MINUTES OF MEETING

of

April 19, 20 and 21, 1962

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on April 19, 20 and 21, 1962.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable James A. Cobey (April 20 and 21)
Honorable Clark L. Bradley
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.

Absent: Joseph A. Ball
Angus C. Morrison, ex officio

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

Professor Arvo Van Alstyne, the Commission's research consultant on Study No. 52(L) - Sovereign Immunity, and Mr. Benton A. Sifford, special research consultant to the Senate Fact Finding Committee on Judiciary, and the following persons were also present:

J. F. Brady, Department of Finance (April 19 and 20)
Robert F. Carlson, Department of Public Works
Louis J. Heinzer, Department of Finance (April 20)
Robert Lynch, Office of County Counsel (Los Angeles)

Minutes of March 1962 Meeting. The Minutes of the March 1962 meeting were corrected as follows:

On page 6, Section 901.3, Commissioner Stanton was recorded as voting against approval of Section 901.3.

On page 7, Section 901.4, Commissioner Bradley was recorded as voting against disapproval of Section 901.4.

The Minutes of the March 1962 meeting as corrected were approved.

ADMINISTRATIVE MATTERS

Stanford Contract for 1962-63 Fiscal Year. The Commission considered Memorandum No. 14(1962). Commissioner Edwards moved and Commissioner Sato seconded that the research contract for the 1962-63 fiscal year with Stanford University as outlined in Memorandum No. 14(1962) be approved in the amount of $7,500 and that the Chairman be authorized to execute the contract on behalf of the Commission. This motion was unanimously adopted by the Commission.

Change in Portion of Salary of Executive Secretary Paid by State. Upon motion by Commissioner Sato, seconded by Commissioner Edwards, the Commission unanimously approved the staff recommendation that the salary of the Executive Secretary be paid 80 percent by the State and 20 percent by Stanford. This change from a 75-25 basis to a 80-20 basis was made to reflect the actual experience over the past several years.

Members of State Bar Committee on Sovereign Immunity. The Executive Secretary reported that the following persons have been appointed to serve as a Special Committee of the State Bar on Sovereign Immunity:

Southern Section	Northern Section
Hudson B. Cox, Chairman	Dr. Frank C. Newman, Vice Chairman
John U. Edwards	Joseph W. Diehl
Knox Farrand	Robert J. Foley
Thomas E. Heffernan	S. B. Gill
James H. Krieger	

Commission Voting Procedures. A motion that a proposition adopted by five votes cannot be later rejected by a majority of less than five votes was not approved. Voting Aye: Commissioners Cobey, Keatinge, Edwards

and Selvin. Voting No: Commissioners Sato, McDonough, Bradley and Stanton.

Meeting Dates and Places. Future meetings are tentatively scheduled as follows:

May 24-26	-	Los Angeles (U.C.L.A. Law School)
June 15-16	-	Los Angeles (State Bar Building)
July 20-21	-	Stanford Law School
August 10-11	-	San Francisco
September 21-22	-	Beverly Hills (State Bar Convention)

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

The Commission considered Memoranda Nos. 11(1962) (Medical and Hospital Torts), 13(1962) (Law Enforcement Torts), 16(1962) (Defense of Public Officers and Employees), 17(1962) (Insurance) and 18(1962) (Alternative Courses of Action for 1963).

Alternative Courses of Action for 1963

The Commission first considered Memorandum No. 18(1962) setting forth several alternative recommendations that might be made in regard to the areas of liability not studied. Some Commissioners indicated that continuing of the moratorium for two more years might be the best solution; but others pointed out that this would eventually mean that liabilities accruing over a period of four years would have to be paid at the end of the moratorium, thus increasing a financial burden that is going to be heavy even after a two year moratorium. Other Commissioners indicated that the areas not covered by Commission recommendations will be small; hence, the Muskopf and Lipman cases could be permitted to cover these areas without imposing excessive liabilities upon public entities. Other Commissioners indicated that the likelihood of the adoption of this course by the Legislature is remote. Another suggestion made was to adopt the staff proposal to assume the liabilities of public officers and employees and retain a moratorium as to any matters not covered.

