TENTATIVE RECOMMENDATION

relating to

Tort Liability of Public Entities and Public Officers and Employees

DIRECTIONS FOR INSERTING REPLACEMENT PAGES

Attached are replacement pages which replace pages in the Tentative Recommendation relating to Tort Liability of Public Entities and Public Employees. (Commissioners have this tentative recommendation with covers on it.) Use new Table of Contents as a check list.

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LETTER OF TRANSMITTAL
[For use in printed pamphlet]

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

On January 27, 1961, the California Supreme Court, in Muskopf v. Corning Hospital District, decided that the doctrine of sovereign immunity would no longer protect public entities in California from civil liability for their torts. At the same time the court decided Lipman v. Brisbane Elementary School District, in which it stated that the doctrine of discretionary immunity, which protects public officers and employees from liability for their discretionary acts, might not protect public entities from liability in all situations where the officers and employees are immune.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the Muskopf and Lipman decisions until the ninety-first day after the adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the public entities in California will be liable for their torts under the conditions set forth in the Muskopf and Lipman cases.

Since the decision in the Muskopf case, the Commission has devoted substantially all of its time to the study of

sovereign immunity.

The Commission herewith submits its recommendation on one portion of this subject--tort liability of public entities and public officers and employees. Recommendations covering other aspects of the subject are contained in other reports prepared for the 1963 legislative session. The Commission has also published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

In formulating its recommendations concerning sovereign immunity, the Commission first prepared a series of tentative recommendations, each of which related to a different aspect of the subject. These tentative recommendations were widely distributed and comments and suggestions were solicited from all persons and organizations who have expressed an interest in this subject. The State Bar appointed a special committee to consider the recommendations of the Commission relating to sovereign immunity and this Committee has provided the Commission with helpful comments and suggestions. In addition, representatives of various public entities and other interested organizations have attended the meetings of the Commission as observers. All comments and suggestions received were considered by the Commission in preparing its final recommendations.

Although the Commission has devoted the major portion of its time during the past two years to the study of sovereign immunity, the subject is so vast that a complete study of its aspects could not be completed prior to the 1963 legislative session. The recommendations prepared for the 1963 legislative session are designed to meet the most pressing problems in regard to governmental tort liability. Problems may remain to be solved

in the areas of activity already studied; and there are other areas of activity, where claims of liability arise less frequently, which require attention. Accordingly, the Commission proposes to continue its study of this subject and to make recommendations to subsequent legislative sessions dealing with these remaining problems.

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BACKGROUND

On January 27, 1961, the California Supreme Court, in Muskopf v. Corning Hospital District,[1] decided that the doctrine of sovereign immunity would no longer protect public entities in California from civil liability for their torts. At the same time, the court decided Lipman v. Brisbane Elementary School District,[2] in which it stated that the doctrine of discretionary immunity, which protects public employees[3] from liability for their discretionary acts, might not protect public entities from liability in all situations where the employees are immune

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the Muskopf and Lipman decisions until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the public entities of California will be liable for their torts under the conditions set forth in the Muskopf and Lipman decisions.

The Need for Legislation

Prior to the Muskopf and Lipman decisions, extensive legislation relating to the subject of governmental liability or immunity had been enacted. This legislation expresses a variety of conflicting policies.

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1. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

2. 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

3. As used in this tentative recommendation, "employee" includes an officer, agent or employee, and "employment" includes office, agency or employment.

Some statutes create broad immunities for certain entities and others create wide areas of liability. Some apply to many public entities and others apply to but one. In some cases, statutes expressing conflicting policies overlap.[4] Even where statutes impose liability on public entities, they do so in a variety of inconsistent ways. Some entities are liable directly for the negligence of their servants. Others are not liable directly, but are required to pay judgments recovered against their personnel even where the judgments result from malicious acts.

Where statutes are not applicable, the courts have determined liability on the basis of whether the injury was caused in the course of a governmental or proprietary activity. Thus, if the injury occurred in a swimming pool (a "governmental" activity), the public entity was not liable, but if the injury occurred on a golf course (a "proprietary" activity), the public entity was liable.

Even where the government is immune from liability for a negligent or wrongful act or omission, the governmental employee who acted or failed to act is often personally liable; and many governmental entities have assumed the cost of insurance protection for their employees against this liability.

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4. For example, Streets and Highways Code Sections 5640 and 5641 (part of the Improvement Act of 1911) provide that cities, counties, resort districts and all corporations organized for municipal purposes are immune from liability for injuries caused by street and sidewalk defects. It is likely that these immunity provisions apply to several other kinds of districts, for the Improvement Act of 1911 hasbeen incorporated by reference in many other statutes. But Government Code Section 53051 provides that cities, counties and school districts are liable for such dangerous conditions. As the Government Code section was last enacted, it has impliedly repealed the Streets and Highways Code sections insofar as cities and counties are concerned, but not insofar as resort districts and corporations organized for municipal purposes are concerned.

Thus, even before the Muskopf and Lipman cases were decided, there was a great need for comprehensive legislation to deal with the problems of governmental liability and immunity.

The effect of the Muskopf and Lipman decisions on the existing statutes is not clear. Statutes that impose liability upon public entities in particular areas of activity may be construed either as limitations on the liability that would exist under these decisions or, in cases where a rule is declared that is broader than the common law rule that would be applicable under these decisions, as extensions of governmental liability.

The problem of reconciling the Muskopf and Lipman decisions with the existing statutory law could be met by repealing the existing statutes. Then the courts could decide all cases under the general principle that the government is liable for its torts. In some jurisdictions this approach to governmental liability has been taken. Thus, in some states, a statute merely declares that the government is not immune from liability for its torts, while in others, the courts have declared a similar rule.

