meeting

11/9/62

Memorandum No. 76(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Tort Liability of Public Entities and Public Employees)

We have sent to you a revised recommendation and statute relating to tort liability of public entities and public employees. We have run the portions of the recommendation and the portions of the statute relating to the same topic on the same colored paper. General provisions relating to liability are on pink paper, dangerous conditions of public property is on yellow paper, police and correctional activities is on green paper, fire protection is on gold paper, medical is on blue paper, and tort liability under agreements between public entities is on white paper. The amendments and repeals are on buff paper at the end of the statute.

You should be familiar with the entire recommendation and statute. We hope that it may be sent to the printer after the November meeting. Many minor revisions have been made to accomodate the changes that the Commission has directed. We do not expect to discuss these matters unless a Commissioner has a question about any of them. Questions of policy and important questions in regard to the drafting of the statute or recommendation are presented hereafter in this memorandum. We do not expect to discuss the amendments and repeals or the notes appended to the amendments and repeals on buff paper. You should read them, however, so that you may raise questions about them at the meeting.

RECOMMENDATION

The recommendation is much the same as it was the last time it was presented to you. Pages 8 through 11 have been revised in accordance with the Commission's instruction to delete the references to "open end"

and "closed end" statutes.

There are revisions in the recommendation relating to dangerous conditions of public property (yellow pages) to reflect changes made by the Commission in the related statute.

On page 39 (green pages) you will note that paragraph 5 contains a reference to the release of prisoners on parole or probation. On page 47 (blue pages) there is a new discussion appearing in paragraph 6. These additions relate to additional sections which have been placed in the statute to express the Commission's policy. However, the specific immunities have not been considered by the Commission. Consideration, though, should be deferred until the related statutes are considered.

GENERAL LIABILITY STATUTE

The staff has placed notes under each section of the proposed statute to explain the function of the particular statute. For this reason, the discussion in the preceding recommendation is sometimes fairly general. You should be familiar with all of the notes so that they may be approved at this meeting whether or not we specifically consider any particular note.

There are listed below specific problems that the staff believes should be discussed in connection with various sections. You should be familiar with the other sections that are not listed so that you may raise questions concerning any matters that are not specifically mentioned below.

Section 810.8. The staff was asked to report on whether the word "tort" should be used in this definition for the purpose of clarification. There is attached to this memorandum as Exhibit I a portion of a memorandum

that was prepared in connection with the survival of actions study. The Commission, at the time it considered the survival of actions study, concluded that the use of the word "tort" in the survival statute would create unnecessary uncertainty and might lead to unnecessary litigation. You will note, though, that the statute as presently drafted follows Prosser's definition of "tort" fairly closely. The memorandum, citing Prosser, states that: "A tort has been described as 'a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.'" Although our definition of "injury" is not limited to tort injuries, Section 829 excludes causes of action based on contract from the statute, and Section 826 excludes causes of action for specific relief (to the extent that the right to such relief existed under the law of the State prior to January 1, 1961) from the operation of the statute. Thus, by exclusion, the statute defines the liability of public entities in much the same fashion that Professor Prosser has defined "tort".

There appears to be no real reason for restricting the definition of "injury" in Section 810.8. This definition neither imposes liability nor grants immunity. The immunities and liabilities of public entities and public officers and employees are determined under the provisions of Part 2 (beginning with Section 815). Thus, the real problem is one of confining Section 815 and Section 815.2 to tortious injuries. This problem will be discussed in connection with those sections.

Section 811.6. The definition of "regulation" is new. The definition was taken largely from Government Code Section 11371. The definition has been included in the statute because of the fear that the word

"regulation", if undefined, might be construed to include what are loosely called regulations but are not formal legislative or quasi-legislative actions.

Sections 815, 826 and 829. At the October meeting, during the discussion of Section 815, the question was raised whether Section 815 should be limited in its terms to money or damages. Some Commissioners believed that the Muskopf decision might have the effect of removing the immunity of governmental entities in equity cases and, therefore, Section 815 should not be limited to money or damages. In order not to curtail such right to equitable relief as may have existed prior to the Muskopf decision, the staff was asked to draft a section restricting the application of this part so that it would not affect any such pre-existing right to specific relief. The staff was also asked to draft a section excluding causes of action based on contract from the application of this part. The sections that the staff has drafted to accomplish these purposes are Sections 826 and 829. The problem with Section 826 is that it supposes that the law relating to equitable relief against public entities is in some way different before the effective date of the Muskopf case than it will be after. Although the doctrine of sovereign immunity as it originally existed may have protected public entities from judgments for specific relief as well as from judgments for damages, the California courts have for many years awarded equitable relief against public entities without regard for the doctrine of sovereign immunity. In Muskopf itself, Justice Traynor states that "Municipal corporations were first held subject to the court's equitable jurisdiction (Spring Valley Water Works v. City and

County of San Francisco, 82 Cal. 286[1880])." That case involved an ordinance adopted by the supervisors of San Francisco setting water rates. The enforcement of the ordinance was enjoined by a judgment against the City of San Francisco, the court holding that the board had exercised its discretion in an arbitrary and capricious manner. It would be difficult to conceive of a more "governmental" function than adopting and enforcing laws and ordinances.

The California law in regard to specific and preventative relief (not including relief by way of writ) derives from the following code sections:

> Civil Code § 3274. Species of Relief. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance: and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code. [Emphasis added.]
>
> Civil Code § 3366. Specific or preventive relief may be given as provided by the laws of this state.
>
> Civil Code § 3367. Specific relief, how given. Specific relief is given: 1. by taking possession of a thing, and delivering it to a claimant; 2. by compelling a party himself to do that which ought to be done; or, 3. by declaring and determining the rights of parties, otherwise than by an award of damages.
>
> Civil Code § 3368. Preventive relief, how given. Preventive relief is given by prohibiting a party from doing that which ought not to be done.
>
> Civil Code § 3420. Preventive relief, how granted. Preventive relief is granted by injunction, provisional or final.
>
> Civil Code § 3422. Injunction, when allowed. Except where otherwise provided by this Title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
>
> 1. Where pecuniary compensation would not afford adequate relief;
>
> 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
>
> 3. Where the restraint is necessary to prevent a

multiplicity of judicial proceedings; or,

4. Where the obligation arises from a trust.

Civil Code § 3423. An injunction can not be granted:

First--To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings.

Second--To stay proceedings in a court of the United States.

Third--To stay proceedings in another state upon a judgment of a court of that state.

Fourth--To prevent the execution of a public statute, by officers of the law, for the public benefit.

Fifth--To prevent the breach of a contract, other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character, which gives it a peculiar value the loss of which can not be reasonably or adequately compensated in damages in an action at law, the performance of which would not be specifically enforced; provided, however, that an injunction may be granted to prevent the breach of a contract entered into between any nonprofit cooperative corporation or association and a member or stockholder thereof in respect to any provision regarding the sale or delivery to the corporation or association of the products produced or acquired by such member or stockholder.

Sixth--To prevent the exercise of a public or private office, in a lawful manner, by the person in possession.

Seventh--To prevent a legislative act by a municipal corporation.

Under these sections, the courts have issued injunctions against a variety of local and state wide governmental agencies to restrain their governmental acts. A court of equity will not enjoin enforcement of a valid public statute or ordinance. Los Angeles v. Superior Court, 51 Cal.2d 423 (1959). When the validity of a law under which a board is acting is beyond question and the powers of the board are plain, a court will not enjoin such board from carrying out its statutory duties. State Board of Equalization v. Superior Court, 5 Cal. App.2d 374 (1935). But, where it appears that an officer is acting illegally under a statute,

he can be enjoined. Brock v. Superior Court, 11 Cal.2d 682 (1938). In the Brock case the supreme court held that the superior court has authority to restrain enforcement of a law until the constitutionality of the law is determined even though it is clear that the court has no authority to issue an injunction when it is conceded that an officer is acting within his authority. In Bueneman v. Santa Barbara, 8 Cal.2d 405 (1935) the supreme court held that the City of Santa Barbara could be enjoined from enforcing an unconstitutional licensing ordinance. Similarly, in MacLeod v. Los Altos, 182 Cal. App.2d 364 (1960) the City of Los Altos was enjoined from enforcing its "Green River ordinance" forbidding soliciting and begging against certain persons. In Jones v. Los Angeles, 211 Cal. 204 (1930) the city was enjoined from enforcing a zoning ordinance. In the cited cases, there are references to a great number of other cases in which governmental entities and their officers have been restrained from taking governmental action. It should be clear that under the doctrine of sovereign immunity a city could not be held liable for enacting an unconstitutional ordinance and Government Code Section 1955 prevented an officer, agent or employee of a political entity from being held liable for enforcing an unconstitutional ordinance or law.

The rule is stated in 28 Am. Jur. at 680: "While equity will not act to control discretionary acts, discretionary acts of public officers which are exercised arbitrarily, maliciously, in bad faith, and without a right purpose, are unlawful, and one suffering irreparable injury from such acts may have them enjoined."

The writ of mandamus is also used to control public officers. 32 Cal. Jur.2d at 181 states: "The general rule is that mandamus does not

lie to control the exercise of discretion conferred on a public officer or board, except to prevent its abuse." But the cases go quite far in controlling "abuse" of discretion. It has been settled since the earliest days of this state that public officers and entities are not liable for suspending or revoking licenses. Downer v. Lent, 6 Cal. 94 (1856). Yet writs are continually issued in license suspension cases to compel public agencies to exercise their discretion in a particular manner. The courts always state that they are doing so in order to prevent abuse of discretion. See the cases collected in the annotations under Code of Civil Procedure Section 1094.5. Under these cases the court is permitted to re-weigh the evidence before state administrative agencies created by statute in order to determine whether the agency's discretion has been abused.

Presumably, the law in regard to specific and preventive relief and in regard to the availability of the writ of mandamus will continue to develop. Inasmuch as the availability of these remedies is governed by other statutes the staff suggests that the Commission should avoid any indication that its proposed statute is in any way inconsistent with the statutes governing the availability of these other forms of relief. The language of 826, which the staff drafted in response to the Commission's action at the October meeting, implies that there is a limitation on the right to this form of relief in this statute. This may not be so in fact, for as a practical matter most specific relief cases are directed against public officers and not against public entities. Even in those cases where public entities are named as defendants, public officers are also named as defendants and the ordered action is always

directed to the officers involved. Nonetheless, the implication of Section 826 is inconsistent with the declaration in Section 3274 of the Civil Code that the provisions of Part 1 of the fourth division of the Civil Code govern specific and preventive relief.

The staff suggests either that the limitations stated in Section 826 be deleted or that Section 815 be modified to apply only to money or damages.

Section 815.2. In accordance with the Commission's directions the words "negligent or wrongful" have been deleted from Section 815.2 so that a public entity may be held vicariously liable in those situations where public employees would be subject to absolute liability. Because of the use of the phrase "negligent or wrongful" in the Federal Tort Claims Act, the federal government has been held immune from absolute liability. Even though there are California cases indicating that the word "wrongful" has a broader meaning, the problem is avoided by the deletion of the word from the section.

Section 816.4. The traditional statement of the cause of action for malicious prosecution is that the cause of action consists of instituting judicial proceedings without probable cause and with actual malice. The terms "actual fraud" and "corruption" seem to have no place in a malicious prosecution section. Hence, the staff has deleted these terms from this section. This makes the section parallel with the immunity section relating to public officers. See Section 821.6.

Section 818.6. The staff was directed to revise this section to make clear that an entity is not liable for failure to comply with a duty to inspect the property of others but is liable for a failure to

inspect its own property when it has a mandatory duty to do so. This section has been revised to accomplish that purpose. Under the section a public entity, nothwithstanding the mandatory duty section, is not liable for failure to inspect the property of others. In Section 821.4, a similar modification has been made.

There is still a slight problem with these sections, but it is not likely to cause a great deal of practical trouble. Under these sections the state may be held liable because of the failure of an employee of the State Department of Public Health to exercise due care in inspecting some facility operated by another agency of the state, even though in conducting such inspection the employee is merely enforcing health or safety rules the same as he would be if he were inspecting the property of any other person.

Dangerous Conditions of Public Property. Because of the deletion of the section imposing liability upon public entities for nuisance, the only liability for nuisance will be under the dangerous conditions statute. This may be all right, but the Commission should be aware that there are many nuisances for which public entities have been held liable which are not "dangerous" except in a highly technical sense. For instance in Hassell v. San Francisco, 11 Cal.2d 168 (1938) a property owner was able to enjoin a threatened nuisance which would have consisted of a "public convenience station" in a public park approximately 120 yards from the plaintiff's residence. In Phillips v. City of Pasadena, 27 Cal.2d 104 (1945), a resort owner was held to be entitled to recover damages caused by the closing of an access road upon the theory of nuisance. In the nuisances cases, there is no need to make out the

conditions of liability stated in the dangerous conditions statute, or, under existing law, under the Public Liability Act. Nuisance liability is a form of absolute liability.

Section 830.4, 830.6, and 830.8. Note the immunities mentioned in these sections. The language of the sections is new and expresses the policies adopted by the Commission at the October meeting. Section 830.4 grants immunity from liability under this chapter so that liability might be imposed under the general liability act if it were applicable in a particular situation. Under Section 830.6, subdivision (d) was limited to injury arising out of recreational use of property as the staff did not believe that the Commission intended to immunize public entities for taking no action in regard to hazards to navigation and similar conditions. Note the definition of an "interior access road" that appears in subdivision (e). The remainder of the dangerous conditions statute appears in the form recommended by the committee that considered these matters at the October meeting. Hence, these revisions have not as yet been approved by the Commission. You will note that the reasonable inspection system has been made a matter of defense on the question of notice.

