Place of Meeting

State Bar Building
1230 W. Third St.
Los Angeles

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles — Friday and Saturday, November 10-11, 1961

(Meeting will start at 9:30 a.m. on Nov. 10 and at 9:00 a.m. on Nov. 11)

1. Minutes of October 1961 meeting (to be sent)

2. Administrative Matters

3. Study No. 52(L) - Sovereign Immunity

   Memorandum No. 53(1961) (to be sent)
   Memorandum No. 54(1961) (to be sent)
   Study: Parts I, II and III (you have Parts I and II, Part III to be sent)

4. Study No. 46 - Arson

   Memorandum No. 46(1961) (sent October 17, 1961)
   Study on Arson (you have this study)

5. Study No. 53(L) - Personal Injury Damages as Separate Property

   Memorandum No. 55(1961) (to be sent)
   Study (you have this study)

6. Study No. 34(L) - Uniform Rules of Evidence

   Memorandum No. 56(1961) (Rules 23-27 as revised to date with comments) (to be sent)
   Memorandum No. 57(1961) (New Jersey material on Privileges Article) (to be sent)
   Memorandum No. 58(1961) (Psychotherapist Privilege) (to be sent)
   Memorandum No. 30(1961) (Rule 28) (sent August 14, 1961)

Memorandum No. 31(1961) (Rule 29) (sent August 14, 1961)
Memorandum No. 32(1961) (Rules 30, 31 and 32) (sent August 14, 1961)
Memorandum No. 33(1961) (Rules 33, 34 and 35) (sent August 14, 1961)
Memorandum No. 34(1961) (Rule 36) (sent August 14, 1961)
Memorandum No. 35(1961) (newsmen's privilege) (sent September 15, 1961)
Memorandum No. 40(1961) (Rule 37) (sent September 15, 1961)

MINUTES OF MEETING

of

November 10 and 11, 1961

Los Angeles

A regular meeting of the Law Revision Commission was held in Los Angeles on November 10 and 11, 1961.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr. (November 10)
Angus C. Morrison, ex officio

Absent: Honorable James A. Cobey
Joseph A. Ball

Messrs. John H. DeMoully, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

During the discussion of Study No. 52(L) - Sovereign Immunity, Professor Arvo Van Alstyne, the Commission's research consultant, and the following persons were also present:

Charles Barrett, Assistant Attorney General (November 10)
Robert Reed, Department of Public Works
Robert Carlson, Department of Public Works
Louis Heinzer, Department of Finance (November 10)
Robert Lynch, L. A. County Counsel (November 10)
Elda G. Sayles, Senate Judiciary Committee staff (November 10)
Virginia White, Senate Judiciary Committee staff (November 10)

On page 8 of the Minutes of the meeting of October 20 and 21, 1961, the first paragraph was corrected to read as follows:

> Similarly, it was agreed to define the rule of privilege to exclude its availability in an action or proceeding brought by the patient for restoration to capacity. The purpose of

this limitation is to make it clear that the testimony of examining psychotherapists (whether institutional or private) would be available in a restoration to capacity action involving an incompetent who was involuntarily committed.

The Minutes of the October meeting were approved as corrected.

Meeting Dates. Future meetings are scheduled as follows:

December 15 and 16 (San Francisco)

January 19 and 20 (Los Angeles)

February 16 and 17 (San Francisco)

March 16 and 17 (Los Angeles)

STUDY NO. 46 - ARSON

The Commission considered Memorandum No. 46(1961) relating to the study of arson. The Commission deferred consideration of the definition of the culpable conduct which should constitute the greater crime of aggravated arson in favor of examining the various purposes underlying the probable consequences of such conduct. This involves consideration of the statutory felony-murder rule (Penal Code § 189), the habitual criminal statute (Penal Code § 644) and the availability of probation (Penal Code § 1203).

The Commission agreed to delete arson from the crimes specifically listed in Penal Code Section 189 (the statutory felony-murder rule). Excluding the crime of arson from the crimes specifically listed in this section means that the death penalty can never be imposed for a murder committed in the perpetration of or attempt to perpetrate arson unless the necessary elements of first degree murder can otherwise be established.

With respect to the habitual criminal statute (Penal Code § 644), the Commission agreed that the type of arson to be included in the list of offenses for which a life sentence might be imposed (i.e., the upper portion of the statute) should be aggravated arson (defined in terms of an actor's subjective state of mind similar to that proposed by the research consultant, i.e., a conscious disregard of a substantial risk to human life). With respect to offenses which could be

counted as "priors" for purposes of recording previous offenses (i.e., the lower portion of the statute), the Commission agreed that any arson should be included, particularly because of the difficulties of proof involved in considering convictions obtained in other jurisdictions. The working out of the details as to how the substantive crime of aggravated arson should be defined was deferred until after an examination of Penal Code Section 1203.