This solution to the problem, though, is fraught with difficulties. No precise standards for the determination of the liability of government have as yet been defined by the California courts. Hence, it is impossible to ascertain how large the potential liability would be even if the Muskopf and Lipman cases were permitted to determine all governmental liability. The suggestion in the Lipman case that public entities may be liable for discretionary actions of governmental officers has given rise to fears that governmental liability may be expanded to the extent

that essential governmental functions will be impaired. Experience in states which have left the limits of liability to be determined by the courts has shown that liability insurance to protect the financial integrity of small public entities is at times prohibitively expensive or impossible to obtain when there is no defined limit to the potential extent of liability. As a result, the legislatures have enacted measures substantially curtailing governmental liability.

The courts, of course, have recognized that the liability of government cannot be unlimited. In the Muskopf case the Supreme Court stated that it is not a tort for government to govern. In other jurisdictions where there has been a general waiver of sovereign immunity, the courts have worked out the limits of liability on a case by case basis over a period of years. Thus, in New York, the courts have declared that public entities are not liable for failing to enforce the law, for negligently inspecting buildings or for improperly issuing building permits. If the limits of governmental liability are not specified by statute in California, it is likely that our courts will eventually define the limits of liability much as the courts have done in New York. Under this process, though, many years will pass before the extent of governmental liability can be determined with certainty. Many cases must be tried and processed through the appellate courts. Large amounts of both private and public money must be fruitlessly expended in prosecuting and defending actions where the governmental defendant cannot be held liable. And in the meantime, while the potential liability is yet unknown, the financial stability of many governmental entities may be unprotected because insurance may not be available to protect them against an undefined risk.

There is an immediate need, therefore, for the enactment of comprehensive legislation stating in considerable detail the extent to which governmental entities will be liable when the legislation suspending the effect of the Muskopf and Lipman decisions expires. In preparing this legislation, California may profit from the experience of the New York and the federal governments in administering their governmental tort laws. The difficulties the New York and federal courts have experienced in defining the limits of liability may be avoided here to a considerable extent by the statement of these limits in statutory form. Where the New York and federal courts have reached sound conclusions, the rules declared may be enacted here so that no time or money need be lost in test cases to determine whether the California courts will reach the same conclusions. Where the courts of these jurisdictions have reached unsound conclusions and have either restricted liability unduly or placed burdens on government that impair its ability to perform its vital functions, California can meet the problem by declaring a different rule by statute.

The resulting certainty will be of benefit both to governmental entities and to persons injured by governmental activities. If the limits of potential liability are known, governmental entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance. Meritorious claims will not be resisted in the hope that the appellate courts will create an additional immunity; and unmeritorious claims will not be pressed in the hope that an existing immunity will be curtailed or that liability will be extended beyond previously established limits.

The Difficult Problem of Drawing Standards for Governmental Liability

The problems involved in drawing standards for governmental liability and governmental immunity are of immense difficulty. Government cannot merely be made liable as private persons are, for governmental entities are fundamentally different than private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only governmental entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a governmental entity often cannot reduce its risk of potential liability risks by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately furnished from any other agency. Moreover, in our system of government, decision making has been allocated among three branches of government--legislative, executive and judicial--and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.

The courts have recognized these problems where tort actions have been brought against public officers for injuries caused by the officers' activities. Where the injury is caused by a discretionary act of a

public officer that was committed within the scope of the authority delegated to him, the public officer has been held immune from liability. The courts have said that this immunity is necessary because the officer's fear of personal liability might otherwise inhibit him from carrying out his public duties with diligence. Similar considerations are applicable where the liability is that of the government itself instead of that of an officer of the government. Rising expenses and a limited tax base may make an officer as apprehensive of the effect of governmental liability upon the budget he must administer as he is of the effect of personal liability upon his own resources.

Yet it would be harsh and unjust to deny compensation to all persons injured as the result of the wrongful or negligent acts of governmental servants. Government operates for the benefit of all; hence, it is reasonable to expect that all should bear some of the burden of the injuries that are wrongfully inflicted by the government. The basic problem is to determine how far it is desirable to permit the loss distributing function of tort law to apply to governmental agencies without unduly frustrating or interfering with the other desirable purposes for which such agencies exist.

The Legislative Scheme Proposed by the Commission

"Open end" or "closed end" liability. The initial question to be decided in formulating a legislative plan to govern the tort liability of governmental entities is whether they should be liable only as made liable by statute, a so-called "closed end" liability, or whether they should be made liable for all damages and injuries caused by their activities except as such liability is limited or conditioned by statute, a so-called "open end" liability.

A statute drafted using the open end approach would provide the governing bodies of public entities with little basis upon which to budget for the payment of claims, judgments and damages, for public entities would be faced with a vast area of unforeseen situations, any one of which could give rise to costly litigation and a possible damage judgment. An open end liability statute would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under an open end liability statute would no doubt be greater than under the closed end liability statute since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under an open end type of statute.

Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by statute.

This closed end type of liability statute will provide a better basis upon which the financial burden of liability may be calculated,

since each statutory provision imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability may then be imposed by carefully drafted statutes.

Formulation of rules governing liability. In its formulation of the rules governing liability of public entities and public employees, the Commission has studied a number of areas of potential liability: dangerous conditions of public property; police and correctional activities; suppression of mobs and riots; fire protection; medical, hospital and public health activities; park and recreational activities; and operation of motor vehicles. These are the areas where experience in other states and under the Federal Tort Claims Act has shown that claims of liability are most apt to arise. In each area, the Commission has sought to determine how the interest of the public in effective governmental administration should be balanced against the need for providing compensation to those injured by the activities of government. From this study of particular areas of government activity, the Commission has concluded that certain problems recur and that the rule formulated to meet such a problem in one area may be readily applied to all areas of governmental activity. On the other hand, in some areas of activity there are unique problems that require a specific legislative solution. Therefore, the Commission recommends the enactment of legislation containing sections of general application to all activities of governmental entities and, in addition, a number of sections stating special rules applicable to problems requiring separate treatment.