Section 845.8. Subdivision (a) has been added to this section to express a policy similar to that which the Commission adopted in regard to the release of insane persons.

Section 855.6. This section has been re-written to include all types of conditions for which a person may be committed to a public hospital. You will note that the list of conditions is quite a long one and includes such things as epilepsy about which medical knowledge is extensive.

The Commission, therefore, may wish to consider whether to delete epilepsy or any of the other conditions from the section. The section confers an immunity upon public employees for diagnosing and treating these matters.

Section 856. This section is new, and reflects a policy similar to that in Section 818.6. The note underneath the section explains the purpose for its inclusion.

Use of the word "enactment". The staff was asked to report to the Commission on the use of the word "enactment" so that the Commission might consider whether the use of the defined term (Section 810.6) is intended in each case.

Section 815, 815.2. The word "enactment" is used in these two sections to indicate that there may be exceptions to the immunity rules which they provide. Enactment includes regulations. It seems somewhat questionable to permit administrative agencies to accept liability on behalf of the state where they have general regulatory authority in regard to particular matters. Then, too, liability of public entities seems to be a matter of statewide concern upon which it may not be desirable to have varying ordinances and charter provisions.

Actually, as the note to Section 815.2 makes clear, subdivision (b) of Section 815.2 is unnecessary.

Section 815.6, 818.4, and 818.6. The use of the word "enactment" appears to be appropriate in these sections.

Section 820. The problem involved in this section is the same as that involved in Sections 815 and 815.2. It seems somewhat questionable

to permit liability of public employees to be created by administrative agencies.

Sections 820.2 and 820.4. The use of the word "enactment" in these sections appears to be proper.

Section 820.6. In this section we say "authorized by law". However, it appears an appropriate use of the phrase because the Commission intends to refer not only to enactments but to the uncodified law declared by the courts.

Section 820.8. The use of the word "enactment" in this section seems somewhat questionable for the reasons mentioned in connection with Sections 815 and 815.2. Actually the entire section seems somewhat questionable in view of the deletion from the statute of the section creating entity liability for negligent supervision. Because of this section, there is no liability for injuries resulting from negligent supervision if there is no cause of action against the entity arising out of the act or omission of the employee who actually caused the injury. Perhaps this section should provide that a public employee is not liable for an injury caused by the act or omission of another employee unless he is himself guilty of negligent or wrongful conduct. This would be enough to preclude any respondeat superior liability on the part of superior employees and would permit entities to be held liable for negligent supervision where the actual injury was inflicted outside the scope of employments.

Sections 821, 821.2 and 821.4. The use of the word "enactment" in these sections appears to be proper.

Section 821.8. In this section we use the word "statute" even

though the situation seems comparable to those in Sections 820, 820.8, 815, and 815.2.

Section 855. The next use of the words with which we are concerned appears in Section 855. Here we use "statute or regulation". In the context, however, it appears appropriate to use these words since we are limiting the regulations involved to those of the State Department of Public Health or the State Department of Mental Hygiene. In subdivision (c) the word "law" is used at the end of the section. It is possible that "statute" may be preferred.

Section 855.4. In this section we use the word "legally". The use of the word was deliberate. It was used to pick up administrative rules other than regulations. This seems to be a somewhat subtle manner of doing so. The recommendation, at page 45, makes clear what is intended; but neither the statute nor the note underneath the particular section involved indicates the reason for the varying phraseology.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

October 30, 1962

EXHIBIT I

DEFINING INJURY BY REFERENCE TO "TORT"

The fundamental problem here is that no one seems to have come up with a satisfactory definition of "tort." The writers seem unanimous only on the difficulty, if not the impossibility, of the task. A tort has been described as "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."[1] Although this statement is no doubt correct it is not particularly helpful in determining whether a particular action is a tort since it really only says that a tort is one kind of wrong for which the law gives a particular remedy.

Some have undertaken to describe torts by saying that they consist of breaches of duties imposed on the parties by the law itself, without regard to their consent to assume them, or their efforts to evade them.[2] This distinction is not entirely correct, however, since all legal duties are of course imposed by the law, and under the "objective" theory of contracts contract obligations are held to be imposed not because of subjective intent or consent, but because of consequences the law attached to the parties' conduct. Also, quasi-contractual and familial duties (to name only two) are imposed by the law without regard to the consent of the defendant.

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1. Prosser, Law of Torts 2 (2d ed. 1955).
2. Winfield, Law of Tort 6 (2d ed. 1943).

Others have attempted to define torts by saying that tort duties are duties owed to persons generally or toward general classes of persons rather than to specific individuals.[3] Although this may be true generally, it does not follow in all cases. For example, the tort liability of a servant to his master or the bailee to his bailor, or of a converter of goods to their owner rests upon a duty owed to one person, and one only "and it can be called general only in the same sense that everyone is under a general obligation to perform all of his contracts."[4]

Attempt has also been made to define torts by enumerating what they are not. This, too, is only partially helpful since "tort is a field which pervades the entire law, and is so interlocked at every point with property, contract and other accepted classifications that, as the student of law soon discovers, the categories are quite arbitrary and there is no virtue in them."[5] Along this same line some writers have attempted to define torts by saying that besides not including breaches of contract and wrongs exclusively criminal, they do not include "civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively" and do not include "civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation."[6] These distinctions, however,

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3. Id. p. 8.
4. Prosser, op. cit. note 1, p. 5.
5. Id., p. 2.
6. Heuston, Salmond on Torts 8-14 (12th ed. 1957).

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

Number 1 — Tort Liability of Public Entities and Public Employees

January 1963

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

[On Commission Letterhead]

LETTER OF TRANSMITTAL
[For use in printed pamphlet]

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

On January 27, 1961, the California Supreme Court, in Muskopf v. Corning Hospital District, decided that the doctrine of sovereign immunity would no longer protect public entities in California from civil liability for their torts. At the same time the court decided Lipman v. Brisbane Elementary School District, in which it stated that the doctrine of discretionary immunity, which protects public officers and employees from liability for their discretionary acts, might not protect public entities from liability in all situations where the officers and employees are immune.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the Muskopf and Lipman decisions until the ninety-first day after the adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the public entities in California will be liable for their torts under the conditions set forth in the Muskopf and Lipman cases.

Since the decision in the Muskopf case, the Commission has devoted substantially all of its time to the study of

sovereign immunity.

The Commission herewith submits its recommendation on one portion of this subject--tort liability of public entities and public officers and employees. This is one of six reports prepared for the 1963 legislative session containing the recommendations of the Commission relating to various aspects of the subject of sovereign immunity. The Commission has also published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

In formulating its recommendations concerning sovereign immunity, the Commission first prepared a series of tentative recommendations, each of which related to a different aspect of the subject. These tentative recommendations were widely distributed and comments and suggestions were solicited from all persons and organizations who have expressed an interest in this subject. The State Bar appointed a special committee to consider the recommendations of the Commission relating to sovereign immunity and this Committee has provided the Commission with helpful comments and suggestions. In addition, representatives of various public entities and other interested organizations have attended the meetings of the Commission as observers. All comments and suggestions received were considered by the Commission in preparing its final recommendations.

Although the Commission has devoted the major portion of its time during the past two years to the study of sovereign immunity, the subject is so vast that a complete study of its aspects could not be completed prior to the 1963 legislative session. The recommendations prepared for the 1963 legislative session are designed to meet the most pressing problems in regard to governmental tort liability. Problems may remain to be solved

in the areas of activity already studied; and there are other areas of activity, where claims of liability arise less frequently, which require attention. Accordingly, the Commission proposes to continue its study of this subject and to make recommendations to subsequent legislative sessions dealing with these remaining problems.

Respectfully submitted,

Herman F. Selvin
Chairman

C O N T E N T S

BACKGROUND

On January 27, 1961, the California Supreme Court, in Muskopf v. Corning Hospital District,[1] decided that the doctrine of sovereign immunity would no longer protect public entities in California from civil liability for their torts. At the same time, the court decided Lipman v. Brisbane Elementary School District,[2] in which it stated that the doctrine of discretionary immunity, which protects public employees[3] from liability for their discretionary acts, might not protect public entities from liability in all situations where the employees are immune.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspends the effect of the Muskopf and Lipman decisions until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature. At that time, unless further legislative action is taken, the public entities of California will be liable for their torts under the conditions set forth in the Muskopf and Lipman decisions.

The Need for Legislation

Prior to the Muskopf and Lipman decisions, extensive legislation relating to the subject of governmental liability or immunity had been enacted. This legislation expresses a variety of conflicting policies.

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1. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).
2. 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).
3. As used in this tentative recommendation, "employee" includes an officer, agent or employee, and "employment" includes office, agency or employment.

Some statutes create broad immunities for certain entities and others create wide areas of liability. Some apply to many public entities and others apply to but one. In some cases, statutes expressing conflicting policies overlap.[4] Even where statutes impose liability on public entities, they do so in a variety of inconsistent ways. Some entities are liable directly for the negligence of their servants. Others are not liable directly, but are required to pay judgments recovered against their personnel even where the judgments result from malicious acts.

Where statutes are not applicable, the courts have determined liability on the basis of whether the injury was caused in the course of a governmental or proprietary activity. Thus, if the injury occurred in a swimming pool (a "governmental" activity), the public entity was not liable; but if the injury occurred on a golf course (a "proprietary" activity), the public entity was liable.

Even where the government is immune from liability for a negligent or wrongful act or omission, the governmental employee who acted or failed to act is often personally liable; and many governmental entities have assumed the cost of insurance protection for their employees against this liability.

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4. For example, Streets and Highways Code Sections 5640 and 5641 (part of the Improvement Act of 1911) provide that cities, counties, resort districts and all corporations organized for municipal purposes are immune from liability for injuries caused by street and sidewalk defects. It is likely that these immunity provisions apply to several other kinds of districts, for the Improvement Act of 1911 hasbeen incorporated by reference in many other statutes. But Government Code Section 53051 provides that cities, counties and school districts are liable for such dangerous conditions. As the Government Code section was last enacted, it has impliedly repealed the Streets and Highways Code sections insofar as cities and counties are concerned, but not insofar as resort districts and corporations organized for municipal purposes are concerned.

Thus, even before the Muskopf and Lipman cases were decided, there was a great need for comprehensive legislation to deal with the problems of governmental liability and immunity.

The effect of the Muskopf and Lipman decisions on the existing statutes is not clear. Statutes that impose liability upon public entities in particular areas of activity may be construed either as limitations on the liability that would exist under these decisions or, in cases where a rule is declared that is broader than the common law rule that would be applicable under these decisions, as extensions of governmental liability.

The problem of reconciling the Muskopf and Lipman decisions with the existing statutory law could be met by repealing the existing statutes. Then the courts could decide all cases under the general principle that the government is liable for its torts. In some jurisdictions this approach to governmental liability has been taken. Thus, in some states, a statute merely declares that the government is not immune from liability for its torts, while in others, the courts have declared a similar rule.

This solution to the problem, though, is fraught with difficulties. No precise standards for the determination of the liability of government have as yet been defined by the California courts. Hence, it is impossible to ascertain how large the potential liability would be even if the Muskopf and Lipman cases were permitted to determine all governmental liability. The suggestion in the Lipman case that public entities may be liable for discretionary actions of governmental officers has given rise to fears that governmental liability may be expanded to the extent

that essential governmental functions will be impaired. Experience in states which have left the limits of liability to be determined by the courts has shown that liability insurance to protect the financial integrity of small public entities is at times prohibitively expensive or impossible to obtain when there is no defined limit to the potential extent of liability. As a result, some of these states have enacted legislation that substantially curtails governmental liability.

The courts, of course, have recognized that the liability of government cannot be unlimited. In the Muskopf case the Supreme Court stated that it is not a tort for government to govern. In other jurisdictions where there has been a general waiver of sovereign immunity, the courts have worked out the limits of liability on a case by case basis over a period of years. Thus, in New York, the courts have declared that public entities are not liable for failing to enforce the law, for negligently inspecting buildings or for improperly issuing building permits. If the limits of governmental liability are not specified by statute in California, it is likely that our courts will eventually define the limits of liability much as the courts have done in New York. Under this process, though, many years will pass before the extent of governmental liability can be determined with certainty. Many cases must be tried and processed through the appellate courts. Large amounts of both private and public money must be fruitlessly expended in prosecuting and defending actions where the governmental defendant cannot be held liable. And in the meantime, while the potential liability is yet unknown, the financial stability of many governmental entities may be unprotected because insurance may not be available to protect them against an undefined risk.

There is an immediate need, therefore, for the enactment of comprehensive legislation stating in considerable detail the extent to which governmental entities will be liable when the legislation suspending the effect of the Muskopf and Lipman decisions expires. In preparing this legislation, California may profit from the experience of the New York and the federal governments in administering their governmental tort laws. The difficulties the New York and federal courts have experienced in defining the limits of liability may be avoided here to a considerable extent by the statement of these limits in statutory form. Where the New York and federal courts have reached sound conclusions, the rules declared may be enacted here so that no time or money need be lost in test cases to determine whether the California courts will reach the same conclusions. Where the courts of these jurisdictions have reached unsound conclusions and have either restricted liability unduly or placed burdens on government that impair its ability to perform its vital functions, California can meet the problem by declaring a different rule by statute.