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memorandum No. 53(1961) and the study prepared by Professor Van Alstyne relating to sovereign immunity.

Scope of Remaining Portions of Study

Professor Van Alstyne outlined the scope of the remaining portions of the study. The next portion of the study will be an analysis of the experience of the Federal Government under its tort claims act (the FTCA) and the experience of other states where there has been a waiver of immunity. The analysis will primarily be for the purpose of identifying those areas where the courts have had difficulty in determining whether liability should be imposed notwithstanding a waiver of immunity from liability. Under the FTCA, this would involve analysis of the exceptions, particularly the "discretionary function" exception. Under the New York Court of Claims Act, this would involve analysis of the exception created by the courts for functions that are "inherently governmental." There will be some analysis of experience in other states, too, where a partial or complete waiver of immunity exists or has existed. From our analysis of this experience of other jurisdictions, problems may be identified that have not been presented in the California cases and a consideration of these problems will bear on the policies to be formulated by the Commission.

The last portion of the study will tie the preceding portions of the study together and will attempt to identify the desirable

direction of legislative action in the light of the policies tentatively agreed upon by the Commission.

Some discussion of cost problems will be included in the study. This discussion will indicate how the cost problem has been met in other jurisdictions and what techniques are available. The discussion, though, will be on a legal level. Professor Van Alstyne suggested that an investigation of the actual financial problems involved would be helpful. The factual analysis should be made by someone acquainted with the insurance field. The analysis should indicate the cost and availability of insurance, the experience of school districts with their liability problems (as these are the only entities in California with a virtually complete waiver of immunity that are likely to have substantial tort liability experience), and similar matters so that at least some prediction might be made of the cost factors involved. This research, analysis and prediction, however, should be made by someone who is an expert in this field, not by a lawyer.

Factual Analysis by Senate Judiciary Committee

The Chairman reported that a meeting had been held with Senator Regan, Chairman of the Senate Fact Finding Committee on Judiciary, in which the question of the hiring of a consultant to do factual research of the type described was discussed. Senator Regan requested that the Commission supply him with a statement of the kind of facts that should be ascertained and the sources which should be explored for the purpose of getting those facts. Senator Regan indicated that such a statement would be needed to support a request to the Rules Committee for

authorization of additional funds for the employment of a consultant to do the work for Senator Regan's Committee. The Chairman reported that, in general, it was agreed that the Senate Committee would rely on the work of the Commission for the legal background on the problems involved while the Commission would rely on the Senate Committee for the factual research necessary.

The following matters were suggested as subjects for statistical research in connection with the subject of sovereign immunity:

1. An analysis of the experience of governmental entities with liability under pre-Muskopf law. Information concerning the following items would be valuable:

   1. functions or conditions alleged to have caused the injury (i.e., categories*)
   2. causative elements involved in accident (e.g. fall, trip, negligent sponge count in surgical operation, collision, spattering by paint sprayer, punch in nose, etc.)
   3. number of claims filed in each category and amount prayed for in each
   4. number of claims rejected on ground of sovereign immunity alone
   5. number of claims rejected as being factually unfounded
   6. number of claims rejected for other reasons
   7. number of claims paid and amounts of payments made in each category
      - -by settlement before litigation commenced
      - -by settlement after litigation commenced
      - -in satisfaction of judgment after litigation

* The "functions" or "categories" referred to here are those reflected in existing records of past experience--hence the statistician will simply have to do his best to make a functional breakdown from what those records show. As an example, see Assembly Interim Committee on Finance and Insurance, Semifinal Report, Municipal Liability Insurance, pp. 47-48 (1953).

8. ratios between amounts sought in claim and amounts paid in each case described in item 7
9. number of claims rejected which were successfully defeated in subsequent court action by claimant, and amounts thereof
10. ratio between total amounts sought in claims (arranged by category) and total amounts paid out
11. ratios between total amounts paid out on claims (arranged by category) and (a) operational budget of entity; (b) total budget of entity; (c) tax rate of entity; (d) amounts paid for insurance coverage thereon (if any); and (e) population of entity.

It is further suggested that the information would be most helpful if gathered from a selected list of public entities--say 10 or 20 school districts, ranging from the largest to the smallest; 10 or 20 cities and counties of like distribution; the State, perhaps arranged by department; and a selected number of districts of varying sizes, including fire protection districts, flood control districts, county sanitation districts, sanitary districts, county water districts, hospital districts, recreation or park districts, public utility districts, and joint highway districts. (These are the most prevalent types of districts, and would seem to be functionally most exposed to risk of tort liability.)

2. An analysis of the experience of governmental entities with claims filed under the 1961 anti-Muskopf legislation--what kinds of claims are being filed? What additional costs does this liability impose on public entities?

