

10/16/62

First Supplement to Memorandum No. 64 (1962)

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

Agent

As pointed out in the memorandum that this supplements, there is a problem that arises out of the inclusion of "agent" in the definition of "employee". This problem is that it has been suggested that "agent" may be construed to include independent contractors. Thus, it is feared that such contractors might be entitled to a mandatory defense under the defense statute, the public entity might be required to pay any judgments against the contractor, and the public entity might have a right to be indemnified by the contractor only if there is actual malice, actual fraud or corruption.

A similar problem prompted the Legislature to remove the word "agent" from Education Code Section 1029, which required school districts to insure their officers, agents and employees.

In Memorandum No. 64, a possible solution is suggested: Retain the word "agent" but exclude independent contractors from the definition of "employee". Then add a provision imposing liability for the torts of independent contractors to the extent that private persons are liable.

If this solution is adopted, the Commission should consider one or two additional matters. What adjustments, if any, should be made in the dangerous conditions statute? What adjustments, if any, should be made in the motor

vehicle statute?

So far as the remainder of the liability statutes are concerned, the staff does not see any difficulty that would arise out of the imposition of a separate type of liability for independent contractors. The only question in connection with dangerous conditions of property is whether public entities should be liable for the tortious acts of independent contractors that result in dangerous conditions of property under the liability rules applicable to private parties, or whether public entities should be liable for dangerous conditions of property only under the conditions specified in the dangerous conditions statute? This problem does not arise in connection with public employees, for public employees are liable for dangerous conditions only under the conditions stated in the dangerous conditions statute.

So far as the vehicle tort statute is concerned, see the second supplement to Memorandum No. 62.

Equitable and contractual relief.

In Memorandum No. 64, it is suggested that a provision be added indicating that the provisions of Part 2 do not prevent equitable relief from being granted in appropriate cases and have no effect on contractual remedies. To accomplish this, the staff suggests that Section 815 be amended to read:

815. Except as otherwise provided by enactment, a public entity is not liable for injury arising out of

an act or omission of the public entity or of an employee of the public entity. Nothing in this section or in this part has any effect upon the liability of a public entity arising out of contract. Nothing in this part prevents a court from granting any form of relief, legal or equitable, that may be appropriate under the circumstances.

In accordance with this amendment, the title of Part 2 should be revised to refer to the "Tort Liability of Public Entities etc."

Respectfully submitted,

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