The resulting certainty will be of benefit both to governmental entities and to persons injured by governmental activities. If the limits of potential liability are known, governmental entities may plan accordingly, may budget for their potential liabilities, and may obtain realistically priced insurance. Meritorious claims will not be resisted in the hope that the appellate courts will create an additional immunity; and unmeritorious claims will not be pressed in the hope that an existing immunity will be curtailed or that liability will be extended beyond previously established limits.

The Difficult Problem of Drawing Standards for Governmental Liability

The problems involved in drawing standards for governmental liability and governmental immunity are of immense difficulty. Government cannot merely be made liable as private persons are, for governmental entities are fundamentally different than private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only governmental entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a governmental entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision making has been allocated among three branches of government--legislative, executive and judicial--and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions.

The courts have recognized these problems where tort actions have been brought against public employees for injuries caused by their activities. Where the injury is caused by a discretionary act of a

public employee that was committed within the scope of the authority delegated to him, the public employee has been held immune from liability. The courts have said that this immunity is necessary because the employee's fear of personal liability might otherwise inhibit him from carrying out his public duties with diligence. Similar considerations justify a comparable immunity where the claim is against the government itself instead of an employee of the government, for rising expenses and a limited tax base may make a public employee as apprehensive of the effect of governmental liability upon the budget he must administer as he is of the effect of personal liability upon his own resources.

Yet it would be harsh and unjust to deny compensation to all persons injured as the result of the wrongful or negligent acts of governmental servants. Government operates for the benefit of all; hence, it is reasonable to expect that all should bear some of the burden of the injuries that are wrongfully inflicted by the government. The basic problem is to determine how far it is desirable to permit the loss distributing function of tort law to apply to governmental agencies without unduly frustrating or interfering with the other desirable purposes for which such agencies exist.

The Legislation Proposed by the Commission

Determination of basic statutory approach. The initial question to be decided in formulating a legislative plan to govern the tort liability of governmental entities is whether they should be liable only as made liable by statute or whether they should be made liable for all damages and injuries caused by their activities except as such liability is limited or conditioned by statute.

A statute imposing liability with specified exceptions would provide the governing bodies of public entities with little basis upon which to budget for the payment of claims, judgments and damages, for public entities would be faced with a vast area of unforeseen situations, any one of which could give rise to costly litigation and a possible damage judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the courts and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under such a statute would no doubt be greater than under a statute which provided for liability only to the extent provided by statute, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by statute. This type of liability statute will provide a better basis upon which the financial burden of liability may be calculated,

since each statutory provision imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability may then be imposed by carefully drafted statutes.

Formulation of rules governing liability. In its formulation of the rules governing liability of public entities and public employees, the Commission has studied a number of areas of potential liability: dangerous conditions of public property; police and correctional activities; suppression of mobs and riots; fire protection; medical, hospital and public health activities; park and recreational activities; and operation of motor vehicles. These are the areas where experience in other states and under the Federal Tort Claims Act has shown that claims of liability are most apt to arise. In each area, the Commission has sought to determine how the interest of the public in effective governmental administration should be balanced against the need for providing compensation to those injured by the activities of government. From this study of particular areas of government activity, the Commission has concluded that certain problems recur and that the rule formulated to meet such a problem in one area may be readily applied to all areas of governmental activity. On the other hand, in some areas of activity there are unique problems that require a specific legislative solution. Therefore, the Commission recommends the enactment of legislation containing sections of general application to all activities of governmental entities and, in addition, a number of sections stating special rules applicable to problems requiring separate treatment.

One of the most important provisions in the recommended legislation provides that public entities are liable for the torts of their employees within the scope of their employment to the extent that such employees are personally liable. The liability of public employees is an existing liability and one for which insurance companies now provide insurance coverage. By imposing vicarious liability only to the extent that public employees are personally liable, the provision adopts a liability of ascertained or ascertainable limits. This avoids the problems inherent in a statute (such as those adopted in New York and by the federal government) that waives immunity from liability generally and attempts to specify exceptions to governmental liability, for the possibility that government may be liable for discretionary acts for which public employees are immune is foreclosed unless, by specific enactment, such liability is accepted by the legislative branch of the government.

The provision imposing vicarious liability on public entities is qualified by a number of other provisions providing for immunity in particular cases. The most significant of the immunity provisions contained in the recommended legislation is one that provides that neither public entities nor public employees are liable for discretionary acts within the scope of an employee's authority. Under existing law, public employees enjoy this discretionary immunity; but the statutory statement of the rule will assure its continued existence. Although the case law has spelled out in some detail the extent of the discretionary immunity of public employees, there are instances where the law is not clear. The Commission hereinafter proposes numerous statutory provisions that will clarify the limits of discretionary immunity. These provisions

will, to a considerable extent, eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions. The judicial process, by its very nature, can deal only with the isolated problems of individual citizens which from time to time are litigated and appealed. To wait for the fabric of the law to shape itself in this fashion would be slow, unpredictable and expensive.

The Commission has also concluded that under certain circumstances public entities should be liable although no employee is personally liable. For example, such liability should exist in some cases where public property is in a dangerous condition or where a public entity fails to exercise reasonable diligence to comply with an applicable statute which establishes minimum standards for equipment, personnel or facilities in a public hospital. Such liability should exist, however, only where the liability is created by statute. In absence of such a statute, public entities should not be liable unless an employee is personally liable.

The legislation recommended by the Commission will meet the most pressing problems in regard to liability that public entities will face upon the expiration of the statute suspending the effect of the Muskopf and Lipman decisions. The subject of sovereign immunity is so vast, however, that a complete study of all aspects of the subject could not be completed prior to the 1963 session of the Legislature. Problems may remain to be solved in the areas of activity already studied; and there are other areas of activity, where claims of liability arise less frequently, which require attention. Accordingly, the Commission intends to continue its study of sovereign immunity so that recommendations may be submitted to subsequent legislative sessions to deal with these remaining problems.

RECOMMENDATIONS

General Provisions Relating to Liability

1. A statute should be enacted providing that public entities are not liable for torts unless they are declared to be liable by statute. This recommendation will permit the Legislature to establish the limits of governmental liability by statute. The Commission is recommending the enactment of several statutes imposing liability upon public entities within limits that are carefully described. These limits would have little meaning if liability could be imposed beyond the area defined in the statutes.

2. A public entity should be liable for a negligent or wrongful act or omission[1] of its employee within the scope of his employment[2] to the extent that the employee is personally liable for such act or omission. This would impose upon public entities the same responsibility for the tortious acts of their employees as presently rests upon private employers.

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1. The phrase "negligent or wrongful act or omission" embraces any act or failure to act, whether negligent, intentionally tortious or criminal. The fact that the act done is a serious crime is, of course, a factor indicating that it is not in the scope of employment.

2. The phrase " scope of his employment" is intended to make applicable the general agency principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the principal for the torts of the agent.

For many entities, this recommendation would constitute a substantial expansion of their tort liability. For many others, however, this recommendation would constitute little or no extension of their existing liability. School districts and reclamation districts are now generally liable for the negligence of their personnel. Certain flood control districts are generally liable for the negligence of their trustees. Community services districts, county water districts, various water agencies and several other districts are required to pay any judgments recovered against their personnel for acts or omissions committed in the service of the district. Irrigation districts and California water districts must pay judgments recovered against their officers. Thus, over 2,400 public entities in California are now financially responsible for the torts of some or all of their personnel. In addition, Vehicle Code Section 17001 subjects all public entities in the State to liability for the negligent operation of motor vehicles by their personnel; and cities, counties and school districts are liable under existing law for injuries caused by dangerous conditions of public property that have been negligently created or permitted to remain. The Commission's recommendation would extend the principle underlying these statutes to all public entities in the State, thus permitting the repeal of numerous statutes that are, without apparent reason, inconsistent both as to the manner in which the principle is applied and as to the personnel covered.

3. Public entities should be immune from liability for acts or omissions

of their employees in regard to matters which are committed to the discretion of such employees. This recommendation would make applicable to public entities the discretionary immunity doctrine now applicable only to public employees. Under this doctrine, public employees are not liable for their acts or omissions within the scope of their discretionary authority. Thus, for example, judges are immune from liability for their judicial acts, prosecutors are immune from liability for instituting criminal prosecutions, administrative officials are immune from liability for suspending or revoking licenses, health officers are immune from liability for deciding not to quarantine, and city officers are not liable for awarding a franchise.

A dictum in the Lipman case stated that public entities should be liable in some situations where public employees enjoy an immunity. The Commission agrees that there are some instances where such should be the rule. For example, a public entity is made liable under the recommended legislation for its failure to exercise reasonable diligence to comply with a mandatory statute or enactment. In the absence of a statute imposing such liability, however, the public entity should not be liable for the discretionary act or omission of a public employee. In order to clarify the limits of the discretionary immunity, the Commission has considered the application of the doctrine in areas where claims of liability most often arise and recommends specific statutory provisions that will indicate whether or not liability should exist in particular situations. Where no specific provision covers a particular case, the discretionary immunity developed or to be developed by the cases in regard to the personal liability of public personnel will be the standard of immunity

for governmental entities.

The Commission recognizes that occasionally the application of the discretionary immunity doctrine may seem harsh and unfair--as, for example, when persons are denied all relief in those rare cases where injuries are caused by deliberate and malicious abuses of governmental authority. The Commission, in its continuing study of sovereign immunity, will undertake a study of other areas where the discretionary immunity doctrine applies to determine whether further modifications of the doctrine should be made.

4. Public entities should be liable for the tortious acts of independent contractors to the extent that private persons are liable for the torts of their independent contractors. Under existing law, private parties and public entities have been held liable for the negligence of an independent contractor when the contractor is performing a nondelegable duty, where the hazardous nature of the work called for by the contract may result in injury if care is not exercised, and where the very act the contractor undertakes to perform causes the injury. Public entities as well as private parties should not be able to escape their legal responsibilities by contracting for the performance of work that is likely to lead to injury.

5. Public entities should be liable for the damages that result from their failure to exercise reasonable diligence to comply with applicable standards of safety and performance that have been established by statute and regulation. Although decisions relating to the facilities, personnel or equipment to be provided in various public services involve discretion and public policy to a high degree, nonetheless, when minimum standards of safety and performance have been fixed by law and regulation--as, for example, the duty to supervise pupils under Education Code Section 13557 and the rules of the State Board of Education, the duty to provide lifeguard service at public swimming pools under Health and Safety Code Section 24104.4 and the regulations of the State Department of Public Health, or the duty to meet applicable requirements established by law in the construction of improvements--there should be no discretion to refuse to comply with those minimum standards.

6. Under the common law, certain public officers were at times held liable for the acts of subordinate employees even though the officers themselves were innocent of any negligence or other wrong. For most public officers, though, the courts held that respondeat superior was inapplicable and that they were not liable for the acts of their

subordinates unless they participated in those acts or were negligent in appointing or failing to discharge or take other appropriate action against unfit subordinates.

A large number of statutes have been enacted limiting the liability of public officers for the acts of others, many of which are inconsistent with each other. These statutes should be replaced by a statute providing that a public entity is liable for injury caused by a public employee where the injury has resulted from the failure of the responsible officials of the public entity to exercise due care in the selection or appointment of the employee or in failing to take steps to remove him from a position where he created a risk of injury.

7. The immunity from liability for malicious prosecution that public employees now enjoy should be continued. A review of the cases reaching the appellate courts reveals that a great many malicious prosecution suits against public employees are groundless. Public officials should not be subject to harassment by "crank" suits. However, where public employees have acted maliciously in using their official powers, the injured person should not be totally without remedy. The employing public entity should, therefore, be liable for the damages caused by such abuse of public authority; and, in those cases where the responsible public employee acted with actual malice, the public entity should have the right to seek indemnity from the employee.

8. Public entities should not be liable for punitive or exemplary damages. Such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers.

9. An essential function of government is the making and enforcing of laws. The public officials charged with this function will remain politically responsible only if the courts exercise no review of the desirability of enacting and enforcing particular laws through the device of deciding tort actions. Hence, the statutes should make clear that public entities and their employees are not liable for any injury flowing from the adoption of or failure to adopt any statute, ordinance, or regulation or from the execution of any law with due care.

For similar reasons, public entities and their employees should not be liable for inadequate enforcement of any law or regulation or for failure to take steps to regulate the conduct of others. The extent and quality of governmental service to be furnished is a basic governmental policy decision. Public officials must be free to determine these questions without fear of liability either for themselves or for the governmental bodies that employ them if they are to be politically responsible for these decisions.

The remedy for officials who make bad law, who do not adequately enforce existing law, or who do not provide the people with services they desire, is to replace them with other officials. But their discretionary decisions in these areas cannot be subject to review in tort suits for damages if government is to govern effectively.

Public entities and public employees should not be liable for negligent or wrongful failure to enforce any law. They should not be liable for failing to adequately inspect persons or property to determine compliance with health and safety regulations. Nor should they be liable for negligent or wrongful issuance or revocation of licenses

and permits. These activities the government has undertaken to insure public health and safety. To provide the utmost public protection, governmental entities should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately. Moreover, if liability existed for this type of activity, the risk exposure to which a public entity would be subject would include virtually all activities going on within the community. There would be potential governmental liability for all building defects, for all crimes, and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude. In these cases, there is usually some person other than the governmental employee who is liable for the injury, but liability is sought to be imposed on government for failing to prevent that person from causing the injury. The Commission believes that it is better public policy to leave the injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury. Far more persons would suffer if government did not perform these functions at all than would be benefitted by permitting recovery in those cases where the government is shown to have performed inadequately.