One of the most important provisions in the recommended legislation provides that public entities are liable for negligent or wrongful acts or omissions of their employees within the scope of their employment to the extent that such employees are personally liable for their acts or omissions. This provision is qualified by a number of other provisions providing for immunity in particular cases. The most significant of the immunity provisions contained in the recommended legislation is one that provides that neither public entities nor public employees are liable for discretionary acts within the scope of an employee's authority.

Although the existing case law has spelled out in some detail the extent of the discretionary immunity of public employees, there are instances where the law is not clear. The Commission hereinafter proposes numerous statutory provisions that will clarify the limits of discretionary immunity. These provisions will, to a considerable extent, eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions. The judicial process, by its very nature, can deal only with the isolated problems of individual citizens which from time to time are litigated and appealed. To wait for the fabric of the law to shape itself in this fashion would be slow, unpredictable and expensive.

The Commission has also concluded that under certain circumstances public entities should be liable although no employee is personally liable. For example, such liability should exist where a public entity maintains a nuisance. Such liability should exist, however, only where the liability is created by statute. In absence of such a statute, public entities should not be liable unless an employee is personally liable.

The legislation recommended by the Commission will meet the most pressing problems in regard to liability that public entities will face upon the expiration of the statute suspending the effect of the Muskopf and Lipman decisions. The subject of sovereign immunity is so vast, however, that a complete study of all aspects of the subject could not be completed prior to the 1963 Session of the Legislature. Problems may remain to be solved in the areas of activity already studied; and there are other areas of activity, where claims of liability arise less frequently, which require attention. Accordingly, the Commission intends to continue its study of sovereign immunity so that recommendations may be submitted to subsequent legislative sessions to deal with these remaining problems.

RECOMMENDATIONS

General Provisions Relating to Liability

1. A statute should be enacted providing that public entities are not liable for torts unless they are declared to be liable by statute. This recommendation will permit the Legislature to establish the limits of governmental liability by statute. The Commission is recommending the enactment of several statutes imposing liability upon public entities within limits that are carefully described. These limits would have little meaning if liability could be imposed beyond the area defined in the statutes.

2. A public entity should be liable for a negligent or wrongful act or omission[1] of its employee within the scope of his employment[2] to the extent that the employee is personally liable for such act or omission. This would impose upon public entities the same responsibility for the tortious acts of their employees as presently rests upon private employers.

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1. The phrase "negligent or wrongful act or omission" embraces any act or failure to act, whether negligent, intentionally tortious or criminal. The fact that the act done is a serious crime is, of course, a factor indicating that it is not in the scope of employment.

2. The phrase " scope of his employment" is intended to make applicable the general agency principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the principal for the torts of the agent.

For many entities, this recommendation would constitute a substantial expansion of their tort liability. For many others, however, this recommendation would constitute little or no extension of their existing liability. School districts and reclamation districts are now generally liable for the negligence of their personnel. Certain flood control districts are generally liable for the negligence of their trustees. Community services districts, county water districts, various water agencies and several other districts are required to pay any judgments recovered against their personnel for acts or omissions committed in the service of the district. Irrigation districts and California water districts must pay judgments recovered against their officers. Thus, over 2,400 public entities in California are now financially responsible for the torts of some or all of their personnel. In addition, Vehicle Code Section 17001 subjects all public entities in the State to liability for the negligent operation of motor vehicles by their personnel; and cities, counties and school districts are liable under existing law for injuries caused by dangerous conditions of public property that have been negligently created or permitted to remain. The Commission's recommendation would extend the principle underlying these statutes to all public entities in the State, thus permitting the repeal of numerous statutes that are, without apparent reason, inconsistent both as to the manner in which the principle is applied and as to the personnel covered.

3. Public entities should be immune from liability for acts or omissions

of their employees in regard to matters which are committed to the discretion of such employees. This recommendation would make applicable to public entities the discretionary immunity doctrine now applicable only to public employees. Under this doctrine, public employees are not liable for their acts or omissions within the scope of their discretionary authority. Thus, for example, judges are immune from liability for their judicial acts, prosecutors are immune from liability for instituting criminal prosecutions, administrative officials are immune from liability for suspending or revoking licenses, health officers are immune from liability for deciding not to quarantine, and city officers are not liable for awarding a franchise.

A dictum in the Lipman case stated that public entities should be liable in some situations where public employees enjoy an immunity. The Commission agrees that there are some instances where such should be the rule. For example, a public entity is made liable under the recommended legislation for its failure to exercise reasonable diligence to comply with a mandatory statute or enactment. In the absence of a statute imposing such liability, however, the public entity should not be liable for the discretionary act or omission of a public employee. In order to clarify the limits of the discretionary immunity, the Commission has considered the application of the doctrine in areas where claims of liability most often arise and recommends specific statutory provisions that will indicate whether or not liability should exist in particular situations. Where no specific provision covers a particular case, the discretionary immunity developed or to be developed by the cases in regard to the personal liability of public personnel will be the standard of immunity

for governmental entities.

The Commission recognizes that occasionally the application of the discretionary immunity doctrine may seem harsh and unfair--as, for example, when persons are denied all relief in those rare cases where injuries are caused by deliberate and malicious abuses of governmental authority. The Commission, in its continuing study of sovereign immunity, will undertake a study of other areas where the discretionary immunity doctrine applies to determine whether further modifications of the doctrine should be made.

