final minutes

Michigan Law Revision Commission Meeting

Wednesday, May 13, 2015 ▪ 11:30 a.m.
Legislative Council Conference Room
3rd Floor ▪ Boji Tower Building
124 W. Allegan ▪ Lansing, Michigan

Members Present:
Richard McLellan, Chair
Tony Derezinski, Vice Chair
Representative Rose Mary Robinson
Senator Tonya Schuitmaker
John Strand
George Ward

Members Absent and Excused:
Senator Bert Johnson
Representative Peter Lucido
Judge William C. Whitbeck

I. Convening of Meeting
Chair McLellan called the meeting to order at 11.44 a.m. and welcomed Representative Rose Mary Robinson to the Commission.

II. Roll Call
The Chair began with an introduction of those present at today's meeting. The roll was taken and absent members were excused. A quorum was present.

III. Approval of November 5, 2014 MLRC Meeting Minutes
The Chair asked for a motion to approve the minutes of the November 5, 2014. No corrections or additions were offered. **Commissioner Derezinski, supported by Commissioner Ward, to adopt the minutes of the November 5, 2014 Michigan Law Revision Commission meeting. There was no further discussion. The minutes were unanimously approved.**

IV. 2014 MLRC Annual Report
The Chair called on Ms. Wilensky to present the items to be included in the 2014 Michigan Law Revision Commission Annual Report. She proceeded with an overview of the parts of the report including the Sentencing Guidelines and Justice Reinvestment Study Special Report, tribute resolutions to honor former MLRC members whose service ended in 2014, and a Report on Recent Court Decisions Identifying Statutes for Legislative Actions and Recommendations to the Legislature. A discussion of the recent court case decisions followed. With regard to the People v Taylor case, the Chair proposed that the recommendation be changed to indicate that the Commission will undertake a review of the issues raised by Justice Markman and to include a report to the Legislature in a future annual report. After further discussion, the Chair asked Ms. Wilensky to make arrangements for someone to work on this project. **Senator Schuitmaker moved, supported by Representative Robinson, that the revised Report on Recent Court Decisions and the tribute resolutions to honor Senator Vincent Gregory, Representative Andrew Kandrevas, and Representative Tom Leonard be included as part of the 2014 Michigan Law Revision Commission Annual Report and that the report as proposed be approved. There was no further discussion. The motion was unanimously approved.**

V. New Business
1. Immigration Report
Ms. Wilensky directed the members' attention to a report submitted by David Koelsch, Associate Professor at University of Detroit Mercy, that identifies some areas of the law that refer to persons who are not citizens of the United States and a report prepared by Susan Reed on Driver's Licenses, State I.D.s, and Michigan Immigrants. The Chair opened a discussion and asked if this is an area that the Commission should get involved in. Representative Robinson expressed her support that this is an issue the Commission should pursue. Ms. Wilensky will invite Ms. Reed to the next MLRC meeting to discuss this issue further. The Chair asked Ms. Wilensky to also set up meetings with key individuals and groups that can provide input on this issue.

2. New Cyber Business Court Report
A report on establishing a new cyber business court prepared for the Commission by Valerie Brannon was discussed. After Ms. Brannon provided an overview of the report, the Chair thanked her for her work on the issue. Ms. Wilensky noted that the report identified a number of issues that still need to be pursued and she suggested work on this issue continue.

VI. Other Business

1. CRC Report RE: Use of Immediate Effect in Michigan

Ms. Wilensky provided an overview of the Citizens Research Council's report on the history of the use of immediate effect. A discussion followed. Because the Chair views this as an anachronism in the law, he suggested this is an issue the Commission may want to continue to review. Ms. Wilensky will work with Bruce Timmons and others to prepare a report that could be included in the 2015 MLRC Annual Report.

VII. Comments from Commissioners

The Chair asked if there were any comments from the Commissioners. Commissioner Derezinski inquired about the activities of the Criminal Justice Policy Commission. Ms. Wilensky recognized Valerie Brannon for her work with the Commission and presented her with a token of the Commission's appreciation.

VIII. Public Comment

The Chair asked if there were any public comments. Bob Ciaffone was present and offered comments regarding gaming issues. Sean Bennett was present and offered comments regarding governmental immunity. The Chair directed Ms. Wilensky to review the memo submitted by Mr. Bennett and recommend an action plan on this issue at the next meeting. Bruce Timmons offered comments regarding the earlier discussion on criminal intent and noted that it will be difficult to search statutes for things that are not there. There were no other public comments.

