

6/17/69

## Memorandum 69-70

Subject: Study 52.20 - Sovereign Immunity (Prisoners and Mental Patients)

In this memorandum, we review the comments received after distribution of the tentative recommendation relating to the revision of two chapters of the governmental liability act: (1) Police and Correctional Activities and (2) Medical, Hospital, and Public Health Activities. Two copies of the tentative recommendation are attached. Please mark your suggested editorial changes on one copy to turn in to the staff at the June 26-28 meeting.

Various letters containing comments on the tentative recommendation are attached as exhibits.

General reaction

The reaction to the tentative recommendation was generally favorable. However, the comment of Herbert Hafif, Claremont attorney, in Exhibit VI seems to indicate the feelings of private attorneys: "I think that your thoughts on the changes are well taken. Quite frankly, I feel that all governmental immunities are examples of the most regressive legislation except in a few limited areas such as whether or not they give a parole, constituting a basis of governmental liability. . . . It is hard to justify the immunities, but I feel to the extent we're going to have to live with some of them, that your recommendations in these sections are well taken."

The California State Bar Committee on Governmental Liability and Condemnation unanimously approved the tentative recommendation. The Committee, however, expressed the view that the immunity now enjoyed by governmental entities for injuries to or caused by mental patients is harsh

in some respects and needs further study. One suggestion that the Committee felt could receive consideration was a limitation on possible recovery specifically restricted to mental patients. The staff believes that such a proposal should not be encouraged because once such a concept is introduced into the law, its spread to other areas of the law would be difficult to contain. Moreover, we believe that we can better expend our resources on other projects.

Specific comments

Employee immunity. Exhibit I appears to have been written with the misunderstanding that the immunity conferred on public entities by Sections 844.6 and 854.8 was being extended to public employees.

Mandatory indemnification of employees. Exhibit IV is a letter from a Sacramento attorney. He advocates mandatory indemnification for all public employees. The mandatory indemnification provision applies to all practitioners of the healing arts (includes all licensed medical personnel). With respect to other employees, it is discretionary whether the employee is to be indemnified. This is the scheme that was set up by amendments made to the 1963 bill after it was introduced. The scheme is inconsistent with the basic scheme of the act--the entity bears the ultimate liability for the acts or omissions of its employees--but the staff recommends that no attempt be made to change the 1963 decision of the Legislature on this point.

Discovery in malpractice cases. Exhibit III is a letter from Justice Robert Kingsley. Justice Kingsley points out a specific problem that arises in malpractice cases because the public entity cannot be sued. A mental

patient who has been treated by numerous unknown attendants and has been injured may have difficulty in gaining access to the hospital records to obtain the names of the persons attending to him. Such records may be confidential under the California Public Records Act Section 6254. A John Doe complaint may not assure access to the records since only parties can be ordered to produce documents. Code Civ. Proc. § 2031. Perhaps the records can be obtained by taking the deposition of the records custodian if a subpoena duces tecum is served. It should be noted that this situation does not arise in a private malpractice case because the hospital can be named as a party.

Justice Kingsley suggests the following solution: "allow the injured patient in a mental institution to file a claim with the entity; then provide that he may request, in support of that claim, all information that he could obtain by discovery procedures in a lawsuit against the entity, with the right to a court order to obtain it if not voluntarily given. Then provide that the entity may, but need not, allow or settle the claim without suit; but if the entity does not allow or settle, then limit the patient to his lawsuit against the employee or employees involved. . . ."

Does the Commission wish to expend resources in an attempt to solve this problem?

