#52 11/21/67

Memorandum 67-78

Subject: Study 52 - Sovereign Immunity

Attached as Exhibit I is material sent to the Commission by the State Bar. The State Bar requests the views of the Commission on Senate Bill No. 921 which was vetoed by the Governor at the 1967 session.

We have requested comments on the material provided by the State Bar from the Office of the Attorney General (see Exhibit II), the Department of General Services, the Department of Public Works, the Department of Water Resources, the County Supervisors Association, and the League of California Cities. We requested these comments on November 14 and have received only the comments of the Office of the Attorney General. We will provide you with copies of any additional comments at the meeting. At the suggestion of the League of California Cities, we today (November 21) requested comments from additional persons, but we doubt that they will be received in time for the December meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 67-78 EXHIBIT I

THE STATE BAR OF CALIFORNIA

HERBERT E. ELLINGWOOD
Legislative Representative

SUITE 475
INSURANCE & EXCHANGE BUILDING
455 CAPITOL MALL
SACRAMENTO 95814
TELEPHONE 444-2762
AREA CODE 916

November 8, 1967

Mr. John DeMoully
Executive Secretary
Law Revision Commission
Stanford University
Stanford, California

Re: SB 921

Dear John:

As you know, the State Bar sponsored SB 921 to eliminate the minimum mandatory penalty involved in a suit against a public entity.

Enclosed is a copy of our letter to the Governor and the Governor's veto message. You will note in the veto message that the alleged reason for the Governor's action was that your group did not comment on the proposal.

We would appreciate your consideration of this bill at your earliest opportunity. I stand ready to assist the Commission either as a witness or in providing material from our files.

We would like to introduce the bill again this next year if your action is favorable and relatively soon.

Thanks for your continued cooperation.

Sincerely,

Herbert E. Ellingwood
Legislative Representative

HEE:dp

SENATE BILL No. 921

Introduced by Senator Song

April 6, 1967

REFERRED TO COMMITTEE ON JUDICIARY

An act to amend Sections 947 and 951 of the Government Code, relating to suits against a public entity.

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

SECTION 1. Section 947 of the Government Code is amended to read:

947. (a) 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 each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100) for each plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars ($200), 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, his action shall be dismissed.

~~(b) 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 fifty dollars ($50), shall be awarded against each plaintiff.~~

~~(c)~~ *(b)* This section does not apply to an action commenced in a small claims court.

SEC. 2. Section 951 of this code is amended to read:

LEGISLATIVE COUNSEL'S DIGEST

SB 921, as introduced, Song (Jud.). Suits against public entities.

Amends Secs. 947 and 951, Gov.C.

Eliminates provision setting minimum costs which a public entity as a defendant or as a nonparty providing the defense may collect against a losing plaintiff.

Vote—Majority; Appropriation—No; State Expense—No.

951. (a) At any time after the filing of the complaint in any action against a public employee or former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($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, his action shall be dismissed.

~~(b) If judgment is rendered for the public employee or former public employee in any action where a public entity is not a party to the action but undertakes to provide for the defense of the action, allowable costs incurred in defending the action, but in no event less than fifty dollars ($50), shall be awarded against each plaintiff.~~

~~(c)~~

(b) This section does not apply to an action commenced in a small claims court.

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THE STATE BAR OF CALIFORNIA

Herbert E. Ellingwood
Legislative Representative

Suite 475
425 Capitol Mall Building
Sacramento 95814
Telephone 444-2762
Area Code 916

July 28, 1967

Honorable Ronald Reagan
Governor of California
State Capitol
Sacramento, California 95814

Re: SB 921

Dear Governor Reagan:

We would appreciate your signature on SB 921.

This proposal had its origin in 1966 State Bar Conference Resolutions 24 and 25. After study and report by the Committee on the Administration of Justice, the Board of Governors of the State Bar of California placed this item on its 1967 Legislative Program.

This proposal amends Sections 947 and 951 of the Government Code, regarding suits against a public entity or employee.

In 1963 the Legislature adopted extensive changes in the field of sovereign immunity which were necessitated by judicial decision. Sections 947b and 951b were added then to the code allegedly for the following reason:

> "The Commission has concluded that all public entities are entitled to protection against unmeritorious litigation . . . . If a judgment is rendered for the public entity in any action brought against it, the public entity should be entitled to recover at least $50 as allowable costs." 1963 Report of the California Law Revision Commission (Vol. 4, p. 1014-1015).