IX. Adjournment

Having no further business, the meeting was adjourned at 1:20 p.m.

(These minutes were approved at the May 18, 2017 Michigan Law Revision Commission meeting.)

MCL 691.1407(5) SHOULD BE AMENDED TO EXCLUDE LOCAL GOVERNMENT EXECUTIVES AND/OR TO CLARIFY THAT INTENTIONALY ILLEGAL OR UNCONSTITUTIONAL MISCONDUCT IS INHERENTLY NOT WITHIN AN OFFICIAL'S LEGAL AUTHORITY

691.1407(5) was a legislative codification of ROSS V CONSUMERS POWER, 363 NW2d 641 at 667. ROSS was correct to disavow the Court's previous "discretionary/ministerial" approach granting absolute rather than qualified immunity. Prosser and Keeton's Treatise on Torts 1984, 5th ed. Explains that in most states "officials and employees enjoy no immunity at all for ministerial acts and only a qualified immunity on matters calling for the officer's discretion. The qualified immunity is usually destroyed by malice, bad faith or improper purpose, or in some instances by objectively unreasonable conduct." P.1059-60. ROSS erred, however, in creating absolute executive immunity for the highest executive officials of **all** levels of government (unless the Court meant that intentionally illegal, malicious, corrupt, unconstitutional abuses of government powers are not and cannot be within an official's authority). The current position of the Michigan supreme court is that "an official's motive or intent has no bearing on the scope of his or her executive authority". PETIPREN V JASKOWSKI, 833 NW2d 247, 255. As a result the "scheme of individual immunity", ostensibly adopted in ROSS to get Michigan in line with other jurisdictions is out of line with every other state. A blanket absolute executive immunity for all highest local government executives including village police chiefs, for all they do at work- even ministerial functions, had never before and has never since been adopted by any other state. Such immunity is a perversion of the common law, inimical to justice, the constitution and democratic values.

The Court's intent in ROSS was to follow other jurisdictions in granting immunity depending on the functions of the officer. However, ROSS cited no cases or states on the matter. ROSS cited only Prosser's Treatise on Torts, 1971 4th ed., p.987-990, and cases cited therein, and 1982 Detroit College of Law Review article by Littlejohn and Demars, p.25-28, (who in turn relied on Prosser's Torts). The language claiming that the common law traditionally granted absolute immunity "to the highest executive officials of all levels of government as long as they had not exceeded the discretionary powers granted to them by law" is from the Littlejohn and Demars article, who **mistakenly attributed** the statement to Prosser's Torts. Prosser was absolutely clear that Mayors, School Superintendents, County Administrators, Prosecuting Attorneys, etc. were considered "lower" or "inferior" state administrative officials who did not receive immunity for malicious, dishonest, bad faith misconduct in the "considerable majority" of states. P. 988-989. Prosser clearly referenced only the highest state and federal executives, not local government executives for absolute immunity. Moreover the law throughout the US progressed greatly away from executive official immunity from 1971 to 1984. By 1984 the only executive official who could claim absolute immunity under federal law was the President (by a 5-4 decision). The absolute immunity of all state and local executives was swept away by a unanimous Court. The most prominent jurisdiction to follow the functional approach to immunity is the federal judiciary. Federal law grants immunity based on the function of the conduct, rather than on the title of the office-holder. This means that highest state and local executives receive only qualified immunity unless they engage in a judicial or legislative function.

Historically, since 1776, the common law in the US and in England did not permit officials who misused a badge of authority for an illegal purpose to escape personal liability for their misconduct. "With us [England] every official, from the Prime Minister down to a constable...is under the same responsibility for every act done without legal justification as any other citizen." All executive officials high and low "are as responsible for any act the law does not authorize as is any private person." Acts done in official character "but in excess of their lawful authority" are subjected to liability under the common law. A.V. Dicey, The law of English Constitution, 1915, 7th ed. Historically the motive or intent of the official has been of great importance in determining liability. Good faith conduct was excused while intentionally illegal misconduct was not. The "law" in the PETIPREN case resulting in the absolute obstruction of civil justice for the intentional torts of a policeman is a shameful affront to American values. The legislature should revise 691.1407(5) immediately.

