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1/16/69

Memorandum 69-24

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

Attached is a revised tentative recommendation that reflects the decisions made at the last meeting. Should the staff distribute this tentative recommendation for comment by interested persons and organizations?

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

NUMBER 10 -- REVISIONS OF THE GOVERNMENTAL LIABILITY ACT

Police and Correctional Activities

Medical, Hospital, and Public Health Activities

CALIFORNIA LAW REVISION COMMISSION
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WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

LETTER OF TRANSMITTAL

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with the liability of public entities and their employees. See Cal. Stats. 1963, Chs. 1681-1686, 1715, 2029. 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 Commission recommended to the 1965 Legislature certain revisions of the Governmental Liability Act; the recommended legislation was enacted. See Cal. Stats. 1965, Chs. 653, 1527. A recommendation relating to the statute of limitations in actions against public entities and public employees was submitted to the 1969 Legislature.

The 1965 and 1969 recommendations 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 provisions of the 1963 legislation that deal with police and correctional activities and medical, hospital, and public health activities and this recommendation is concerned with these areas of governmental liability. In preparing this recommendation, the Commission has considered both the decisional law and other published 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 Law Journal 573 (1968).

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

NUMBER 10 - REVISION OF THE GOVERNMENTAL LIABILITY ACT

Police and Correctional ActivitiesMedical, Hospital, and Public Health Activities

BACKGROUND

Comprehensive legislation relating to the liability of public entities and their employees was enacted in 1963. Under that legislation a public entity is directly liable for the dangerous condition of its property¹ and vicariously liable for the torts of its employees.² Generally, the liability of public employees is determined by the same rules that apply to private persons.³ However, a public employee is given an overriding immunity from liability for injuries resulting from an exercise of discretion vested in him, and the vicarious liability of the public entity also is limited by this immunity for discretionary acts.⁴

1 Gov't Code § 835.

2 Gov't Code § 815.2. But see Gov't Code §§ 844.6 and 854.8.

3 Gov't Code § 820.

4 Gov't Code § 820.2.

These broad general rules are supplemented by specific ones relating to certain major areas of potential liability. With certain significant exceptions, these specific rules merely specify the extent to which the immunity for discretionary acts applies in particular situations. Such specific rules are provided for police and correctional activities⁵ and for medical, hospital, and public health activities.⁶ However, in these two major areas, a broad general immunity for all injuries by or to prisoners⁷ and mental patients⁸ respectively is conferred upon the public entity, but not upon the public employee. Thus, to this extent, the rules in these areas are inconsistent with the general rule of vicarious liability.

The Commission has reviewed the impact of the legislation enacted in 1963 upon police and correctional activities and upon medical, hospital, and public health activities. It has also considered the effect of judicial decisions that have construed that legislation. As a result, it submits this recommendation.

⁵ Gov't Code §§ 844-846.

⁶ Gov't Code §§ 854-856.4.

⁷ Gov't Code § 844.6.

⁸ Gov't Code § 854.8.

RECOMMENDATIONS

Police and Correctional Activities

General immunity for injuries caused by or to prisoners

Government Code Section 844.6 gives public entities a broad immunity from liability for injuries caused by or to "prisoners." Except for injuries arising out of the operation of a motor vehicle or medical malpractice, a prisoner has no right to recover from the public entity for injuries that result from the negligence of a public employee or from a dangerous condition of public property. The immunity applies to any "inmate of a prison, jail or penal or correctional facility."⁹ Thus, the immunity extends to innocent--as well as guilty--persons held in custody. However, Section 844.6 provides immunity only for the public entity; it does not cover the public employee (who remains liable in most circumstances for his negligence or willful misconduct) nor, except in malpractice cases, does it require the public entity to pay any judgment against the public employee. Thus, the section is inconsistent with the general rule under the governmental liability act that the employing public entity is liable whenever its public employee incurs a liability in the scope of his employment.

The Commission has considered the reasons that caused the Legislature to include Section 844.6 in the governmental liability act. Some writers have concluded that the section is neither necessary nor desirable.¹⁰ Nevertheless, the Commission has been advised that some public

⁹ Gov't Code § 844.

¹⁰ E.g., Note, California Public Entity Immunity from Tort Claims by Prisoners, 19 Hastings L. J. 573 (1968).

entities follow the practice of paying any judgment against an employee who acted in good faith in the scope of his employment even though the public entity would be immune from direct liability under Section 844.6. To this extent, a person with a just claim receives payment despite the immunity conferred by Section 844.6. Moreover, the Commission is further advised that the existing statutory scheme provides employees engaged in law enforcement activities with an incentive to exercise reasonable care towards prisoners. Accordingly, in view of the fact that the Legislature included this section in the governmental liability act despite a recommendation to the contrary by the Law Revision Commission, the Commission has concluded that retention of the section is acceptable, subject to the following minor modifications.

