

#71

8/3/70

Memorandum 70-97

Subject: Study 71 - Joinder of Parties

At the July meeting, the Commission directed the staff to prepare a letter to respond to Senator Grunsky's request that the Commission include the substance of his Senate Bill 847 in our recommendation on various pleading matters. Attached as Exhibit I is a draft of such a letter.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memo 70-97

EXHIBIT I

Hon. Donald L. Grunsky
Senate Post Office
State Capitol
Sacramento, California 95814

Dear Senator Grunsky:

You requested that the Law Revision Commission review your bill--Senate Bill 847 (1970)(mandatory joinder of parties)--with a view to incorporating its substance in legislation being prepared by the Commission for introduction at the 1971 Legislature. Senate Bill 847 would require that the plaintiff join as defendants in one action any persons against whom he might possibly have any cause of action arising out of the same transaction or occurrence.

The Commission has tentatively determined that a plaintiff should be required to assert against the persons he names as defendants all causes of action arising out of the same transaction, occurrence, or series of transactions or occurrences and that any causes not so asserted would be waived. This would prevent the plaintiff from asserting a cause of action for injury to property and then, in another action, asserting a cause of action against the same defendant for personal injury arising out of the same transaction or occurrence. The Commission recognizes that this recommendation would not have much practical effect on current practice since the plaintiff now almost always asserts all causes he has against the defendant because he fears that causes not asserted might otherwise be barred by principles of res judicata or collateral estoppel. Nevertheless, the recommended rule will make the law clear and will avoid the need to rely upon the often confusing doctrines of res judicata and collateral estoppel to bar the claims not asserted.

Your Senate Bill 847 goes much further than the Commission's tentative proposal. Under your bill, a plaintiff would often be placed under the dilemma

of adding potential defendants whose liability appears remote or losing his rights against such defendants. It would have the serious negative effect of inducing the plaintiff to bring in parties who might otherwise never be sued. Presently, a plaintiff, who chooses not to sue all possible defendants, will select those persons who are most likely to be held liable and can afford to pay a judgment. If he is successful, it is very unlikely he will bring a second action; and, even if he loses, he must balance the costs of an additional trial against the reduced chances of ultimate success. In many cases, this will result in a decision not to go forward. An added factor is that the plaintiff must at least commit himself to a second action prior to the running of the statute of limitations. Especially in personal injury actions under California's one-year limitations period, it will usually be known before trial of the first action whether a second action will be brought, and consolidation of the two cases may be available.

The Commission believes that enactment of Senate Bill 847 would increase the amount of litigation and raise the cost of insurance. As it now stands, the plaintiff will often avoid going against a potential defendant whose liability seems remote and no action will ever be filed against him. Only in the rare case, after the suit against the initial defendant is concluded, will new evidence or circumstances arise to make a second action desirable. Under your bill, however, lawyers will be forced to gamble that the rare case might be the one they are handling; hence, they will join all potential defendants in every action. The fear of malpractice suits as well as the desire to protect their clients's interests will be an impelling factor. Thus, as a practical matter, the Commission believes that the probable net effect of your bill would be to increase the overall cost to insurance companies of defending claims since

the companies would be required to defend persons who are not now made defendants.

Moreover, enactment of the rule proposed by Senate Bill 847 would appear to go contrary to the policy reflected in Section 405.8 of the Code of Civil Procedure which requires the plaintiff in a personal injury action arising out of medical malpractice to furnish a written undertaking as security for the costs of defense which may be awarded against the plaintiff. This section was enacted in 1969 to discourage plaintiffs in medical malpractice actions from joining defendants against whom they do not have a sound claim for liability. Enactment of the rule proposed by Senate Bill 847 would put the plaintiff in a medical malpractice case in a difficult position: If he does not join as a party a person whose liability is doubtful, he loses his cause of action against that party; if he does join that person as a defendant, he may be required to post an undertaking for costs under Section 405.8.

There also would be practical problems of court administration if the rule of Senate Bill 847 were adopted. No standards are set out in the bill for determining when a plaintiff will be held responsible for knowing of related causes and defendants. An exception is needed to cover the case where the plaintiff has difficulty getting jurisdiction over multiple defendants. Exceptions could be written into the bill to take care of the jurisdictional problems, and a fair standard for defining the responsibility of plaintiffs in determining related causes and defendants might be constructed; but it is not unlikely that the additional judicial workload in hearing and resolving the issues so created would outweigh any possible benefit that might result from the adoption of the substance of Senate Bill 847. Moreover, the exceptions and standards so developed might very well substantially defeat the policy behind the bill.

Section 389 of the Code of Civil Procedure protects the defendant in a case where the plaintiff fails to join an "indispensable" party. Section 389 could be interpreted to require joinder of all defendants whom plaintiff would be permitted to join where joinder would allow the court to determine all causes arising out of the same transaction. Section 389 has been widely criticized for that reason. See, e.g., Comments, Bringing New Parties Into Civil Actions in California, 46 Cal. L. Rev. 100 (1958); Joinder of Parties in Civil Actions in California, 33 So. Cal. L. Rev. 428 (1960). California courts have refused to concede that such a broad interpretation was intended for Section 389. See, e.g., Duval v. Duval, 165 Cal. App.2d 627, 318 P.2d 15 (1957). These rulings are readily explained on the ground that, had the Legislature intended to do away with permissive joinder, it would have repealed the sections of the code dealing with permissive joinder, and this was not done. (Logically, enactment of Senate Bill 847 would also call for repeal of the permissive joinder sections since Senate Bill 847 would, in effect, abolish permissive joinder.)

For the above reasons, the Commission has concluded that the adoption of the rule proposed by Senate Bill 847 would not be desirable.

Yours truly,

Thomas E. Stanton, Jr.
Chairman