3. The experience of governmental entities with insurance: the cost and availability of insurance; the types of policies now available, including excess liability coverage; the relationship between the risk and premium cost; the experience of governmental entities with self-

insurance; the cost and availability of faithful performance bonds which inure to the benefit of both the employing entity and the public. The experience of California entities and of entities in other states, such as New York, with insurance costs will be of interest. This information is necessary in order to make even a speculative estimate of the cost of various specific types of potential liability. Insurance may not be available to cover particular areas of potential liabilities.

4. The liability experience of officers and employees of governmental entities and the extent to which this liability is covered by insurance carried by the employing entity. If a particular area of liability is already covered by insurance protecting the public officers and employees, the extension of entity liability to the same area would not involve much additional expense to the entity. For example, are police officers usually covered by insurance for false arrest and is such insurance paid for by the entity?

5. Cost of insurance as determined by cost to private persons engaged in same activity. Some estimate of the cost of insuring against malpractice at county hospitals might be obtained from the experience of hospitals that are now subject to this liability.

6. The experience of other states with tort liability, such as Illinois, New York, etc. What is the cost, availability of insurance, degree of liability, administrative procedures, etc.?

It was suggested that the person collecting statistical information might also incidentally collect some information relating to the various

kinds of functions carried on by public entities.

Formulation of Tentative Policy Considerations

The Commission then decided to formulate certain tentative policy considerations which might be applied to specific situations. These policies would necessarily be tentative and would be subject to exception and modification and perhaps abandonment as they are applied to specific problem areas. They would merely provide a frame of reference that will be used for considering specific functions of government and deciding the extent to which government should incur liability in the exercise of those functions. After desirable policy considerations from a legal standpoint are formulated, the decisions made may be evaluated and perhaps modified in the light of the economic considerations that will be revealed by the factual research.

Over-all approach to problems. As a preliminary matter, the Commission considered the over-all approach that should be taken to the problems of sovereign immunity and liability. Professor Van Alstyne pointed out that the alternatives are: (1) to reenact the law that pre-existed the Muskopf decision, (2) to allow the Muskopf decision to stand and permit the courts to develop the law in this area or (3) to attempt to solve the basic problems legislatively.

Professor Van Alstyne pointed out that the Federal Government and New York have both enacted blanket waivers of immunity, thus turning over the job of establishing the limits of governmental liability to the courts. New York has, in addition, set up a legislative watchdog committee. This committee keeps abreast of developments in the field of the liability of local governmental bodies and meets undesirable trends with legislative recommendations.

The New York blanket-waiver-of-immunity approach may be a valid approach. Attempting to solve the problems legislatively, instead of turning them over to the courts, involves real difficulties, for no one can anticipate all possible types of situations which may arise in the future; hence, to some extent, the solutions suggested will have to be generalized and to some extent the courts are going to have to be given some discretion to fit new fact situations as

they arise into the legislative policy. But, under the legislative approach, a number of situations can be identified, and the Commission may discover that a legislative and policy pattern will evolve.

Despite the difficulties inherent in it, Professor Van Alstyne favors the legislative approach. He stated in substance:

> A pragmatic, piecemeal approach to the problems of sovereign immunity is desirable. Under this approach the Commission would resolve the problems that inhere in this field of law upon the basis of the actual situations that are encountered by governmental bodies instead of upon the basis of policy decisions at a high doctrinal or theoretical level. Governmental entities in California are greatly varied in their financial resources, in their ability to meet liabilities without impairing the basic functions for which they are created, in their exposure to tort liability, and in their ability to protect themselves from exposure to tort liability; these differences must be faced if a realistic solution to the problems of governmental liability is to be fashioned. The matter of actual cost of a waiver of immunity in a particular case must also be taken into account.
>
> I suspect this approach--trying to identify specific areas--is going to be pretty tough and intellectually difficult. On the other hand, frankly--as I stated before--I think this is the better approach because it gets us away from just broad generalities and theory and gets us down to talking about what's really going on in real life. I can give you a concrete illustration of what I mean. It's one thing to talk about whether or not the negligence of a doctor employed in a public hospital, as in the Muskopf case, should be imputed to the governing entity and that the entity should be liable to malpractice just like private doctors would be. This is a different situation entirely, I think, from the question whether or not public entities should be liable for injuries arising out of motor vehicle accidents. It's different from the standpoint of many of the interests that are brought to bear on the problem. All public entities, I take it, of almost every size and every dimension, every type of function, to some extent use motor vehicles. We're in an age where motor vehicles are essential to transportation. They use the same highways as other citizens; they are exposed to the same risks; and they expose other citizens

to the same risks. Personal liability insurance and property damage insurance arising out of the use of motor vehicles is such a common thing--and we have our financial responsibility law--that the risks are spread over such a broad base, that liability would not interfere too drastically with those functions.

