

## Memorandum 68-51

Subject: Study 52 - Sovereign Immunity (Prisoners and Mental Patients)

The staff believes that it would be desirable for the Commission to consider all possible revisions in the chapters of the 1963 Governmental Liability Act dealing with Police and Correctional Activities and with Medical, Hospital, and Public Health Activities. We have prepared the attached preliminary draft of a portion of a tentative recommendation that presents for Commission consideration various changes that could be made in these chapters. The comments to each section of the legislation attached indicate the changes that might be made and the reason for the changes.

The provisions of the Welfare and Institutions Code relating to the care and treatment of mentally ill persons and other persons in mental institutions were substantially revised, to become operative on the 61st day after the end of the 1968 Regular Session. Time did not permit us to determine all of the changes that will be necessary to conform the 1963 Governmental Liability Act to the recent revision of the Welfare and Institutions Code.

When the Commission has determined which changes it wishes to recommend be made in the Governmental Liability Act, the staff will revise and check out the attached draft statute and prepare a revised tentative recommendation for a subsequent meeting.

Respectfully submitted,

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Executive Secretary

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA LAW  
REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 9--Police and Correctional Activities; Medical, Hospital,  
and Public Health Activities

In 1963, upon the recommendation of the Law Revision Commission,<sup>1</sup> the Legislature enacted comprehensive legislation dealing with the liability of public entities and their employees.<sup>2</sup> This legislation was designed to meet the most pressing problems created by the decision of the California Supreme Court in *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

The Commission reported in its recommendation relating to the 1963 legislation that additional work was needed and that the Commission would continue to study the subject of governmental liability. The Com-

<sup>1</sup> See *Recommendations Relating to Sovereign Immunity: Number 1--Tort Liability of Public Entities and Public Employees; Number 2--Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3--Insurance Coverage for Public Entities and Public Employees; Number 4--Defense of Public Employees; Number 5--Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6--Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7--Amendments and Repeals of Inconsistent Special Statutes*, 4 CAL. LAW REVISION COMM'N. 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). For a legislative history of these recommendations, see 4 CAL. LAW REVISION COMM'N. 211-213 (1963). See also *A Study Relating to Sovereign Immunity*, 5 CAL. LAW REVISION COMM'N. REP. SER. & SOURCE 1 (1963).

Reports

Reports

Reports

<sup>2</sup> Cal. Stats. 1963, Ch. 1881 (Sovereign immunity--tort liability of public entities and public employees).  
Cal. Stats. 1963, Ch. 1715 (Sovereign immunity--claims, actions and judgments against public entities and public employees).  
Cal. Stats. 1963, Ch. 1682 (Sovereign immunity--insurance coverage for public entities and public employees).  
Cal. Stats. 1963, Ch. 1683 (Sovereign immunity--defense of public employees).  
Cal. Stats. 1963, Ch. 1684 (Sovereign immunity--workmen's compensation benefits for persons assisting law enforcement or fire control officers).  
Cal. Stats. 1963, Ch. 1685 (Sovereign immunity--amendments and repeals of inconsistent special statutes).  
Cal. Stats. 1963, Ch. 1686 (Sovereign immunity--amendments and repeals of inconsistent special statutes).  
Cal. Stats. 1963, Ch. 2029 (Sovereign immunity--amendments and repeals of inconsistent special statutes).

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mission recommended to the 1965 Legislature certain revisions of the  
Governmental Liability Act,<sup>3</sup> and the recommended legislation was enacted.<sup>4</sup>  
The 1965 recommendation did not deal with the provisions of the 1963  
legislation that relate to substantive rules of liability and immunity  
of public entities and public employees because the Commission concluded  
that additional time was needed in which to appraise the effect of these  
provisions. The Commission has reviewed the experience under the pro-  
visions of the 1963 legislation that deal with police and correctional  
activities and medical, hospital, and public health activities<sup>5</sup> and  
makes the following recommendations.

