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7/13/62

Memorandum No. 42(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Civil Liability of Public Entities, Officers, Agents and Employees)

Attached to this memorandum (on blue pages) are two copies of a tentative recommendation and statute imposing liability upon public entities in all activities. One copy is for marking and return to the staff.

The policies involved were discussed at the April meeting but no conclusions were reached. The matter is presented for reconsideration in the light of the decisions that have been made in regard to specific areas of liability.

Whether the rest of the statute is approved or not, Section 900.2 is needed, for several other recommendations have been drafted upon the assumption that there would be such a statute. If Section 900.2 is approved, then Section 900.4 is necessary (nuisance) or else a large area of existing governmental liability will be wiped out.

The indemnity sections are from the medical activity recommendation. They are placed here so that the same rules will be applicable to all entities and all public employees. If approved here, they will not appear in the final recommendations relating to medical torts, law enforcement torts, etc.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

TENTATIVE RECOMMENDATION  
of the  
CALIFORNIA LAW REVISION COMMISSION  
relating to  
The Civil Liability of Public Entities, Officers, Agents and Employees

Background

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

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation, in effect, suspends the effect of these decisions until the ninety-first day after the adjournment of the 1963 Regular Session of the Legislature. At that time, unless

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1. 55 Cal.2d 211 (1961).

2. 55 Cal.2d 244 (1961).

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

legislation is enacted, the public entities of California will be faced with a large amount of additional liability. Because no precise standards have been set forth by the Court by which public entities may determine the extent of their additional liability, it is impossible to predict just how large the potential additional liability will be. As liability insurance is impossible to obtain or prohibitively expensive when the scope of potential liability is not ascertained, as public entities have no way of budgeting or otherwise planning for a liability of indefinite scope, the development of adequate legislation to govern the tort liability of public entities has become imperative.

Prior to the Muskopf and Lipman decisions, the California Law Revision Commission was authorized to study the doctrine of sovereign immunity and to report its recommendations to the Legislature. Since these decisions were made, the Commission has redoubled its efforts and has devoted virtually all of its time to the study of this subject. The subject is so vast, though, that a complete study of all facets of the problem could not be completed prior to the 1963 Session of the Legislature. Nonetheless, the Commission has made close scrutiny of many of the most difficult aspects of the problem. The Commission has devoted its attention to several large areas of governmental activity in order to determine what the rules of liability should be in these areas. From this study, the Commission has concluded that some general conclusions can be drawn and recommendations made in regard to all areas of governmental activity.

#### Recommendations

1. Public entities should not be liable for torts unless they are

declared to be liable by statute. Unless such a general immunity is conferred upon public entities, there will always be an indeterminate area of potential liability not expressly covered by statute. Because government performs a large number of functions that private persons do not and cannot perform, and because the operations of government are so vast, this undefined potential liability would be an ever present threat to the financial stability of governmental entities. Spreading of the risk through insurance would either be impossible or ruinously expensive precisely because of the undefined limits of the risk.

Because there are a great many statutes creating large areas of liability, this recommendation would not create an undue immunity. Vehicle torts are covered by Vehicle Code Section 17001. Education Code Section 903 creates a general liability of school districts for negligence. The Commission has elsewhere recommended that all public entities be liable for dangerous conditions of property, as cities, counties and school districts are now. The Constitution will continue to require compensation in inverse condemnation cases. And in this recommendation, the Commission hereinafter recommends that public entities be liable for all torts committed by their employees for which their employees would be personally liable.

Thus, there is little liability that this recommendation would eliminate. It would, however, permit the Legislature to draw ascertainable limits to the liability of public entities.

2. Public entities should be liable for the acts of their employees within the scope of their employment to the extent that the employees

are personally liable for such acts. This recommendation would mean that public employees are no longer solely responsible for their tortious acts committed within the scope of their employment. Their employers would be required to assume responsibility for their acts to the same extent that private employers are required to assume responsibility for their employees' acts within the scope of their employment.

Then, too, this recommendation would make applicable to public entities the discretionary immunity doctrine now applicable only to public employees. Thus, although public entities will be vicariously liable for their employees' torts just as private persons are, the discretion of public entities to determine and carry out public policy will not be curtailed by the fear of liability imposed by a trier-of-fact who disagrees with the policy adopted.

