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Fourth Supplement to Memorandum 69-124

Subject: Function of Law Revision Commission

Attached is a copy of an article that describes how the California Law Revision Commission conducted the sovereign immunity study. This article will give you a general idea of the procedure the Commission used in this study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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Department of Legislation

Charles B. Nutting, Editor-in-Charge

This department is pleased to present the following case study in fact finding for legislation as an example of the sort of research, drafting and discussion which should precede the enactment of important measures such as the one described, which deals with the problem of governmental liability for torts. The author is Executive Secretary of the California Law Revision Commission.

Fact Finding for Legislation: A Case Study

by John H. DeMouly

IN AUGUST, 1963, an article¹ in this department discussed the various devices used to provide legislative bodies with a factual background for legislation. Among the devices mentioned was a law revision commission, with that of New York used as an example. But developments in the West should not be ignored, and the role of the California Law Revision Commission in that state's recent reform of governmental tort liability law provides a good case study to supplement the August, 1963, article.

In January, 1961, the California Supreme Court held in *Muskopf v. Corning Hospital District*² that the doctrine of sovereign immunity "must be discarded as mistaken and unjust".³ In *Lipman v. Brisbane Elementary School District*,⁴ decided on the same day, the court recognized and applied the doctrine that a public employee is immune from liability for "discretionary" acts, but stated in a dictum that this doctrine might not protect public agencies in all situations where the employee is immune.⁵ The opinion did not indicate clearly the types of cases where agency liability would exist for discretionary acts of employees.⁶

As one would expect, representatives of many public agencies expressed great concern that the monetary obligations of governmental tort liability under the *Muskopf* and *Lipman* cases would impair the financial stability of public agencies, for the two cases provided governing bodies of public agencies with little indication of the rules by which governmental tort liability would be determined. It was also feared

that judges and juries would be reviewing basic governmental policy decisions in deciding tort actions for damages.

Although it was generally agreed that acute problems were created by the judicial abrogation of the doctrine of sovereign immunity, it soon became apparent that there was not sufficient time at the 1961 legislative session to consider ramifications of the *Muskopf* and *Lipman* decisions and to prepare remedial legislation. In order to provide time for a study of the problems, the 1961 legislature enacted a "moratorium statute",⁷ suspending the effect of the *Muskopf* and *Lipman* decisions until the 1963 legislature would have an opportunity to act.

The legislature looked to the California Law Revision Commission to provide the necessary background legal research and suggested legislation. Fortunately, the commission had been directed by the legislature in 1957 to undertake a study to determine whether the doctrine of sovereign immunity should be abolished or revised. Following its usual practice, the commission had retained a research consultant to prepare a comprehensive study of the existing law, its defects and the possible solutions to them. The research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles, was engaged in background research but had not yet begun to write the research study at the time the *Muskopf* case was decided.

During the two-year period between the 1961 and 1963 legislative sessions, the commission devoted substantially

all of its time to the study of sovereign immunity. As portions of the research study were completed by the research consultant, they were considered by the commission at its regular meetings. Meetings were held regularly two or three days each month, and were conducted as work sessions, not public hearings. Interested persons were permitted to attend but not to participate in the deliberations of the commission. Representatives of various state departments and local public entities usually attended the meetings and, upon request, provided valuable information concerning the practical effect of various alternative proposals.

After a particular portion of the research study was considered, the commission prepared tentative recommendations for proposed legislation and distributed them widely to all persons who had indicated an interest in the study. Several legal newspapers printed portions of the research study and the tentative legislative proposals. The California State Bar appointed a special committee to work with the commission. Comments, suggestions and criticisms were received from numerous persons and organizations and were considered by the commission in formulating its final recommendations.

While the Law Revision Commission was engaged in its study of the legal problems involved, the Senate Fact Finding Committee on Judiciary undertook an inquiry concerning the potential financial impact of the abolition of sovereign immunity. The committee retained Mr. Benton Sifford, Vice President of the Fireman's Insurance Fund and Associated Companies, to prepare its report. The report⁸ is 111 pages

1. Nutting, *Fact Finding for Legislation*, 49 A.B.A.J. 791 (August, 1963).

2. 55 Cal. 2d 211, 359 P. 2d 457 (1961).