[Note: Balance of preliminary portion of recommendation will  
be prepared after the Commission has determined the sub-  
stance of the recommended legislation.]

3. Recommendation Relating to Sovereign Immunity: Number 8--Revisions  
of the Governmental Liability Act, 7 Cal. L. Revision Comm'n Reports  
401 (1965). For a legislative history of this recommendation, see  
7 Cal. L. Revision Comm'n Reports 914 (1965).
4. Cal. Stats. 1965, Ch. 653 (claims and actions against public entities  
and public employees); Cal. Stats. 1965, Ch. 1527 (liability of pub-  
lic entities for ownership and operation of motor vehicles).
5. The Commission has considered both the decisional law and other pub-  
lished materials commenting on these provisions. See A. Van Alstyne,  
California Government Tort Liability (Cal. Cont. Ed. Bar 1964); Note,  
California Public Entity Immunity from Tort Claims by Prisoners, 19  
Hastings L. J. 573 (1968).

Section 1. Section 844 of the Government Code is amended to read:

844. As used in this chapter, "prisoner" ~~includes an inmate of a prison, jail or penal or correctional facility.~~ means:

(a) A person who is held in custody pursuant to a previous adjudication, whether final or not, that he is guilty of a crime; or

(b) A person within the jurisdiction of the juvenile court who is held in custody pursuant to a previous adjudication, whether final or not, declaring him to be a ward of the juvenile court under Section 602 of the Welfare and Institutions Code or a finding under Section 707 of the Welfare and Institutions Code that he is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

Comment. Section 844 is amended to limit the provisions applying to "prisoners" to those persons who have been convicted of a crime and those minors who have been adjudged a ward of the court who have violated a law or order of the juvenile court and those minors the juvenile court has found are not fit and proper subjects to be dealt with under the Juvenile Court Law and against whom the court has ordered criminal proceedings to be resumed or instituted.

An adult who has been charged with a crime and is held in custody pending trial is not a prisoner. A minor who the juvenile court has found is not a fit and proper subject to be dealt with under the Juvenile Court Law and against whom the court has ordered criminal proceedings to be resumed or instituted is considered a prisoner even though the criminal trial has not yet been held.

A prisoner would continue in custody, for example, while in a work camp or similar facility, while engaged in fire suppression, or while undergoing medical treatment in a county hospital. However, a person on parole would not be considered a prisoner.

Sec. 2. Section 844.6 of the Government Code is amended to read:

844.6. (a) Notwithstanding any other provisions of law this part , except as provided in ~~subdivisions (b), (c), and (d)~~ of this section and in Sections 814, 814.2, 845.4, and 845.6 , a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee who is licensed, certificated or registered in one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state, or against a public employee who, although not so

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licensed, certificated or registered, is engaged as a public employee  
in the lawful practice of one of the healing arts, for malpractice  
arising from an act or omission in the scope of his employment,  
and shall pay any compromise or settlement of a claim or action  
based on such malpractice to which the public entity has agreed.

Comment. Subdivision (a) of Section 844.6 is amended to make it clear that the limited liability imposed by Section 845.4 (interference with right of prisoner of judicial review of legality of confinement) and Section 845.6 (failure to provide medical care for prisoner in need of immediate medical care) also constitute exceptions to the general principle of nonliability embodied in Section 844.6. It has been held that the liability imposed on a public entity by Section 845.6 exists notwithstanding the broad immunity provided by Section 844.6. Sanders v. Yuba County, 247 A.C.A. 875, 55 Cal. Rptr. 852 (1967); Hart v. Orange County, 254 A.C.A. 335, 62 Cal. Rptr. 73 (1967). The reasoning that led the courts to so hold would probably be applied to hold that Section 845.4 also creates an exception to the immunity granted by Section 844.6, but no case in point has been found.