4. Public entities should be liable for the damages that result from their failure to exercise reasonable diligence to comply with applicable standards of safety and performance that have been established by statute and regulation. Although decisions relating to the facilities, personnel or equipment to be provided in various public services involve discretion and public policy to a high degree, nonetheless, when minimum standards of safety and performance have been fixed by law and regulation--as, for example, the duty to supervise pupils under Education Code Section 13557 and the rules of the State Board of Education, the duty to provide

lifeguard service at public swimming pools under Health and Safety Code Section 24104.4 and the regulations of the State Department of Public Health, or the duty to meet applicable requirements established by law in the construction of improvements--there should be no discretion to refuse to comply with those minimum standards.

5. Public entities should be declared by statute to be liable for nuisances which they create or maintain. They are liable for nuisance under existing law, and this liability should be continued. Under existing law, a plaintiff, in order to make out a case of nuisance against either a public entity or a private individual, must bring his case within the scope of Civil Code Section 3479 or some other statute defining nuisance.

Civil Code Section 3482 provides: "Nothing which is done or maintained under the express authority of statute can be deemed a nuisance." This section has been limited to a certain extent by decisions holding that a general statutory authority to engage in a particular activity (as distinguished from explicit authority to create the nuisance itself) would not be construed as requisite authority to grant immunity from nuisance liability. However, the existence of Section 3482 would appear to preclude the imposition of liability upon public entities under this recommendation for "governing" in one of its most fundamental senses--making laws.

6. Under the common law, certain public officers were at times held liable for the acts of subordinate employees even though the officers themselves were innocent of any negligence or other wrong. For most public officers, though, the courts held that respondeat superior was inapplicable and that they were not liable for the acts of their

subordinates unless they participated in those acts or were negligent in appointing or failing to discharge or take other appropriate action against unfit subordinates.

A large number of statutes have been enacted limiting the liability of public officers for the acts of others, many of which are inconsistent with each other. These statutes should be replaced by a statute providing that a public entity is liable for injury caused by a public employee where the injury has resulted from the failure of the responsible officials of the public entity to exercise due care in the selection or appointment of the employee, in supervising the employee, or in failing to take steps to remove him from a position where he created a risk of injury.

7. The immunity from liability for malicious prosecution that public employees now enjoy should be continued. A review of the cases reaching the appellate courts reveals that a great many malicious prosecution suits against public employees are groundless. Public officials should not be subject to harassment by "crank" suits. However, where public employees have acted maliciously in using their official powers, the injured person should not be totally without remedy. The employing public entity should, therefore, be liable for the damages caused by such abuse of public authority; and, in those cases where the responsible public employee acted with actual malice, actual fraud or corruption, the public entity should have the right to seek indemnity from the employee.

8. Public entities should not be liable for punitive or exemplary damages. Such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers.

9. An essential function of government is the making and enforcing of laws. The public officials charged with this function will remain politically responsible only if the courts exercise no review of the desirability of enacting and enforcing particular laws through the device of deciding tort actions. Hence, the statutes should make clear that public entities and their employees are not liable for any injury flowing from the adoption of or failure to adopt any statute, ordinance, or regulation or from the execution of any law with due care.

For similar reasons, public entities and their employees should not be liable for inadequate enforcement of any law or regulation or for failure to take steps to regulate the conduct of others. The extent and quality of governmental service to be furnished is a basic governmental policy decision. Public officials must be free to determine these questions without fear of liability either for themselves or for the governmental bodies that employ them if they are to be politically responsible for these decisions.

The remedy for officials who make bad law, who do not adequately enforce existing law, or who do not provide the people with services they desire, is to replace them with other officials. But their discretionary decisions in these areas cannot be subject to review in tort suits for damages if government is to govern effectively.

Public entities and public employees should not be liable for negligent or wrongful failure to enforce any law. They should not be liable for failing to adequately inspect persons or property to determine compliance with health and safety regulations. Nor should they be liable for negligent or wrongful issuance or revocation of licenses

and permits. These activities the government has undertaken to insure public health and safety. To provide the utmost public protection, governmental entities should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately. Moreover, if liability existed for this type of activity, the risk exposure to which a public entity would be subject would include virtually all activities going on within the community. There would be potential governmental liability for all building defects, for all crimes, and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude. In these cases, there is usually some person other than the governmental employee who is liable for the injury, but liability is sought to be imposed on government for failing to prevent that person from causing the injury. The Commission believes that it is better public policy to leave the injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury. Far more persons would suffer if government did not perform these functions at all than would be benefitted by permitting recovery in those cases where the government is shown to have performed inadequately.

Sections 50140 through 50145 of the Government Code are inconsistent with the foregoing recommendations. These sections impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. These sections are an anachronism in modern law. They are derived from similar English laws that date back to a time when the government relied on local townspeople to suppress

riots. The risk of property loss from mob or riot activity is now spread through standard provisions of insurance policies. Accordingly, these sections should be repealed.

At common law, public officers were immune from liability for trespasses necessarily committed in the execution of law. However, if the authority of the officer was abused or if he committed some tortious injury while upon the property, he was personally liable ab initio as a trespasser for the entry and all injuries resulting therefrom. A great many statutes have been enacted to modify this common law rule. In somewhat inconsistent terms, they generally limit the liability of the officer to the damages flowing from his negligent or wrongful act. But there are many other statutes authorizing public officials to enter private land that contain no reference to the liabilities that may be incurred. These various statutes should be superseded by a statute applicable to all public entities limiting the liability of the entering officer and his employing public entity to the damages caused by his negligent or wrongful act. The enactment of such a statute will permit the repeal of a large number of statutes declaring a similar rule.