There are certain situations where application of the discretionary immunity doctrine seems harsh and unfair--as, for example, when persons are denied all relief for injuries caused by deliberate and malicious abuses of governmental authority. The Commission, in its continuing study of sovereign immunity, will undertake a study of the discretionary immunity doctrine to determine whether or not it should be modified. The courts may modify the doctrine in view of the fact that the financial responsibility for the torts of public employees will no longer fall solely on the employees themselves. The Commission has already made some recommendations that impinge on the doctrine and that will result in entity liability where there is no corresponding employee liability. But, until the sovereign immunity study has been completed, this

recommendation will provide a reasonable guide by which public entities may determine the extent to which they may be held liable; for the case law has spelled out in some detail the extent to which public personnel are personally liable for their actions.

3. Public entities should be declared by statute to be liable for nuisance. They are liable for nuisance under existing law, and this liability should be continued. Under existing law, a plaintiff must bring his case within the scope of Civil Code Section 3479 or some other statute defining nuisance in order to make out a case of nuisance. Civil Code Section 3482 provides:

Nothing which is done or maintained under the express authority of statute can be deemed a nuisance.

Section 3482 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 to authorize the creation of a nuisance. However, the existence of Civil Code Section 3482 would appear to preclude liability from being imposed upon public entities under this recommendation for "governing" in one of its most fundamental senses--making laws.

4. Public entities should not be liable for punitive or exemplary damages. These damages are imposed to punish a defendant for oppression, fraud or malice. Generally, exemplary damages cannot be awarded against a principal for the act of his servant in the absence of a showing that the principal is also guilty of some conduct for which he should be punished--as, for example, his approval or ratification of his servant's fraudulent or malicious conduct.

Where a public entity is involved, the exemplary damages assessed against it would be charged against the taxpayers generally. It would be an inappropriate use of punitive or exemplary damages to impose them upon the taxpayers when the malice, fraud or oppression involved is not that of the taxpayers themselves but is that of an officer, agent or employee of the public entity.

5. 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, excluding punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend it. Several 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.

6. 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. However, where the public entity has provided the employee's defense against the action, it should not have a right to seek indemnity from 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 in such a case the public entity could cross-complain and recover indemnity from the employee for any amounts the entity was required to pay. But such a showing would be contrary to the best interests of the employee, for he would be ultimately responsible for the damages awarded. 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.

7. There are many statutes scattered throughout the codes and general laws that are inconsistent with the foregoing recommendations. These statutes seem to have been enacted as parts of special statutes with no consideration being given to the overall problem of the responsibility of government for tortious acts. Some of these statutes confer almost complete immunity upon public entities, while others impose almost complete liability. Many require public entities to pay judgments recovered against their personnel even where malice is involved. Others require such payment only where malice is not involved. None of these statutes requiring payment of judgments against personnel permit the public entity to control the course of the litigation resulting in the judgment.

These inconsistent and anomalous statutes should be repealed so that a uniform policy in regard to liability and immunity might be



applicable to all public entities in the State.

8. Section 1095 of the Code of Civil Procedure, which relates to mandate actions, should be amended to apply to all public entities and to include officers, agents and employees. As presently worded, it refers only to officers of the State, county, or municipal corporations, and requires damages assessed in mandate actions to be levied against the particular entity represented by the respondent officer. As these cases involve officers appearing in their official capacity the principle should be extended to all public entities and to all persons against whom a mandate action may be directed.

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The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to add Article 1 (commencing with Section 900.1) to Chapter 4 of Division 3.5 of Title 1, and to repeal Sections 2002.5 and 61633, of the Government Code, to repeal Sections 8535, 22730 and 50152 of the Water Code, Section 17002 of the Vehicle Code, and Section 10 of Chapter 641 of the Statutes of 1931, and to amend Section 1095 of the Code of Civil Procedure and Section 23 of Chapter 518 of the Statutes of 1957, relating to the civil liability of public entities, public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Article 1 (commencing with Section 900.1) is added to Chapter 4 of Division 3.5 of Title 1 of the Government Code, to read:

Article 1. General Provisions Relating to Liability

900.1. As used in this chapter:

(a) "Public entity" includes the State and any local public entity.

