

Meeting

6/7/62

Memorandum No. 33(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Medical and
Hospital Torts)

Attached to this memorandum on blue paper is a tentative recommendation and statute that is designed to carry out the Commission's recommendations in regard to medical and hospital torts. Two copies of the tentative recommendation and statute are provided so that you may mark one copy to return to the staff and retain the other.

The statute is based upon the assumption that governmental liability does not exist unless a statute declares it to exist. The statute is also based on the assumption that the judicially declared immunity from liability of public officers and employees for their discretionary acts will continue to exist except to the extent that statutes modify the doctrine in particular situations.

The first assumption--that entities are immune unless statutes otherwise declare--was considered by the Commission and approved as a tentative method of approaching the problems of governmental liability. The second assumption--that the discretionary immunity of public officers and employees should continue--has not been considered specifically by the Commission, although the Commission seemed to assume the continued existence of the doctrine when it considered these matters at the April meeting. Because the Commission's actions seemed to be based upon this assumption, the statute herewith submitted is also based upon it.

conclude from these cases that there is any excessive immunity granted to medical and hospital personnel.

The federal cases dealing with the discretionary immunity of the U.S. government under the Tort Claims Act as well as the cases dealing with the immunity of federal officers do not shed a great deal more light on the subject of discretionary immunity for medical and health officers.

So far as the government itself is concerned, Professor Van Alstyne adequately sums up the experience by pointing out that the federal government is liable for negligence in the administration of medical care, but it is not liable for refusing to admit patients to federal hospitals. (See Study, pp. 528-30.) The only federal case involving a federal officer's immunity in medical matters that has been found is Taylor v. Glotfelty, 201 F.2d 51 (1952). There, an inmate of the federal prison system sued a staff psychiatrist for giving a diagnosis of paresis and having him confined in an insane ward without having examined the inmate. The complaint was dismissed with the statement, "An officer acting within the scope of his duties as defined in law is not liable for damages in a civil action because of a mistake of fact made by him in the exercise of his judgment or discretion."

From the foregoing, it appears that the discretionary immunity enjoyed by hospital and public health officials probably does not extend to most matters that would be characterized as malpractice.

The foregoing is presented so that the Commission will realize that its existing policy decisions and the attached statute that is based on them do not really cover the problem of when a public entity should be liable for its employees' acts. To a large extent, the decision as to

liability or immunity is still left to the courts.

At the April meeting, the Commission requested a report on the right of a peace officer to arrest for mental illness without a warrant or court order. The Commission wondered whether a peace officer may arrest without a warrant upon "probable cause" based upon information supplied by others or whether he is required to act only upon his own observations. Unfortunately, there is nothing in the previous forms of Welfare and Institutions Code Section 5050.3 that gives a clue to its interpretation. Neither is there anything in the Senate Interim Judiciary Committee report on the proposed amendment that revised the section to its present form in 1951 that is of assistance. There have been no cases construing the section. It is possible, though, that the courts might attempt to reconcile the various parts of the section by holding that the "reasonable cause" which the peace officer must have to justify taking a person into custody for dangerous mental illness must arise "as a result of his personal observation." Such an interpretation would make arrests for mental illness somewhat like arrests for misdemeanors: In misdemeanor cases, the peace officer may arrest if he has reasonable cause to believe that an offense was committed in his presence. (Penal Code Section 836(1).)

Under the draft statute, the employing public entity will be liable as well as the employee for false arrest and false imprisonment, however that tort may be worked out under Welfare and Institutions Code Section 5050.3. Under the draft statute, the liability will arise under Section 903.3.

Respectfully submitted,

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Ass't. Executive Secretary

6/7/62

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Governmental Liability for Hospital, Medical and Public Health Activities

Background

Prior to the decision of the California Supreme Court in Muskopf v. Corning Hospital District,* governmental entities in California were generally immune from liability for injuries arising out of the operation of hospitals or other public health facilities. These functions were deemed "governmental" in nature even where the particular hospital involved was receiving paying patients and was otherwise operated like a private hospital. The effect of this immunity of governmental entities has been lessened within recent years by legislation authorizing the purchase of malpractice insurance for the personnel employed in such hospitals and requiring the State to pay judgments in malpractice cases brought against State officers and employees. The Muskopf case, which involved an injury in a hospital, wiped out the last vestiges of sovereign immunity in hospital and medical activities.