The amendment to subdivision (a) is also designed to eliminate uncertainty. As originally enacted, this subdivision appears to preclude liability (except as provided in this section) elsewhere provided by any law. Taken literally, this would impliedly repeal, at least in some cases, Penal Code Sections 4900-4906 (liability up to \$5,000 for erroneous conviction). Moreover, as a specific provision, it might even be construed to prevail over the general language of Government Code Sections 814 and 814.2, which preserve nonpecuniary liability and liability based on contract and workmen's compensation. Implied repeal of these liability provisions, however, does not appear to have been intended. The problem is solved in the amendment by limiting the "notwithstanding" clause to "this part" and expressly excepting Sections 814 and 814.2. The exception for subdivisions (b), (c), and (d) has been deleted as unnecessary.

The amendment to subdivision (d) expands the mandatory indemnification requirement in malpractice cases to additional medical personnel to whom the same rationale appears to apply. The section, as originally enacted, was unduly restrictive since it referred only to medical personnel who were "licensed" (thus excluding, under a possible narrow interpretation, physicians and surgeons who are "certificated" rather than licensed, as well as "registered" opticians, physical therapists, and pharmacists) under the Business and Professions Code (thus excluding other laws, such as the uncodified Osteopathic Act and Chiropractic Act). In addition, the insistence on licensing precluded application of subdivision (d) to medical personnel lawfully practicing without a California license. E.g., Bus. & Prof. Code §§ 1626(c)(professors of dentistry), 2137.1 (temporary medical staff in state institution), 2147 (medical students), 2147.5 (uncertified interns and residents.)

Sec. 3. Section 845.4 of the Government Code is amended to read:

845.4. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement; but a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury may-be-commenced shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment. Section 845.4 is amended to refer to the date of the accrual of the cause of action. This amendment clarifies the relationship of this section to the claim statute. As originally enacted, the ~~six-month~~ period to sue after rejection of the claim might have expired before illegality of the imprisonment was determined, so that an action could be commenced.

Sec. 4. Section 845.6 of the Government Code is amended to read:

845.6. Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee who is licensed, certificated or registered in one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state, or a public employee who, although not so licensed, certificated or registered, is engaged as a public employee in the lawful practice of one of the healing arts, from liability for injury proximately caused by malpractice or exonerates the public entity from ~~liability for injury proximately caused by such malpractice~~ its obligation to pay any judgment, compromise or settlement that it is required to pay under subdivision (d) of Section 844.6.

Comment. Section 845.6 is amended to expand the scope of the public employees who are referred to as potentially liable for medical malpractice to include all types of medical personnel, not merely the limited classes who are "licensed" under the Business and Professions Code. This conforms Section 845.6 to amended Section 844.6. The amendment also clarifies the relationship of Section 845.6 and subdivision (d) of Section 844.6.

Sec. 5. Section 846 of the Government Code is amended to read:

846. (a) Neither a public entity nor a public employee is liable for an injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody. "Failure to retain" includes but is not limited to the escape or attempted escape of an arrested person and the release of an arrested person from custody.

(b) Nothing in this section affects liability pursuant to any applicable statute for escape or rescue of a person arrested in a civil action.

Comment. Subdivision (a) of Section 846 is amended to add the second sentence. The added section codifies existing law. See Ne Casek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965)(city not liable to pedestrian injured by escaping arrestee).

As originally recommended by the Law Revision Commission in 1963, Section 846 only granted immunity for failure to make an arrest. The additional immunity for "failure to retain an arrested person in custody" was added by the Senate in the course of enactment of the 1963 legislative program. In context, and in light of the officially approved "comments" to this section and its companion provision, Section 845.8 (granting immunity for parole and release decisions and for injuries "caused by an escaping or escaped prisoner"), it is clear that the immunity here conferred was being considered with reference to persons arrested or taken into custody under criminal process or

on criminal charges. The application of the statutory language to instances of civil arrest (as authorized by sections 478-504 of the Code of Civil Procedure) appears not to have been considered. Indeed, the entire concern of the Commission and the Legislature seems to have been directed to the problem of liability for torts committed by the person who escapes from official custody or who is not arrested.

