9/11/62

Memorandum No. 56(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Medical, Hospital and Public Health Activities)

Attached is a copy of the tentative recommendation that was distributed for comments. The proposed statute appears on pages 82 and 83 and the recommendation appears on pages 38-41 of the General Liability Statute.

Also attached are three letters containing comments upon this recommendation. These are:

Exhibit II (yellow) - Letter from Los Angeles County Counsel

Exhibit III (blue) - Letter from State Department of Public Health

Exhibit IV (white) - Letter from State Department of Mental Hygiene

There is no Exhibit I. We reserved that number for the comments of the State Bar Committee, but no comments were received from them prior to the preparation of this memorandum.

§ 855 (General Liability Statute). The Los Angeles County Counsel is disturbed by the absolute nature of the liability provided by this section. It is inconsistent with the standard of reasonable diligence in § 815.6. Since the liability provided in both sections (§§ 855 and 815.6) rests upon the same base--failure to observe regulations--it would seem that the defense of reasonable diligence provided under § 815.6 should be provided under § 855 also. The County Counsel's letter, though, suggests that this liability be eliminated entirely. (See Exhibit II, pages 1-3.)

The State Department of Public Health suggests adding a reference to

the hospitals licensed by the State Department of Mental Hygiene in the first paragraph of § 855. This would extend the coverage of the statute to mental institutions licensed by the Mental Hygiene Department. The State Department of Mental Hygiene also operates hospitals which would not be covered by § 855. These hospitals might be covered by adding a reference to them similar to the reference to the University of California hospitals.

§ 855.2. The Los Angeles County Counsel suggests that "any attempt" is too broad, for literally this would mean "any attempt, however unreasonable." All that the section is intended to do is to impose liability for holding up communications to the courts unreasonably. This is expressed in the language that imposes liability for "negligent or wrongful interference". In effect, the County Counsel is suggesting that this language should be made more specific.

§ 855.6. The County Counsel feels this section may impose liability for carrying out a prescription of treatment while the prescriber is immune. This is not the purpose of the section; the section is intended to impose liability in subdivision (b) only for the improper carrying out of the treatment prescribed. Perhaps a revision should be made to clarify the intent.

The Department of Mental Hygiene points out that the mentally ill are but one group of persons confined in State mental hospitals. (See Exhibit IV, ¶ 3.) The Department suggests that a more comprehensive term be used than "mentally ill." The staff suggests that the objection might be met by revising the last three lines of § 855.6(a) (at the top of page 83) to read:

> . . . diagnosing or prescribing for mental or emotional disorder or in determining the terms and conditions of the confinement, parole or release of persons who are mentally ill or suffering from any other mental or emotional disorder.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT II

EXTRACT

from

LETTER FROM OFFICE OF THE LOS ANGELES COUNTY COUNSEL

July 20, 1962

5. Medical, Hospital and Public Health Activities

The physicians and hospital administrators with whom we conferred on the Commission's recommendations were seriously disturbed by the provisions of Section 903.3 requiring public agencies to provide equipment, personnel, or facilities as required by the State Department of Public Health. It was their strong feeling that such a provision was completely impractical and unworkable and would leave public agencies in a position in which they had no control over the level of services to be provided or of the cost of providing such services and that these agencies could easily be put in a position in which they would either be subjected to prohibitive costs or problems of finding personnel when none were available, or risk almost absolute liability.

They advised us that at the present time the State Department of Public Health had some rules as to standards for hospital buildings, space requirements, etc., but no rules for personnel to be employed or standards for equipment. Of course there is no way of determining at this time what sort of rules would be made, what compliance would cost, or whether or not personnel sufficient to meet these standards could be recruited. This county faces a constant shortage of nurses, lab technicians, therapists and physicians in certain specialties, and if it was required to have at all times more of these personnel than could be recruited it would be left in a position of absolute liability and with no means to avoid it.

It appears to us to be basically unsound to give an outside agency power to make rules as far reaching as those contemplated by Section 903.3. Whether or

not the State Department of Public Health could make rules which would be applicable to all public hospitals and health facilities in the State without placing an intolerable burden on some of them, is questionable, having in mind the differences in patient load, personnel available, and cost from place to place in the state, and the very different nature of the problems in large counties such as Los Angeles County in comparison to those in rural areas.

In cases of disaster, epidemic or other emergency in which the hospitals of public agencies would suddenly be faced with a tremendous case load, these agencies would be faced with the choice of turning away patients in need of treatment or being absolutely liable if they did not have sufficient personnel and equipment immediately available to meet this patient load.