Government Code Section 1955 now provides public employees with an immunity from liability for enforcing laws later held to be unconstitutional. This section, though, does not provide adequate protection. It is not clear whether it applies to State constitutional provisions, charter provisions, ordinances or administrative regulations. Moreover, it does not provide protection for an officer who in good faith enforces a law later held to be repealed by implication or inapplicable for any other reason.

The protection should be broadened to provide an immunity whenever an employee, exercising due care and acting in good faith and without malice, enforces any constitutional provision, statute, charter provision, ordinance or regulation that is subsequently held to be invalid or inapplicable for any reason.

10. Government Code Section 1953.5 provides that public officers are not liable for money stolen from their custody unless they failed to exercise due care. This statute should be made applicable to all public employees and placed in the statute dealing generally with the liabilities and immunities of public employees.

11. Not only should public entities be directly liable for the torts of their personnel, but in cases where an action is brought against a public employee for tortious acts committed in the scope of his employment, the public entity should be required to pay the compensatory damages, but not punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend it. A number of statutes now require certain public entities to pay judgments against their employees, but none require the employee to give notice and an opportunity to defend to the entity. Yet it seems only fair that if governmental entities are to be bound by judgments, they should have the right to defend themselves by controlling the litigation.

12. Whenever a public entity is held liable for acts of an employee committed with actual fraud, corruption or actual malice, the public entity should have the right to indemnity from the employee. This right to indemnity, however, should not exist in any case where the public entity

has undertaken the defense of the employee, unless the employee has agreed that it should. In conducting an employee's defense, the entity's interest might be adverse to the interest of the employee. For example, if both the employee and the entity were joined as defendants, the public entity's interest might be best served by showing malice on the part of the employee; for if the employee acted with malice the public entity could recover indemnity from the employee for any amounts the entity was required to pay. Hence, the undertaking of an employee's defense should constitute a waiver of the public entity's right to indemnity unless, by agreement between the entity and the employee, the public entity's right of indemnity is reserved.

13. Section 1095 of the Code of Civil Procedure, which requires that damages assessed in a mandate action be levied against the entity represented by the respondent officer, should be amended to apply to all public entities and to agents and employees as well as officers. The section presently applies only to officers of the State, counties and municipal corporations.

Medical, Hospital and Public Health Activities

Medical, hospital and public health activities of public entities have traditionally been regarded as governmental" in nature, even where, for example, the particular hospital involved received paying patients and otherwise was operated like a private hospital. As a result, public entities have been immune from liability arising out of these activities. The effect of this immunity of governmental entities had been lessened, however, by legislation authorizing the purchase of malpractice insurance for the personnel employed in such hospitals and requiring the State to pay judgments in malpractice cases brought against State officers and employees.

The general recommendations relating to the liability of public entities will resolve most of the problems of liability and immunity growing out of medical and hospital activities that have been revealed by the cases arising in other jurisdictions where sovereign immunity has been waived. Some of these problems, though, call for statutes of particular application in this area of activity:

1. A public entity should be liable for an injury which results from the failure to comply with an applicable statute, or an applicable regulation of the State Department of Public Health or the State Department of Mental Hygiene, which establishes minimum standards for equipment, personnel or facilities in public hospitals and other public medical facilities, unless the public entity establishes that it

exercised reasonable diligence to comply with the statute or regulation. Although decisions as to the facilities, personnel or equipment to be provided in public medical facilities involve discretion and public policy to a high degree, nonetheless, when minimum standards have been fixed by statute or regulation, there should be no discretion to refuse to meet those minimum standards.

This recommendation will leave determinations of the standards to which public hospitals and other public medical facilities must conform in the hands of the persons best qualified to make such determinations and will not leave those standards to the discretion of juries in damage actions. Hence, governmental entities will know what is expected of them and will continue to be able to make the basic decisions as to the standards and levels of care to be provided in public hospitals and other public medical facilities within the range of discretion permitted by state statutes and regulations.

Although most public hospitals and mental institutions are subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene, some (e.g., the University of California's hospitals) are not. Yet, these hospitals should be required to exercise reasonable diligence to maintain the same minimum standards that other comparable public hospitals do. Accordingly, public entities should be liable for damages resulting from inadequate facilities, personnel or equipment in public medical facilities

not specifically subject to regulation if they do not exercise reasonable diligence to conform to the regulations applicable to other facilities of the same character and class.

2. Public entities and public employees should be made liable for the damages proximately resulting from their intentional and unjustifiable interference with any right of an inmate of a public medical facility to seek judicial review of the legality of his confinement. The right of a person involuntarily confined to petition the courts is a fundamental civil right that should receive effective legal protection.

3. Public entities and public employees should not be liable for refusing to admit a person to a public medical facility when there is discretion whether or not to do so. The decision whether or not to admit a patient to a public medical facility often depends upon a weighing of many complex factors, such as the financial condition of the patient, the availability of other medical facilities, and the like. Public entities and public employees should be free to weigh these factors without fear that a judge or jury may later disagree with the conclusion reached. On the other hand, if by statute, regulation or administrative rule, the public entity or a public employee is legally required to admit a patient, there should be liability for negligently or wrongfully failing to do so.