Subdivision (d) of Section 844.6 requires the public entity to pay any malpractice judgment against its employee who is "licensed" in one of the healing arts. This provision might be construed to exclude medical personnel who are "registered" or "certified" rather than "licensed" and also might exclude certain medical personnel specifically exempted from licensing requirements.¹¹ The Commission recommends that subdivision (d) of Section 844.6 be revised to make clear that it applies to all public employees who may lawfully practice one of the healing arts, and not merely to those who are "licensed." This revision would make the section reflect more accurately its original intent.

Section 844.6 also has been affected by judicial decisions which hold that it does not cover liability imposed by Section 845.6 for failure to summon medical care for a prisoner in need of immediate

¹¹ See, e.g., Bus. & Prof. Code §§ 1626(c) (professors of dentistry), 2137.1 (temporary medical staff in state institutions), 2147 (medical students), and 2147.5 (uncertified interns and residents).

medical care. The Commission recommends that Section 844.6 be revised to codify these decisions and to make it clear that certain other special rules of liability prevail over the general immunity conferred by Section 844.6.

Medical, Hospital, and Public Health Activities

General immunity for injuries caused by or to mental patients

Section 854.8 of the Government Code parallels Section 844.6 (immunity for injuries by or to a prisoner) and confers a general immunity upon the public entity--but not upon the public employee--for any injury caused by or to a person "committed or admitted" to a "mental institution." Since enactment of Section 854.8 in 1963, the provisions of the Welfare and Institutions Code that deal with the care and treatment of mental patients have been substantially revised. The language in Section 854.8 and related sections no longer accords with the terms used in the Welfare and Institutions Code.

The phrase "committed or admitted" in Section 854.8 appears to have been intended to make that section applicable to all persons confined in mental institutions, whether voluntarily or involuntarily. However, the word "committed" might not be construed to cover all of the various procedures¹² now used to effect the confinement of persons in mental institutions. Moreover, although "mental institution" is defined in Government Code Section 854.2, this definition also uses the word "committed" (in this case, without the alternate "admitted") and further is based on the definition of "mental illness or addiction" set forth in Government Code Section 854.4. The latter definition, in turn, is based on terms (now obsolete)

¹² See, e.g., Welf. & Inst. Code §§ 5206 (court-ordered evaluation for mentally disordered persons), 5304 (90-day court-ordered involuntary treatment of imminently dangerous persons).

that formerly were used in the Welfare and Institutions Code.

To reconcile these Government Code Sections with the new terminology of the Welfare and Institutions Code, the Commission recommends that Section 854.2 (defining "mental institution") be revised and that a new Section 854.3 be added to define "county psychiatric hospital." Together, these sections would include (1) county psychiatric hospitals (see Welfare and Institutions Code Section 7100), (2) such state hospitals for the care and treatment of the mentally disordered and mentally retarded as are defined and listed in the Welfare and Institutions Code,¹³ and (3) the California Rehabilitation Center for narcotic addicts. Government Code Section 854.4 (defining "mental illness or addiction") should be revised to define "mental illness or addiction" as any mental or emotional condition for which a person may be cared for or treated in a mental institution. This revision would eliminate the existing inconsistency between that section and the revised provisions of the Welfare and Institutions Code, and also would minimize the possibility that future changes in the Welfare and Institutions Code will create similar inconsistencies.

For the reasons indicated in the foregoing discussion of Section 844.6 (immunity for injuries by or to a prisoner), the Commission recommends that the broad general immunity conferred by Section 854.8 be retained, subject to the following minor modifications:

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See Welf. & Inst. Code §§ 7200, 7500.

(1) The immunity should be restricted to those persons who are inpatients--as distinguished from outpatients--of a mental institution. This revision would make clear the legislative intent that led to the enactment of this section in 1963.

(2) Section 854.8 should be revised to make changes similar to those recommended in connection with Section 844.6 (relating to prisoners). These changes would make clear the extent to which those sections that impose special liabilities prevail over the blanket immunity conferred by Section 854.8. They would also clarify the scope of the indemnification requirement for public employees "licensed" in one of the healing arts. See the foregoing discussion of incidental changes relating to prisoners.

