

4/10/62

Memorandum No. 20(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Fiscal Administration)

Attached to this memorandum is a copy of Memorandum No. 10(1962) part of which was considered at the February 1962 meeting. In this memorandum we set out the actions taken at the February 1962 meeting on Memorandum No. 10(1962) together with additional pertinent material.

Sections 740 to 744 were considered at the February 1962 meeting. Section 740 formerly contained a definition of "tort judgment." It was generally agreed that the definition set out in Memorandum No. 10(1962) was not satisfactory. It was suggested that the staff revise the definition by indicating what judgments were not tort judgments. The staff has given the matter further consideration. Based on the research set out in Exhibit I (attached blue sheets), the staff recommends that the phrase "tort judgment" not be defined in the proposed statute. (The research set out in Exhibit I was prepared in connection with the Commission's study on survival of actions.)

If the staff recommendation concerning Section 740 is accepted, Sections 740 to 743 would read as follows:

Article 4. Actions on Claims and Payment of Tort Judgments

740. As used in this article, "fiscal year" means a year beginning on July 1 and ending on June 30 unless the local public entity has adopted a different fiscal year as authorized by law, in which case "fiscal year" means the fiscal year adopted by such local public entity.

741. A local public entity may sue and be sued.

742. The governing body of a local public entity shall pay to the extent funds are available any tort judgment out of any funds to the credit of the local public entity that are:

(a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes.

(b) Appropriated for the current fiscal year for the payment of tort judgments and not previously encumbered.

743. If a local public entity does not pay a tort judgment during the fiscal year in which it becomes final and if, in the opinion of the governing body, the amount of the unpaid judgment is not too great to be paid out of revenues for the ensuing fiscal year, the governing body shall pay the judgment during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.

Section 744 (page 5 of Memorandum No. 10). This provision reflects a policy decision made by the Commission at the December 1961 meeting. At the February 1962 meeting, however, it was suggested that certain public entities be given a longer period to pay judgments. On the other hand, the view was also expressed that the plaintiff should not have to wait for a long period of time before his judgment is paid. The Commission might want to consider the following as an alternative to Section 744.

744. When in the opinion of the governing body the unpaid amount of a tort judgment is so great that its payment during the ensuing fiscal year will threaten the financial solvency of the public entity, the public entity may bring an action against the judgment creditor for declaratory relief in the superior court in accordance with the

provisions of the Code of Civil Procedure. If the court finds that the unpaid amount of the judgment is so great that its payment during the ensuing fiscal year will threaten the financial solvency of the public entity, the court shall make a judgment that the public entity provide for the payment of the unpaid amount of the judgment with interest thereon in annual installments over such period as the court shall determine is suitable in view of the size of the judgment and the financial resources of the public entity. Each annual installment shall be of at least an equal portion of the principal of the judgment unpaid at the due date of the first installment.

If the approach to the problem suggested by the above provision appears to be a desirable one, the staff will undertake the necessary research to perfect the provision. If the alternative Section 744 is adopted in principle, Section 743 will, of course, need to be revised to conform.

Pages 6-21 of Memorandum No. 10(1962) have not yet been considered by the Commission although these provisions were drafted to carry out the decisions made by the Commission at its December 1961 meeting.

The matter of insurance (pages: 22-24 of Memorandum No. 10) is covered by a tentative recommendation contained in Memorandum No. 17(1962).

Pages 25-42 of Memorandum No. 10(1962) have not yet been considered by the Commission although these provisions were drafted to carry out the decisions made by the Commission at its December 1961 meeting.

Respectfully submitted,

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Executive Secretary

## EXHIBIT I

## PROBLEM OF DEFINING WHAT CONSTITUTES A "TORT JUDGMENT"

The fundamental problem here is that no one seems to have come up with a satisfactory definition of "tort." The writers seem unanimous only on the difficulty, if not the impossibility, of the task. A tort has been described as "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."<sup>1</sup> Although this statement is no doubt correct it is not particularly helpful in determining whether a particular action is a tort since it really only says that a tort is one kind of wrong for which the law gives a particular remedy.

Some have undertaken to describe torts by saying that they consist of breaches of duties imposed on the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them.<sup>2</sup> This distinction is not entirely correct, however, since all legal duties are of course imposed by the law, and under the "objective" theory of contracts contract obligations are held to be imposed not because of subjective intent or consent, but because of consequences the law attached to the parties' conduct. Also, quasi-contractual and familial duties (to name only two) are imposed by the law without regard to the consent of the defendant.

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1. Prosser, Law of Torts 2 (2d ed. 1955).

2. Winfield, Law of Tort 6 (2d ed. 1943).

Others have attempted to define torts by saying that tort duties are duties owed to persons generally or toward general classes of persons rather than to specific individuals.<sup>3</sup> Although this may be true generally, it does not follow in all cases. For example, the tort liability of a servant to his master or the bailee to his bailor, or of a converter of goods to their owner rests upon a duty owed to one person, and one only "and it can be called general only in the same sense that everyone is under a general obligation to perform all of his contracts."<sup>4</sup>

Attempt has also been made to define torts by enumerating what they are not. This, too, is only partially helpful since "tort is a field which pervades the entire law, and is so interlocked at every point with property, contract and other accepted classifications that, as the student of law soon discovers, the categories are quite arbitrary and there is no virtue in them."<sup>5</sup> Along this same line some writers have attempted to define torts by saying that besides not including breaches of contract and wrongs exclusively criminal, they do not include "civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively" and do not include "civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation."<sup>6</sup> These distinctions, however,

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3. Id. p. 8.

4. Prosser, op. cit. note 1, p. 5.

5. Id., p. 2.

6. Heuston, Salmond on Torts 8-14 (12th ed. 1957).

merely lead us to further problems in determining what damages may be regarded as "liquidated" (and thus quasi-contractual) and what may not, and as to what actions may be excluded as breaches of "merely equitable" obligations.

It is, of course, possible to exaggerate the difficulties which would arise under a statute of the type under consideration by the lack of a satisfactory definition of "tort." It does not necessarily follow that because it is not possible to find a satisfactory single definition or description of a tort a court, or a lawyer, would not know a tort when he saw one. More recent authorities have taken the view that there is a general body of law which may properly be classified as the law of torts which has certain distinguishing basic principles and objectives.<sup>7</sup> In the vast majority of cases, precedent and generally accepted principles would lead quite readily to proper classification.

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7. Harper, Law of Torts, c. 1 (1933); Winfield, Foundations of Tort Liability, 27, Col. L. Rev. 1 (1927).