4. Public entities and public employees should not be liable for negligence in diagnosing and prescribing treatment for mental illness, mental deficiency, habit forming drug

addiction, narcotic drug addiction, inebriation or sexual psychopathy. Much of the treatment of these conditions goes on in public mental institutions. The field of psychotics is relatively new and standards of diagnosis and treatment are not as well defined as where physical illness is involved. Moreover, state mental hospitals must take all patients committed to them; hence, there are frequently problems of supervision and treatment created by inadequate staff and excessive patient load that similar private hospitals do not have to meet. For the same reasons, no liability should exist for negligence in determining the terms and conditions of the confinement, parole or release of habit forming drug addicts, narcotic drug addicts, inebriates, sexual psychopaths or persons who are mentally ill or mentally deficient. The statutes should made clear, however, that public entities and employees are liable for injuries caused by negligent or wrongful acts or omissions in administering prescribed treatment or confinement.

5. Public health officials and public entities should not be liable for acting or failing to act in imposing quarantines, disinfecting property, or otherwise taking action to prevent or control the spread of disease, where they have been given the legal power to determine whether or not such action should be taken. Where the law gives a public 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 committed. But when a public official has a legal duty to act in a particular manner, he should be liable for his wrongful or negligent failure to perform the duty; and his employing public entity should be liable if such failure occurs in the scope of his employment.

Chapter 2. Dangerous Conditions of Public Property

Article 1. General

830. As used in this chapter:

(a) "Dangerous condition" means a condition of public property that exposes persons or property to a substantial risk of injury when the public property is used with due care in a manner in which it is reasonably foreseeable that the public property will be used.

(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, and warning of a dangerous condition.

(c) "Property of a public entity" and "public property" include real and personal property of the public entity but do not include (1) easements, encroachments and other property, not owned or controlled by the public entity, that is located on the property of the public entity or (2) foodstuffs, beverages, drugs or medicines.

Note: This section defines the terms used in this chapter. The definition of "dangerous condition" defines the type of property conditions for which a public entity may be held liable but does not impose liability. A public entity may be held liable for a "dangerous condition" of public property only if it has acted unreasonably in creating or failing to remedy or warn against the condition under the circumstances described in subsequent sections.

A "dangerous condition" is defined in terms of "foreseeable use." This does not change the pre-existing law relating to cities, counties and school districts. These entities are liable under Government Code Section 53051 for maintaining property in a condition that creates a hazard to foreseeable users even if those persons use the property for a purpose for which it is not designed to be used or for a purpose that is illegal. Acosta v. County of Los Angeles, 56 Adv. Cal. 198 (1961); Terkelson v. City of Redlands, 198 A.C.A. 359 (1961).

A condition is not dangerous within the meaning of this chapter unless it creates a hazard to those who foreseeably will use the property with due care. Thus, even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons. The definition would, however, take into consideration the standard of care that would be applicable to foreseeable users of the property. Where it is reasonably foreseeable that persons to whom a lower standard of care is applicable--such as children--may be exposed to a substantial risk of injury from the property, the public entity should be required to take reasonable precautions to protect such persons from that risk. Thus, a public entity may be expected to fence a swimming pool or to fence or lock up a dangerous instrumentality if it is reasonably foreseeable that small children may be injured if such precautions are not taken.

The definition of "protect against" is self-explanatory.

"Property of a public entity" excludes easements, encroachments and similar property that may be located on the property of a public entity in order to make clear that it is not the duty of the owner of the servient estate to inspect such property for hazards; rather, it is the duty of the person or entity that owns the easement, encroachment, etc. Of course, if the condition of the easement or encroachment renders the public property dangerous--as, for example, where a privately owned power line falls or sags across a public highway--the public entity will have an obligation to take reasonable precautions after it receives notice of the condition.

Foodstuffs, beverages, drugs and medicines are excluded from the definition of public property so that this chapter will not be the basis for liability based on the unfit condtion of such materials. Liability, if any, for unfit foodstuffs, beverages, drugs or medicines must be grounded upon contract or upon some other statute.

830.2. A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition exposed persons or property to a substantial risk of injury when the public property was used with due care in a manner in which it was reasonably foreseeable that the public property would be used.

Note: This section declares a rule that has been applied by the courts in cases involving dangerous conditions of sidewalks. Technically it is unnecessary, for it merely declares the rule that would be applied in any event when a court rules upon the sufficiency of the evidence. It is included in the chapter as a reminder to the courts that they have an obligation to determine that a substantial, as opposed to a possible, risk must be involved before they may permit the jury to find that a condition is dangerous.

830.4. No public entity, and no employee of a public entity, is liable for an injury . . . [here will be listed the specific immunities approved by the Commission].

Article 2. Liability of Public Entities

835. Notwithstanding Section 815.4 and except as provided in Sections 835.6 and 835.8, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that:

(a) The property of the public entity was in a dangerous condition at the time of the injury.

(b) The injury was proximately caused by the dangerous condition.

(c) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.

(d) The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.

Note: The purpose of this section is to make clear that public entities are liable for dangerous conditions that are created by the negligent or wrongful acts of their employees. The section, in this respect, declares a rule that has been previously declared by the California courts in construing the provisions of the Public Liability Act of 1923. Pritchard v. Sully-Miller Contracting Co., 178 Cal. App.2d 246 (1960).

The section is not subject to the discretionary immunity declared in Section 815.4, for this chapter itself declares the limits of a public entity's discretion in dealing with dangerous conditions of its property.

The reference to Sections 835.6 and 835.8 is to indicate that liability does not necessarily exist if the evidentiary requirements of this section are met. Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the alternative courses of action available to it and the practicability and cost of pursuing such alternatives.

Subdivision (d) requires the plaintiff to show that the injury suffered was of a kind that was reasonably foreseeable. Thus, a person landing an airplane on a public road might not be able to recover for an injury resulting from striking a chuckhole, whereas a motorist might be able to recover for the injury resulting from striking the same hazard; for it is reasonably foreseeable that motorists will be injured by such a defect, but it is highly unlikely that airplanes will encounter the hazard.