Definition of "county psychiatric hospital." Exhibits V and VII are letters from the County Counsels of Los Angeles County and Santa Clara County. These letters suggest that Section 854.3, which defines "county psychiatric hospital," is not sufficiently broad to cover all facilities used to treat persons suffering from mental illness. The definition of county psychiatric hospital refers to Section 7100 of the Welfare and Institutions Code (text reproduced in Exhibit VIII--attached)

and is limited to hospital facilities. Insofar as the broad general immunity provided by Section 854.8 is concerned, we do not believe that the immunity should be expanded beyond the extent proposed in the tentative recommendation. Under present law, "mental institution" is defined to mean "any facility for the care or treatment of persons committed for mental illness or addiction." (It has been held that the county psychiatric unit of the county hospital is within this definition.) The tentative recommendation proposes to extend this 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, whether or not committed. The broad general immunity provided by Section 854.8 is then limited to "inpatients." This scheme appears to be a desirable clarification of the immunity provided by Section 854.8 that accepts the legislative decision that resulted in the inclusion of that section in the governmental liability act.

At the same time, the other specific immunities provided in the article on medical, hospital, and public health activities should not be limited to hospital facilities. Accordingly, the staff recommends that the definition of "mental illness or addiction" be expanded so that certain other immunities (not including Section 854.8) will be expanded.

The definition should read:

854.4. As used in this chapter, "mental illness or addiction" means any condition for which a person may be detained, cared for, or treated in a mental institution or in a facility designated by a county, pursuant to Chapter 2 (commencing with Section 5150) of Part 1 of Division 5 of the Welfare and Institutions Code, for the detention and evaluation of any person who is or appears to be a danger to others or to himself or to be gravely disabled.

This revision would affect the immunities provided by Sections 855.8 (text set out Exhibit VIII), 856, and 856.2. While this would expand the immunity conferred by those sections, the expansion is consistent with the nature of the immunities provided.

Relationship to other immunity provisions. Exhibit VII refers to various sections of the Welfare and Institutions Code which grant immunities to certain public employees. The text of the Welfare and Institutions Code sections to which reference is made are set out in Exhibit VIII attached. It is suggested in Exhibit VII that the substance of the above provisions could be included in the Government Code provisions dealing with mental patients. The staff believes that the provisions quoted above are better placed in the Welfare and Institutions Code. No harm results to the extent that they overlap the immunity provided by the Government Code.

Chronic alcoholics. Exhibit VII notes that the provisions of the Welfare and Institutions Code cover court-ordered evaluations for chronic alcoholics. See Welf. & Inst. Code §§ 5225-5230. However, these provisions cover only "a criminal defendant who appears, as a result of chronic alcoholism, to be a danger to others, to himself, or to be gravely disabled." There appears to be no need to be concerned with this portion of the Welfare and Institutions Code since the immunities for prisoners would apply. Moreover, the revised definition of "mental illness or addiction" would make the specific immunities provided in Sections 855.8, 856, and 856.2 applicable.

Approval for printing

Although a number of the letters question whether the immunities are justified insofar as they provide the public entity with an immunity in a case where the public employee is liable, the staff suggests that the tentative recommendation be approved for printing. As drafted, the tentative recommendation merely clarifies existing law and makes no significant substantive changes. The staff does not believe it would be desirable to expend our resources in an effort to determine what significant substantive changes should be made in this area of the law.

Respectfully submitted,

John L. Cook  
Junior Counsel

Memo 69-70

EXHIBIT II

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MARCH 20-69.

CALIF. LAW REVISION COMMISSION,  
SCHOOL OF LAW, STANFORD UNIV.,  
STANFORD, CALIFORNIA. 94305.

ATT: MR. JOHN H. DEMOULLY.

GENTLEMEN:

REGARDING # 52-# 10 RECOMMENDATION  
RELATING TO GOVERNMENT LIABILITY, I FEEL THE  
ASSUMPTIONS AND RECOMMENDATIONS AS REVISED  
FEB. 14-1969 ARE WELL TAKEN AND I FEEL THAT  
THEY SHOULD BE SET UP AS A STANDARD FOR  
FUTURE LEGISLATION.