Sections 50140 through 50145 of the Government Code are inconsistent with the foregoing recommendations. These sections impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. These sections are an anachronism in modern law. They are derived from similar English laws that date back to a time when the government relied on local townspeople to suppress

riots. The risk of property loss from mob or riot activity is now spread through standard provisions of insurance policies. Accordingly, these sections should be repealed.

At common law, public officers were immune from liability for trespasses necessarily committed in the execution of law. However, if the authority of the officer was abused or if he committed some tortious injury while upon the property, he was personally liable ab initio as a trespasser for the entry and all injuries resulting therefrom. A great many statutes have been enacted to modify this common law rule. In somewhat inconsistent terms, they generally limit the liability of the officer to the damages flowing from his negligent or wrongful act. But there are many other statutes authorizing public officials to enter private land that contain no reference to the liabilities that may be incurred. These various statutes should be superseded by a statute applicable to all public entities limiting the liability of the entering officer and his employing public entity to the damages caused by his negligent or wrongful act. The enactment of such a statute will permit the repeal of a large number of statutes declaring a similar rule.

Government Code Section 1955 now provides public employees with an immunity from liability for enforcing laws later held to be unconstitutional. This section, though, does not provide adequate protection. It is not clear whether it applies to State constitutional provisions, charter provisions, ordinances or administrative regulations. Moreover, it does not provide protection for an officer who in good faith enforces a law later held to be repealed by implication or inapplicable for any other reason.

The protection should be broadened to provide an immunity whenever an employee, exercising due care and acting in good faith and without malice, enforces any constitutional provision, statute, charter provision, ordinance or regulation that is subsequently held to be invalid or inapplicable for any reason.

10. Government Code Section 1953.5 provides that public officers are not liable for money stolen from their custody unless they failed to exercise due care. This statute should be made applicable to all public employees and placed in the statute dealing generally with the liabilities and immunities of public employees.

11. 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, the public entity should be required to pay the compensatory damages, but not punitive damages, awarded in the judgment if the public entity has been given notice of the action and an opportunity to defend it. A number of 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.

12. 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. This right to indemnity, however, should not exist in any case where the public entity

has undertaken the defense of 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 if the employee acted with malice the public entity could recover indemnity from the employee for any amounts the entity was required to pay. 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.

13. Section 1095 of the Code of Civil Procedure, which requires that damages assessed in a mandate action be levied against the entity represented by the respondent officer, should be amended to apply to all public entities and to agents and employees as well as officers. The section presently applies only to officers of the State, counties and municipal corporations.

Dangerous Conditions of Public Property

Background

Prior to the 1961 decision in Muskopf v. Corning Hospital District,[1] a public entity was not liable for an injury resulting from a dangerous condition of public property owned or occupied for a "governmental" purpose, as distinguished from a "proprietary" purpose, unless some statutory waiver of its sovereign or governmental immunity was applicable. The principal statutory waiver was found in the Public Liability Act of 1923, now Section 53050 et seq. of the Government Code.[2] This Act waived immunity from liability for dangerous conditions only for cities, counties and school districts. There is no other general statute waiving governmental immunity from liabilities arising out of dangerous conditions of public property.

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

2. The section of the Public Liability Act that states the conditions of liability for dangerous conditions is Government Code Section 53051. It provides:

> A local agency [defined in Section 53050 as a city, county or school district] is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
>
> (a) Had knowledge or notice of the defective or dangerous condition.
>
> (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

Prior to the Muskopf decision, however, all public entities were liable for injuries arising out of "proprietary" activities. This liability was based upon common law principles of liability applicable to private individuals. Thus, all public entities were liable for injuries caused by dangerous conditions of property owned or occupied for a proprietary purpose to the same extent that private owners and occupiers of land are liable to trespassers, licensees and invitees for injuries caused by dangerous conditions. In the case of cities, counties and school districts, liability for injuries caused by dangerous conditions of property owned or occupied for a proprietary purpose could be based either on the Public Liability Act or on common law principles of liability of owners and occupiers of land.

There are significant differences in the standard of liability under the Public Liability Act and the common law standard of liability for owners and occupiers of land. There are also striking similarities. Under the Public Liability Act, as well as under common law principles, liability for dangerous conditions of property may exist only if the owner or occupier of the property has created or otherwise knows of the condition. Knowledge of the condition under either the Public Liability Act or common law principles may be actual or constructive. However, under the Public Liability Act, a public entity may be held liable only if the knowledge is that of the governing body or of an officer authorized to remedy the condition. Under common law principles, the knowledge of employees will be imputed to the landowner if such knowledge relates to a matter within the scope of the employee's employment.

As a general rule liability of a private landowner to a trespasser or licensee for a condition of the property must be based upon wanton or wilful injury and not merely upon negligent failure to discover or correct dangerous conditions. Hence, a private landowner is under no general duty to inspect his land to discover conditions that are apt to expose licensees and trespassers to danger. A private landowner may be held liable to licensees--and possibly to trespassers-- for failure to discover and repair dangerous conditions in instrumentalities such as electric power lines where extremely hazardous conditions may arise if inspections and repairs are not made with due diligence.

On the other hand, the Public Liability Act draws no distinctions between invitees, licensees and trespassers. Thus, a public entity may be held liable under that Act for injuries to trespassers and licensees caused by conditions of property even though common law principles would not impose liability under the same circumstances.

Effect of the Muskopf Decision

In the Muskopf case, the Supreme Court held that the doctrine of sovereign immunity will no longer be a defense for public entities. Under this decision, public entities other than cities, counties and school districts will probably be liable under common law principles for injuries caused by dangerous conditions of public property -- whether such property is owned or occupied in a governmental or proprietary capacity -- to the same extent that private landowners are liable.

Just what effect the Muskopf decision will have upon the liabilities of cities, counties and school districts for dangerous conditions of property is not certain. Recent decisions of the District Courts of Appeal have indicated that the Muskopf decision will have no effect at all -- that these entities will be liable for dangerous conditions of property owned or occupied in a governmental capacity only under the conditions specified in the Public Liability Act and will be liable for dangerous conditions of property owned or occupied in a proprietary capacity under both the Public Liability Act and common law principles. These decisions reflect the view that the Muskopf decision did not purport to alter the standards of liability declared in the Public Liability Act as interpreted by court decisions, despite the fact that those standards incorporated the distinction between governmental and proprietary functions. In view of the unqualified renunciation of that distinction in Muskopf, however, it is possible that the Supreme Court may hold that common law principles furnish an alternative basis for the liability of cities, counties and school districts for dangerous conditions of property owned or occupied in a governmental capacity.

So far as counties, cities and certain other public entities are concerned, the Muskopf decision probably will not broaden their liability for dangerous street and sidewalk conditions. Streets and Highways Code Section 5640 grants these entities a statutory immunity from liability for street and highway defects except to the extent that the Public Liability Act imposes liability. Although the Muskopf decision may have wiped out the common law immunity of governmental entities, it is likely that it did not affect this statutory immunity.

Recommendation

The Law Revision Commission has concluded that the pre-Muskopf law relating to the liability of governmental entities for dangerous conditions of public property used for governmental purposes does not adequately protect persons injured by such conditions, nor does it adequately protect public entities against unwarranted tort liability. Many governmental entities are not liable at all for injuries caused by their negligence in maintaining such property. In the cases where the Public Liability Act is applicable, the liability that has been placed upon public entities has been broader than is warranted by a proper balancing of public and private interests, for the Act does not have any standard defining the duty of an entity to make inspections to discover defects in its property. As a result, public entities have been held liable at times for dangerous conditions which a reasonable inspection system would not have revealed.

Moreover, the pre-Muskopf law is unduly and unnecessarily complex. If no changes are made in the existing statutes, it seems unlikely that the situation will be greatly improved when the Muskopf decision becomes effective. There is, for example, no reason for having one law applicable to dangerous conditions of publicly owned swimming pools (held to be a governmental activity) and another law applicable to dangerous conditions of publicly owned golf courses (held to be a proprietary activity), for applying one standard of liability to cities, counties and school districts and another to all other governmental entities, or for having one law applicable to municipal streets and sidewalks and another law applicable to all other governmental property.

Repeal of the existing statutes relating to dangerous conditions of public property would achieve uniformity in the law and would avoid such inconsistencies as are outlined in the preceding paragraph. Repeal of these statutes, however, is not recommended, for in many respects the Public Liability Act is greatly superior to the common law as it relates to the liabilities of owners and occupiers of land. The Public Liability Act does not draw any distinctions between invitees, licensees and trespassers. Liability may be established simply by showing a breach of duty to keep property in a safe condition and that foreseeable injuries resulted from this breach of duty. The Commission has concluded, therefore, that the general principles of the Public Liability Act should be retained. That statute should be revised, however, to eliminate certain defects and to make it applicable to all governmental entities and to all public property, whether owned or occupied in a governmental or proprietary capacity.

Accordingly, the Commission recommends the enactment of new legislation that would retain the desirable principles of the Public Liability Act with the following principal modifications:

1. "Dangerous condition" should be defined as a condition of property that exposes persons or property to a substantial risk of injury or damage when the property is used with due care in a manner in which it is reasonably foreseeable that the property will be used. The condition of the property involved should create a "substantial risk" of injury for an undue burden would be placed upon public entities if they were

responsible for the repair of all conditions creating any possibility of injury, however remote that possibility might be. The "dangerous condition" of the property should be defined in terms of the manner in which it is foreseeable that the property will be used by persons exercising due care in recognition that any property can be dangerous if used in a sufficiently abnormal manner. Thus, a public entity should not be liable for injuries resulting from the use of a highway--safe for use at 65--at 90 miles an hour, even though it may be foreseeable that persons will drive that fast. The public entity should only be required to provide a highway that is safe for reasonably foreseeable careful use. On the other hand, where it is reasonably foreseeable that persons to whom a lower standard of care is applicable--such as children--may, consistently with the standard of care applicable to such persons, use property for an unintended purpose, the public entity should be required to take reasonable precautions to prevent an undue risk of injury from arising from such use. Thus, a public entity may be expected to fence swimming pools or to fence or lock up dangerous instrumentalities if it is reasonably foreseeable that small children may be injured if it does not do so. But governmental entities should not be required to guard against the potentialities of injury that arise from remotely foreseeable uses of their property. To impose such liability would virtually require public entities to insure the safety of all persons using public property.

2. The "trivial defect" rule developed by the courts in sidewalk cases arising under the Public Liability Act to prevent juries from imposing unwarranted liability on public entities should be extended

to all cases arising under the Act. Under this rule, the courts will not permit a governmental entity to be held liable for injuries caused by property defects unless the court (as distinguished from the jury) is satisfied that a reasonable person could conclude that the defect involved actually created a substantial risk of injury.

3. Certain immunities from liability under the dangerous conditions statutes should receive explicit statutory recognition. The courts have recognized some of these immunities in cases arising under the Public Liability Act. For example, there is no liability under that Act for failing to provide stop signals at particular intersections or for failing to provide adequately maintained fire-fighting equipment. The Legislature has provided other immunities such as the immunity for dangerous conditions of stock or bridle trails. These immunities are recognitions of the fact that the sufficiency of governmental services and the wisdom of governmental decisions are not proper subjects for review in tort litigation. Giving expression to these immunities in the statutes relating to governmental liability will assure their continued recognition by the courts and will obviate the need for test cases to be appealed to determine whether such immunities continue to exist.

There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless the court is able to find that no reasonable official would have adopted the plan or design or that the action approving the plan or design was so arbitrary as to constitute an abuse of discretion.

While it is proper to hold governmental entities liable in damages for injuries caused by arbitrary abuses of discretionary authority in planning public improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested.

Governmental entities should be immune from liability for failure to provide regulatory traffic signals and devices such as stop signs and road markings. The California courts have held governmental entities immune from such liability despite the broad language of the Public Liability Act. Whether or not to install regulatory devices in particular locations requires an evaluation of a large variety of technical data and policy criteria, including traffic volume frequency and peak load factors, physical layout and terrain, visibility hazards and obstructions, prevailing weather conditions, nature of vehicular use, normal traffic speed in the area, volume of pedestrian traffic, alignment and curvature, need for similar precautionary measures at other like places, alternative methods of control, and availability of currently budgeted funds to do the job. Decisions not to adopt control devices, when based on premises of this order do not appear to be readily susceptible to intelligent and rational reexamination by untrained juries or judges sitting as triers of fact.

Public entities should be immune from liability for the effect of weather conditions on the streets and highways unless there is some

actual physical destruction or deterioration caused by the weather. Drivers should be expected to take weather conditions into consideration when they drive. They should be expected to realize that a highway is likely to be slippery when covered by ice and snow. Moreover, a public entity should not be required to post signs informing motorists of matters, such as fog, that are as obvious as a sign would be. It is unlikely that a court would hold such conditions dangerous, but it is desirable to make the immunity for such conditions explicit in order to preclude claims from being presented and actions from being litigated.

There is much public property in the State over which public entities exercise little or no supervision. They permit the public to use bodies of water and water courses for recreational activities, and to use remote trails and roads for hunting, fishing, riding and camping. It is desirable to preserve these uses of public property, but such uses would likely be curtailed if the public entities owning such property were required by law to make extensive inspections of the property for the purpose of discovering potential hazards. Hence, public entities should be immune from liability for conditions of such property unless they have actual knowledge of concealed hazards, not likely to be apparent to the users of the property, and fail to take reaonable steps to warn of the hazards.