835.2. Nothwithstanding Section 815.4 and except as provided in Sections 835.6 and 835.8, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that:

(a) The property of the public entity was in a dangerous condition at the time of the injury.

(b) The injury was proximately caused by the dangerous condition.

(c) The public entity had notice of the dangerous condition under Section 835.4.

(d) The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.

(e) The public entity did not take adequate measures to protect against the risk.

Note: The scheme of this section is similar to that of the Public Liability Act of 1923. Under this section, public entities are liable for injuries caused by dangerous conditions of public property if they receive notice of the condition and do not take necessary precautions to protect against the condition. Unlike the 1923 Act, this section does not leave the question of notice to judicial construction. The requisite conditions for notice are stated in Section 835.4.

Subdivision (d) is the same as subdivision (d) of Section 835. See the note to Section 835.

Subdivision (e) requires the plaintiff to show that whatever measures the entity took in regard to the hazard were not sufficient to protect against the risk of injury, i.e., that the condition still created a substantial risk of harm to those who foreseeably would be using the property with due care. Thus, a plaintiff would be required to show not only that a hole in the street was dangerous, but also that lights and barriers either were not placed around the hole, or were inadequate to protect street users from the hazard created by the hole.

Under this section, if an entity placed lights and barriers around a hole sufficient to remove any substantial risk to persons who would be foreseeably using the street with due care, the entity could not be held liable for any injuries caused by the condition, for the condition would not be "dangerous" within the meaning of Section 830. If the lights subsequently failed to function, a person injured from striking the hazard would have to show either that there was some negligence in preparing the lights or that, although the lights failed without fault on the part of the entity, the entity had notice of the failure and did not take appropriate precautions.

835.4. A public entity has notice of a dangerous condition within the meaning of Section 835.2 only if the plaintiff proves:

(a) The public entity had actual knowledge of the existence of the condition and knew or should have known of its dangerous character; or

(b) The existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

Note: This section sets forth the matters that must be established before a public entity may be charged with notice of a dangerous condition.

Under the Public Liability Act of 1923, the knowledge necessary to charge a public entity with notice of a dangerous condition has to be the knowledge of "the legislative body, board, or person authorized to remedy the condition." Subdivision (a), however, permits an entity to be charged with knowledge under the ordinary agency rules of imputed knowledge that would be applicable to a private person. Thus, under this section, a public entity could not defend an action on the ground that a "person authorized to remedy the condition" did not have knowledge of the defect where a telephone receptionist had received, but had not transmitted, a complaint concerning the condition.

Under the Public Liability Act of 1923, public entities are at times charged with "constructive notice" of a defect because it would be obvious upon an inspection or because it has existed for a substantial period of time. Subdivision (b), however, recognizes that public

entities cannot reasonably be expected to know of all substantial defects in their property, even where such defects may be obvious to any observer or may have existed for a substantial period of time. This subdivision places these factors in their appropriate place: these factors are merely matters that must be considered to determine the question whether a reasonable inspection system--one that is designed to inform the entity whether its property is safe--would have informed the entity of the particular defect.

835.6. (a) A public entity is not liable under Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the act or omission that created the condition was not unreasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under Section 835.2 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was not unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Note: Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else.

This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the

cost and decide not to engage in it. Government cannot "go out of the business" of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable.

No similar defense is available to public entities subject to the Public Liability Act of 1923.

Article 3. Liability of Public Employees

840. Except as provided in this article, no public employee is personally liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The liability established by this article is subject to any immunity of the public employee provided by statute.

Note: Government Code Section 1953 has provided the exclusive basis for the liability of public officers and employees for dangerous conditions of public property since its enactment in 1919. This article supersedes Section 1953 and the provisions of that section that restrict liability to the conditions set forth therein are carried forward, in substance, in this section. Hence, liability, if any, of a public employee for a condition of public property must be grounded upon this article and upon no other statute.

On the other hand, the general liability of public employees that is described here is subject to statutory immunities from liability that are found in other statutes such as the immunities of Article 1 of this chapter and the immunities found in Article 2 of Chapter 1.

840.2. Subject to the same defenses that are available under Section 835.8, an employee of a public entity is personally liable for injury caused by a dangerous condition of public property if the plaintiff establishes that:

(a) The property of the public entity was in a dangerous condition at the time of the injury.

(b) The injury was proximately caused by the dangerous condition.

(c) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the means immediately available to take alternative action which would not have created the dangerous condition.

(d) The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and no adequate action was taken to protect against that risk.

Note: This section subjects a public employee to liability for injuries caused by conditions which he has negligently created. The cases that have arisen under Government Code Section 1953 are in conflict upon the question whether public employees are subject to such liability; although the more recent authority seems to indicate that they are not.

Under subdivision (d), a public employee who has negligently created a dangerous condition may not be held liable for injuries caused thereby if someone other than the employee has taken adequate measures to protect against the condition. For example, if an employee through negligence creates a dangerous condition in a street, the employee may not be held liable to an automobile passenger who is injured when the auto strikes the condition if the entity has placed lights, warnings or barriers sufficient to prevent injury to careful motorists, even though the defense of contributory negligence may not be available against the passenger.

840.4. Except as provided in Section 840.8 and subject to the same defenses that are available under Section 835.8, an employee of a public entity is personally liable for injury caused by a dangerous condition of public property if the plaintiff establishes that:

(a) The property of the public entity was in a dangerous condition at the time of the injury.

(b) The injury was proximately caused by the dangerous condition.

(c) The employee had notice of the condition under Section 840.6.

(d) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the means for doing so were immediately available to him.

(e) The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and no adequate measures were taken to protect against that risk.