While governmental entities have been immune from liability arising out of health and medical activities, the governmental officers and employees engaged in these activities enjoy no such immunity. As a general rule, they may be held liable for their tortious acts committed

* 55 Cal.2d 211 (1961).

in the scope of their governmental employment. But governmental officers and employees, too, have been held to be immune from liability for their discretionary acts within the scope of their employment.

The extent to which governmental entities will be liable for torts when the legislation that suspended the effect of the Muskopf decision expires in 1963 cannot be determined. At the same time that the Supreme Court decided Muskopf, it decided Lipman v. Brisbane Elem. Sch. Dist.^{*} and stated that public entities may be held liable for some of the discretionary acts for which its employees are immune. But, until cases are decided, it is impossible to determine just what discretionary acts will result in liability for governmental entities.

It must be recognized that public entities cannot be readily compared with private persons for all purposes of liability. Governmental entities must do many things private persons do not or cannot do. This essential difference has been recognized in the discretionary immunity that the courts have granted to public personnel. Private persons do not impose quarantines. Private persons do not establish health regulations that all others must observe. Private persons do not confine others involuntarily in mental hospitals. Private hospitals are not required to accept all persons who apply for admittance. Because of these differences between private persons and public entities, care must be exercised in formulating the rules of liability for public entities lest the discretion of public entities to formulate and carry out public policy be inhibited.

Recommendations

Liability of public entities for torts of their personnel. As a

* 55 Cal.2d 224 (1961)

general rule, the Commission recommends that public entities be liable for the acts of their personnel, within the scope of their employment, for which the personnel themselves are liable. This rule will make applicable to public entities the vicarious liability to which private institutions are subject. This liability will be limited, though, by the "discretionary immunity" rule now applicable only to public employees. Thus, public entities will assume responsibility for the malpractice or other torts committed by their personnel, but the discretion of governmental entities to determine and carry out public policy will not be curtailed by the fear of liability imposed by a trier-of-fact who disagrees with the policy adopted.

Public entities, however, should be liable only for compensatory damages and not for punitive damages. Punitive damages are awarded to punish a tortfeasor for actual malice, fraud or oppression. Inasmuch as the damages imposed upon governmental bodies will be borne by the taxpayers generally, it would be inappropriate to "punish" them when the malice, fraud or oppression involved is not that of the taxpayers themselves but is that of an officer or employee of the public entity.

To implement the general rule of vicarious liability, where action is brought against a public officer or employee for tortious acts committed in the scope of his employment, the public entity should be required to pay the compensatory damages, excluding punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend. Several statutes require certain public entities to pay judgments against their employees, but none require the employee to give notice and an opportunity to defend to the entity. If governmental entities are to be bound by judgments, they should have

the right to defend themselves by controlling the litigation.

Indemnity from public personnel. Whenever a public entity is held liable for acts of an employee committed with actual fraud, corruption or actual malice, the public entity should have the right to indemnity from the employee. However, where the public entity has provided the employee's defense against the action, it should not have a right to seek indemnity from the employee unless the employee has agreed. In conducting an employee's defense, the entity's interest might be adverse to the interest of the employee. For example, if punitive damages were claimed, the public entity's interest might be best served by showing malice on the part of the employee; for in such a case the public entity could recover indemnity from the employee for any amounts the entity was required to pay. But such a showing would be contrary to the best interests of the employee. Hence, the undertaking of an employee's defense should constitute a waiver of the public entity's right to indemnity unless, by agreement between the entity and the employee, the public entity's right of indemnity is reserved.