The State, by virtue of its sovereignty, owns vast acreages that are unimproved and unoccupied. There should be an absolute immunity from liability for any condition of such property until it has been improved or occupied.

4. The dangerous conditions statute should provide specifically that a governmental entity is liable for dangerous conditions of property created by the negligent or wrongful act of an employee acting within the scope of his employment even if no showing is made that the entity had any other notice of the existence of the condition or an opportunity to make repairs or take precautions against injury. The courts have construed the existing Public Liability Act as making public entities liable for negligently created defects.

Liability under the Act should not be limited to negligence liability. Just as private landowners may be held liable for deliberately creating traps calculated to injure persons coming upon their land, public entities should be liable under the terms of the dangerous conditions statute if a public employee commits similar acts within the scope of his employment.

5. Where the dangerous condition has not been created by the negligent or wrongful act of an employee of the entity, the entity should be liable only if it acts unreasonably in failing after notice to repair the condition or otherwise to protect persons against the risk of injury. This is an existing basis for the liability of public entities under the Public Liability Act and for the liability of private landowners to invitees; however, private landowners are generally not liable to licensees or trespassers upon this basis. The Public Liability Act, like the proposed statute, does not distinguish between invitees, licensees and trespassers in determining liability after the duty to discover and remedy defects has been breached.

These common law distinctions were developed so that the private landowner's duty to inspect his property and to maintain it in a safe condition would not be unduly burdensome. Under these common law rules, a person foreseeably injured as a result of a landowner's admitted negligence in inspecting and maintaining his property may be denied recovery because he does not fit into the proper classification. The courts at times have developed arbitrary and unrealistic distinctions to avoid such harsh results.

The Commission believes that if the duty of public entities to inspect and maintain their property is to be limited, the limitation should be expressed directly--either by curtailing the duty of inspection or by granting specific immunities from liability. The proposed legislation does so.

6. The requirement that the dangerous condition of public property be known to the governing board or a person authorized to remedy the defect should be repealed. The ordinary rules for imputing the knowledge of an employee to an employer should be applicable to public entities just as they are applicable to private owners and occupiers of land. Under these rules, the knowledge of an employee concerning a dangerous condition is imputed to the employer if under all the circumstances it would have been unreasonable for the employee not to have informed the employer thereof. The knowledge of employees will not be imputed to the entity in other circumstances. These

rules are sensible and workable. For example, a public entity should not be absolved from liability for failure to repair a dangerous condition after a telephone complaint to the proper office on the ground that the telephone receptionist was not a "person authorized to remedy the condition."

7. A public entity should be charged with notice of a dangerous condition of its property if it has actual knowledge of the condition and should have realized its dangerous character or if the condition and its dangerous nature would have been revealed by a reasonable inspection system. The Public Liability Act provides that entities are liable if they fail to remedy dangerous conditions after "notice" without specifying how such notice may be acquired. As a result entities have at times been held liable for defects that could not have been discovered even through reasonable inspections. Such a "notice" standard imposes too great a burden upon public entities, for it virtually requires them to be insurers of the safety of their property. The proposed legislation makes clear that public entities are not chargeable with notice unless they have acted unreasonably in failing to inspect their property.

8. A public entity should be able to absolve itself of liability for a dangerous condition of public property--other than those conditions it negligently or wrongfully created--by showing that the entity did all that it reasonably could have been expected to do under the circumstances to remedy the condition or to warn or protect persons against it. A public entity should not be an insurer of the safety

of its property. When its action or failure to take action is all that reasonably could have been expected of it under the circumstances, there should be no liability.

9. The standards for personal liability of public employees for negligently or wrongfully creating or failing to remedy dangerous conditions, now contained in Government Code Section 1953, should be revised so that they are not inconsistent with the liability standards contained in the sections relating to public entities. In addition to the matters that must be shown to establish entity liability, a person seeking to hold a public employee personally liable for failing to remedy a dangerous condition should be required to show that the particular employee knew or should have known of the condition and that he had the means available and the authority and responsibility to take action to remedy the condition or to warn or to provide safeguards but failed to do so. This further showing is necessary to show personal culpability on the part of the employee. The employee should be able to show by way of defense that he did not act unreasonably in failing to remedy the condition or protect against the risk of injury created by it.

Police and Correctional Activities

A major activity at all levels of government involves the detection, arrest and incarceration of violators of the law. This function of government has been regarded traditionally as an exclusively governmental, as distinguished from proprietary, activity. Hence, governmental bodies have been immune from liability for damages caused by governmental personnel engaged in law enforcement. Moreover, governmental employees have also been held immune from liability for many of their law enforcement activities. For example, judges have been held immune for damages caused by their judicial acts, prosecutors are immune for instituting prosecutions, and police officers are not liable for failing to arrest offenders, even though these acts or omissions may have been malicious.

Although governmental law enforcement officers have enjoyed an extensive immunity from liability for their discretionary acts, they are still subject to tort liability in many situations. They may be held liable in damages for false arrest, false imprisonment or assault, even though they may have been acting in utmost good faith in carrying out their duties. Because the government has been immune from all liability in this area, public law enforcement officers have had to bear this liability alone. In some instances, governmental entities have provided their law enforcement officers with insurance, but the protection offered them has neither been uniform nor complete.

The recommendations made in regard to the liability of public entities and employees generally will provide adequate rules for determining liability in most cases that may arise out of police and

correctional activities. In a few instances, though, experience in other jurisdictions that have waived sovereign immunity indicates the need for legislation stating rules applicable specifically to this area of activity. The Commission, therefore, recommends the enactment of legislation containing the following principles:

1. Public entities should not be liable for failure to provide police protection or for failure to provide adequate police protection. Whether police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions.

2. Public entities and employees should not be liable for failure to provide a jail or other detention or correctional facility or for failure to provide sufficient equipment, personnel or facilities therein unless the facility is in a dangerous condition or there has been a departure from an applicable statutory or regulatory standard. There are few statutes and regulations that now prescribe standards for local jails and detention facilities; but to the extent that they do impose mandatory standards, the local authorities should not have any discretionary immunity for departing from those standards.

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

unjustifiable interference with the attempt of an inmate of a correctional institution to seek a judicial review of the legality of his confinement. The right of a person confined involuntarily to seek redress in the courts is a fundamental civil right that should receive effective legal protection.

4. As a general rule, public entities and public employees should not be liable for failing to provide medical care for prisoners. Again, the standards of care to be provided prisoners involve basic governmental policy that should not be subject to review in tort suits for damages. However, if an employee charged with the care actually knows or has reason to know that a prisoner is in need of immediate medical attention, he and his employing public entity should be subject to liability if he fails to take reasonable action to see that such attention is provided.

5. Public entities and employees should not be liable for the damage caused by escaping or escaped prisoners or by persons released on parole or probation. The nature of the precautions necessary to prevent the escape of prisoners and the extent of the freedom that must be accorded prisoners for rehabilitative purposes are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability.

Fire Protection

Public administration of programs of fire prevention and protection have long been regarded as a "governmental" function and, hence, a form of activity protected by the doctrine of sovereign immunity. Even in states where the doctrine of sovereign immunity has been waived, the courts have held public entities immune from liability for failing to maintain adequate water pressure for fire fighting purposes. In California, the Legislature has removed a substantial portion of this immunity by providing that public entities are liable for the negligent operation of emergency vehicles, including fire fighting equipment, when responding to emergency calls.

There are strong policy reasons for retaining the large measure of the immunity that now exists. The incentive to diligence in providing fire protection that might be provided by liability is already provided because fire insurance rates rise where the fire protection provided is inadequate. Moreover, the risk spreading function of tort liability is performed to a large extent by fire insurance. In emergency situations, it is more desirable for fire fighters to act diligently to combat a conflagration without thought of the possible liabilities that might be incurred than it is to spread the loss from the fire by imposing such cost upon the taxpayers. Thus, in formulating rules of liability applicable to fire protection activities, it is necessary to strike a careful balance between the need for encouraging utmost diligence in combatting fires and providing compensation for injuries caused by the negligent or wrongful conduct of public personnel. To resolve these problems, the Commission recommends

that legislation be enacted containing the following principles:

1. Public entities should not be liable for failure to provide fire protection or for failure to provide enough personnel, equipment or other fire protection facilities. Whether fire protection should be provided at all, and the extent to which fire protection should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions.

2. Except to the extent that public entities are liable under Vehicle Code Sections 17000 to 17004 for the tortious operation of vehicles, public entities and public personnel should not be liable for injuries caused in fighting fires or in maintaining fire protection equipment. There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable. The liability created by the Vehicle Code for negligent operation of emergency fire equipment should be retained, however, for such liability does not relate to the conduct of the actual fire-fighting operation.

3. Fire protection agencies often provide assistance in combatting fires beyond their own boundaries. In such cases, the entity calling for aid may be held responsible for a tortious injury caused by an entity answering the call on the basis of respondeat superior. A small public entity may have a large outbreak of fire requiring the services of many fire departments and hundreds of men. To impose all

risks of liability upon the agency calling for aid under such circumstances might expose it to risks of liability far beyond its capacity to bear. Moreover, most fire protection agencies are insured against liabilities that may arise out of the operation of their firefighting vehicles. If the entity calling for aid were liable for torts committed by the entities answering its call, it would be required to procure insurance for a potential liability that had already been insured. **The Commission recommends, therefore, that each public entity** should be liable only for the torts committed by its own personnel. The public entities should, of course, have the right to allocate ultimate tort responsibility in some other way by agreement.

4. Existing statutes provide an immunity to fire-fighting personnel for transporting persons injured by fire to obtain medical assistance. This immunity should be continued, for the fear of tort liability might provide an undesirable deterrence to the prompt and diligent furnishing of such assistance.

Medical, Hospital and Public Health Activities

Medical, hospital and public health activities of public entities have traditionally been regarded as governmental" in nature, even where, for example, the particular hospital involved received paying patients and otherwise was operated like a private hospital. As a result, public entities have been immune from liability arising out of these activities. The effect of this immunity of governmental entities has 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 general recommendations relating to the liability of public entities will resolve most of the problems of liability and immunity growing out of medical and hospital activities that have been revealed by the cases arising in other jurisdictions where sovereign immunity has been waived. Some of these problems, though, call for statutes of particular application in this area of activity:

1. A public entity should be liable for an injury which results from the failure to comply with an applicable statute, or an applicable regulation of the State Department of Public Health or the State Department of Mental Hygiene, which establishes minimum standards for equipment, personnel or facilities in public hospitals and other public medical facilities, unless the public entity establishes that it

exercised reasonable diligence to comply with the statute or regulation. Although decisions as to the facilities, personnel or equipment to be provided in public medical facilities involve discretion and public policy to a high degree, nonetheless, when minimum standards have been fixed by statute or regulation, there should be no discretion to refuse to meet those minimum standards.

This recommendation will leave determinations of the standards to which public hospitals and other public medical facilities 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 public medical facilities within the range of discretion permitted by state statutes and regulations.

Although most public hospitals and mental institutions are subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene, some (e.g., the University of California's hospitals) are not. Yet, these hospitals should be required to exercise reasonable diligence to maintain the same minimum standards that other comparable public hospitals do. Accordingly, public entities should be liable for damages resulting from inadequate facilities, personnel or equipment in public medical facilities

not specifically subject to regulation if they do not exercise reasonable diligence to conform to the regulations applicable to other facilities of the same character and class.

2. Public entities and public employees should be liable for the damages proximately caused by their intentional and unjustifiable interference with any right of an inmate of a public medical facility to seek judicial review of the legality of his confinement. The right of a person involuntarily confined to petition the courts is a fundamental civil right that should receive effective legal protection.

3. Public entities and public employees should not be liable for refusing to admit a person to a public medical facility when there is discretion whether or not to do so. The decision whether or not to admit a patient to a public medical facility often depends upon a weighing of many complex factors, such as the financial condition of the patient, the availability of other medical facilities, and the like. 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, or regulation or administrative rule, the public entity or a public employee is legally required to admit a patient, there should be liability for negligently or wrongfully failing to do so.

4. Public entities and public employees should not be liable for negligence in diagnosing that a person is afflicted with mental illness, mental deficiency, habit forming drug

addiction, narcotic drug addiction, inebriation or sexual psychopathy. Nor should liability be imposed for negligence in prescribing treatment for such conditions. Much of the diagnosis and treatment of these conditions goes on in public mental institutions. The field of psychotics is relatively new and standards of diagnosis and treatment are not as well defined as 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 similar private hospitals do not have to meet. For the same reasons, no liability should exist for negligence in determining whether to confine a person for such conditions, nor in determining the terms and conditions of the confinement. Similarly, there should be no tort liability for determining whether to parole or release such persons. Providing immunity from tort liability does not, of course, impair any right to other legal remedies, such as a judicial review of the legality of any such confinement. The statutes should make clear, however, that public entities and employees are liable for injuries caused by negligent or wrongful acts or omissions in administering or failing to administer prescribed treatment or confinement.

5. Public health officials and public entities should not be liable for acting or failing to act in imposing quarantines, disinfecting property, or otherwise taking action to prevent or

control the spread of disease, where 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 legal 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.