It was finally concluded that no solution could be proposed as to the areas of potential liability not studied until the Commission had

finally determined what areas of liability are to be covered. This matter should be again considered early in the fall when there may be statistics available as to the extent of existing officer and employee liability that is not paid by public entities.

Medical and Hospital Torts

The Commission then considered Memorandum No. 11(1962). The following decisions were made:

1. Public entities should be liable for the malpractice of their medical personnel, excluding liability for inadequacies of facilities, equipment and personnel, to the extent that the personnel themselves are liable. The staff was directed to draft the statute so that it would not be necessary in every case to identify the specific doctor or nurse guilty of malpractice and so that it would not preclude the plaintiff from relying on res ipsa loquitur.

2. Public hospitals should be liable for damages arising from inadequacies of facilities, equipment and personnel when such damages are proximately caused by the failure of the hospital to comply with the minimum standards prescribed by applicable law or regulation. The University of California hospitals, which are not subject to regulation by the State Department of Public Health, should be liable for failure to comply with standards laid down by regulations applicable to hospitals of the same character and class.

This standard for liability will leave determinations of the standards to which hospitals must conform in the hands of persons qualified to make

such determinations and will not leave those standards to the discretion of juries in damage actions. Thus, governmental entities will continue to be able to make the basic decisions as to the standards and level of care to be provided in public hospitals within the range of discretion permitted by the State laws and regulations.

3. Public hospitals should be liable for damages proximately caused by failure to admit a patient only in those cases where there is a duty to admit such patient prescribed by law and the hospital negligently or wilfully refuses to admit him. This standard will leave the entity immune in those cases where it has discretion to admit or not to admit patients. Liability will exist only in a case where the duty to admit exists--where there is no discretion to refuse admittance--and admittance is negligently or wilfully refused.

4. Public hospitals should also be liable for the negligent or wrongful conduct of their personnel within the scope of their employment for which their personnel are personally liable. This liability will impose upon public entities the vicarious liability to which private hospitals are subject. This recommendation will cover the nonmedical torts committed by public employees in public hospitals--the medical torts, i.e., malpractice, being covered by item 1. above. The staff was asked to draft the statute so that an entity would not be immune if the particular employee who caused the injury could not be identified. The plaintiff should merely be required to show that some employee, without necessarily identifying which one, of the public entity caused the injury by negligent or wrongful conduct within the scope of his employment for which he could be held personally liable.

The staff was asked to report on whether the discretionary immunity of public officers applies in the area of torts in medical and mental hospitals and, if so, whether the doctrine would create too broad an area of entity immunity under the actions taken.

5. Public entities and their employees should be immune from liability for errors in diagnosis and prescription of treatment for the mentally ill. Subject to this immunity, public entities should be liable for the care of the mentally ill upon the same basis that public entities are to be liable for injuries to the physically ill in public hospitals as stated in items 1, 2, 3 and 4. Where injuries are caused because of insufficient supervision, the question will be whether the extent of supervision was ordered in the course of the treatment or whether supervision was ordered and was negligently carried out.

The immunity was created in recognition that most treatment of the mentally ill goes on in public hospitals. The field is relatively new and standards of diagnosis and treatment are not as well defined as they are where physical illness is involved. Moreover, state mental hospitals take all patients committed to them; hence, there are frequently problems of supervision and treatment created by inadequate staff and excessive patient load that private mental hospitals do not have to meet.

6. For injuries caused by escaping mental patients, liability will be upon the same basis as stated in item 5. For injuries caused by discharged mental patients, liability will be upon the same basis as stated in item 5. Thus, if a patient is discharged upon diagnosis that

he is able to live in society, there would be no liability. But if through negligence the wrong patient were released, there might be liability for the injuries caused by the person erroneously released.