It appears to us that matters such as the determination of the level of care to be given, facilities to be provided, and standards of care are governmental decisions to be made by the appropriate officers in each agency and are a part of government governing. Local governing bodies must have control of fiscal matters such as the cost of providing hospital care. These agencies could be financially ruined by some arbitrary regulation by the State Department and without any means to appeal therefrom. The State Department of Public Health is not particularly concerned with the fiscal problems of local agencies.

We believe that the level of care to be given, reflected in the personnel, facilities and equipment provided for medical and hospital care, involves precisely the same considerations as the level of any other governmental service such as law enforcement and that when the governing body of a local agency has made a decision as to the level of service to be provided, then the only question should be what use was made of the available facilities and that there should be no liability for failure to provide additional facilities unless the level which was provided was so low as to be arbitrary or fraudulent.

These decisions are policy decisions made by the governing bodies of the local agencies who must consider what funds are available and what the local needs are. This can be done far more effectively by the governing body of each agency than by a state

agency which is primarily concerned with other considerations. The decision as to the level of any government service is a matter of the highest discretion in the governing body and should properly come under discretionary immunity.

In the event that your commission does not see fit to change the provisions of Section 903.3 to exempt public agencies entirely from liability in this area, we believe that the standard of liability should be that the agency is liable only if it fails to use reasonable diligence to meet the requirements for personnel, facilities and equipment set forth by the State Department of Public Health. This is a far more realistic standard having in mind the problems of financing and of obtaining personnel and would take care of situations arising during periods of disaster or epidemic.

We believe that the language "any attempt" used in Section 903.5 is too broad since this would appear to make a public employee liable in damages for any interference at all with the efforts of an inmate in connection with the judicial review of his confinement no matter how unreasonable these efforts might be. It would not be realistice to require that public employees allow a mentally disturbed patient constant phone calls or messenger service to take obviously unmeritorious and insufficient documents to court. Sooner or later such a procedure might well involve demands for supplies, typewriters or even stenographic service to dictate petitions.

Section 903.6 providing that an employee of a public agency is not liable for failing to admit a person to a hospital realistically recognizes the problems faced by hospital personnel at peak periods where the case load may exceed the available facilities and many persons who are in an emergent state may demand treatment when the problems of those who are far more in need of treatment are already overtaxing the facilities available.

The medical personnel with whom we discussed this problem were startled by the provisions of Section 903.7 which they stated is directly contrary to the present practice of medicine wherein the person who does the diagnosing or prescribing is primarily liable. They feel that the provisions of this section would lead to anomalous situation in which there would be no

liability in prescribing some treatment for a mental patient which simply is not indicated and exposing a subordinate to liability for carrying out the treatment prescribed.

Sections 903.9 through 903. 12 appear to be general sections relating to the duty to defend cases against public officers and the rights of public agencies to indemnification from employees under certain situations. These do not appear to be particularly related to actions arising out of medical, hospital or public health activities and perhaps should be in a separate article or more properly be included in the provisions relating to the defense of actions against public employees rather than in the medical and hospital provisions.

Memo 56(1962)

EXHIBIT III

State of California

DEPARTMENT OF PUBLIC HEALTH

August 30, 1962

John H. DeMoully
Executive Secretary
California Law Revision Commission
Office of Commission and Staff
School of Law
Stanford University
Stanford, California

Dear Mr. DeMoully:

In compliance with your request of June 28, 1962, we have reviewed tentative recommendations of the California Law Revision Commission on government liability for hospital and public health activities.

From our standpoint, the objectives seem sound. We believe the citizen should, in general, have the same protection from negligence in a governmental hospital as in a private hospital. If government is the owner or employers, then it follows that government should not be able to evade its liability. We are not lawyers, however, and are not attempting to express a legal opinion on this.

On Section 903.3 we believe your objective is good, but there is an omission which may create confusion. The State Department of Mental Hygiene operates a licensing program for mental institutions and operates the state mental hospital system which, like the University of California hospitals, is unlicensed. We would suggest that you consult the State Department of Mental Hygiene on this. We believe the section should be changed by adding or State Department of Mental Hygiene on line four of the first paragraph after State Department of Public Health.