The civil arrest statutes, on the other hand, establish a policy of personal liability of public officers (e.g., sheriff, marshal or constable) who fails to retain in custody a person arrested under civil arrest proceedings. This liability is not dependent on the commission of a tort by the person who escapes, but is a liability of the officer to the party who invoked civil arrest as a provisional remedy and whose rights have thus been frustrated by the escape. See Govt. Code §§ 26681, 26682; Code Civ. Proc. §§ 501, 502. Hence, civil arrest cases are excepted from Section 846 by the addition of subdivision (b).

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Sec. 6. Section 854.2 of the Government Code is amended to read:

854.2. As used in this chapter, "mental institution" means any medical facility , or identifiable part of any medical facility, used primarily for the care or treatment of persons committed for mental illness or addiction.

Comment. Section 854.2 is amended to insert "medical" before "facility" to better correlate this section with the definition of "medical facility" in Section 854. Section 854.2 also is amended to make it clear that the entire institution does not have to be devoted to care and treatment of the mentally ill in order to come within the definition, but that a ward or wing of a general hospital used for that purpose will also qualify. See Goff v. Los Angeles County, 254 A.C.A. 53, 61 Cal. Rptr. 840 (1967)(psychiatric unit of county hospital). See Welf & Inst. Code § 6003 (defining "county psychiatric hospital").

Sec. 7. Section 854.4 of the Government Code is amended to read:

854.4. As used in this chapter, "mental illness or addiction" means mental illness, mental disorder bordering on mental illness, mental deficiency, epilepsy, habit forming drug addiction, narcotic drug addiction, dipsomania or inebriety, sexual psychopathy, or such mental abnormality as to evidence utter lack of power to control sexual impulses.

Note: Section 854.4 requires substantive revision to conform to new terminology that will be used in the Welfare and Institutions Code, operative on and after the 61st day following the 1968 regular session.

Sec. 8. Section 854.6 is added to the Government Code, to read:

854.6. As used in this chapter, "mental patient" means a person who is in a mental institution for purposes of observation, diagnosis, care or treatment for mental illness or addiction, or is on parole or leave of absence from a mental institution.

Comment. Section 854.6 has been added to clarify the scope of the immunities created by Section 854.8. Section 854.8 provides that a public entity (except where otherwise provided in the section) is not liable for injuries by or to "any person committed or admitted to a mental institution." The quoted wording is not entirely clear. For example, it might not apply to persons who were neither committed nor admitted, but had been temporarily "placed" (e.g., Welf. & Inst. Code §§ 5150, 5206) or "held" (e.g., Welf. & Inst. Code § 5152) or temporarily "detained" (e.g., Welf. & Inst. Code §§ 5151, 5206, 5213, 5231), or "certified" for "involuntary intensive treatment" (e.g., Welf. & Inst. Code § 5250) pending commitment proceedings. Moreover, the requirement in Section 854.8 that the person be committed or admitted to a mental institution raises doubts as to its applicability to mental patients on parole or leave of absence, as authorized by law. E.g., Welf. & Inst. Code §§ 6360 (narcotic drug addicts), 6407 (habit forming drug addicts), 6455 (mentally abnormal sex offenders), 5257, 5258 (inebriates), 5306 (eminently dangerous persons), 5154 (mentally disordered persons). Yet, such paroled patients, or patients on leave, would seem to come within the rationale of the mental patient immunity, since the decision to parole or grant a leave should not be influenced by fear of possible liability for injuries by or to the patient. These ambiguities are cleared up by the addition of Section 854.6 and by the use of the phrase "mental patient" in Section 854.8.

Sec. 9. Section 854.8 of the Government Code is amended to read:

854.8. (a) Notwithstanding any other provision of law this part , except as provided in ~~subdivisions-(b),-(c)-and-(d)-of~~ this section and in Sections 814, 814.2, 855, and 855.2 , a public entity is not liable for:

(1) An injury proximately caused by ~~any person committed or admitted to a mental institution~~ a mental patient .