Note: This section is comparable to Government Code Section 1953. However, unlike Section 1953, this section does not leave the question of notice to judicial construction. The requisite conditions for notice are stated in Section 840.6.

There is no provision similar to subdivision (e) in Section 1953. Under subdivision (e), a public employee may not be held liable for injuries caused by a dangerous condition of public property if it was not reasonably foreseeable that the particular type of injury incurred would occur. See the note under Section 835. Subdivision (e) also relieves an employee of liability if other persons have taken adequate measures to protect against the risk. See the note under Section 840.2.

840.6. A public employee has notice of a dangerous condition within the meaning of Section 840.4 only if the plaintiff proves:

(a) The public employee had personal knowledge of the existence of the condition and knew or should have known of its dangerous character; or

(b) The existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate within the meaning of paragraph (b) of Section 835.4 and the public employee had the authority and it was his responsibility to make such inspections or see that such inspections were made and the means for doing so were immediately available to him.

Note: This section prescribes the conditions under which a public employee may be charged with notice of a dangerous condition. See the discussion of "constructive notice" under Section 835.4.

840.8. (a) A public employee is not liable under Section 840.2 for injury caused by a dangerous condition of public property if he establishes that the act or omission that created the condition was not unreasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or protecting against the risk of injury.

(b) A public employee is not liable under Section 840.4 for injury caused by a dangerous condition of public property if he establishes that the action taken to protect against the risk of injury created by the condition or the failure to take such action was not unreasonable. The reasonableness of the inaction or action shall be determined by taking into consideration the time and opportunity the public employee had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Note: This section makes available to a public employee a defense similar to that given public entities by Section 835.8. See the note to that section.

Chapter 6. Medical, Hospital and Public Health Activities

855. (a) A public entity that operates or maintains any medical facility that is subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately resulting from the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation.

(b) A public entity that operates or maintains any medical facility that is not subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately resulting from the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities substantially equivalent to those required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities applicable to a public medical facility of the same character and class, unless the public entity establishes that it exercised reasonable diligence to conform with such minimum standards.

(c) Nothing contained in this section grants any authority to the State Department of Public Health or the State Department of Mental Hygiene to make regulations establishing minimum standards for equipment, personnel or facilities in any medical facility operated or maintained by a public entity.

Note: This section imposes liability upon a public entity operating or maintaining medical facilities where the public entity fails to comply with applicable minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply. The minimum standards for equipment, personnel or facilities may be established by statute or by regulations promulgated by the State Department of Public Health or the State Department of Mental Hygiene. This section grants no authority to promulgate regulations; such authority must be granted by some other statute.

855.2. A public employee is liable for any injury proximately caused by the intentional and unjustifiable intereference with any right of an inmate of a medical facility operated or maintained by a public entity to obtain judicial review of the legality of his confinement.

Note: This section, like Section 840.4, imposes liability for the wrongful interference with a basic legal right--the right to obtain judicial review of the legality of confinement.

855.4. Neither a public entity nor a public employee is liable for failure to admit a person to a medical facility operated or maintained by the public entity unless the public entity or the public employee is legally required to admit the person and negligently or wrongfully fails to do so.

Note: This section provides that neither a public entity nor a public employee is liable for failure to admit a person to a public medical facility unless a legal duty to admit exists and the public entity or public employee negligently or wrongfully fails to perform the legal duty.

855.6. (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for negligence in diagnosing or prescribing for mental illness, mental deficiency, habit forming drug addiction, narcotic drug addiction, inebriation or sexual psychopathy, or in determining the terms and conditions of the confinement, parole or release of habit forming drug addicts, narcotic drug addicts, inebriates, sexual psychopaths or persons who are mentally ill or mentally deficient.

(b) A public employee is liable for any injury proximately caused by his negligent or wrongful act or omission in administering or failing to administer any treatment prescribed for, or in carrying out the terms and conditions of the confinement, parole or release of, habit forming drug addicts, narcotic drug addicts, inebriates, sexual psychopaths or persons who are mentally ill or mentally deficient, but neither the public entity nor the public employee is liable for executing with due care the prescribed treatment or for carrying out with due care the terms and conditions of the confinement, parole or release.

Note: This section grants immunity from liability for negligence in diagnosing or prescribing for certain named conditions or in determining the terms and conditions of confinement, release or parole for persons suffering from such illnesses. Diagnosis and treatment of the specified conditions and determination of the terms of confinement of persons suffering therefrom necessarily involve a high degree of discretion because of inexact knowledge regarding such conditions. Liability may be imposed, however, for failure to use reasonable care in carrying out whatever treatment or confinement may be prescribed for these conditions.

855.8. (a) Neither a public entity nor a public employee is liable for an injury resulting from the performance or failure to perform any act relating to the prevention or control of disease if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused.

(b) Except as otherwise provided in Sections 821.2, 821.4 or 821.6, a public employee is liable for an injury proximately caused by his negligent or wrongful act or omission in performing or failing to perform any act relating to the prevention or control of disease that he was required by law to perform.

Note: This section declares a specific rule of discretionary immunity for acts or omissions relating to the prevention or control of disease. The section makes clear, however, that liability may be imposed for the negligent or wrongful breach of a legal duty relating to the prevention or control of disease, except for acts or omissions connected with inspection or licensing duties.

SEC. 110. Section 26 of Chapter 40 of the Statutes of 1962 (1st Ex. Sess.) (Crestline-Lake Arrowhead Water Agency Act) is repealed.

[26. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.]

SEC. 111. Section 24 of the Upper Santa Clara Valley Water Agency Law (Statutes of 1962 (1st Ex. Sess.), Chapter 28) is repealed.

[24. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.~~

~~If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.]~~