(b) "Local public entity" includes any county or city and any district, local authority or other political subdivision of the State but does not include the State or any office, officer, department, division, bureau, board, commission or agency thereof claims against which are paid by warrants drawn by the Controller.

(c) "Employee" includes an officer, agent or employee

(d) "Employment" includes office, agency or employment.

900.2. Except as otherwise provided by statute, a public entity is not liable for death or for injury to person or property arising out of the negligent or wrongful act or omission of the entity or of any employee of the entity.

900.3. A public entity is liable for death or for injury to person or property proximately caused by a negligent or wrongful act or omission of an employee of the entity within the scope of his employment if the act or omission is one for which the employee would be personally liable.

900.4. Except as otherwise provided by statute, a public entity is liable for death or for injury to person or property proximately caused by a nuisance to the same extent as if such entity were a private person.

900.5. A public entity is not liable for punitive or exemplary damages.

900.6. If an employee of a public entity requests the public entity to defend him against any claim or action against him arising out of his

negligent or wrongful act or omission occurring within the scope of his employment, or if the public entity conducts the defense of an employee against any claim or action arising out of his negligent or wrongful act or omission, the public entity shall pay any compromise or settlement based thereon to which the public entity has agreed and shall pay any judgment based thereon. Nothing in this section authorizes a public entity to pay any claim or judgment for punitive or exemplary damages.

900.7. (a) Subject to subdivision (b), if an employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under Section 900.6, the employee is entitled to recover the amount of such payment from the public entity.

(b) If the public entity did not conduct the employee's defense against the action or claim, or if the public entity conducted such defense pursuant to an agreement with the employee reserving the rights of the public entity against him, an employee of a public entity may recover from the public entity under subdivision (a) only if the employee establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his public employment and the public entity does not establish that the employee acted or failed to act because of actual fraud, corruption or actual malice.

900.8. Except as provided in Section 900.9, if a public entity pays any claim or judgment against itself or against an employee of the public entity, or any portion thereof, arising out of the negligent or wrongful act or omission of an employee of the public entity, the employee is not liable to indemnify the public entity.

900.9. (a) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee of the public entity, arising out of the negligent or wrongful act or omission of an employee of the public entity, the public entity may recover from the employee the amount of such payment if such employee acted or failed to act because of actual fraud, corruption or actual malice. Except as provided in subdivision (b), a public entity may not recover any payments made upon a judgment or claim against an employee if the public entity conducted the employee's defense against the action or claim.

(b) If a public entity pays any claim or judgment, or any portion thereof, against an employee of the public entity arising out of the negligent or wrongful act or omission of the employee, and if the public entity conducted the defense of the employee against the claim or action pursuant to an agreement with the employee reserving the rights of the public entity against the employee, the public entity may recover the amount of such payment from the employee unless the employee establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his public employment and the public entity does not establish that the employee acted or failed to act because of actual fraud, corruption or actual malice.

SEC. 2. Section 8535 of the Water Code is repealed.

~~[8535.--The-drainage-district,-the-board-and-the-members-thereof are-not-responsible-or-liable-for-the-operation-or-maintenance-of-levees, overflow-channels,-by-passes,-weirs,-cuts,-canals,-pumps,-drainage ditches,-sumps,-bridges,-basins,-or-other-flood-control-works-within or-belonging-to-the-drainage-district.]~~

SEC. 3. Section 50152 of the Water Code is repealed.

[50152.--The negligence of a trustee in his official capacity or any employee or servant of a district shall be imputed to the district to the same extent as if the district were a private corporation.]

SEC. 4. Section 10 of Chapter 641 of the Statutes of 1931 is repealed.

[10.--The negligence of a trustee or trustees of a flood control and water conservation district shall be imputed to the district to the same extent as if the water conservation and flood control district were a private corporation, and such district shall have power and authority to levy assessments for the purpose of paying any damage so incurred as hereafter provided.]

SEC. 5. Section 2002.5 of the Government Code is repealed.

[2002.5.--Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions code; for malpractice alleged to have arisen out of the performance of his duties as a state employee; a copy of the complaint shall also be served upon the Attorney General and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee.--If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General.--The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.]