(2) An injury to ~~any person committed or admitted to a mental institution~~ a mental patient .

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Nothing in this section prevents a person, other than a ~~person committed or admitted to a mental institution~~ mental patient , from recovering from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment

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based on a claim against a public employee who is licensed, certified or registered in one of the healing arts under Division 2-(commencing with Section 500)-of-the-Business-and-Professions Code any law of this state, or against a public employee who, although not so licensed, certified or registered, is engaged as a public employee in the lawful practice of one of the healing arts, for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action based on such malpractice to which the public entity has agreed.

Comment. Section 854.8 is amended to substitute "mental patient" for the original language in subdivisions (a) and (c), thereby adopting the new definition of "mental patient" in Section 854.6.

The other changes in Section 854.8 are supported by the reasoning advanced for the similar amendments made to Section 844.6

Sec. 10. Section 855.2 of the Government Code is amended to read:

855.2. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of an inmate of a medical facility operated or maintained by a public entity to obtain a judicial determination or review of the legality of his confinement; but a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury ~~may-be-accrued~~ shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment. The amendment to Section 855.2 is similar to that made to Section 845.4. See the Comment to Section 845.4.

Sec. 11. Section 856 of the Government Code is amended to read:

856. (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment:

(1) Whether to confine a person for mental illness or addiction.

(2) The terms and conditions of confinement for mental illness or addiction in a medical facility operated or maintained by a public entity.

(3) Whether to parole , grant a leave of absence to, or release a person ~~from-confinement~~ confined for mental illness or addiction in a medical facility operated or maintained by a public entity.

(b) A public employee is not liable for carrying out with due care a determination described in subdivision (a).

(c) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out:

(1) A determination to confine or not to confine a person for mental illness or addiction.

(2) The terms or conditions of confinement of a person for mental illness or addiction in a medical facility operated or maintained by a public entity.

(3) A determination to parole , grant a leave of absence to, or release a person ~~from-confinement~~ confined for mental illness or addiction in a medical facility operated or maintained by a public entity.

(d) As used in this section, "confine" includes admit, commit, place, detain, and hold in custody.

Comment. Section 856 is amended to make reference to "leave of absence" since the Welfare and Institutions Code appears to consider such leaves equivalent to paroles. See Welf. & Inst. Code § 7351. Subdivision (d) has been added to clarify application of this section to all cases within its rationale.

Sec. 12. Section 856.2 of the Government Code is amended to read:

856.2. Neither a public entity nor a public employee is liable for an injury caused by or to an escaping or escaped ~~person-who-has-been-committed-for-mental-illness-or-addiction~~ mental patient .

Comment. The amendment of Section 856.2 accomplishes two purposes:

First, by insertion of the words, "or to," it is clear that injuries sustained by escaping or escaped mental patients are not a basis of liability. Other jurisdictions have recognized that, when a mental patient escapes as a result of negligent or wrongful acts or omissions of custodial employees, injuries sustained by the escapee as a result of his inability due to mental deficiency or illness to cope with ordinary risks encountered, may be a basis of state liability. See, e.g., Callahan v. State of New York, 179 Misc. 781, 40 N.Y.S.2d 109 (Ct. Cl. 1943), aff'd 266 App. Div. 1054, 46 N.Y.S.2d 104 (1943)(frostbite sustained by escaped mental patient); White v. United States, 317 F.2d 13 (4th Cir. 1963)(escaped mental patient killed by train). It is not certain whether the immunity provided by Section 854.8 for injuries to mental patients would apply after an escape or even during one. Hence, to clarify the rule, the immunity here should be expressly made to cover injuries to escapees.

Second, by using the term, "mental patient," the scope of the immunity is clarified consistently with its rationale. "Mental patient" is defined in Section 854.6. As so defined, it covers not only persons