Very truly yours,

S/ Gordon R. Cumming

Gordon R. Cumming, Chief
Bureau of Hospitals

GRC:emc

Memo 56(1962)

EXHIBIT IV

State of California

DEPARTMENT OF MENTAL HYGIENE

Sacramento

California Law Revision Commission
School of Law
Stanford University, California

Date: August 17, 1962

File No.

Attention: Mr. John H. DeMoully
Executive Secretary

Subject: Tentative Recommendation of California Law Revision Commission, relating to Governmental Liability for Hospital, Medical and Public Health Activities

In accordance with your request, we are glad to furnish the following comments relating to the above subject:

1. We believe the Commission has properly recognized that there are essential differences in the responsibilities of governmental entities operating in the health field as compared with private operations in the same field. We believe you have also recognized that the standards of diagnosis and treatment of the mentally ill are not as well defined as they are where the physically ill are involved.

2. We believe that, in general, you have made provision for these essential differences in your tentative recommendations. However, we plan to give the matter further study and may later have suggestions concerning the subject.

3. We would like to make one specific suggestion at this time. It concerns proposed Section 903.7. Both Subsection (a) and Subsection (b) use the term "mentally ill". The problem is that only about half the admissions to state hospitals in this state are classified as "mentally ill". The rest are committed under other classifications, such as inebriates (Section 5400, Welfare and Institutions Code), habit-forming drug addicts (Sec. 5400), narcotic drug addicts (Sec. 5350), sexual psychopaths (Sec. 5500), mentally deficient (Sec. 5250). The Supreme Court in People v. Jensen (43 C. 2d 572) said that these were separate categories and that persons committed to state hospitals thereunder could not be classified as mentally ill.

California Law Revision Commission
Attn: Mr. John H. DeMoully August 17, 1962

The mentally ill are defined in Section 5040, Welfare and Institutions Code, and the form of commitment order is in Section 5100. Our point is that the use of the term "mentally ill" in your proposal may likely be construed to refer only to persons committed as mentally ill and may not refer to the other classes mentioned. For that reason, it is suggested that some broader term be used in this section.

We appreciate the opportunity of reviewing the proposed draft and will assist the Commission in connection with this matter wherever we can.

S/ Daniel Blain, M. D.

Daniel Blain, M. D.
Director of Mental Hygiene

cc: Mr. C. A. Barrett
Assistant Attorney General

52(L) July 1, 1962

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford, California

TENTATIVE RECOMMENDATION

of the

CALIFORNIA LAW REVISION COMMISSION

relating to

Governmental Liability for Hospital, Medical and Public Health Activities

NOTE: This is a tentative recommendation prepared by the California Law Revision Commission. It is not a final recommendation and the Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature. This material is being distributed at this time for the purpose of obtaining suggestions and comments from the recipients and is not to be used for any other purpose.

52(L) July 1, 1962

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,[1] 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 had been lessened, however, 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. The effect of this decision has been postponed until 1963 by the enactment of Chapter 1404 of the Statutes of 1961.

While governmental entities have been generally immune from liability arising out of health and medical activities, the governmental officers

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

and employees engaged in these activities enjoy no such general immunity. As a general rule, they may be held liable for their tortious acts committed 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.[2] in which the court stated that public entities may be held liable for some of the discretionary acts for which their 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 at the outset 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. Private persons do not impose quarantines. Private persons do not establish health laws and 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. These essential differences have been recognized in the discretionary immunity that the courts have granted to public personnel. 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.

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2. 55 Cal.2d 244 (1961)

Recommendations

Liability of public entities for torts of their medical and hospital personnel. As a general rule, the Commission recommends that public entities be liable for the acts of their medical and hospital 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 to public employees.[3] Thus, public entities will assume a substantial degree of financial 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 employee of the public entity.

Not only should public entities be directly liable for the torts of their personnel, but in cases where an action is brought against a public employee for tortious acts committed in the scope of his employment,

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

the public entity should be required to pay the compensatory damages, excluding punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend it. Several statutes now require certain public entities to pay judgments against their employees, but none require the employee to give notice and an opportunity to defend to the entity. Yet it seems only fair that if governmental entities are to be bound by judgments, they should have the right to defend themselves by controlling the litigation.

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 that it should. In conducting an employee's defense, the entity's interest might be adverse to the interest of the employee. For example, if both the employee and the entity were joined as defendants, the public entity's interest might be best served by showing malice on the part of the employee; for in such a case the public entity could cross-complain and recover indemnity from the employee for any amounts the entity was required to pay. But such a showing would be contrary to the best interests of the employee, for he would be ultimately responsible for the damages awarded. Hence, the undertaking of an employee's defense should constitute a waiver of the public entity's right to indemnity unless, by agreement between the entity and the employee, the public entity's right of indemnity is reserved.