Therefore, I would pose, perhaps, as the first issue that might bear some discussion this general choice of whether we ought to be thinking in terms of a move in the direction of the Federal Tort Claims Act, perhaps, with a general rule plus a few exceptions allowing the courts to develop the basic rule, or whether we ought to be moving in the direction of a much more specific layout of the law. In terms of legislative drafting I don't think this is a problem that need concern us now because there are means of drafting statutes that are available so that even if we don't identify specific areas we can identify the general outlines of the areas with sufficient specificity that we give the courts a pretty clear guide as to what the basic policy is, and then the courts will necessarily have to decide cases within the ambit of that policy. We can make the rules narrow enough so that the courts don't have too much maneuvering room. On the other hand, Leon Green, I think, has written quite extensively on the theory that the Legislature ought to get out of the tort field and ought not to meddle in this business of tort liability; this, he believes, is a function which the courts are far better able to perform than the Legislature. Thus passing the buck to the courts is not necessarily an irrational approach--it may have good sense to it.

Professor Van Alstyne pointed out that the specific approach involves developing specific rules applicable to various functions. He explained this as follows:

The sort of thing I am thinking about is identifying functions at a certain level of abstraction because, frankly, I think that we get to an unmanageable thing if we try to go into this too deeply. But we can talk, for example, about the fire protection function and we can identify agencies that do engage in this function and realize there may be a difference between a large city like the City of Los Angeles engaging in fire protection and a small fire protection district out in some unincorporated area that engages in this. And there may be differences also between fire protection in terms

of structural fire protection and fire protection in terms of forest fires and brush fires. And if we realize that there are these various subclasses of types, I think we'll probably pretty well have realized the distinctions between the kinds of entities that may be engaged in this activity and then we can talk about the tort liability consequences of various things. I suggested in the study, for example, that when we're dealing with structural fires, at least, the prevalence of structural fire insurance protection already spreads the risk. It spreads the risk among all the persons who receive the benefit of the fire protection service. What utility is there--what advantage is there--to spread the risk any further by spreading it back against the taxpayers in a subrogation suit by the insurance company or a suit by the property owner to the extent that his policy doesn't cover it. If he doesn't have enough insurance, why then he takes the risk. This may be a type of policy cnnsideration that we can identify. It may be a little bit different when we are dealing with other types of fire protection, but at least this is the kind of approach I would try to use.

We can talk about police protection and see what the risks are there, and we have a number of different kinds of risks that occur in the course of police protection activities: one type is the policeman who accidently shoots a suspect; another type is the police officer who is driving on an emergency call with a siren going and the red lights blinking; another type is the jailer in charge of the jail who allows the other jailers to hold a kangaroo court and beat up a prisoner and injure him seriously; another type is the police department that fails to provide adequate police protection to a witness and as a result the witness is seriously injured or perhaps killed, as in the Arnold Schuster case in New York. In other words, we may be able to find the subheadings of different kinds of tort situations which expose different policy considerations, but I think these considerations by and large will be about the same for most police protection agencies and then we simply look at it in a horizontal way by pointing out that there may be different kinds of police protection agencies with slightly different problems. We have the police protection district; we have the county; we have the city; we have the highway patrol and various other kinds of agencies, each of which represents a different type of entity with different financial problems. Then I think we get a reasonable cross-section picture of the situation without necessarily having to go into a great deal of depth into what any particular agency may be doing.

The Commission determined that it would tentatively adopt the approach suggested by Professor Van Alstyne. This can be stated as follows:

General Approach - Developing Specific Rules Applicable to Various Functions

The objective of the Commission is to formulate specific rules covering as many different functions as possible. Where the same rule can be applied to a number of different functions (i.e., where a legislative or policy pattern evolves), a particular rule may be made applicable to a number of different functions.

To accomplish this objective, the general approach of the Commission will be to formulate tentative general policy rules and to take these general policy rules into consideration when specific rules applying to particular functions are being developed.

It was recognized that the policy rules are merely general principles to be applied to specific functions of government as the Commission goes through the process of determining the extent to which there should be liability and immunity. The over-all statutory approach to be utilized after the specific policy questions have been decided--whether a blanket waiver of immunity with exceptions or a blanket immunity from liability with exceptions--cannot be determined until the specific questions have been decided.

Formulation of rules stating general principles of policy. The Commission then directed its attention to various general

principles that would be tentatively adopted for use later in considering the various specific functions of public entities. The following rules of general policy were tentatively adopted:

Rule No. 1 - Conduct that is Erroneous or Mistaken but not Negligent.

(1) As a general rule, a public officer or employee should not be liable for injuries or damage caused by his erroneous or mistaken action (or nonaction) where he acted (or failed or refused to act) honestly and in good faith and with due care and reasonably believed himself to be acting within the scope of his authority.