3. 55 Cal. 2d at 213, 359 P. 2d at 458.

4. 55 Cal. 2d 224, 359 P. 2d 465 (1961).

5. 55 Cal. 2d at 229-30, 359 P. 2d at 467.

6. The court stated, "Although 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, various factors furnish a means of deciding 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."

7. Cal. Stat. 1961, ch. 1404.

8. California Senate, Fact Finding Committee on Judiciary, *Seventh Progress Report to the Legislature: Part I—Governmental Tort Liability* (1963).

long and contains sixty-three tables. It was available in printed form early in the 1963 legislative session. The report examines the experience in New York and other selected states where governmental tort liability exists and the experience under the Federal Tort Claims Act. It includes also a careful analysis of claims against the State of California and claims against local public entities in California. Finally, the report contains a rough estimate of the potential cost of the legislation recommended by the Law Revision Commission.

Working with the staff of the Law Revision Commission, Mr. Sifford prepared a comprehensive questionnaire that was distributed to every local public entity in California. The State Department of Finance made available data tabulating equipment to compile the results. The questionnaires provided valuable information concerning the extent of existing insurance coverage of local entities and their claims experience.

Mr. Sifford worked closely with the Law Revision Commission and attended all of its meetings while recommendations were being prepared. This permitted the commission to utilize the information gathered by Mr. Sifford in formulating its final recommendations.

During the summer of 1962, the commission presented its tentative recommendations on governmental tort liability at interim hearings of Senate and Assembly interim committees. These hearings provided members of the appropriate legislative committees with the general background information they needed to permit them to evaluate the legislation during the 1963 session. The hearings also provided the commission with some indication of which of its tentative recommendations were most con-

troversial and needed further study.

As a result of its study the Law Revision Commission approved and submitted to the legislature a package of nine bills. Accompanying the bills were a series of seven pamphlets containing background information concerning the bills.⁹ Two of the pamphlets dealing with the two most complex and controversial bills contained the text of each proposed section accompanied by an explanatory comment. The 568-page research study prepared by the research consultant also was published.¹⁰

Extensive hearings were held during the 1963 session by four legislative committees. Eight of the nine bills recommended by the commission were enacted.¹¹ The most important bill—one dealing with the liability and immunity of public agencies and public employees—was substantially amended by the legislature; but the amendments, being concerned largely with matters of detail and the application of the statute to specific situations, left unchanged the basic legislative scheme conceived and recommended by the commission.

California, like most other states, does not make any transcript of legislative hearings or proceedings on the floor of the Senate and Assembly. In order to provide a source of legislative intent, an exceptional procedure was used. Three special reports were made by legislative committees and were printed in the legislative journals. These reports indicate that the comments contained in the report of the commission are to be considered in determining legislative intent. Revised comments on various sections are also included in order to clarify or to reflect changes made in the bill after introduction.

The text of the comments contained in the reports of the Law Revision

Commission and in the special legislative committee reports is available in several forms. The private publishers of the California codes have included excerpts from the comments in their annotated codes, and the Continuing Education of the Bar is publishing a book containing the full text of the comments. This does much to meet the objection that legislative history is not conveniently available to the general practitioner.

As a final step in this project, Professor Van Alstyne has undertaken to prepare two publications on California governmental tort liability for the Continuing Education of the Bar. The Continuing Education of the Bar offered a special program on governmental tort liability in November and December, 1963, and the Law Revision Commission co-operated in this effort to acquaint California lawyers with the new legislation.

The author believes that the background of the 1963 California governmental tort liability statute provides a splendid example of how the legislature, a law revision commission, the State Bar, state departments and local agencies, and other interested persons and organizations can co-operate in fact finding for legislation designed to meet a complex and controversial problem.

9. *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes*, 4 CAL. LAW REVISION COMM'N REP., REC. & STUDIES at 801, 1001, 1201, 1301, 1401, 1501 and 1601 (1963).

10. *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 1 (1963).

11. Cal. Stats. 1963, chs. 1681, 1682, 1683, 1684, 1685, 1686, 1715 and 2029.