Clarification of discretionary immunity. Although the existing case law has spelled out in some detail the extent of the discretionary immunity of public 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 or to be developed by the cases in regard to the liability of public personnel will be the standard of immunity for governmental entities.

At least one underlying basis for the doctrine of discretionary immunity has been that the subjection of public personnel to the burden of a trial and to the danger of personal liability would unduly impair their zeal in the performance of their duties. To some extent, this basis for the doctrine will be removed by the recommended legislation; for unless actual malice, fraud or corruption is involved, the ultimate liability will be that of the employing public entity rather than that of the employee himself. The Commission recognizes that the courts themselves may modify the doctrine in the light of this statutory change. In any event, the Commission itself in the course of its study of sovereign immunity will undertake a study of the discretionary immunity doctrine and report to the Legislature on the extent to which it should be retained, modified or repealed in the light of the changing scope of sovereign liability and immunity. Until such study is completed, though, the following statutory provisions should be enacted to clarify the existing scope of the doctrine insofar as medical and hospital activities are concerned:

1. Public entities and public employees should be made liable for the damages proximately resulting from their 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.

2. Public entities and employees should not be liable for refusing to admit a person to a public hospital when the employee is given discretion whether or not to do so. 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 that a judge or jury may later disagree 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 the employee negligently or wrongfully fails to do so.

3. Public employees and public entities should not be liable 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. The statutes should make clear, though, that public entities and employees are liable for

injuries caused by negligent or wrongful acts in administering prescribed treatment.

4. Public health officials should not be liable for acting or failing to act in imposing quarantine, disinfecting property, and otherwise taking action to prevent or control the spread of disease, if they have been given the legal power to determine whether or not such action should be taken. Where the law gives a public 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 but not otherwise. 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. On the other hand, when those

standards are met in a public hospital, or other medical institution, it should not be liable to one who claims that more should have been done.

This recommendation will leave determinations of the standards to which public hospitals and other medical institutions must conform in the hands of the persons best qualified to make such determinations and will not leave those standards to the discretion of juries in damage actions. Hence, governmental entities will know what is expected of them and will continue to be able to make the basic decisions as to the standards and levels of care to be provided in public hospitals and other medical institutions 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 comparable 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, a county, city, district and 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; or

(b) In diagnosing physical or mental conditions in human beings or 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 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 such failure is caused by the failure of the public entity 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 equipment, personnel or facilities substantially equivalent to those required by statutes or regulations of the State Department of Public Health which are applicable to institutions of the same character and class.

903.4. 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.

903.5. 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 legally required to do so.

903.7. (a) No employee of a public entity is liable for negligence in diagnosing or prescribing for mental illness or in determining the terms and conditions of the confinement, parole or release of persons who are mentally ill, while acting within the scope of his employment.

(b) An employee of a public entity is liable for any damages proximately caused by his negligent or wrongful act or omission in administering or failing to administer any treatment prescribed for the mentally ill.

903.8. (a) No employee of a public entity may be held liable for performing or failing to perform any act relating to the prevention and control of disease if he had the legal authority to decide whether or not such act should or should not be performed.

(b) An employee of a public entity is liable for the damages proximately caused by his negligent or wrongful act or omission in performing or failing 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 the public entity to defend him against any claim or action against him arising out of his negligent or wrongful act or omission occurring within the scope of his employment, or if the public entity conducts the defense of an employee against any claim or action arising out of his negligent

or wrongful act or omission, the public entity shall pay any compromise or settlement based thereon to which the public entity has agreed and shall pay any judgment based thereon. Nothing in this section authorizes a public entity to pay any claim or judgment for punitive or exemplary damages.

903.10. (a) Subject to subdivision (b), if an employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under Section 903.9, the employee is entitled to recover the amount of such payment from the public entity.

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

903.11. Except as provided in Section 903.12, if a public entity pays any claim or judgment against itself or against an employee of the public entity, or any portion thereof, arising out of the negligent or wrongful act or omission of an employee of the public entity, the employee is not liable to indemnify the public entity.

903.12. (a) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee of the public

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

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

SEC. 2. Section 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-emregency-aid-given-to-inmates,-state-officials, employees,-and-to-members-of-the-public.]~~