Clarification of discretionary immunity. Although the existing case law has spelled out in some detail the extent of the discretionary immunity of public officers and employees, there are certain recurring situations where the law is not clear. Statutes should be enacted, therefore, to make clear whether or not the discretionary immunity is or is not applicable to these cases. Where the statutes are not explicit, the discretionary immunity developed by the cases in regard to the liability of public personnel will be the standard of immunity for governmental entities.

The statutes should make clear that a public employee may be held liable for the damages proximately resulting from his negligent or wrongful interference with the attempt of an inmate of a public hospital to seek a judicial review of the legality of his confinement. The right of a person confined involuntarily to petition the courts is a fundamental civil right that should receive the utmost legal protection.

Public entities and employees should not be liable for exercising discretion as to who should be admitted to public hospitals. The decision whether or not to admit a patient to a public hospital often depends upon a weighing of many complex factors, such as the financial condition of the patient, the availability of other medical facilities, etc. Public entities and public employees should be free to weigh these factors without fear of liability if someone else later disagrees with the conclusion reached. On the other hand, if by statute, regulation or administrative rule, an employee has a mandatory duty to admit a patient, he and the public entity should be liable if, within the scope of his employment, the employee negligently or wrongfully fails to admit the patient.

Public employees and public entities should be immune from liability for negligence in diagnosing mental illness and prescribing treatment therefor. Most treatment of the mentally ill goes on in public mental hospitals. The field is relatively new and standards of diagnosis and treatment are not as well defined as they are where physical illness is involved. Moreover, State mental hospitals must take all patients committed to them; hence, there are frequently problems of supervision and treatment created by inadequate staff and excessive patient load that private mental hospitals do not have to meet.

In imposing quarantine, disinfecting property, and otherwise taking action to prevent or control the spread of disease, public health officials should not be liable for taking any action or failing to take any action if they have been given the legal power to determine whether or not such action should be taken. Where the law gives a public officer or employee discretion to determine a course of conduct, liability should not be based upon the exercise of that discretion in a particular manner; for this would permit the trier-of-fact to substitute its judgment as to how the discretion should have been exercised for the judgment of the person to whom such discretion was lawfully committed. But when a public official has a mandatory duty to act in a particular manner, he should be liable for his wrongful or negligent failure to perform the duty; and his employing public entity should be liable if such failure occurs in the scope of his employment.

Liability of public entities where employees are not liable. Where damages result from inadequate facilities, personnel or equipment in hospitals and other medical institutions, public entities should be liable if the inadequacy stems from a failure to comply with applicable statutes or the regulations of the State Department of Public Health. Although decisions as to the facilities, personnel or equipment to be provided in public institutions involve discretion and public policy to a high degree, nonetheless, when minimum standards have been fixed by law and regulation, there should be no discretion to fail to meet those minimum standards. This recommendation will leave determinations of the standards to which public hospitals must conform in the hands of persons qualified to make such determinations and will not leave those standards to the discretion of juries in damage actions. Hence, governmental entities will continue to be able to make the basic decisions as

to the standards and levels of care to be provided in public hospitals within the range of discretion permitted by State law and regulations.

Although most public hospitals are licensed by the State Department of Public Health and are subject to its regulations, the University of California's hospitals are not. Yet, its hospitals should be required to maintain the same minimum standards that other hospitals do. Hence, the Commission recommends that the State should be liable for damages resulting from inadequate facilities, personnel or equipment in University hospitals if they do not conform to the regulations applicable to other hospitals of the same character and class.

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

An act to add Article 3 (commencing with Section 903.1) to Chapter 4 of Division 3.5 of Title 1 of, and to repeal Section 2002.5 of the Government Code, relating to the civil liability of public entities, officers, agents and employees.

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

SECTION 1. Article 3 (commencing with Section 903.1) is added to Chapter 4 of Division 3.5 of Title 1 of the Government Code, to read:

Article 3. Medical, Hospital and Public Health Activities

903.1. As used in this article;

(a) "Public entity" includes the State and a county, city, district, or other public agency or public corporation.

(b) "Employee" includes an officer, agent or employee.