(2) As a general rule, a public entity should not be liable for injuries or damage caused by the erroneous or mistaken action (or nonaction) of its public officers and employees where they act (or fail or refuse to act) honestly and in good faith and with due care and reasonably believe themselves to be acting within the scope of their authority.

(3) Where, however, a public officer or employee commits one of the traditionally recognized intentional torts--false imprisonment, trespass, assault, defamation, etc.--and where he acted honestly and without fraud, malice or bad faith and reasonably believed himself to be acting within the scope of his authority, as a general rule the public officer or employee should be liable for the injuries or damage caused; but the public entity, not the public officer or employee, should bear the ultimate financial responsibility for this liability.

There are situations today where good faith decisions conceived honestly and in the exercise of reasonable care result in tort liability. The classic illustration of this--and it has been almost universally criticized by most of the experts--is the leading case of Miller v. Horton, a Massachusetts case. We have California counterparts to the Miller case. The Miller case involved a statute which provided that health officers, if they found a horse that was infected with a disease known as glanders, could destroy the horse to protect health. There was no liability for the destruction if the horse, in fact, had glanders. (We have a similar rule in California approved by our Supreme Court in the Riley case. Neither the official nor the State is liable if the action is taken for public health purposes.) But the Miller case said that if the owner of the horse sues and can establish that the horse was not in fact infected with glanders, then the official is liable. The official, in other words, acts at his peril. Most of the commentators say that this is ridiculous when the official acted honestly and in good faith, made the best judgment he could, and probably was an expert on the subject and knew a lot more about it than the jury that finally determined that the horse was not infected with glanders.

Professor Van Alstyne suggested that:

> As a general rule, the public employee ought to be totally immune for good faith decisions conceived honestly and in the exercise of reasonable care, because he is simply doing his job. His job is to carry out the duties that are vested in him by law. And if government is going to govern, its officers and employees ought to have the job of simply doing the best they

can in good faith and using reasonable care. They shouldn't be responsible and thus deterred from doing so, at least so long as they meet those standards.

The consultant believes, as a general rule, that the entity probably ought to be immune also in those situations because, when we impose liability where the government is simply trying to govern and do its job, we may be going much too far in the way of imposing liability.

This general approach of immunity for the good faith decision using reasonable care is, of course, subject to exceptions where we think the particular risk of injury is exceptionally great and the injured member of the public ought not to have to bear that particular risk. I think one of these areas is, perhaps, in the area of destruction of animals. The injured farmer should perhaps be compensated to some extent in such a case. The innocent-man-convicted-statute seems to me to be perfectly justifiable under this approach. There may be a few other areas that we can identify where the same policy considerations would apply, but for now I think perhaps it is better to confine our discussion to these general concepts in order to lay a framework within which we can fit these specific cases as we get to the actual specific evaluation of them.

Paragraph (3) of Rule No. 1 states the policy that a good faith intentional tort is to be treated the same as a negligent tort is treated under Rule No. 2.

Rule No. 2 -- Negligent Conduct

(1) As a general rule, a public officer or employee should be liable for injuries caused by his negligent actions in the performance of his duties; but the public entity, rather than the officer or employee, should bear the ultimate financial responsibility for this liability (as, for example, through some appropriate procedural device such as compulsory insurance, assuming the judgment, etc.).

(2) As a general rule, a public entity should be liable for the injuries negligently caused by its officers and employees while carrying out their duties.

It was agreed that the principle of liability for the negligent acts of public officers and employees adopted here provides only a frame of reference for the purpose of analyzing the specific problems. What statutory standard of liability or immunity will be established for unknown and anticipated functions of government was not decided.

It was recognized, too, that the principle of liability for negligence is easy to articulate in general terms but difficult to apply; the difficult task will be to determine what is the scope of the government's duty to its citizens. What the government's duty may be will have to be considered as specific functions of government are discussed.

Rule 2 is based upon the consideration that the public officer or employee should not be made solely responsible for his negligent acts in carrying out the functions of the government. Where the public officer or employee is acting in good faith, he should not be required to act at his peril. On the other hand, if a citizen is injured by some tortious activity of government, he should be entitled to relief; and since the functions of government are carried on for the benefit of the public generally, all citizens should share the burden of compensating those who are injured by the negligent acts of governmental officers and employees in carrying out those functions.