6. Public entities and public health officials and other public employees who are required to examine persons to determine their physical condition should not be liable for failing to examine or to make an adequate examination of any person for the purpose of determining whether such person has a communicable disease or any other condition that might constitute a hazard to the public or to the person examined. This immunity from liability would not cover examinations and diagnosis for the purpose of treatment, but would cover such examinations as public tuberculosis examinations, examinations for the purpose of determining whether persons should be isolated or quarantined, eye examinations for prospective

drivers, and examinations of athletes--such as boxers--to determine whether they are qualified to engage in athletic activity.

The New York courts have granted similar immunities to public entities in that state. Government undertakes these activities to insure public health and safety and to add a measure of safety to some hazardous occupations such as boxing. To provide the utmost public protection, governmental entities should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately. Far more persons would suffer if government did not perform these functions at all than would be benefitted by permitting recovery in those cases where the government is shown to have performed inadequately.

Tort Liability Under Agreements Between Public Entities

Throughout the California statutes there are provisions authorizing governmental entities by agreement to embark upon joint projects. Other statutes authorize one public entity to contract with another public entity for the performance of various governmental services such as fire protection, police protection, tax assessment and tax collection. Under existing law, governmental entities even may, by agreement, create new and independent entities to carry out joint projects.

The problems of governmental immunity and liability can become quite complex if no provision is made in these agreements for the allocation of responsibility for the torts that may occur in the performance of the agreements. Moreover, as governmental entities may create an independent entity to carry out a joint project, the participating governmental entities may insulate themselves from tort liability in connection with the project and leave the risk of such liability with an entity having limited resources and no power to raise money by taxation.

The Commission recommends, therefore, that when agreements are entered into between governmental entities to carry out some project

or activity, each of the contracting entities involved should be jointly and severally liable to the injured party for any torts that may occur in the performance of the agreement for which any one of the entities, or any agency created by the agreement, is otherwise made liable by law. However, the entities should be permitted to allocate the ultimate financial responsibility among themselves in whatever manner seems most desirable. Where an agreement between governmental entities fails to specify how the responsibility for tort liability is to be allocated, each of the entities should be required to contribute to any one that is subjected to liability so that one entity will not have to bear alone what ought to be a common responsibility. The share of each of the public entities should be determined by dividing the total amount of the liability by the number of public entities that are parties to the agreement. Where it would not be appropriate to determine contributions in this manner, the public entities may by agreement provide another method of allocating responsibility for tort liability.

Amendments and Repeals of Existing Statutes

A substantial number of codified and uncodified statutes relate to the liability of public entities and public employees. Many of these statutes should be amended or repealed in view of the general liability statute recommended by the Commission.

The legislation recommended by the Commission contains the text of each section that should be amended or repealed. A comment under each of these sections (beginning on page *** infra) indicates the reason why its amendment or repeal is proposed.

In many cases where the comment states that an existing section is superseded by a provision in the legislation recommended by the Commission, the new provision may be somewhat narrower or broader (in imposing liability or granting immunity) than the existing law. In these cases, the Commission has concluded that the recommended provision is better than the existing law.

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

An act to add Division 3.6 (commencing with Section 810) to Title 1 of the Government Code, and to amend Sections 748, 5084, 5406, and 5571 of, and to repeal Sections 1300.21, 2185, 2916 and 3407 of, the Agricultural Code, and to amend Section 5312 of, and to repeal Section 6904.5 of, the Business and Professions Code, and to amend Sections 340, 1095 and 1242 of the Code of Civil Procedure, and to repeal Sections 903, 1041, 1042, 13551, 15512, 15513, 15514, 15515 and 15516 of the Education Code, and to repeal Article 1 (commencing with Section 1950) of Chapter 6 of Division 4 of Title 1 of, Article 6 (commencing with Section 50140) of Chapter 1 of Part 1 of Division 1 of Title 5 of, Article 3 (commencing with Section 53050) of Chapter 2 of Part 2 of Division 1 of Title 5 of, and Sections 2002.5, 39586, 54002, 61627 and 61633 of, the Government Code, and to amend Section 4006.6 of the Public Resources Code, and to amend Section 21635 of the Public Utilities Code, and to amend Sections 941, 943, 954 and 1806 of, and to repeal Chapter 23 (commencing with Section 5640) of Part 3 of Division 7 of, the Streets and Highways Code, and to repeal Section 17002 of the Vehicle Code, and to repeal Article 4 (commencing with Section 22725) of Chapter 4 of Part 5 of Division 11 of, Chapter 4 (commencing with Section 35750) of Part 5 of Division 13 of, Article 10 (consisting of Section 51480) of Part 7 of Division 15 of, Chapter 5 (commencing with Section 60200) of Part 3 of Division

18 of, and Sections 8535, 31083, 31088, 31089, 31090, 50150, 50151 and 50152 of, the Water Code, and to amend Section 6610.3 of, and to repeal Sections 6005 and 6610.9 of, the Welfare and Institutions Code, and to repeal Section 21 of the Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911), and to repeal Section 10 of Chapter 641 of the Statutes of 1931 [Flood Control and Flood Water Conservation District Act], and to amend Section 5 of the Alameda County Flood Control and Water Conservation District Act (Chapter 1275, Statutes of 1949), and to repeal Sections 36, 37 and 38 of the Alpine County Water Agency Act (Chapter 1896, Statutes of 1961), and to repeal Sections 9.2, 9.3 and 9.4 of the Amador County Water Agency Act (Chapter 2137, Statutes of 1959), and to repeal Section 76 of the Antelope Valley-East Kern County Water Agency Law (Chapter 2146, Statutes of 1959), and to amend Section 5 of the Contra Costa County Flood Control and Water Conservation District Act (Chapter 1617, Statutes of 1951), and to amend Section 5 of the Contra Costa County Storm Drainage District Act (Chapter 1532, Statutes of 1953), and to repeal Section 23 of the Contra Costa Water Agency Act (Chapter 518, Statutes of 1957), and to repeal Section 26 of Chapter 40 of the Statutes of 1962 (1st Ex. Sess.) [Crestline-Lake Arrowhead Water Agency Act.], and to amend Section 6 of the Del Norte Flood Control District Act (Chapter 166, Statutes of 1955), and to repeal Section 24 of the Desert Water Agency Law (Chapter 1069, Statutes of 1961), and to repeal Sections 35, 36 and 37 of the El Dorado County Water Agency Act (Chapter 2139, Statutes of 1959), and to amend Section 6 of the Humboldt County Flood Control District Act (Chapter 939, Statutes of 1945), and to repeal Sections 9.1, 9.2 and 9.3 of the Kern County Water Agency Act (Chapter 1003, Statutes of 1961), and to repeal Sections 14, 16 and 17 of the Kings River Conservation District Act (Chapter

931, Statutes of 1951), and to amend Section 5 of the Lake County Flood Control and Water Conservation District Act (Chapter 1544, Statutes of 1951), and to amend Section 5 of the Marin County Flood Control and Water Conservation District Act (Chapter 666, Statutes of 1953), and to repeal Sections 7.2, 7.3 and 7.4 of the Mariposa County Water Agency Act (Chapter 2036, Statutes of 1959), and to repeal Section 27 of the Mojave Water Agency Law (Chapter 2146, Statutes of 1959), and to amend Section 5 of the Monterey County Flood Control and Water Conservation District Act (Chapter 699, Statutes of 1947),

and to amend Section 5 of the Napa County Flood Control and Water Conservation District Act (Chapter 1449, Statutes of 1951), and to repeal Sections 36, 37 and 38 of the Nevada County Water Agency Act (Chapter 2122, Statutes of 1959), and to amend Section 49 of the Orange County Water District Act (Chapter 924, Statutes of 1933), and to repeal Sections 7.2, 7.3 and 7.4 of the Placer County Water Agency Act (Chapter 1234, Statutes of 1957), and to amend Section 6 of the San Benito County Water Conservation and Flood Control District Act (Chapter 1598, Statutes of 1953), and to repeal Section 24 of the San Gorgonio Pass Water Agency Law Chapter 1435, Statutes of 1961), and to amend Section 5 of the San Joaquin Flood Control and Water Conservation District Act (Chapter 46, Statutes of 1956 (1st Ex. Sess.)), and to amend Section 5 of the San Luis Obispo County Flood Control and Water Conservation District Act (Chapter 1294, Statutes of 1945), and to amend Section 5 of the Santa Barbara County Flood Control and Water Conservation District

Act (Chapter 1057, Statutes of 1955), and to amend Section 5 of the Santa Clara County Flood Control and Water Conservation District Act (Chapter 1405, Statutes of 1951), and to repeal Sections 7.2, 7.3 and 7.4 of the Sutter County Water Agency Act (Chapter 2088, Statutes of 1959), and to repeal Section 24 of the Upper Santa Clara Valley Water Agency Law (Chapter 28, Statutes of 1962 (1st Ex. Sess.)), and to repeal Sections 35, 36 and 37 of the Yuba-Bear River Basin Authority Act (Chapter 2131, Statutes of 1959), and to repeal Sections 7.2, 7.3 and 7.4 of the Yuba County Water Agency Act (Chapter 788, Statutes of 1959), relating to liability of public entities and public officers, agents and employees.

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

SECTION 1. Division 3.6 (commencing with Section 810) is added to Title 1 of the Government Code, to read:

DIVISION 3.6

CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

PART 1. DEFINITIONS

810. Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.

Note: This section is based on similar provisions found in the definition or general provisions portions of various codes. See, for example, Section 5 of the Government Code.

The definition of these terms in this part makes it possible to avoid unnecessary repetition in the various statutory provisions in Division 3.6.

810.2. "Employee" includes an officer, agent or employee; but does not include an independent contractor.

Note: Independent contractors are excluded from the definition of "employee" so that the problems of liability, insurance, defense, and claims arising out of acts and omissions of independent contractors may be met by a different set of statutes than those applicable to public employees.

810.4. "Employment" includes office, agency or employment.

Note: See the note under Section 810.

810.6. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

Note: See the note under Section 810.

The definition is intended to refer to all measures of a formal legislative or quasi-legislative nature. "Regulation" is defined in Section 811.6 to carry out this intent more fully.

In the remainder of this division, "statute" will be used to refer only to State legislative enactments and "law" will be used to refer to the entire body of constitutional, statutory, regulatory and decisional law.

810.8. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate of such nature that it would be actionable if inflicted by a private person.

Note: This definition merely defines "injury"; it does not impose liability for an injury. The standards and conditions of liability for an injury are found in other provisions of this division and in other statutes. The purpose of the definition is to make clear that public entities may be held liable only for injuries to the kind of interests that have been protected by the courts in actions between private persons.

811. "Local public entity" includes a county, city, district, local authority, and any other public corporation or political subdivision of the State, but does not include the State.

Note: See note to Section 810.

811.2. "Public employee" means an employee of a public entity.

Note: Liability and immunity provisions in Division 3.6 are often made applicable to "public employees." These provisions will not be applicable to independent contractors since the term "employee" is defined in Section 810.2 to exclude independent contractors.

811.4. "Public entity" includes the State and any local public entity.

Note: This definition includes all public entities--both the State and local public entities. Local public entity is defined in Section 811.

811.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an officer or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such officer or agency to implement, interpret, or make specific the law enforced or administered by the officer or agency, or to govern the procedure of the office or agency, except a rule, regulation, order or standard which relates only to the internal management of the office or agency.

Note: See the notes under Sections 810 and 810.6.

The definition of "regulation" used here is similar to the definition contained in the State Administrative Procedure Act--Section 11371 of the Government Code.

PART 2. LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES

Chapter 1. General Provisions Relating to Liability

Article 1. Liability of Public Entities

815. Except as otherwise provided by enactment, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

Note: This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the State or federal constitutions, e.g., inverse condemnation. In the absence of a constitutional requirement, governmental entities may be held liable only if a statute is found declaring them to be liable. Because of the limitations contained in Sections 826 and 829, which declare that this part does not affect liability arising out of contract or the right that persons formerly had to obtain specific relief against governmental entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word "tort" has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury.

In the following portions of this division, there are many sections providing for the liability of governmental entities under specified conditions. In other codes there are a few provisions providing for the liability of governmental entities, e.g., Vehicle Code Section 17001 et seq, and Penal Code Section 4900. But there is no liability in the absence of a statute declaring such liability. For example, there is no section in this statute declaring that public entities are liable for nuisance, even though the California courts had previously held that governmental entities were subject to such liability even in the absence of statute. Under this statute, the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the situation. However, the right to specific relief in nuisance cases is not affected. Similarly, this statute eliminates the common law liability of public entities for injuries inflicted in proprietary activities.

In the following portions of this division, there are also many sections granting public entities and public employees broad immunities from liability. In general, the statutes imposing liability are cumulative in nature, i.e., if liability cannot be

established under the requirements of one section, liability will nevertheless exist if liability may be established under the provisions of another section. On the other hand, the immunity provisions as a general rule prevail over all sections imposing liability. Where the sections imposing liability or granting an immunity do not fall into this general pattern, the sections themselves make this clear.

815.2. (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by enactment, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability because the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Note: This section imposes upon public entities vicarious liability for the tortious acts and omissions of their employees. Because under Section 815, governmental entities are not liable in the absence of legislation declaring them liable, and because this section permits vicarious liability only to the extent that the employee whose act or omission caused the injury would himself be liable, a governmental entity cannot be held liable for an employee's act where the employee himself would be immune. The California courts have held on many occasions that a public employee is immune from liability for his discretionary acts within the scope of his employment even though the discretion be abused. This rule is codified in Section 820 of this division. Under the above section, a public entity is also entitled to the protection of that immunity. Thus, this section nullifies the suggestion appearing in a dictum in Lipman v. Brisbane Elementary School District, 55 Cal.2d 224 (1961), that public entities may be liable for the acts of their employees even when the employees are immune.