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

903.2. This article applies only to the activities and operations of public entities and their employees:

(a) In hospitals, clinics, dispensaries, pharmacies and related facilities; and

(b) In prescribing and administering drugs, therapeutic devices or treatment of any kind to human beings for the relief of pain or suffering, for the alleviation of injury, for the prevention, control or cure of illness whether physical or mental, or for the care or treatment of any bodily or mental condition.

903.3. A public entity is liable for death or for injury to person or property proximately caused by a negligent or wrongful

act or omission of an employee of the entity within the scope of his employment if the act or omission is one for which the employee would be personally liable.

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

903.4. A public entity is liable for damages proximately resulting from failure of the entity to provide adequate or sufficient equipment, personnel or facilities in any hospital, clinic, dispensary or similar institution licensed by the State Department of Public Health which is operated or maintained by the public entity if the public entity has failed to comply with any statute or regulation of the State Department of Public Health governing equipment, personnel or facilities.

If a public entity maintains a hospital, clinic, dispensary or similar institution that is not subject to regulation by statute or by the State Department of Public Health, such entity is liable for damages proximately resulting from its failure to provide adequate or sufficient equipment, personnel or facilities if it has failed to comply with the statutes or regulations of the State Department of Public Health applicable to institutions of the same character and class.

903.5. A public employee is liable for any damages proximately caused by his negligent or wrongful interference with any attempt by an inmate of a public hospital or institution for human care or treatment to obtain judicial review of the legality of his confinement.

903.6. An employee of a public entity is not liable for failing to admit a person to a hospital operated by such public entity unless

such employee negligently or wrongfully fails to admit a person when he is required by law to do so.

903.7. No employee of a public entity may be held liable for negligence while acting within the scope of his employment in diagnosing or prescribing for mental illness. No employee of a public entity may be held liable for negligence while acting within the scope of his employment in determining the terms and conditions of the confinement, parole or release of persons who are mentally ill. An employee of a public entity is liable for any damages proximately caused by his negligent or wrongful act or omission in administering any treatment prescribed for the mentally ill.

903.8. No public employee may be held liable for performing or failing to perform any act relating to the prevention and control of disease if such employee had the legal authority to decide whether or not such act should or should not be performed. A public employee is liable for the damages proximately caused by his negligent or wrongful failure to perform any act relating to the prevention and control of disease that he was required by law to perform.

903.9. If an employee of a public entity requests and permits the public entity to defend him against any claim or action brought against him on account of his negligent or wrongful act or omission occurring within the scope of his employment, the public entity shall pay any compromise or settlement based thereon to which the public entity has agreed and shall pay any judgment based thereon. Nothing in this section authorizes a public entity to pay any claim or judgment for punitive or exemplary damages.

903.10. Except as provided in Section 903.11, if a public entity pays any claim or judgment, or any portion thereof, based upon death or upon injury to person or property caused by the act or omission of an employee of the public entity, the employee is not liable to indemnify the public entity.

903.11. If a public entity pays any claim or judgment, or any portion thereof, based upon death or upon injury to person or property caused by the act or omission of an employee of the public entity and such employee acted or failed to act because of actual fraud, corruption or actual malice, the public entity may recover from the employee the amount of such payment.

Unless the right of a public entity against its employee under this section is reserved by agreement between the public entity and the employee, the public entity may not recover any payments made upon a judgment or claim against the employee if the public entity conducted the employee's defense against the action or claim.

SEC. 2. Section 2002.5 of the Government Code is repealed.

~~[2002.5.--Whenever-a-suit-is-filed-against-an-employee-or-officer of-the-State-of-California-licensed-in-one-of-the-healing-arts-under Division-2-of-the-Business-and-Professions-Code,-for-malpractice-alleged to-have-arisen-out-of-the-performance-of-his-duties-as-a-state-employee, a-copy-of-the-complaint-shall-also-be-served-upon-the-Attorney-General and-the-Attorney-General-upon-the-request-of-such-employee-shall defend-said-suit-on-behalf-of-such-employee.--If-there-is-a-settlement or-judgment-in-the-suit-the-State-shall-pay-the-same;-provided,~~

that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. -- The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.