Liability for escaping or escaped mental patients

Section 856.2 presently confers immunity only as to injuries caused by an escaping or escaped mental patient. Injuries sustained by the escapee are not covered. Certain other jurisdictions impose liability where a mental patient escapes and is injured because of his inability to cope with ordinary risks.¹⁴ The Commission recommends that Section 856.2 be extended to confer immunity for injuries sustained by an escaping or escaped mental patient. These changes would be consistent with the rationale of Section 856.2 that the public entity should not be responsible for the conduct of a mental patient who has escaped or is attempting to escape.

¹⁴

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).

Miscellaneous

The Commission also recommends a number of technical or clarifying changes in the Government Code provisions that deal with liability in connection with police and correctional activities. These changes do not involve any significant policy considerations not reflected in the foregoing discussion.

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

An act to amend Sections 844.6, 845.4, 845.6, 846, 854.2, 854.4,
854.8, 855.2, 856, and 856.2 of, and to add Sections 854.3
and 854.5 to, the Government Code, relating to the liability
of public entities and public employees.

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

Section 1. 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.

§ 844.6

(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 on a claim against a public employee ~~licensed-in~~ who is lawfully engaged in the practice of one of the healing arts under Division 2 (commencing with Section 560) of the Business and Professions Code any law of this state 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 to based on such malpractice to which the public entity has agreed.

Comment. Subdivision (a) of Section 844.6 is amended to make clear that the limited liability imposed by Section 845.4 (interference with right of prisoner to seek judicial review of legality of confinement) and Section 845.6 (failure to summon 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. Apelian v. County of Los Angeles, 266 Adv. Cal. App. 595, 72 Cal. Rptr. ____ (1968); Hart v. County of Orange, 254 Cal. App.2d 302, 62 Cal. Rptr. 73 (1967); Sanders v. County of Yuba, 247 Cal. App.2d 748, 55 Cal. Rptr. 852 (1967). The reasoning that led the courts to so hold would indicate 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.

§ 844.6

Implied repeal of these liability provisions, however, does not appear to have been intended. The problem is solved 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) makes clear that the mandatory indemnification requirement in malpractice cases covers all persons lawfully engaged in the practice of one of the healing arts. The language of 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). 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.2.. 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 time of the accrual of the cause of action. This amendment clarifies the relationship of this section to the claim statute. As originally enacted, the statute of limitations might have expired before illegality of the imprisonment was determined--a determination that must be made before the action may be commenced.

Sec. 3. 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 ~~licensed-in~~ who is lawfully engaged in the practice of one of the healing arts under Division-2-(commencing with-Section-500)-of-the-Business-and-Professions-Code any law of this state 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 group of public employees who are referred to as potentially liable for medical malpractice to include all types of medical personnel, not merely those 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. 4. Section 846 of the Government Code is amended to read:

846. Neither a public entity nor a public employee is liable for 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.

Comment. Section 846 is amended to add the second sentence which codifies existing law and makes clear that "failure to retain" includes not only discretionary release of an arrested person but also negligent failure to retain an arrested person in custody. 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).

Sec. 5. Section 854.2 of the Government Code is amended to read:

854.2 As used in this chapter, "mental institution" means any ~~facility-for-the-care-or-treatment-of-persons committed-for-mental-illness-or-addiction~~ state hospital for the care and treatment of the mentally disordered or the mentally retarded, the California Rehabilitation Center referred to in Section 3300 of the Welfare and Institutions Code, or any county psychiatric hospital .

Comment. Section 854.2 is amended to specify more precisely the institutions that are embraced within the definition. Formerly, the definition included only facilities "for the care or treatment of persons committed for mental illness or addiction." The amendment makes clear that the designated institutions are "mental institutions" even though they are used primarily for persons voluntarily admitted or involuntarily detained (but not "committed") for observation and diagnosis or for treatment. See, e.g., Welf. & Inst. Code §§ 703 (90-day court-ordered observation and treatment of minors appearing to be mentally ill), 705 (temporary holding of minor in psychopathic ward pending hearing), 5206 (court ordered evaluation for mentally disordered persons), 5304 (90-day court-ordered involuntary treatment of imminently dangerous persons), 6512 (detention of mentally retarded juvenile pending commitment hearings).

Section 7200 of the Welfare and Institutions Code lists the state hospitals for the care and treatment of the mentally disordered and Section 7500 of the Welfare and Institutions Code lists the state hospitals for the care and treatment of the mentally

retarded.

The principal purpose of the California Rehabilitation Center, established by Section 3300 of the Welfare and Institutions Code, is "the receiving, control, confinement, employment, education, treatment and rehabilitation of persons under the custody of the Department of Corrections or any agency thereof who are addicted to the use of narcotics or are in imminent danger of becoming so addicted." Welf. & Inst. Code § 3301.