7. No decision was made on the extent to which there should be liability for wrongful arrest and restraint of persons suspected of mental illness. The staff was asked to prepare a memorandum showing the existing law and to propose alternative suggestions for arresting procedure and liability for failure to follow the procedure. The memorandum should discuss whether the arresting officer is now permitted to act on a subjective standard--as matters appear to him--or whether he is held to the standard of a reasonable man. The memorandum should also discuss whether he is required to act upon his own observations or whether he is permitted to rely upon statements and charges of others.

8. A public officer or employee and the employing public entity should be liable for wrongful interference with a person's attempts to seek legal redress by filing a petition for a writ of habeas corpus.

9. In the administration of public health functions of government, a public entity should not be liable for the act or failure to act of an officer or employee of the entity if the officer or employee had legal authority to exercise his discretion with regard to the performance or nonperformance of the act. Where the law gives a public officer or employee discretion to determine a course of conduct, liability should not be based upon the exercise of that discretion in a particular manner; for this would permit the trier of fact to substitute its judgment as to how

the discretion should have been exercised for the judgment of the person to whom such discretion was lawfully granted.

Where a public officer or employee has a mandatory legal duty to act in a particular manner, whether based on a finding to be made by him or otherwise, the officer or employee and the employing public entity should be liable for damages proximately caused by his negligent or wrongful failure to do the act. There should be no liability if reasonable efforts have been made to comply with the mandatory legal duty. The officer or employee and the employing entity should also be liable for the negligent or wrongful carrying out of his duties.

10. The staff was instructed to study and report upon the liability of governmental entities for destruction of private property in the public interest.

11. Where the entity is held liable for the conduct of its officers or employees, it should have no right of subrogation against the officer or employee whose conduct resulted in liability unless such employee acted with bad faith, corruption or malice. Where the officer or employee acted with bad faith, corruption or malice, the entity should be liable for no more than compensatory damages (excluding punitive damages) and should have a right of subrogation against the responsible officer or employee.

12. Where action is brought against a public officer or employee for tortious acts committed in the scope of his employment,

the public entity should be required to pay the compensatory damages, excluding punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend. Where the employee acted with bad faith, corruption or malice, the public entity should have the right to recover the amount paid under the judgment from the employee by right of subrogation. By agreement between the employee and the public entity, the public entity should be able to undertake the defense under a reservation of rights so that its subrogation rights are not waived by defending. In any action between the employee and employer on the issue of subrogation, the public entity should have the burden of showing the employee's bad faith or malice.

Police Protection and Law Enforcement

The Commission considered Memorandum No. 13(1962). The following decisions were made:

1. Public entities should be liable for false arrest and false imprisonment committed by their police officers within the scope of their employment.

2. Where the entity is held liable for the conduct of its officers or employees, it should have no right of subrogation against the officer or employee whose conduct resulted in liability unless such employee acted with bad faith, corruption or malice. Where the officer or employee acted with bad faith, corruption or malice, the entity should be liable for no more than compensatory damages (excluding punitive damages) and should have a right of subrogation against the responsible officer or employee.

3. Where action is brought against a public officer or employee for tortious acts committed in the scope of his employment, the public entity should be required to pay the compensatory damages, excluding punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend. Where the employee acted with bad faith, corruption or malice, the public entity should have the right to recover the amount paid under the judgment from the employee by right of subrogation. By agreement between the employee and the public entity, the public entity should be able to undertake the defense under a reservation of rights so that

its subrogation rights are not waived by defending. In any action between the employee and employer on the issue of subrogation, the public entity should have the burden of showing the employee's bad faith or malice.

4. In cases of malicious prosecution, the entity should be liable for compensatory damages only if the public officer or employee instituted the malicious prosecution within the scope of his employment. Adequate procedural safeguards should be provided to eliminate the "crank" suit. These will be suggested by the staff in draft statutes. The responsible officer or employee should not be directly liable, but the entity should have a right to recover from the officer or employee for any damages it paid because of the employee's acts. A motion to base liability upon a showing of common law malice did not carry. Voting Aye: Commissioners Keatinge, Edwards and Selvin. Voting No: Commissioners Cobey, Sato, McDonough, Bradley and Stanton. A motion to base liability on the personal animosity or corruption of the responsible officer or employee carried. Voting Aye: Commissioners Cobey, Keatinge, Sato, Edwards and Selvin. Voting No: Commissioners McDonough, Bradley and Stanton.