This procedure has created an undue and unnecessary hardship. It requires a court to award $50 as minimum costs regardless of actual costs whenever a defendant prevails. No maximum

cost limit is set. Furthermore, the requirement is for such an award against each plaintiff. A mother and five children who are injured in one accident suffer a nonmodifiable minimum penalty of $300 if they do not prevail even if actual costs are only $25. This is an unfair penalty on private litigants.

In a recent Los Angeles case, a plaintiff was required to deposit security for costs for four public entities and twenty employees. The cause of action was in contract. Three of the entities and fifteen of the employees were joined in the defense and represented by the county counsel. If the plaintiff loses, minimum costs as a penalty at $50 per defendant will be $1200. This obviously bears no relationship to actual costs.

It should be noted that there is no similar penalty imposed upon the defendant who contests the suit and loses.

It should also be noted that spurious litigation will still be discouraged by this section which requires the plaintiff to file a bond in the minimum amount of $100 upon demand of the defendant. The requirement of a bond has proved to be more of a deterrent to unmeritorious litigation than has imposition of minimum costs. In fact, there is no maximum limit to the amount of bond the court can require.

The defendants are not damaged by the repeal of minimum costs. The present law would not be changed which provides that the losing party in a civil matter may be required to pay actual costs. No public entity would lose a penny of actual costs as a result of this bill.

It should be recognized that the creation of such a penalty in 1963 was an innovation. No such penalty was then or is now applicable to any other individual, group or entity.

This penalty is too harsh for another reason. It is almost always necessary to include in a complaint multiple public employees and entities because governmental secrecy or alleged security prevents or hinders a citizen from ascertaining who is liable. A careful attorney in order to protect his client must join in the complaint those he thinks may be liable. The entities are not damaged generally because they are all represented by one counsel.

It certainly is questionable if this penalty is a deterrent. If it is, its deterrence value is outweighed by the hardship to the individual citizen plaintiff-especially in view of the fact that the governmental entities have the bonding protections.

In order to be consistent, this bill should be signed. Prior legislation on this subject was passed this year and signed. SB 484 (Chap. 255) established bonding requirements for suits against the University of California. As introduced it contained a $50 minimum mandatory penalty which was deleted by the Senate Committee on Judiciary on opposition.

There was opposition to this bill from many governmental entities contending the penalty is a justifiable deterrent. However, the bill passed the Senate by a vote of 28-1 and the Assembly by a unanimous vote.

If you have any questions on this bill, we will be most happy to respond.

Sincerely,

Herbert E. Ellingwood
Legislative Representative

HEE:dp
cc: Messrs. Halsted, Song, Hayes, Macomber, Elmore

RONALD REAGAN
GOVERNOR

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

September 1, 1967

The Honorable Members of the Senate
State of California
Sacramento, California

Greetings:

I am returning without my signature Senate Bill No. 921, entitled, "An act to amend Sections 947 and 951 of the Government Code, relating to suits against a public entity."

This bill eliminates the minimum costs which a public entity may collect against a plaintiff when the plaintiff fails to recover a judgment against the public entity.

The Government Tort Liability Act was adopted by the Legislature after several years of study by the Law Revision Commission. The Commission in its recommendations to the Legislature stated the provision for payment of costs would provide "a large measure of protection against groundless and unjustified actions against the State." There is danger in making piecemeal amendments to the Government Tort Liability Act without first receiving the views of the Law Revision Commission.

Accordingly, I am returning this bill unsigned.

Respectfully,

Ronald Reagan

RONALD REAGAN
Governor

Memo 67-78

THOMAS C. LYNCH
ATTORNEY GENERAL

EXHIBIT II
STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL
Department of Justice

ROOM 500, WELLS FARGO BANK BUILDING
FIFTH STREET AND CAPITOL MALL, SACRAMENTO 95814

November 16, 1967

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

This will acknowledge your letter of November 14, 1967, concerning the Commission's plan to consider S.B. No. 921, vetoed by the Governor during the last session.

It is our position on this bill that section 947(b) provides a protection against unmeritorious actions by attorneys who include public agencies as defendants on the remote possibility that they might be involved in a particular accident or injury. It also protects against groundless suits by litigants who habitually harass public agencies. It provides a minimum of recovery of expenses for necessary appearances. Our position has not changed since we supported this legislation before the Law Revision Commission in the studies connected with the California Tort Liability Act of 1963.

Thank you for the opportunity to comment on your proposed consideration of this bill.

Very truly yours,

THOMAS C. LYNCH
Attorney General

WILLARD A. SHANK
Assistant Attorney General

WAS:cg