SINCERELY

SCHER & CORNBLUM

ATTORNEYS AT LAW

MEYER SCHER  
BRUCE CORNBLUM

SUNNYVALE, CALIFORNIA 94086  
203 SOUTH MURPHY AVENUE  
739-5300

April 4, 1969

California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California 94305

Gentlemen:

This letter is written in response to the tentative recommendation of the California Law Revision Commission No. 10, revised February 14, 1969, relating to revisions of Governmental Liability Act, Policing Correctional Activities, Medical Hospital and Public Health, and more specifically, relating to suggested extension of immunity to government employees under the Government Code §844.6 relating to injuries caused by or to "prisoners," and modification of §854.8 of the Government Code which confers general immunity upon a public entity but not upon its public employees for injuries caused by persons "committed" or "admitted" to "mental institutions."

With regard to the extension of any immunities to public employees, it seems that this is most unfortunate. No person, whether he be an independent party or prisoner should have his future, health or welfare be subject to negligent acts of others by virtue of their employment, unless the legislature can take notice and guarantee that their employees are superior to other types of employees. As I understand it, all government agencies are having problems with obtaining qualified, competent caretakers in the jails or otherwise. However, basically, I would refer the Commission to the recent case of McCorkle v. City of Los Angeles, 70 AC 262, 271 (1969), where it employee shall not be granted immunity by virtue of "acts of discretion" where the injury was not proximately caused by the discretion per se but rather the negligence in exercising that discretion.

It is my suggestion: First, that the sanctity of immunity not be extended in these areas of law; secondly, that if public employees are to be clothed with the cloak of immunity, the comment or statute specifically relate that he only be protected in the exercise of discretion but that no immunity would accrue come the consequences of his negligence in conducting the immunity, as under the McCorkle case.

Very truly yours,

  
BRUCE CORNBLUM

BC:bg

cc: California Trial Lawyers Association  
Guarantee Bldg., Third Floor  
1020 - 12th Street  
Sacramento, California  
Attn: James L. Frayne, Executive Director



Memo 69-70

EXHIBIT III  
COURT OF APPEAL OF CALIFORNIA  
SECOND DISTRICT--DIVISION FOUR

GORDON L. FILES  
PRESIDING JUSTICE

EDWIN L. JEFFERSON  
ASSOCIATE JUSTICE

ROBERT KINGSLEY  
ASSOCIATE JUSTICE

908 STATE BUILDING  
217 WEST FIRST STREET  
LOS ANGELES, CALIFORNIA

March 11, 1969

John H. DeMouilly, Esq.  
Executive Secretary  
California Law Revision Commission  
School of Law  
Stanford University  
Stanford, California 94305

Dear Sir:

This letter is written in response to your communication, dated February 20, 1969, inviting comments on the draft of proposed revisions of the Governmental Liability Act.

My concern is with section 854.8 both as originally enacted and as proposed to be revised. That section creates a situation in which it is usually a practical impossibility for a patient in a mental hospital to recover for malpractice. In either a medical or a mental hospital, the patient ordinarily is not aware of the names of the parade of attendants who supposedly take care of him; and neither he nor his attorney are usually in a position to determine which staff member, among all of those who had contact with the patient, was legally responsible for any given injury. If the patient is in a medical hospital, these facts create no serious problem: the hospital -- i.e., the public entity -- is liable, whichever employee or employees were negligent; and discovery will lie against the defendant entity to gain access to the hospital records and to obtain the names of people involved. But, under section 854.8, the entity may not be sued. And the injured plaintiff cannot use discovery until he has sued someone; and without discovery, he does not know who to sue.

I understand all of the policy reasons that are alleged to support the immunity. But some method should be devised that will let the injured patient secure, prior to suit, the data he could obtain after suit if he could sue the entity -- otherwise the employee's liability

John H. DeMouilly, Esq.

March 11, 1969  
Page 2

under section 854.8(d) becomes illusory.

The cases that concern me are those of malpractice of some sort. I suggest one scheme (your staff may well think of a better one): If the employee is authorized to practice a healing art and is guilty of malpractice, the statute requires the entity to pay the ultimate judgment. If the employee is not in that class, the entity, as you point out, frequently will pay the judgment anyway. Why not allow the injured patient in a mental institution to file a claim with the entity; then provide that he may request, in support of that claim, all information that he could obtain by discovery procedures in a lawsuit against the entity, with the right to a court order to obtain it if not voluntarily given. Then provide that the entity may, but need not, allow or settle the claim without suit; but if the entity does not allow or settle, then limit the patient to his lawsuit against the employee or employees involved, the identities of those persons being, by now, known to him.