5. Public entities and public officers and employees should be liable for the infliction of physical injuries upon suspects and prisoners through the use of excessive force upon the same bases that they are liable for false arrest and false imprisonment as stated in items 1, 2 and 3.

6. The question of liability for retaining unfit or incompetent employees in public service was deferred until the extent of entity liability for acts of officers and employees is more fully studied.

7. So far as jail and detention facilities are concerned, the public entity should be liable for inadequate facilities, equipment or personnel only if there is an unreasonable departure from an applicable statutory or regulatory standard. The standard of liability should be similar to that for inadequate facilities, equipment and personnel of public hospitals. There are few statutes and regulations that now prescribe standards for local jails and detention facilities; but to the extent that they do impose mandatory standards, there should be liability for unreasonable departures from the standards. Departures from legally required standards would not result in liability, though, if the entity could show that it did all that it reasonably could be expected to do under the circumstances.

8. There should be a cause of action against the public entity only for failure of its officers and employees to take reasonable steps to provide emergency medical care to jail prisoners if the need for such care is known or if sufficient facts are known to put the entity on notice that such care is needed. The entity should have a cause of action against the responsible officer or employee if the officer or employee failed to provide the necessary medical care because of malice.

9. There should be no liability on the part of public entities, officers and employees for injuries inflicted by escaped prisoners.

10. For negligent and intentional torts generally that are committed by law enforcement officers in the scope of their employment, such as assault and battery and negligent infliction of injury, the entity and the responsible officer should be liable. The entity should be subrogated to the rights of the injured party against the officer or employee if the tort was committed with malice, corruption or bad faith.

11. There should be no liability for the adoption of or the failure to adopt police regulations and implementing policies, either on the part of the officer or the entity.

12. A public entity and its officers and employees should not be liable for enforcing without malice and in good faith statutes, ordinances, charters and regulations that are held invalid or inapplicable. The existing immunity statute, Government Code Section 1955, should be broadened to cover all of these cases which may arise. The entity and its officers and employees should be liable, though, under the general provisions as to liability previously adopted if there is enforcement of invalid statutes, ordinances, charters and regulations by its police officers when such invalidity is known.

13. Public entities, their officers and employees should not be liable for failure to adopt safety regulations or precautions, including placement of stop signs. This principle, though, would not prevent liability from arising under the statutes relating to dangerous physical conditions of property.

14. Public entities, their officers and employees should not be liable for failure to enforce the law.

15. Public entities, their officers and employees should not be liable for failure to provide police protection against threatened injury by third persons. The existing statute creating absolute liability for mob damage should be broadened, though, so that it is applicable to personal injury as well as property damage. Liability under the statute should be limited to persons who were not members of the mob. The mob damage statute should also be revised to include a definition of a mob or riot.

16. Persons called upon to aid police officers in enforcing the law should be entitled to Workmen's Compensation benefits for injury or death suffered while aiding in law enforcement.

17. A proposal to require public entities to assume responsibility for judgments obtained against their officers and employees for violations of the Federal Civil Rights Act was not approved.

Defense of Public Officers and Employees

The Commission considered Memorandum No. 16(1962) relating to defense of public officers and employees. The Commission first determined that one statute should be drafted to apply to all public officers and employees. This statute would replace the existing statutes providing for defense of public officers and employees.

The Commission then directed its attention to Exhibit III of Memorandum No. 16(1962)--a redrafted version of Section 2001 of the

Government Code. The Commission revised the redrafted version of Section 2001 as follows:

(1) The third clause of subdivision (1)(a) was revised to read:

> (a) "Action or proceeding" does not include . . . an action or proceeding brought by a public entity against its own employee as an individual and not in his official capacity.