The same reasoning applies to the traditional intentional torts. See Rule 1(3). The dividing line between negligent and intentional torts is often a very slippery one; often it is determined upon the attorney's appraisal of whether or not he can convince the jury that the actor was acting with a good deal of drive or whether he was not. The policy behind the personal immunity of the public officer or employee from ultimate liability under these circumstances is that if we impose too much personal liability on the officer, we may create a serious obstacle to effective performance of the powers of government. The officer will be deterred because he is afraid to incur tort liability. Therefore, in order to protect against that--in order to promote the policy of having courageous, effective, efficient, full-fledged enforcement of the public policy reflected in our statutes--the officer should not have to bear the financial burden of his negligence. It is possible to evaluate this policy of not preventing government from governing against the other policy reflected in tort law--the policy of distributing the risk of loss as widely as possible so that persons who suffer injuries are reimbursed for them and don't have to stand them alone when the injury is the result of a particular enterprise which the public agency is engaged in. When you evaluate these policies, it seems generally that the best fundamental approach is to assume--to whatever extent you can justify it from a policy standpoint--that the entity ought to be liable. That's to distribute the risk. But in order to carry out the protective policy, the officer should not bear the financial burden. This, then, protects the officer; you get full-fledged enforcement; and yet you get risk distribution at the same time.

The Commission rejected a suggestion that the liability be imposed upon the entity but that the entity be authorized to recover back against the negligent officer or employee in those exceptional cases where the entity might choose to do so. The Commission concluded that the burden of paying the financial cost of the negligence of the officer or employee should be on the entity, not the officer. Placing this burden on the officer or employee is not an effective way of preventing the negligence. The deterrent to insure that an officer or employee acts as carefully as possible in every situation is the internal administrative disciplinary procedures available to his superior officers. The pressure on the departmental budget, for example, if there are too many accidents caused by negligence of employees in the road department will soon be called to the attention of the road department by the board of supervisors and the road department will take action: it will discharge employees who are accident prone, start training programs to improve the situation or transfer such employees into jobs that will not expose them to the possibility of creating accidents. There are numerous studies made on the subject of negligence. The tendency among the behavioral scientists apparently is that negligence is something that is very often part of a person's own psychological and physical make-up. People are accident prone and they do negligent acts all the time even though they are doing their level best to be careful. But they don't realize it. They get distracted when they start concentrating on something and may, for example, drive their car through a red light. Thus, the basic policy consideration

is whether the entity ought to bear the loss of these negligent acts or whether the employee should bear the loss of the negligent acts or whether the injured person should bear the loss of the negligent acts. Fundamentally, the employee should be immune from the financial burden, but the entity should be liable in order to distribute the risk of loss. We can depend upon the internal disciplinary structure and the possibility of safety programs, safety education, training programs, reassignment of accident prone employees to other positions where they will not create such risks etc., as a means of cutting down the accidents. Moreover, if the public entity has the ultimate financial liability, it will have an incentive to take necessary action to prevent accidents. It is unlikely that a right by the entity to go against the employee in exceptional cases would reduce the cost of insurance. Moreover, such a right might make it necessary for the employee to carry his own insurance.

It was noted that the policy decision of the Commission is consistent with the decision of the Legislature when it enacted the statute requiring school districts to insure officers and employees against their negligence.

Note that intentional torts that fall under Rule 1(3)--i.e., intentional torts not involving negligence--are treated the same as negligent acts under Rule 2. Intentional torts that involve negligence are covered by Rule 2. Intentional torts done maliciously, corruptly, fraudulently or dishonestly are covered by Rule 3, infra.

Rule No. 3 -- Malicious, Corrupt, Fraudulent or Dishonest Conduct

(1) A public officer or employee should be liable and should bear the ultimate financial responsibility for injuries and damage caused by his malicious, corrupt, fraudulent or dishonest conduct.

(2) A public entity should also be liable for injuries and damage caused by the malicious, corrupt, fraudulent or dishonest conduct of its public officers and employees in the course of their employment, but this liability of the public entity should be for compensatory damages only and the public entity should be able to enforce repayment of this liability from the guilty officer or employee.

Although the public entity should not bear the ultimate financial burden resulting from the maliciously wrongful conduct of its agents, this risk should not be borne solely by the individual citizen who is injured. Often the guilty officer or employee is judgment proof. In such cases, the government itself should bear the risk of the injuries caused by its own employees in carrying out the governmental functions. However, the liability of the governmental entity should be restricted to compensatory damages; it would be undesirable to permit the injured person to recover punitive or exemplary damages against the government. The government is in a position to protect itself against this risk through the purchase of faithful performance bonds or insurance, whereas the individual citizen is not in a position to do so.

Rule No. 4 -- "Discretionary Acts Exception" Abolished

Public officers and employees should not be immune from liability on the ground that they are entitled to immunity for their discretionary acts.

The standards developed above in Rules 1-3, inclusive, which in general are based upon the degree of fault involved, provide a sounder basis for predicating liability and immunity of public officers and employees than does the common law immunity for discretionary acts. The common law immunity for injuries caused by discretionary acts immunized officers and employees from liability even for malicious acts.