Under this section, it will not be necessary in every case to identify the particular employee upon whose act the liability of the public entity is to be predicated. All that will be necessary will be to show that some employee of the public entity tortiously inflicted the injury in the scope of his employment.

Subdivision (a) is similar to the English Crown Proceedings Act of 1947, the Canadian Crown Proceedings Act, and a uniform Proceedings Against the Crown Act that has been adopted in several Canadian provinces. Under statutes of a similar nature, more than 2,400 public entities in California have been subjected to liability for the negligence of their employees or for all torts of their employees. Some statutes impose liability directly on the public entity, others require the public entity to pay their employees' judgments. These

statutes, all of which are superseded, are Education Code Section 903, Water Code Section 50152, and Section 10 of the Flood and Control and Water Conservation District Act, which impute the negligence of public employees to the public entity concerned, and Government Code Section 61633, Water Code Sections 22730, 31090, 35755 and 60202, Section 38 of the Alpine County Water Agency Act, Section 9.4 of the Amador County Water Agency Act, Section 76 of the Antelope Valley-East Kern County Water Agency Law, Section 24 of the Desert Water Agency Law, Section 23 of the Contra Costa County Water Agency Law, Section 37 of the El Dorado County Water Agency Law, Section 9.3 of the Kern County Water Agency Law, Section 17 of the Kings River Conservation District Act, Section 7.4 of the Mariposa County Water Agency Act, Section 27 of the Mojave Water Agency Law, Section 21 of the Municipal Water District Act of 1911, Section 38 of the Nevada County Water Agency Act, Section 7.4 of the Placer County Water Agency Act, Section 7.4 of the Sutter County Water Agency Act, Section 37 of the Yuba-Bear River Basin Authority Act, and Section 7.4 of the Yuba County Water Agency Act, which require public entities to pay tort judgments generally that are recovered against their personnel.

Subdivision (b) is technically unnecessary, for under the standards of Section 815 and subdivision (a) of this section, it is apparent that a public entity would be immune from liability whenever the employee upon whose act liability is sought to be founded is entitled to a discretionary immunity. Nonetheless, the provision appears here so that the immunity of public entities for the discretionary acts of their employees might not be left to implication but would be clear from the face of the statutes.

The exception appears in subdivision (b) because under certain circumstances it appears to be desirable to provide that a public entity is liable even when the employee is immune. For example, Section 816 provides that an entity may be held liable for malicious prosecution even though the responsible employee is not directly liable. And under Section 815.8, a public entity may be liable for the discretionary act of an employee in selecting or failing to discipline a subordinate.

815.4 A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.

Note: The California courts have held that public entities--and private persons, too--may at times be liable for the tortious acts of their independent contractors. Snyder v. So. Cal. Edison Co., 44 Cal.2d 793 (1955) (discussing general rule); Shea v. City of San Bernardino, 7 Cal.2d 688 (1936); and Mulder v. City of Los Angeles, 110 Cal. App. 663 (1930). This section retains that liability. Under the terms of this section, though, a public entity cannot be held liable for an independent contractor's act if the entity would have been immune had the act been that of a public employee.

815.6 Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Note: This section declares the familiar rule, applicable to both public entities and private persons, that failure to comply with applicable statutory or regulatory standards is negligence unless reasonable diligence has been exercised in an effort to comply with those standards. Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897 (1958) (setting forth general rule); Lehmann v. Los Angeles City Bd. of Educ., 154 Cal.App.2d 256, 316 P.2d 55 (1957) (applying rule to public entity).

In the sections that follow in this division, there are stated some immunities from this general rule of liability. See, for example, Section 818.2.

815.8. A public entity is liable for an injury caused by an employee of the public entity if the injury was proximately caused by the failure of the appointing power of the public entity to:

(a) Exercise due care in selecting or appointing the employee; or

(b) Exercise due care to eliminate the risk of such injury

after the appointing power had knowledge or notice that the conduct, or the continued retention, of the employee in the position to which he was assigned created an unreasonable risk of such injury.

Note: This section supersedes a number of sections stating that a public employee is not liable for the torts of a subordinate unless the superior public employee failed to exercise due care in selecting or failing to discipline the subordinate employee. These sections, which state the rule in a variety of inconsistent ways, are Government Code Sections 1953.6, 1954, and 61627, Water Code Sections 22726, 31083, 35751, and 60200, Section 9.2 of the Amador County Water Agency Act, Section 76 of the Antelope Valley-East Kern County Water Agency Law, Section 24 of the Desert Water Agency Law, Section 35 of the El Dorado County Water Agency Act, Section 9.1 of the Kern County Water Agency Act, Section 14 of the Kings River Conservation District Act, Section 7.2 of the Mariposa County Water Agency Act, Section 21 of the Municipal Water District Act of 1911, Section 36 of the Nevada County Water Agency Act, Section 7.2 of the Placer County Water Agency Act, Section 35 of the Yuba-Bear River Basin Authority Act, and Section 7.2 of the Yuba County Water Agency Act.

The practical effect of the section is quite limited. It has independent significance only where the subordinate employee was not guilty of tortious conduct or was outside the scope of his employment. If the subordinate is guilty of tortious conduct within the scope of his employment, the liability of the public entity may be founded on Section 815.2.

The liability under this section must be based on a failure to exercise due care on the part of the "appointing power", i.e., that superior employee with the power to appoint or institute disciplinary proceedings. Thus, the findings and orders of civil service commissions or personnel boards may not be subjected to collateral attack in tort actions under this section.

816. A public entity is liable for injury proximately caused by an employee of the public entity if the employee, acting within the scope of his employment, instituted or prosecuted a judicial or administrative proceeding without probable cause and with actual malice.

Note: Under the previous law, public employees were not liable for malicious prosecution. White v. Towers, 37 Cal.2d 727 (1951). This immunity is continued by a later section in this division, Section 821.6, in order to protect the individual employee from undue harassment. But under this section, the public entity employing the particular employee may be held liable. The public entity may then, under the provisions of Section 825.6, recover any amounts paid on the judgment from the employee whose maliciousness caused the injury. Under this arrangement, public employees are protected from undue harassment, but the rights of persons injured by malicious abuses of public authority are also protected.

818. Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

Note: This section exempts public entities from liability for punitive or exemplary damages.

818.2. Notwithstanding Section 815.6, a public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any enactment.

Note: This section would be unnecessary except for the existence of Section 815.6, which imposes liability upon public entities for failure to exercise reasonable diligence to comply with a mandatory duty imposed by an enactment. This section recognizes that the wisdom of legislative or quasi-legislative action, and the discretion of law enforcement officers in carrying out their duties, should not be subject to review in tort suits for damages if political responsibility for these decisions is to be retained.

The New York courts recognize a similar immunity in the absence of statute. Under the Federal Tort Claims Act, this immunity falls within the general immunity for discretionary acts.

818.4. Notwithstanding Section 815.6, a public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke, whether negligent or wrongful, any permit, license, certificate or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Note: This section, like the previous one, would be unnecessary but for Section 815.6. It recognizes another immunity that has been recognized by the New York courts in the absence of statute. Under the Federal Tort Claims Act, the immunity would be within the general discretionary immunity. Direct review of this type of action by public entities is usually available through writ proceedings.

818.6. Notwithstanding Section 815.6, a public entity is not liable for injury caused by its failure to make an inspection, or to make an adequate inspection, of any property, other than property of the public entity, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Note: Like the previous two sections, this section would be unnecessary but for Section 815.6. It recognizes another immunity that has been recognized by the New York courts in the absence of statute. Because of the extensive nature of the inspection activities of governmental entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity were not granted.

So far as its own property is concerned, a public entity may be held liable under Chapter 2 (commencing with Section 830) for negligently failing to discover a dangerous condition by conducting reasonable inspections, or a public entity may be held liable under Section 815.6 if it does not exercise reasonable diligence to comply with any mandatory legal duty that it may have to inspect its property.

The immunity provided by this section relates to the "adequacy" of the inspection; the section does not provide immunity, for example, where a public employee negligently injures a person while making an inspection.

Article 2. Liability of Public Employees

820. Except as otherwise provided by enactment, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Note: This section restates the pre-existing California law. White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); Lipman v. Brisbane Elem. School Dist., 55 Cal.2d 224, 11 Cal.Rptr. 97, 359 P.2d 465 (1961); Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957). The discretionary immunity rule is restated here in statutory form to ensure that public employees will continue to remain immune from liability for their discretionary acts within the scope of their employment even though the public entities that employ them are vicariously liable under Section 815.2 for any torts for which the employees are liable.

In the sections that follow, several immunities of public employees are set forth even though they have been regarded as within the discretionary immunity. These specific immunities are stated here in statutory form so that the liability of public entities and employees may not be expanded by redefining "discretionary immunity" to exclude certain acts that had previously been considered as discretionary.

820.2. A public employee is not liable for his act or omission, exercising due care, in the execution of any enactment.

Note: This immunity, by virtue of Section 815.2, will inure to the benefit of the public entity employing the particular public employee. A similar immunity in almost identical language appears in the Federal Tort Claims Act.

820.4. If a public employee, exercising due care, acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

Note: This section broadens an immunity contained in former Government Code Section 1955 that applied only to actions pursuant to unconstitutional statutes.

820.6. A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law unless such injury is proximately caused by his negligent or wrongful act or omission.

Note: This section supersedes a large number of provisions contained in sections scattered through the codes providing particular public employees with a similar immunity. The section nullifies the common law rule that a public employee who enters property under authority of law but then commits a negligent or wrongful act is a trespasser ab initio and liable for all damages resulting from his entry.

Sections that include provisions superseded by this section are Business and Professions Code Section 5312, Code of Civil Procedure Section 1242, Public Resources Code Section 4006.6, Public Utilities Code Section 21635, Section 5 of the Alameda County Flood Control and Water Conservation Act, Section 5 of the Contra Costa County Flood Control and Water Conservation Act, Section 5 of the Contra Costa County Storm Drainage District Act, Section 6 of the Del Norte Flood Control District Act, Section 6 of the Humboldt County Flood Control District Act, Section 5 of the Lake County Flood Control and Water Conservation District Act, Section 5 of the Marin County Flood Control and Water Conservation District Act, Section 5 of the Monterey County Flood Control and Water Conservation District Act, Section 5 of the Napa County Flood Control and Water Conservation District Act, Section 6 of the San Benito County Flood Control and Water Conservation District Act, Section 5 of the San Joaquin County Flood Control and Water Conservation District Act, Section 5 of the San Luis Obispo County Flood Control and Water Conservation District Act, Section 5 of the Santa Barbara County Flood Control and Water Conservation District Act, and Section 5 of the Santa Clara County Flood Control and Water Conservation District Act.

820.8. Except as otherwise provided by enactment, a public employee is not liable for an injury caused by the negligent or wrongful act or omission of another employee unless he directs or participates in the negligent or wrongful act or omission.

Note: This section supersedes several sections scattered through the codes and uncodified acts that limit a public employee's liability to liability for his own negligent or wrongful conduct. The sections superseded by the above section are Agricultural Code Sections 748, 1300.21, 2185, 2916, 3407, 5084, 5406, and 5771, Education Code Sections 1042, 13551, and 15512, Water Code Sections 22725 and 35750, Section 49 of the Orange County Water District Act, Section 23 of the Contra Costa County Water Agency Act, and Section 27 of the Mojave Water Agency Law.

See Section 815.8 imposing liability on public entities for failure to exercise due care in selecting or failing to discipline employees.

821. A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment.

Note: This section continues an existing immunity of public employees. Martelli v. Pollock, 162 Cal. App.2d 655 (1958)(city councilman immune for actions as councilman); Rubinow v. County of San Bernardino, 169 Cal. App.2d 67 (1959) (no liability for failure to arrest drunk driver).

821.2. A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or his failure or refusal to issue, deny, suspend or revoke, whether negligent or wrongful, any permit, license, certificate or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Note: The immunity stated here has been long established in California. Downer v. Lent, 6 Cal. 94 (1856) (pilot commissioners immune from liability for maliciously revoking pilot's license).

821.4. A public employee is not liable for injury caused by his failure to make an inspection, or to make an adequate inspection, of any property, other than the property of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Note: This section grants immunity to a public employee for his failure to make adequate inspections of private property. Thus, a building inspector would be immune from liability if he negligently failed to detect a defect in the building being inspected. So far as a public employee's liability for public property is concerned, see Sections 840-840.4 relating to the liability of public employees for dangerous conditions of public property.

The immunity provided by this section relates to the "adequacy" of the inspection; the section does not provide immunity, for example, where a public employee negligently injures a person while making an inspection.

821.6. A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

Note: The California courts have repeatedly held public employees immune from liability for this sort of conduct. White v. Towers, 37 Cal.2d 727 (1951); Goverstone v. Davies, 38 Cal.2d 315 (1952); Hardy v. Vial, 48 Cal.2d 577 (1957). See Section 816 and the note to that section.

821.8. Except as otherwise provided by statute, a public employee is not liable for moneys stolen by another from his custody unless the loss was sustained because he failed to exercise due care.

Note: This section is similar to Government Code Section 1953.5, which it supersedes.

