section 1029 followed a path similar to Section 1028. In its original form (enacted in 1872), this section also was interpreted as merely pointing to the funds from which costs would be paid, if assessed (and they could not be since no other statute permitted it). This section was not amended to its present form until 1945, immediately following a district court opinion in which it was held that the 1943 amendment to Section 1028 did not apply to a judgment against a district attorney since he is a county officer, and Section 1029 was merely directory, etc., Gayer v. Whelan, 60 Cal. App.2d 616 (1943). Section 1029 now provides:

> 1029. When any county, city, district, or other public agency or entity, or any officer thereof in his official capacity, is a party, costs shall be awarded against it on the same basis as against any other party and, when awarded, must be paid out of the treasury thereof.

From this clear policy expressed in the Code of Civil Procedure, it is doubted that the Section 652 limitation on costs is current law.

7/13/62

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Protection of Public Entities and Public Officers and Employees Against Unfounded Litigation*

Section 647 of the Government Code provides that a plaintiff who brings an action against the State must post an undertaking in an amount to be determined by the court (with a minimum amount of $250) conditioned upon the payment of costs and a reasonable counsel fee to the State if he fails to recover a judgment against the State. Such an undertaking is required in all cases except those involving motor vehicles operated by State personnel. No statute exists that provides local public entities with a similar protection against unfounded litigation.

Section 652 of the Government Code provides that interest on any judgment recovered against the State shall be computed from the time the obligation first accrued and that the judgment shall not include costs. The provision with respect to the time from which interest runs is clearly

* This tentative recommendation does not cover all the techniques that may be utilized to provide protection to public entities and public officers against unfounded litigation. For example, the claims presentation statutes tend to discourage unfounded litigation. Statutes that provide for insurance and for counsel at public expense also protect public officers and employees against personally having to pay the cost of defending unfounded litigation. These and other techniques which are designed in part to discourage unmeritorious litigation are or will be covered by other tentative recommendations prepared by the Law Revision Commission.

contrary to the usual rule of law applicable to private persons similarly situated. Moreover, the expressed denial of recovery of costs is plainly inconsistent with the clear language in Code of Civil Procedure Section 1028, which declares that such costs may be awarded against the State on the same basis as against any other party.

The Law Revision Commission has concluded that Section 647 represents sound public policy to the extent that it is designed to deter litigation-prone individuals from instituting unmeritorious actions. This law should be changed, however, so that it does not impose an unreasonable burden upon a plaintiff who has a meritorious cause of action and to remedy other defects in the law. Similarly, Section 652 should be revised to eliminate the defects and inconsistencies contained therein.

The Commission recommends, therefore, that all public entities--not just the State--be authorized, in their discretion, to require the plaintiff in any case to provide an undertaking to pay costs to the public entity. Local public entities are as likely as the State to be subjected to unfounded litigation and no good reason exists for not extending this protection to all public entities. The exception in the present law with respect to cases arising under the Vehicle Code is not needed where the undertaking is entirely discretionary.

Expansion of the applicable scope of undertakings, however, calls for a corresponding restriction in the burden imposed upon a litigant, since it is not the intent of requiring an undertaking to deter a plaintiff who has a meritorious action. Accordingly, whether an undertaking is to be required in a given case should be left to the discretion of the defendant public entity. The minimum amount of the undertaking

should be reduced to the more reasonable sum of $100 and the entity should be required to show good cause for having the court fix an amount in excess of this minimum.

With respect to interest and costs, there is no reason why a uniform provision should not be applicable to local public entities as well as the State. Morecver, the specific provisions of present Section 652 of the Government Code should be revised to conform to current practices with respect to private parties. Accordingly, interest on a judgment against a public entity should be computed from the date of entry of the judgment. Similarly, costs should be awarded against public entities the same as against private parties, a policy heretofore clearly expressed in Code of Civil Procedure Sections 1028 and 1029. Conversely, where judgment is rendered for the public entity, allowable costs incurred by the public entiy, but not less than $50, should be assessed against the unsuccessful plaintiff.

The proposed statutory provisions will serve two purposes. First, they will tend to discourage litigation of doubtful merit since a plaintiff will be encouraged to compromise and settle doubtful claims rather than to resort to court proceedings. Second, public entities will properly be treated more nearly like private litigants once liability is established.

The Commission further recommends that the protection that would be afforded public entities under the above recommendations be extended to cases where the public entity undertakes to defend an action brought against one of its officers, agents or employees. This will discourage the plaintiff from bringing his action against the public officer,

agent or employee (instead of against the employing public entity) merely to avoid the requirement that an undertaking be filed. Moreover, it is sound public policy to discourage unfounded litigation against public officers, agents and employees, and the requirement of an undertaking in such cases will tend to discourage litigation that lacks merit.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Chapter 3.5 (commencing with Section 820.1) to Division 3.5 of Title 1 of, and to repeal Sections 647 and 652 of, the Government Code, relating to counsel fees, interest and security for costs in actions against public entities and public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Chapter 3.5 (commencing with Section 820.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

Chapter 3.5. Counsel Fees, Interest and Security for Costs in Actions Against Public Entities and Public Officers, Agents and Employees

Article 1. Interest and Security for Costs

820.1. At any time after the filing of the complaint in any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of the plaintiff as security for the allowable costs which may be awarded against the plaintiff. The

undertaking shall be in the amount of $100, or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, the action shall be dismissed.

820.2. If judgment is rendered for the plaintiff in an action against a public entity, it shall be for the amount actually due to the plaintiff, with legal interest from the time the judgment is rendered, and for allowable costs incurred by the plaintiff in the action.

820.3. If judgment is rendered for the public entity in any action against it, allowable costs incurred by the public entity in the action, but in no event less than $50, shall be awarded against the plaintiff.

820.4. At any time after the filing of the complaint in any action against a public officer, agent or employee, if a public entity undertakes to defend the action, the public entity may file and serve a demand for a written undertaking on the part of the plaintiff as security for allowable costs which may be awarded against the plaintiff. The undertaking shall be in the amount of $100, or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, the action shall be dismissed.

820.5. If judgment is rendered for the officer, agent or employee in any action defended by a public entity that is not a party to the

action, allowable costs incurred by the public entity in the action, but in no event less than $50, shall be awarded against the plaintiff.

SEC. 2. This act applies only to causes of action that accrue on or after its effective date. Causes of action that accrued prior to the effective date of this act are not affected by this act but shall continue to be governed by the law applicable thereto prior to the effective date of this act.

SEC. 3. Section 647 of the Government Code is repealed.

[~~647.--At the time of filing the complaint in any action against the State, except in an action based upon a claim arising under Sections 17000 to 17093, inclusive, of the Vehicle Code, the plaintiff shall file therewith an undertaking in such sum, but not less than two hundred fifty dollars ($250), as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court.--The undertaking shall be conditioned upon payment by the plaintiff of all costs incurred by the State in the suit, including a reasonable counsel fee to be fixed by the court, if plaintiff fails to recover judgment in the action.--Where no such undertaking is filed at the time of the filing of the complaint the State may file and serve a demand therefor.-Within twenty (20) days after service of a demand, the plaintiff shall file an undertaking as required herein or the action shall be dismissed.~~]

SEC. 4. Section 652 of the Government Code is repealed.

[~~652.--If judgment is rendered for the plaintiff, it shall be for the legal amount actually found due from the State to the plaintiff, with legal interest from the time the claim or obligation first arose or accrued, and without costs.~~]