Mr. Robert Reed, Department of Public Works, stated in substance:

> It seems to me that when we discuss the discretionary acts exception we are getting into a field now where the difference between the relationship between public agencies and citizens is more marked than in any other situation we've talked about. I have in mind the planning of public works, for example. The public agency has so much money and it wants to go as far as it can with that money; and it will design a highway, for example, of so many lanes width. If it happens to be along a river, it will say, "Well, we can't put it high enough up the bank so that it will avoid any flood that we'll ever get. The best thing to do is to put the highway at a level to take care of the floods that occur every 25 years, but if we get a 50-year flood, the highway's going to be flooded. We have the same problem in a flood control project. It seems to me that the public agency cannot be required to do those things at its peril, so that if the 50-year flood occurs, the agency is held as insurer merely because it has furnished a highway. Should the public agency be a guarantor that the highway is adequate, that it won't fail and that it will take care of whatever emergency comes up.
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> You have the same problem in maintaining highways. I happen to have worked in that field. We have highways through the mountains where rocks fall down on the road. The law limits the amount of money we can spend for maintenance of

highways. We have a regular patrol of every highway in the State every so often. If the patrol see a rock, the rock is removed, but if one falls 15 minutes later, there is a rock on the highway and we couldn't keep such rocks off unless we put a man who could see every foot of the highway all the time, and that's just out of the question. When we get into that discretionary field, in a sense it goes back somewhat to the legislative because the amount of money made available for the job is a legislative matter. And the same is true of local agencies for the kind of maintenance that they provide. But if you assess liability there, in every case, you impair, if not destroy, the right or the power of the government to get into these fields and do a job. We can't keep the highways across the mountains free of ice. We can use ploughs to plow them open. If snow occurs that we can't handle, we do our best to keep the highway open and to get the people out of there, but we can't be a guarantor.

It seems to me that so far these questions haven't come up because of sovereign immunity, but if you abolish sovereign immunity, then I think you need a restatement of what the duty of the public agency is to the public. What is the standard of care? What assumption of risk is there by members of the public when they use the facilities? It seems to me that that type of problem is ever present and is the type of problem which the great majority of new claims are going to involve. We can see already the types of claims we get now. Whenever there's nobody else to sue, why they look to the public agency--in automobile accidents and in other types of cases. So I think that what is needed is a very clear definition of what the duty of the public is, what the standard of care is, etc. It seems to me this comes close to this discretionary principle being discussed.

Professor Van Alstyne commented:

I would suggest that I think that the statement of Mr. Reed is very well put and I believe that the study generally reflects sympathy with this position. I might point out that I agree very much with the essence of the statement and think that at one point some place along here I'm going to make a recommendation--at least I've tentatively decided I want to make one--for the Commission to consider because of the very fact that right now cities, counties, and school districts are liable in exactly that type of situation, where they have no basis, no possibility of protecting themselves. The State was immune under pre-Muskopf law, but the cities, counties, and school districts are liable under the Public Liability Act.

And also, I might suggest that this kind of decision that the gentleman was talking about--how to design the bridge: you make the decision one way or the other--whether the lane is to be nine feet wide or twelve feet wide, how often you patrol the highways to get rid of the rocks--this is also the kind of thing that I thought was involved in the discussion yesterday when we were talking about the good faith, non-negligent act which may turn out to be mistaken or erroneous but which is not necessarily a recognized tort.

The Legislature has already provided for some liability in the very area that the Commission said yesterday normally ought to have no liability. The Public Liability Act in effect does this. . . . And this discretionary immunity is an extremely difficult problem--the problem here again is the basic problem of approach rather than the problem of getting the answers. Should we approach it from the standpoint of trying to assume that we ought to if possible eliminate this immunity doctrine, which is a limitation upon the right of the injured person to recover, and then try to see if the basis of recovery can be defined and limited and restricted in terms of specific situations rather than in terms of just a blanket immunity of the public officer.

The Commission has tentatively ruled that the public employee should be technically liable for his good faith, recognized intentional torts, that he should be liable for his intentional torts characterized by malice, corruption, dishonesty or fraud, and he should be liable for his torts based on negligence, technically, but he should not be liable for purely good faith non-negligent acts within the scope and course of his employment which are mistaken or erroneous and are not otherwise within the realm of recognized torts. Now, the problem as I see it is that in these various areas the plaintiff is able to sue the defendant. If it's a recognized intentional tort in good faith, a malicious intentional tort, or a negligent tort, the plaintiff can sue the employee and at least go to trial and get a judgment against the employee. But in these three areas, where the employee would be liable, the employee--unless the law is changed--has, under the Lipman case, the right to raise this defense of official discretionary immunity, and therefore the judgment can't go against him. If the judgment does not go against him, then you may have a serious problem because of the procedural way of handling it. Maybe the entity may not ultimately bear the financial burden, and the third party injured will bear the ultimate financial burden. Maybe he can't sue the entity because he failed to

comply with the claims statute. Maybe the entity is bearing the financial burden under a rule that says that it shall pay the judgment if a judgment is rendered against the employee. Now the employee has asserted an artificial defense. Therefore the entity never bears the burden; the third party does. And so I'm suggesting possibly that we ought to at least start out with the assumption on the basis of the rules already developed that this--what I would regard as a somewhat artificial defense of discretionary immunity--be completely eliminated and that the problem of whether there's liability or nonliability should be based upon a factual appraisal of each individual case without the employee being able to raise this defense on the broad basis that he can today.