SEC. 6. Section 17002 of the Vehicle Code is repealed.

~~[17002---If-there-is-recovery-under-this-chapter-against-a-public agency, it shall be subrogated to all the rights of the person injured against the officer, agent, or employee and may recover from the officer, agent, or employee the total amount of any judgment and costs recovered against the public agency, together with costs thereon.]~~

SEC. 7. Section 61633 of the Government Code is repealed.

~~[61633---If-an-officer, agent, or employee of the district is held liable for any act or omission in his official capacity, except in case of actual fraud or actual malice, and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer, agent, or employee.]~~

NOTE: The following sections are substantially the same as Government Code Section 61633 and should also be repealed:

Water Code § 31090.

Water Code § 60202.

Statutes of 1911, Chapter 671, § 21, as added by Statutes of 1951, Chapter 62, § 22 (last paragraph of section). (Municipal Water District Act of 1911.)

Statutes of 1961, Chapter 1896, § 38. (Alpine County Water Agency Act.)

Statutes of 1959, Chapter 2137, § 9.4. (Amador County Water Agency Act.)

Statutes of 1959, Chapter 2146, § 76 (last paragraph). (Antelope Valley-East Kern County Water Agency Law.)

Statutes of 1961, Chapter 1069, § 24 (last paragraph). (Desert Water Agency Law.)

Statutes of 1959, Chapter 2139, § 37. (El Dorado County Water Agency Act.)

Statutes of 1961, Chapter 1003, § 9.3. (Kern County Water Agency Act.)

Statutes of 1951, Chapter 931, § 17. (Kings River Conservation District Act.)

Statutes of 1959, Chapter 2036, § 7.4. (Mariposa County Water Agency Act.)

Statutes of 1959, Chapter 2122, § 38. (Nevada County Water Agency Act.)

Statutes of 1957, Chapter 1234, § 7.4. (Placer County Water Agency Act.)

Statutes of 1959, Chapter 2088, § 7.4. (Sutter County Water Agency Act.)

Statutes of 1959, Chapter 2131, § 37. (Yuba-Bear River Basin Authority Act.)

Statutes of 1959, Chapter 788, § 7.4. (Yuba County Water Agency Act.)

SEC. 8. Section 22730 of the Water Code is repealed.

~~[When-an-officer-of-a-district-is-held-liable-for-any-act-or-emission done-or-emitted-in-his-official-capacity-and-any-judgment-is-rendered-thereon,-the-district-shall-pay-the-judgment-without-obligation-for repayment-by-the-officer.]~~

NOTE: Section 35755 of the Water Code is identical with the above section and should also be repealed.

SEC. 9. Section 23 of Chapter 518 of the Statutes of 1957 [Contra Costa County Water Agency Act] is amended to read:

SEC. 23. No director, officer, employee or agent of the agency shall be personally liable for any damage resulting from the operations

of the agency or from the negligence or misconduct of any of its directors, officers, employees or agents unless the damage was proximately caused by his own negligence, misconduct or wilful violation of duty. [~~When a director, officer, agent or employee is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the agency shall pay the judgment without obligation for repayment by the director, officer, agent or employee.~~] The agency may carry and pay for insurance to cover any liability of the agency, its directors, officers, employees or agents or any of them.

NOTE: Statutes of 1959, Chapter 2146, § 27 (Mojave Water Agency Law) is identical with the above section and should be similarly amended.

SEC. 10. Section 1095 of the Code of Civil Procedure is amended to read:

1095. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay; provided, however, that in all cases where the respondent is [~~a state, county or municipal~~] an officer of a public entity, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the [~~state, county or municipal corporation~~] public entity represented by such officer and not against such officer so appearing in said proceeding, and the same shall be a proper claim against the [~~state, or county, or municipal corporation~~] public entity for which such officer shall have appeared, and



shall be paid as other claims against the [~~state, county or municipality~~]  
public entity are paid; but in all such cases, the court shall first  
determine that the officer appeared and made defense in such proceeding  
in good faith. For the purpose of this section, "public entity"  
includes the State, a county, city, district or other public agency or  
public corporation. For the purpose of this section, "officer" includes  
officer, agent or employee.