Respectfully,



Robert Kingsley

RK:mr

## CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW  
STANFORD UNIVERSITY  
STANFORD, CALIFORNIA 94305



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February 20, 1969

To: Persons Commenting on Tentative Recommendations of Law Revision  
Commission Relating to Governmental Liability.

The Law Revision Commission has prepared a recommendation for revision of the provisions of the Governmental Liability Act that deal with police and correctional activities and medical, hospital, and public health activities. I enclose a copy of this recommendation. The Commission would appreciate receiving any comments you may have on this recommendation not later than June 2, 1969, so that they can be taken into account when the Commission determines what recommendation should be made to the Legislature on this subject.

Sincerely,

ROBERT H. SHARPE  
ATTORNEY AT LAW  
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TEL. 448-3839

John H. DeMouilly  
Executive Secretary

Robert H. Sharpe  
Esq.

1127 11th St.  
Sacto 95814

4/20/69

Gentlemen -

it wonder about a couple of aspects:

- ① This is limited to just a few phases of governmental operations - police, correctional & medical. It would seem to me that the approaches could logically be extended to all phases of government. But I suppose you have to start somewhere.
- ② As I understand this, it provides that the governmental agency shall pay for medical malpractice. (Thus, providing the benefit of financial security to that select group of public employees - probably the most affluent group.) But the provision is "may" pay as to others. This seems illogical - backwards from my point of view. It is also discriminatory as to the person injured. The practical reality of security may be dependent solely upon which public employee acts.

*Robert H. Sharpe*

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June 3, 1969

California Law Revision Commission  
School of Law  
Stanford, California 94305

Re: Commission's tentative recommendation relating to liability of public entities for medical, hospital and public health activities.

Gentlemen:

After reviewing the tentative recommendations of the Commission on the above matter, we believe that the term "county psychiatric hospital" as used in proposed Section 854.3 is not sufficiently broad to cover all facilities operated by counties for the care or treatment of mentally disordered or addicted persons.

Proposed Section 854.3 defines "county psychiatric hospital" as a hospital, ward, or facility provided by the county pursuant to the provisions of Welfare & Institutions Code Section 7100. Section 7100 authorized boards of supervisors to maintain facilities for detention, supervision, care and treatment of mentally disordered or retarded persons in the county hospital or in any other hospital.

With the changing concepts of treatment of mentally disordered or addicted persons, counties will be treating mental patients, addicts and alcoholics in county facilities not located in hospitals. In areas of treatment of mental illness, drug addiction and alcoholism, Los Angeles County is now operating or will operate in the

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California Law Revision Commission  
June 3, 1969

-2-

near future not only inpatient, clinic and rehabilitation center services, but also day care, night care and halfway house programs. There will be gradations of care as an individual is treated and rehabilitated to the point that he can begin to return to society. In all of these phases the patient would be under the care of the county. As a specific example, this county is now opening a facility for treatment of drug abuse patients.

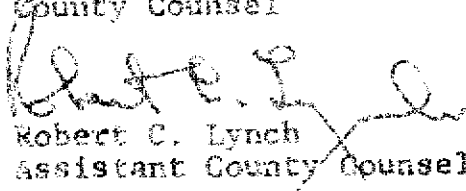
There seems no reason to differentiate between the liability of counties for injuries to mental patients or addicts in facilities which happen to be located in a hospital and those which are not so located.

With the Lanterman-Petris-Short Act taking effect July 1, 1969, there can be no doubt but that there will be substantial changes in the mode of treating mental patients. We believe that it would be appropriate to further examine the effect of the changes brought on by this legislation as they relate to potential liability of public agencies for care of mental patients.