Thank you. Sincerely,

Sean Bennett
1011 Crown St.,Kal. Mich
49006, (734-239-3541)

MCL 691.1407(5) GRANTING ABSOLUTE/UNQUALIFIED IMMUNITY TO EXECUTIVE OFFICIALS AND JUDGES DISSERVES THE PUBLIC INTEREST AND IS AN UNCONSTITUTIONAL, UNWISE, UNFAIR, UNNECESSARY, INEQUITABLE ANACHRONISM IN NEED OF IMMEDIATE REVISION BY THE LEGISLATURE

Especially in light of the Michigan Supreme Court's PETIPREN V JASKOWSKI 2013 decision, the legislature should repeal MCL 691.1407(5) and simply include these officials in MCL 691.1407(2)'s grant of qualified immunity. Legislators are the only officials constitutionally entitled to a limited scope of absolute immunity. If the political branches of government deem it wise, necessary or appropriate they may indemnify or insure any or all of those immunized by 691.1407(5). Because executive officials are not absolutely immune under federal law most are already indemnified or insured anyway. The pretended public interest justifications for executive official immunity are proven bogus by the presence of federal law liability. The crucial policy point is that the possibility of official liability not only preserves justice for victims of governmental wrong-doing, it serves to deter misconduct and encourages good conduct from those entrusted with high responsibility. Public official liability is especially important in Michigan where state and local government entities are usually immune from tort liability under 691.1407(1) and judicial construction. The public should not be and does not want to be stripped of justice so their officials can be "free and fearless" to evade the laws and violate constitutional rights. The great challenge of history has always been keeping those wielding government powers under the laws, not keeping officials free to violate the laws. Absolute immunity is the product of judicial opinion that the public will get higher quality performance from judges as long as citizens cannot sue no matter how egregious the misconduct.

Law-makers should reject the judicial opinion that keeping judges and other officials "free and fearless" to disobey laws and Constitution is necessary to ensure their integrity. Law-makers should recognize that the judicial reasoning behind the absolute immunities enacted as 691.1407(5) in 1986 is biased and fraudulent. When a high official betrays the Constitution(s) and public trust, abuses government powers, and intentionally harms a citizen, why should justice be obstructed, court access deprived, equal protection of the laws denied just so the injured citizen rather than the guilty official pays the cost of the damages? This may be good policy for kings and dictators, but not for michigan's citizens. One might fairly ask what business do judges have making or unmaking laws to begin with, let alone making laws which discriminate against the public to grant special privileges to a select few contrary to constitutional rights, liberty and justice for all, and the rule of law. The Trojan horse used by judges is called the common law of England. Under British Monarchy judges and other royal officials claimed civil as well as criminal immunity and could arrest and punish anyone bold enough to even criticize the performance of a royal official. After the American Revolution states chose to retain the common law which was not contrary to their constitutions in order to better preserve the rights and liberties of the people. Despite the fact that the Revolution was fought to secure inalienable human rights against oppressive government judges in the U.S. would eventually claim royal immunities as their own. The Civil War, the 14th Amendment and civil rights acts made little impression on judicial opinion, as the only privileges and immunities protected by the 14th Amendment are those of judges and other guilty officials. History, law, and policy urge legislators to repeal 691.1407(5).

Thank you. Sincerely,

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Morever, because once absolute immunity is repealed, the high public officials who are not already covered by government indemnity or insurance will undoubtedly move rapidly to assure governmental coverage, the judicial reasoning finally overruling common law government immunity should apply with equal force to MCL 691.1407(5):

GOVERNMENT "INSTITUTED FOR THE EQUAL BENEFIT, SECURITY AND PROTECTION OF THE PEOPLE" MUST ACCEPT RESPONSIBILTY FOR MISFEASANCE CAUSING INJURY TO ITS CITIZENS DURING THE COURSE OF NORMAL GOVERNMENTAL OPERATIONS. IT IS PLAINLY UNJUST TO REFUSE RELIEF TO PERSONS INJURED BY THE WRONGFUL CONDUCT OF THE STATE. NO ONE SEEMS TO DEFEND THAT REFUSAL AS FAIR...THE DOCTRINE OF GOVERNMENTAL IMMUNITY IS AN HISTORICAL ANACHRONISM WHICH MANIFESTS AN INEFFICIENT PUBLIC POLICY AND WORKS INJUSTICE UPON EVERYONE CONCERNED...WE ELIMINATE FROM THE CASE LAW OF MICHIGAN AN ANCIENT RULE INHERITED FROM THE DAYS OF ABSOLUTE MONARCHY WHICH HAS BEEN PRODUCTIVE OF GREAT INJUSTICE IN OUR COURTS. PITTMAN V TAYLOR, MICH. 247 NW2d 512