This revision will limit the last clause to cases where the public entity brings an action against its own employee. The language now found in Section 2001 would, for example, deprive a city employee of a defense at public expense in an action brought against him by a county to recover damages arising out of an auto accident with a county vehicle even though the accident occurred at a time when he was engaged in his duties as a city employee.

(2) The definition of "employee" contained in Section 2001 (1)(b) was approved as suitable for general use in the statutes to be drafted by the Commission unless some reason exists for not using such definition in a particular statute. It was suggested, however, that Section 2001 might be revised so that the right to a defense may be extended to an ex-employee who is sued on a cause of action arising out of his service as a public employee.

(3) The basic provision of Section 2001--found in subdivision (2)--was not accepted by the Commission. The Commission determined that the following should be the general scheme of Section 2001: Upon request by an employee for a defense at public expense, the

public entity is required to provide the defense unless the public entity determines:

(a) That the employee was not within the scope of his service, agency or employment at the time of the alleged negligent or wrongful act or omission; or

(b) That the employee acted or failed to act because of bad faith, corruption or actual malice.

If the public entity undertakes to defend the employee, the public entity shall be deemed to waive its right to raise the defenses listed above insofar as it and its employee are concerned and the public entity has no right to recover the expenses of the defense from the employee.

If, on the other hand, the public entity determines that the public employee was not within the scope of his employment, or that he acted or failed to act because of bad faith, corruption or actual malice, it may refuse to defend the public employee. In such case, the public employee may obtain his own counsel to defend the action or proceeding and is entitled to reimbursement from the public entity for his reasonable expenses in doing so upon a showing that the act or omission upon which the action or proceeding was based occurred in the scope of his service, agency or employment unless the public entity shows that he acted or failed to act because of bad faith, corruption or malice.

The above scheme is designed to deal with the problem of conflict of interest that may arise under the present law. The interest of the public entity itself may be best served by establishing in the action or proceeding against the public officer or employee that he was not within the scope of his employment when the act or omission upon which liability is based occurred. Yet it would be to the employee's interest to establish that he is within the scope of his employment because in such case, under most of the Commission's tentative decisions, the entity would be the one ultimately responsible. Moreover, the public entity may have an interest in showing that the public employee acted or failed to act because of bad faith, corruption or actual malice, for the entity can then--under most of the tentative decisions made by the Commission--recover back from the employee any amounts paid by the entity on a judgment based on the employee's act or omission. The recommended scheme eliminates this conflict of interest: If the entity defends, it waives its right to recover back anything from the employee; if the entity desires to reserve its right to recover back from the employee, the public entity must determine not to provide the defense (but, in such case, the employee is permitted to recover the costs incurred by him in defending the action or proceeding if he can make the necessary showing as to scope of employment and if he acted in good faith).

(4) The Commission approved the phrase "negligent or wrongful act or omission in the scope of his service, agency or employment"

for use in this statute and in the other statutes being drafted by the Commission. The words "negligent or wrongful act or omission" make it clear that the phrase covers both negligent and intentional torts. Similar language is used in the Federal Torts Claims Act. The phrase "in the scope of" is based on the Restatement and it was suggested that the recommendation discuss the intention of the Commission in adopting the Restatement phrase. The word "alleged" should be added where appropriate.

(5) The statute should, in addition to the provisions relating to defense of civil actions and proceedings, also contain provisions authorizing a public entity to defend a criminal action or proceeding brought against its employee when the public entity determines that such defense is in the public interest. The research consultant strongly urged that the Commission include such a provision in the statute. He stated:

> I have discussed this matter with a number of school administrators. A problem that arises quite frequently is what action should the school district take when a criminal proceeding is brought against a school teacher, school principal or playground supervisor who was simply carrying out his orders. For example, a case arose last year at the school where my children go. The so-called coach--a physical education instructor who was a UCLA student--runs the playground after school hours. He was in charge of the playground and a rowdy 15-year old child came into the grammar school playground and began pushing some of the smaller children around. The coach ordered the 15-year old to leave. He wouldn't go so the coach picked him up bodily and threw him out. The next day the coach was served with a warrant by the parents of the boy that he had evicted; they had brought a criminal action for assault and battery against him. Yet he was simply carrying out his orders. He