Very truly yours,

JOHN D. MAHARG  
County Counsel

By

  
Robert C. Lynch  
Assistant County Counsel

RCL: hv

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March 18, 1969

California Law Revision Commission  
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Re: GOVERNMENTAL IMMUNITIES

Gentlemen:

I think that your thoughts on the changes are well taken. Quite frankly, I feel that all governmental immunities are examples of the most regressive legislation except in a few limited areas such as whether or not they give a parole, constituting a basis of governmental liability.

What is unconscionable is to have a society committed to welfare programs, Workmen's Compensation, Unemployment compensation, and at the same time, insulate itself from design defects and other acts of government.

Allowing full liability except for those extremely limited instances mentioned, would serve two purposes:

1. It would compensate people who require compensation and who deserve compensation, and who would normally get compensation, except for one thing - the government shirks its responsibility.

2. Corrective measures would be taken in response to the defects and inadequacies of government pointed out by such lawsuits.

It's hard to justify the immunities, but I feel to the extent we're going to have to live with some of them, that your recommendations in these sections are well taken.

Sincerely,

  
HERBERT HAFIF

HH:mrr

## memorandum

C	TO	FROM
	GERALD J. THOMPSON, Ass't Co. Counsel	Dinny Blacker, Deputy
	SUBJECT	DATE
	Soverign Immunity - Mental Patients	2/5/59

Revision Commission Memo 69-24

The Law Revision Commission seems to be trying to make the Government Liability Act conform to some of the recent changes in the mental health law; however, I do not feel they have gone far enough.

The Lanterman-Petris-Short Act provides for an elaborate scheme of "detention" for treatment for mental illness. The detention may be in a 72-hour evaluation and treatment facility, an intensive treatment facility or a post-treatment facility. The entire scheme is under the direction of the local county mental health program and the facilities include county mental health department centers, county hospital, private hospitals under contract and Agnews State Hospital.

Sec. 854.2 of the Government Code defines mental institutions to include state hospitals and county psychiatric hospitals. County psychiatric hospital (§854.3) is defined to mean hospital, ward, or facility provided by the county pursuant to the provisions of §7100 of the Welfare and Institutions Code. §7100 reads:

"The board of supervisors of each county may maintain in the county hospital or in any other hospital situated within or without the county, suitable facilities and hospital service for the detention, supervision, care and treatment of persons who are mentally disordered, mentally retarded, or who are alleged to be such.

"The county may contract with public or private hospitals for any such facilities and hospital service when they are not suitably available in any institution or establishment maintained or operated by the county. . . ."

It would appear that the detention facilities under L-P-S would come within the definition of the county psychiatric hospital although it is far from clear. It would seem better to either amend §7100 to make it clear that these facilities are considered county psychiatric hospitals or to amend §854.2 to include these facilities.

Sec. 856.2 provides for immunity with respect to injuries by or to an escapee of a mental institution. To be compared are §§ 5154, 5257 and 5306 of the Welf. and Inst. Code which grant immunity to the professional person in charge of a facility and the peace officer bringing the person to the facility for the "action" of a person released prior to the full period of his commitment. I wonder whether the term "action" includes injury by or to the person released.

# memorandum

TO

Gerald J. Thompson

FROM

Dinny Blacker

SUBJECT

(Page 2)

DATE


2/5/69

I also wonder whether it might not be best to include the substance of §§154, 5257 and 3306 in §856.2 of the Government Code. I also wonder what the relationship is between the aforementioned sections and §856(a)(3).

Sec. 856(a)(1) grants immunity for determination to confine a person for mental illness or addiction. §5278 of the Welf. and Inst. Code gives immunity to those persons authorized to make decisions for the detention to treat under provisions of L-P-S. Again it would seem that the substance of §5278 could be placed in §856(a)(1).

One final point. L-P-S has provisions dealing with court ordered evaluations for chronic alcoholics. By the terms of this proposal such individuals would not appear to come under the immunity sections. I question whether this is the intent of the commission.

NFB:mi





6/18/69

EXHIBIT VIII

The following sections of the Welfare and Institutions Code are referred to in the text of Memorandum 69-70:

5154. The professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours pursuant to this article.

5257. The professional person in charge of the facility providing intensive treatment, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 14 days pursuant to this article.