Take, for example, the first rule that the good faith, non-negligent act ordinarily does not result in liability. Among the kinds of acts that this would include would seem to me to be the kind of situation where the officer has statutory authority to decide either one way or the other, and he exercises that authority in good faith and decides one way or the other, and whichever way he decides, it causes injury. No liability under the Commission's already established tentative policy unless the decision falls in the area of a recognized tort and subject to such exceptions as may be drawn. I think it might be better to draw the exceptions in terms of specific factual analysis. It may be we want to draw some very broad exceptions and perhaps make it very clear that such exceptions would include the business of legislation, the business of judging and the quasi-legislative or quasi-judicial functions that are tantamount to those. But I suspect there might be some good policy reasons why we want to eliminate this particular defense that the employee alone can assert.

We should eliminate the official discretionary immunity as an across-the-board proposition.

It is recognized that the Commission may eventually have to create governmental or officer immunity in specific situations--such as immunity for legislative or judicial acts--but the immunities in these situations should be considered on their own merits without regard to any across-the-board immunity for "discretionary acts." It was recognized, too, that the problem with which the courts were concerned when they created the

"discretionary" immunity must be faced in determining the extent of the government's duty. But this problem should be faced directly and an attempt made to indicate the scope of the duty. If the duty is defined, then any breach is necessarily either negligent or intentional and the action is within the scope of the previously defined policies. But if the government's duty is in the alternative--to do either act "A" or act "B"--then the decision is within the first category of cases--the good faith, non-negligent act--resulting in no liability.

So far as the discretionary immunity was intended to protect public officers from vexatious and unfounded litigation, the officers would be better protected through appropriate procedural devices such as increasing the burden of proof, possibly requiring pleading in substantial detail, to make available in more cases the summary judgment motion as a means of disposing of the matter before trial, providing a free defense for the employee and in some cases possibly even providing him with an opportunity of hiring his own counsel subject to payment by the public treasury of a reasonable attorney's fee in the case, etc.

STUDY NO. 53(L) - PERSONAL INJURY DAMAGE AWARDS TO MARRIED PERSONS

The Commission considered Memorandum No. 55(1961) and the attachments thereto relating to problems raised and alternative solutions presented in connection with the study of personal injury damage awards to married persons. The following Commission action should be particularly noted.

The Commission approved the repeal of Section 163.5 of the Civil Code. Prior to enactment of this section, personal injury damage awards were held to be community property. The Commission agrees that this type of recovery should be community property because the community suffers loss by the personal injury of a spouse and hence Section 163.5 should be repealed.

Section 163.5 changed basic marital property rights in order to indirectly accomplish its primary purpose of preventing intraspousal imputation of contributory negligence. The Commission believes that the problem of imputing negligence between spouses should be dealt with directly without the artifice of changing property rights.

With respect to the imputation of negligence between spouses, the Commission approved the proposition that contributory negligence should not be imputed between spouses so as to defeat recovery from a negligent defendant. However, in fairness to a third-party defendant, it was agreed that he should have a right of contribution from a contributorily negligent spouse as though the spouse were not married.

Accordingly, the Commission adopted the staff's suggestion in this regard, but approved making the residual recovery after contribution the community property of the spouses instead of the separate property of the injured spouse. Other possible solutions were rejected as being inconsistent with the theory of community property or as necessitating special verdicts or complicated procedure which invite appeals. The solution adopted is primarily based upon fairness to all parties involved--the injured spouse is not arbitrarily denied recovery merely because of the marital relation, the contributorily negligent spouse is liable to the same extent as though unmarried and a negligent third party defendant is given the same right of contribution as though the joint tortfeasor were unmarried. Procedural methods for accomplishing this result are to be drafted by the staff for later consideration.

It was noted that the proposed solution adopted by the Commission may be wholly defeated by the statutory provision relating to vehicle ownership registration (Veh. Code § 17150). Because of the probable adverse results by application of this section, the Commission unanimously adopted a motion by Commissioner Stanton, seconded by Commissioner Sato, that a request be made to the Legislature at the 1962 Legislative Session for permission to broaden this study to include the doctrine of imputed contributory negligence based on the spousal relation and vehicle ownership.