> went to the school board and requested that they represent and defend him; they declined because they did not have any legal authority to defend him. He had to hire private counsel at a cost of perhaps $50 to make a motion to dismiss the criminal action, which motion was granted. True, he was not convicted, but he still had to pay $50 himself for carrying out his orders.
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> In this case, the school administrator--who was assistant administrator in the L.A. school district--told me that the board and the superintendent of schools were very anxious to find some possible way in which they could provide legal representation but the county counsel advised them that they had no authority to do so.

Mr. Carlson of the Department of Public Works indicated that the department would like to have authority to defend criminal actions against its officers and employees when such defense is found to be in the public interest.

(6) It was suggested that the public entity should have a duty to defend its employee unless and until the public entity determines that he is not to be defended because the act or omission was not within the scope of his employment or because he acted or failed to act because of bad faith, corruption or malice. At the same time, it was also suggested that if the public entity undertakes the defense of the public employee, the public entity shall be deemed to waive its right to raise the defenses mentioned above. The Commission discussed whether a writ of mandate would be appropriate and whether specific provision should be included in the statute authorizing a writ of mandate. It was also suggested that a time limit might be established after which the public entity would be deemed to have waived its right to raise against the employee the

defenses of "without the scope of employment" or of "bad faith, corruption or malice." After considerable discussion, the Commission declined to make a decision as to these problems and referred them to the staff with the request that the staff draft and submit appropriate legislation to the Commission for its consideration.

(7) In subdivision (5) on page 3 of the pink draft, the words "contract or" were added after the word "under".

Insurance

The Commission considered Memorandum No. 17(1962) relating to insurance for public entities and public officers and employees.

The Commission first directed its attention to the proposed statute set out in the tentative recommendation attached to Memorandum No. 17(1962) (page 6 of the blue sheets). The following changes were made in the proposed statute:

(1) Section 990.2(b) was revised to substitute "in the scope" for "during the course" and to insert ", agency" after "service."

(2) Section 990.3 was revised to authorize specifically that a public entity may make appropriations to establish financial reserves for self-insurance purposes and to authorize insurance in a nonadmitted insurer providing that the Insurance Commissioner has approved such insurer. No specific language was approved to effectuate these policy decisions, and the staff was directed to make appropriate changes in the language of Section 990.3.

(3) Section 990.4 was revised to substitute "cost of" for "premium for".

(4) Section 990.5 was revised to read:

> The authority provided by this chapter to insure does not limit or restrict, nor is it limited or restricted by, any other law that authorizes or requires a public entity to insure against its liability or the liability of public personnel.

(5) The amendment made to Section 1959 of the Government Code was approved in principle, but the staff was directed to consider incorporating the substance of Section 1959 into the new statute. In any case, Section 1959 should be made consistent with the language of the new statute.

The text of the tentative recommendation was revised as follows:

(1) The paragraph designated "5." on pages 4 and 5, was revised to delete the last two sentences.

(2) It was suggested that the second paragraph on page 3 be revised to eliminate the phrase "highly desirable method" and to make various additions explaining the advantages of insuring against potential tort liability.

(3) It was suggested that the hazy distinction between negligent and intentional torts is another reason for recommending that public entities be authorized to purchase insurance to cover the personal liability of their officers, agents and employees for intentional torts committed in the scope of their public employment.

The staff was directed to revise the recommendation, taking into consideration the suggestions made at the meeting and additional suggestions contained on copies of the tentative recommendation submitted to the staff by various members of the Commission.

The Commission unanimously approved distribution of the revised tentative recommendation to persons who have expressed an interest in receiving copies of tentative recommendations in this field. This distribution is made for the purpose of obtaining comments and suggestions from the recipients.