5267. Neither the professional person in charge of the facility providing intensive treatment, nor his designee, shall be held civilly or criminally liable for any action by a person released at or before the end of 14 days pursuant to this article.

5278. Individuals authorized under this part to detain a person for 72-hour treatment and evaluation pursuant to Article 1 (commencing with Section 5150) or Article 2 (commencing with Section 5200), to certify a person for intensive treatment pursuant to Article 4 (commencing with Section 5250), or to file a petition for postcertification treatment for a person pursuant to Article 6 (commencing with Section 5300) shall not be held either criminally or civilly liable for exercising such authority in accordance with the law.

5306. Neither the superintendent nor the professional person in charge of the hospital providing 90-day involuntary treatment shall be held civilly or criminally liable for any action by a person released at or before the end of a 90-day period pursuant to this article.

7100. The board of supervisors of each county may maintain in the county hospital or in any other hospital situated within or without the county, suitable facilities and hospital service for the detention, supervision, care, and treatment of persons who are mentally disordered, mentally retarded, or who are alleged to be such.

The county may contract with public or private hospitals for such facilities and hospital service when they are not suitably available in any institution or establishment maintained or operated by the county.

The facilities and services, unless subject to or provided under the Short-Doyle Act, shall be subject to the approval of the State Department of Public Health and each person having charge and control of any such hospital shall allow the department to make such investigations thereof as it deems necessary at any time.

Nothing in this chapter means that mentally disordered, or mentally retarded persons may not be detained, supervised, cared for, or treated, subject to the right of inquiry or investigation by the department, in their own homes, or the homes of their relatives or friends, or in a licensed establishment.

Government Code Section 855.8 provides:

855.8. (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental

illness or addiction or from failing to prescribe for mental illness or addiction.

(b) A public employee acting within the scope of his employment is not liable for administering with due care the treatment prescribed for mental illness or addiction.

(c) Nothing in this section exonerates a public employee who has undertaken to prescribe for mental illness or addiction from liability for injury proximately caused by his negligence or by his wrongful act in so prescribing.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in administering any treatment prescribed for mental illness or addiction.

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  
School of Law  
Stanford University  
Stanford, California 94305

**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).

Revised February 14, 1969

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 property<sup>1</sup> and vicariously liable for the torts of its employees.<sup>2</sup> Subject to certain qualifications,<sup>3</sup> a public entity is required to indemnify its employee against liability for acts or omissions within the scope of his employment,<sup>4</sup> so that in most cases the financial responsibility for a tort ultimately rests with the entity.

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<sup>1</sup> Gov't Code § 835.

<sup>2</sup> Gov't Code § 815.2. But see Gov't Code §§ 844.6 and 854.8.

<sup>3</sup> See Gov't Code §§ 844.6 and 854.8, which grant the public entity immunity but do not grant the employee a comparable immunity. See also Gov't Code § 825.2 (right of employee to indemnity). The public entity is not required to pay punitive or exemplary damages (Gov't Code § 825) and may recover from the employee for any claim or judgment paid by the public entity where the employee acted or failed to act because of actual fraud, corruption, or actual malice (Gov't Code § 825.6).

<sup>4</sup> Gov't Code §§ 825-825.6. See also Gov't Code §§ 995-996.6 (defense of public employees).

Generally, the liability of public employees is determined by the same rules that apply to private persons.<sup>5</sup> 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.<sup>6</sup>

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 activities<sup>7</sup> and for medical, hospital, and public health activities.<sup>8</sup> However, in these two major areas, a broad general immunity for all injuries by or to prisoners<sup>9</sup> and mental patients<sup>10</sup> 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.

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<sup>5</sup> Gov't Code § 820.

<sup>6</sup> Gov't Code § 820.2. The leading case interpreting the "discretionary" immunity provision is *Johnson v. State of California*, 69 Adv. Cal. 813 (1968).

<sup>7</sup> Gov't Code §§ 844-846.

<sup>8</sup> Gov't Code §§ 854-856.4.