"County psychiatric hospital" is defined in Section 854.3 of the Government Code. See also Goff v. County of Los Angeles, 254 Cal. App.2d 45, 61 Cal. Rptr. 840 (1967)(county psychiatric unit of county hospital as "mental institution").

Not included within the scope of Section 854.2 are certain units provided on the grounds of an institution under the jurisdiction of the Department of Corrections (see Welfare and Institutions Code Section 6326) and farms, road camps, and rehabilitation centers under county jurisdiction (see Welfare and Institutions Code Sections 6404 and 6406). These facilities, however, come within the ambit of Government Code Section 844 and the broad general immunity for liability for injuries to mental patients conferred by Section 854.8 is extended to cover liability to inmates of these facilities by Section 844.6.

§ 854.3

Sec. 6. Section 854.3 is added to the Government Code, to read:

854.3. As used in this chapter, "county psychiatric hospital" means the hospital, ward, or facility provided by the county pursuant to the provisions of Section 7100 of the Welfare and Institutions Code.

Comment. The term "county psychiatric hospital" is defined to include the county facilities for the detention, care, and treatment of persons who are or are alleged to be mentally disordered or mentally retarded. See Welf. & Inst. Code § 7100. The definition takes the same form as in other statutes. See, e.g., Welf. & Inst. Code §§ 6003, 7101.

§ 854.4

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,-dipsemania-or inebriety,-sexual-psychopathy,-or-such-mental-abnormality as-to-evidence-utter-lack-of-power-to-control-sexual-impulses~~ any condition for which a person may be detained, cared for, or treated in a mental institution.

Comment. Section 854.4 is amended to eliminate the specific listing of mental or emotional conditions for which a person could, at the time the section was enacted, be committed to a public medical facility and to substitute general language that includes all mental or emotional conditions, including addiction, for which a person may be voluntarily admitted or involuntarily detained in a mental institution. See Section 854.2 (defining "mental institution").

Since enactment of Section 854.4 in 1963, the Welfare and Institutions Code has been revised to make a number of changes in the categories of mental illness previously specified in this section. The amendment eliminates the inconsistency between Section 854.4 and the revised provisions of the Welfare and Institutions Code relating to mental illness and minimizes, if not eliminates, the possibility that future revisions of those provisions will create a similar inconsistency.

§ 854.5

Sec. 8. Section 854.5 is added to the Government Code, to read:

854.5. As used in this chapter, "confine" includes admit, commit, place, detain, or hold in custody.

Comment. Section 854.5 has been added to make clear that Sections 856 and 856.2 apply to all cases within the rationale of those sections.

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~~ an injury proximately caused by ~~any person committed or admitted to a mental institution. (2)-An injury to any person committed or admitted to~~ or to, an inpatient of a mental institution.

(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~~ an inpatient of a mental institution, 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

§ 854.8

Chapter 1 of this part, any judgment based on a claim against a public employee ~~licensed-in~~ who is lawfully engaged in the practice of one of the healing arts under Division 2-(commencing-with-Section-500)-of-the-Business-and-Professions-Code any law of this state 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 to based on such malpractice to to which the public entity has agreed.

Comment. The changes in subdivision (d) and in the introductory portion of subdivision (a) of Section 854.8 parallel the similar amendments to Section 844.6 and are explained in the Comment to that section. Subdivision (a) is further amended to clarify the scope of the immunity. The term "inpatient" is used in place of "any person committed or admitted," thus making clear that the immunity does not cover outpatients.

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-commenced 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~~ .

§ 856

(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~~ .

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.
The phrase "in a medical facility operated or maintained by a public
entity," which appeared four times in the section, has been deleted
because, to the extent that this phrase had any substantive effect,
it resulted in an undesirable limitation on the immunity provided by
Section 856.

Sec. 12. Sections 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~~ confined for mental illness or addiction. Nothing in this section exonerates a public employee from liability if he acted or failed to act because of actual fraud, corruption, or actual malice.

Comment. The amendment of Section 856.2--by insertion of the words, "or to"--makes it 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). The immunity provided by Section 856.2 makes certain that California will not follow these cases.

Formerly, Section 856.2 covered only persons who had been "committed" for mental illness or addiction. The substitution of "confined" for

§ 856.2

"committed" makes clear that the immunity covers all persons who are confined for mental illness or addiction, whether or not they are "committed."

The second sentence has been added so that a public employee who, for example, maliciously injures an escaped mental patient cannot avoid liability. This addition is required since the immunity has been extended to include injuries caused to an escaping or escaped mental patient. The sentence adopts language used in other provisions of the Governmental Liability Act. See, e.g., Section 995.2 (grounds for refusal to provide for defense of action against public employee).