[THE DOCTRINE OF GOVERNMENTAL IMMUNITY IS] ANACHRONISTIC NOT ONLY TO OUR SYSTEM OF JUSTICE BUT TO OUR TRADITIONAL CONCEPTS OF DEMOCRATIC GOVERNMENT. HARGROVE V TOWN OF COCOA BEACH, FLA. 96 SO2d 130

IT IS ALMOST INCREDIBLE THAT IN THIS MODERN AGE OF COMPARATIVE SOCIOLOGICAL ENLIGHTENMENT, AND IN A REPUBLIC, THE MEDIEVAL ABSOLUTISM SUPPOSED TO BE IMPLICIT IN THE MAXIM "THE KING CAN DO NO WRONG" SHOLD EXEMPT THE VARIOUS BRANCHES OF GOVERNMENT FROM LIABILITY FOR THEIR TORTS, AND THAT THE ENTIRE BURDEN OF DAMAGE RESULTING FROM THE WRONGFUL ACTS OF THE GOVERNMENT SHOULD BE IMPOSED UPON THE SINGLE INDIVIDUAL WHO SUFFERS THE INJURY, RATHER THAN DISTRIBUTED AMONG THE ENTIRE COMMUNITY CONSTITUTING THE GOVERNMENT, WHERE IT COULD BE BORNE WITHOUT HARDSHIP UPON ANY INDIVIDUAL, AND WHERE IT JUSTLY BELONGS. MOLITOR V KANELAND, ILL. 163 NE2d 89, HICKS V STATE N.M., 544 P2d 1153

EXPOSURE OF THE GOVERNMENT TO LIABILITY FOR ITS TORTS WILL HAVE THE EFFECT OF INCREASING GOVERNMENTAL CARE AND CONCERN FOR THE WELFARE OF THOSE WHO MIGHT BE INJURED BY ITS ACTIONS...WE MUST ALSO REJECT THE FEAR OF EXCESSIVE LITIGATION AS A JUSTIFICATION FOR THE IMMUNITY DOCTRINE . EMPIRICALLY THERE IS LITTLE SUPPORT FOR THE CONCERN...IT IS THE BUSINESS OF THE LAW TO REMEDY WRONGS THAT DESERVE IT, EVEN AT THE EXPENSE OF A FLOOD OF LITIGATION; AND IT IS A PITIFUL CONFESSION OF INCOMPETENCE ON THE PART OF ANY COURT OF JUSTICE TO DENY RELIEF UPON THE GROUND THAT IT WILL GIVE THE COURT TOO MUCH WORK TO DO. AYALA V PHILADELPHIA, PENN. 305 A2d 877

TO SAY [GOVERNMENT IMMUNITY STATUTE] SUBVERT THE CONCEPT OF DUE PROCESS, IS BUT TO STATE THE OBVIOUS FOR THAT DOCTRINE BLOCKS ACCESS TO OUR COURTS TO THOSE SEEKING REDRESS FOR INJURIES OCCASIONED BY THE NEGLIGENT ACT OF A GOVERNMENT ENTITY...TO HOLD CONVENIENCE IS A PERMISSIBLE LEGISLATIVE OBJECTIVE, SUFFICIENT TO INSULATE THE GOVERNMENT FROM NEGLIGENCE, IS TO ENGAGE IN INCREDULOUS REASONING, VOID OF LOGIC, WHICH UNDERMINES THE VERY PRINCIPLES UPON WHICH THIS NATION WAS FOUNDED....WE FIND IT IMPERMISSIBLE TO DENY APPELLANTS ACCESS TO THE COURTS AS A MEANS OF FORESTALLING SPURIOUS ACTIONS...A GRANT OF POWER BY THE PUBLIC IS NEVER TO BE INTERPRETED AS A POWER TO INJURE. BROWN V WICHITA STATE UNIV, KAN. 540 P2d 66