<sup>9</sup> Gov't Code § 844.6.

<sup>10</sup> 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."<sup>11</sup> 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 Legislature included Section 844.6 in the governmental liability act despite a recommendation to the contrary by the Commission. The Commission understands that the section was included in the statute primarily because it was feared that much litigation without merit would otherwise result. The Commission has been advised that, in practice,

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<sup>11</sup> Gov't Code § 844.

some public entities have followed the policy of paying any judgment against an employee who acted in good faith in the scope of his employment even though the entity would be immune from direct liability under Section 844.6. Under this policy, the employee is protected against loss and a person with a just claim receives payment from the entity despite the immunity conferred by the section. It is claimed that in actual operation the section has not resulted in injustice but has provided employees engaged in law enforcement activities with an incentive to exercise reasonable care towards prisoners. Accordingly, despite the opinion of some writers that the section is neither necessary nor desirable,<sup>12</sup> the Commission has concluded that the section should be retained subject to the following 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.<sup>13</sup> The subdivision should 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 provision reflect more accurately its original intent.

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12

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

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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).

Also, the courts have held that Section 844.6 does not affect liability imposed by Section 845.6 for failure to summon medical care for a prisoner in need of immediate medical care. The section should be revised to codify these decisions and to make 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 terminology of 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 procedures now used to effect the confinement of persons in mental institutions.<sup>14</sup> 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)

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<sup>14</sup> 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, Section 854.2 (defining "mental institution") should be revised and a new Section 854.3 should be added to define "county psychiatric hospital." Together, these sections should 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,<sup>15</sup> 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 given in the foregoing discussion of Section 844.6 (immunity for injuries by or to a prisoner), the broad general immunity conferred by Section 854.8 should be retained, subject to the following modifications:

(1) The immunity should be restricted to those persons who are inpatients (inmates)--as distinguished from outpatients--of a mental institution. This revision would be consistent with the intent of the Legislature in enacting the section in 1963.

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See Welf. & Inst. Code §§ 7200, 7500.

(2) The section should be revised to specify more clearly the extent to which the sections that impose special liabilities prevail over the blanket immunity conferred by Section 854.8 and to 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.<sup>16</sup> Section 856.2 should be extended to confer immunity for injuries sustained by an escaping or escaped mental patient. This revision 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.

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16

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. The significant policy considerations involved in these changes are covered by the foregoing discussion.

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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:



§ 844.6

Section 1. Section 844.6 of the Government Code is amended to read:

844.6. (a) Notwithstanding any other provision of law this part , except as provided in subdivisions-(b),-(e),-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, based on such malpractice, to which the public entity has agreed.

§ 844.6

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. The courts have 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). Under the reasoning of these decisions, Section 845.4 also creates an exception to the immunity granted by Section 844.6.

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. The amendment clarifies the section by expressly limiting the "notwithstanding" clause to "this part" and excepting Sections 814 and 814.2. The exception for subdivisions (b), (c), and (d) has been deleted as unnecessary.

§ 844.6

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" under the Business and Professions Code. This excluded, under a possible narrow interpretation, physicians and surgeons who are "certificated" rather than licensed, as well as "registered" opticians, physical therapists, and pharmacists and excluded persons licensed under other laws, such as the uncodified Osteopathic Act. In addition, the use of the term "licensed" 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.

§ 845.6

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 committment 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.

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.

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~~ 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

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 590) 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 covers only inmates of mental institutions and not outpatients.

§ 855.2

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 appears 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.

§ 856.2

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

856.2. (a) 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.

(b) Nothing in this section exonerates a public employee from liability:

(1) If he acted or failed to act because of actual fraud, corruption, or actual malice.

(2) For injuries inflicted on an escaping or escaped mental patient in recapturing him.

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."

Subdivision (b) has been added to limit the immunity under subdivision (a) for injuries to an escaping or escaped mental patient to cases where such immunity is appropriate. Paragraph (1) 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). Paragraph (2) is consistent with the general rule that a public employee is liable for his negligent or wrongful act in caring for mental patients.