Article 3. Indemnification of Public Employees

825. If an employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an 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 for an injury arising out of an act or omission, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.

Note: The sections in this article require public entities to pay claims and judgments against public employees that arise out of their public employment. The sections permit the public entity to recover such amounts from the employee only where the employee has acted with actual malice, actual fraud or corruption. But to avoid conflicts of interest, the public entity waives its right to recover from the employee if it furnishes his defense.

These sections supersede a large number of sections scattered throughout the California statutes granting particular classes of public employees similar rights. Unlike many of the sections that are superseded, the sections in this article require the public employee to offer the defense of the action to the public entity before he is entitled to the rights this article grants.

The superseded sections are Government Code Sections 2002.5 and 61633, Water Code Sections 22730, 31090, 35755, and 60202, Section 38 of the Alpine County Water Agency Act, Section 9.4 of the Amador County Water Agency Act, Section 76 of the Antelope Valley-East Kern County Water Agency Law, Section 23 of the Contra Costa County Water Agency Act, Section 24 of the Desert Water Agency Law, Section 37 of the El Dorado County Water Agency Law, Section 9.3 of the Kern County Water Agency Act, Section 17 of the Kings River Conservation District Act, Section 7.4 of the Mariposa County Water Agency Act, Section 27 of the Mojave Water Agency Law, Section 38 of the Nevada County Water Agency Act, Section 7.4 of the Placer County Water Agency Act, Section 7.4 of the Sutter County Water Agency Act, Section 37 of the Yuba-Bear River Basin Authority Act, and Section 7.4 of the Yuba County Water Agency Act.

825.2. (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 825, 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 employment for the public entity and the public entity does not establish that the employee acted or failed to act because of actual fraud, corruption or actual malice.

Note: This section permits a public employee to enforce his right of indemnity against the public entity where he has been required to pay a judgment that the entity is required to pay under Section 825.

825.4. Except as provided in Section 825.6, if a public entity pays any claim or judgment against itself or against an employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of an employee of the public entity, the employee is not liable to indemnify the public entity.

Note: See note to Section 825.

825.6. (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, for an injury arising out of an act or omission of an employee of the public entity, the public entity may recover from the employee the amount of such payment if the employee acted of 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 for an injury arising out of an 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 employment for the public entity and the public entity does not establish that the employee acted or failed to act because of actual fraud, corruption or actual malice.

Note: See note to Section 825. Many of the sections that this article supersedes provide that the public entity may not recover indemnity from the public employee who committed the tort. This section is worded broadly to apply whenever the public entity is required to pay a judgment, whether the judgment is against the entity itself or against the employee. But the entity has the right to recover the amount paid from the responsible employee whenever the employee has acted with actual malice, actual fraud or corruption. The public entity will have this right even in those cases where the public employee would have been immune from liability had he been sued directly. See, for example, Sections 816 and 821.6 relating to malicious prosecution.

Article 4. Relief Other Than Money or Damages; Contract Liability

826. Nothing in this part affects the right to obtain relief other than money or damages against a public entity or public employee, but such relief shall be granted only under the circumstances and to the extent provided under the decisions of the appellate courts of this State rendered on or before January 1, 1961, and the statutes other than this division which are applicable to such relief.

Note: This section declares that neither the Muskopf case nor this division has any effect upon whatever right a person may have to obtain specific relief. Thus, even though Section 820.4 provides that public employees are not liable for enforcing unconstitutional statutes, and even though that immunity inures to the benefit of the public entity by virtue of Section 815.2, the right to enjoin the enforcement of unconstitutional statutes will still remain. Under this statute as limited by this section, the appropraite way to seek review of discretionary governmental actions is by an action for specific relief to control the abuse of discretion, not by tort actions for damages.

829. Nothing in this part affects liability based on contract.

Note: The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. The rights of the parties to public contracts and their remedies to enforce those rights are unaffected by this statute.

Chapter 2. Dangerous Conditions of Public Property

Article 1. General

830. As used in this chapter:

(a) "Dangerous condition" means a condition of property that creates a substantial risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, and warning of a dangerous condition.

(c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

Note: This section defines the terms used in this chapter. The definition of "dangerous condition" defines the type of property conditions for which a public entity may be held liable but does not impose liability. A public entity may be held liable for a "dangerous condition" of public property only if it has acted unreasonably in creating or failing to remedy or warn against the condition under the circumstances described in subsequent sections.

A "dangerous condition" is defined in terms of "foreseeable use." This does not change the pre-existing law relating to cities, counties and school districts. These entities are liable under Government Code Section 53051 for maintaining property in a condition that creates a hazard to foreseeable users even if those persons use the property for a purpose for which it is not designed to be used or for a purpose that is illegal. Acosta v. County of Los Angeles, 56 Cal. 2d 208 (1961); Torkelson v. City of Redlands, 198 Cal. App.2d 354 (1961).

The definition of "dangerous condition" is quite broad because it incorporates the broad definition of "injury" contained in Section 810.8. Thus, the danger involved need not be a danger of physical injury; it may be a danger of injury to intangible interests so long as the injury is of a kind that the law would redress if it were inflicted by a private person. For example, liability for an

offensive odor may be imposed if the requirements of this chapter are satisfied. On the other hand, although public entities were formerly liable for maintaining a nuisance, under this statute liability for conditions that would constitute a nuisance will have to be based on the somewhat more rigorous standards set forth in this chapter. Liability for such conditions cannot be imposed upon a nuisance theory because Section 815 provides public entities with immunity from liability unless liability is imposed by an enactment and there will be no enactment imposing liability on a nuisance theory.

"Adjacent property" as used in the definition of "dangerous condition" refers to the area that is exposed to the risk created by a dangerous condition of the public property. For example, the hazard created by a condition of public property may not be a hazard to persons using the public property itself, but may be a hazard to other property or to those using other property. A tree located on public property may have a decayed limb overhanging private property and creating a hazard to that property and the persons on it. Explosives on public property may create a hazard to wide area of private property adjacent to the public property.

Under the definition as it is used in subsequent sections, a public entity cannot be held liable for dangerous conditions of "adjacent property." A public entity may be liable only for dangerous conditions of its own property. But its own property may be considered dangerous if it creates a substantial risk of injury to adjacent property or to persons on adjacent property.

A condition is not dangerous within the meaning of this chapter unless it creates a hazard to those who foreseeably will use the property or adjacent property with due care. Thus, even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons. The definition would, however, take into consideration the standard of care that would be applicable to foreseeable users of the property. Where it is reasonably foreseeable that persons to whom a lower standard of care is applicable--such as children--may be exposed to a substantial risk of injury from the property, the public entity should be required to take reasonable precautions to protect such persons from that risk. Thus, a public entity may be expected to fence a swimming pool or to fence or lock up a dangerous instrumentality if it is reasonably foreseeable that small children may be injured if such precautions are not taken.

The definition of "protect against" is self-explanatory.

"Property of a public entity" excludes easements, encroachments and similar property, not owned or controlled by the public entity, that may be located on the property of a public entity in order to make clear that it is not the duty of the owner of the servient estate to inspect such property for hazards; rather, it is the duty of the person or entity that owns the easement, encroachment, etc. Of course, if the condition of the easement or encroachment

renders the public property dangerous--as, for example, where a privately owned power line falls or sags across a public highway --the public entity will have an obligation to take reasonable precautions after it receives notice of the condition.

830.2. A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

Note: This section declares a rule that has been applied by the courts in cases involving dangerous conditions of sidewalks. Technically it is unnecessary, for it merely declares the rule that would be applied in any event when a court rules upon the sufficiency of the evidence. It is included in the chapter to emphasize that the courts are required to determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before they may permit the jury to find that a condition is dangerous.

830.4. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, unless the court finds that no reasonable public employee would have adopted the plan or design or that the action of the legislative body or other body or employee in approving the plan or design or the standards therefor was so arbitrary as to constitute an abuse of discretion.

Note: Sections 830.4, 830.6 and 830.8 describe certain limitations on the liability of public entities for conditions of public property. Some of these limitations have been previously established by the courts of this State in determining the liability of entities under the Public Liability Act of 1923; some have been established by the courts of other states where public entities are liable generally for their torts. Still others reflect policies previously adopted by the Legislature or logical extensions of the legislatively and judicially established policies. The immunities are stated here in statutory form so that litigation will not be needed to determine whether or not there is liability in these situations under this statute.

Section 830.4 gives expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute. No similar immunity for liability is provided entities under the Public Liability Act of 1923. But where a governmental body is exercising the discretion given to it under the laws of the State in the planning and designing of public construction and improvements, and where there is some reasonable basis for the plan or design approved, to permit a jury to declare that some other plan or design should have been approved would undercut the separation of powers and the principle of political responsibility for policy decisions that is basic to our system of government. The Court of Appeals of New York recognized the necessity for this limitation on the liability of governmental entities in the recent case of Weiss v. Fote, 7 N.Y. 2d . 579(1960).

The immunity provided by Section 830.4 is subject to several limitations. First, the immunity does not apply if the court finds that no reasonable public employee would have adopted the plan or design or that the action taken in approving the plan or design was so arbitrary as to constitute an abuse of discretion. The immunity in New York under the Weiss case is subject to a similar qualification. Second, notwithstanding Section 830.4, a public entity may in some cases be held liable under some statute other than the dangerous conditions statute. For example, a public entity might be held liable under Section 815.6 for an injury resulting from its failure to exercise reasonable diligence to discharge a mandatory duty imposed by an enactment.

830.6. Notwithstanding any other provision of law, neither a public entity nor a public employee is liable for an injury caused by:

(a) The failure to install traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as authorized or required by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

(b) The failure to provide other traffic or warning signals, signs, markings or devices unless the signal, sign, marking or device was necessary to warn of a condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

(c) The effect on the use of streets and highways of weather conditions as such (including but not limited to fog, wind, rain, flood, ice or snow, but not including physical damage to or deterioration of streets and highways resulting from weather conditions) unless such effect would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

(d) A condition of any natural lake, stream, river or beach that is not held out by the public entity as a public recreational facility if the injury arises out of the recreational use of such property unless:

(1) The condition is a dangerous condition that would not be

reasonably apparent to, and would not be anticipated by, a person using such property with due care; and

(2) The public entity or the public employee had actual knowledge of the condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(e) A condition of any hiking, riding, fishing or hunting trail, or of any unpaved road which is not a state or federal highway and which provides access to fishing, hunting or primitive camping, recreational or scenic areas and which is never or only rarely used by the general public for other purposes, unless:

(1) The condition is a dangerous condition that would not be reasonably apparent to, and would not be anticipated by, a person using such property with due care; and

(2) The public entity or the public employee had actual knowledge of the condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Note: Subdivisions (a) and (b), which provide immunity for failure to install traffic control signals and devices, state an immunity that has been recognized in several California cases applying the Public Liability Act of 1923. The immunity provided in these subdivisions does not apply, however, where a traffic control signal or device is negligently installed or is not properly maintained.

Subdivision (a) grants an absolute immunity for failure to install certain specified types of traffic control signals and devices. Decisions on whether to install the signals and devices listed in this subdivision are left to the informed judgment of responsible public officials. These decisions should not be reexamined in tort litigation, for they require an evaluation of a large variety of technical data and policy criteria, including the need for similar precautionary measures at other like places and the availability of currently budgeted funds for the project.

Subdivision (b) provides for immunity for failure to install a traffic regulatory or warning signal or devices of a type not listed in subdivision (a). Unlike subdivision (a), the immunity under subdivision (b) does not apply where the condition constitutes a

trap to a person using the street or highway with due care.

Subdivision (c) may be unnecessary in view of the other provisions of this chapter setting forth the conditions of liability for dangerous conditions of public property. Nonetheless it is included to forestall unmeritorious litigation that might be brought in an effort to hold public entities responsible for injuries caused by weather.

Subdivision (d) is included so that public entities will not be required to inspect the many bodies of water and water courses in the State that are not held out for public recreational use. Of course, where a public entity designates a body of water for use as a public park, it may be expected to conduct reasonable inspections to see that the property is safe for such use.

Subdivision (e) continues and extends an existing policy adopted by the Legislature in Government Code Section 54002. It is desirable to have trails for hikers and riders and roads for campers into the primitive regions of the State, but the burden and expense of maintaining a continuous inspection of such property would probably cause many public entities to close such roads and trails to public use. Hence, this subdivision permits an entity to be held liable for a dangerous condition of such property only if it has actual knowledge of the condition.

Under both subdivisions (d) and (e), liability may not be predicated on the entity's knowledge of the dangerous condition alone. The plaintiff must establish that the condition amounted to a trap and must also meet the evidentiary burdens placed on him in the other portions of this chapter. Moreover, the entity may escape liability by showing the defensive matters it is entitled to show under other provisions of this chapter.

In connection with subdivision (c), it should be noted that the Commission amendment to Section 954 of the Streets and Highways Code will provide counties with an absolute immunity for death or injury to a vehicle owner or operator or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition of a stock trail.

830.8. Neither the State nor an employee of the State is liable under this chapter for any injury caused by a condition of the unimproved and unoccupied portions of:

(a) The ungranted tidelands and submerged lands owned by the State, and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits.

(b) The unsold portions of the sixteenth and thirty-sixth sections of school lands, the unsold portions of the 500,000 acres granted to the State for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the sixteenth and thirty-sixth sections and losses to the school grant.

Note: This section exempts the State from liability under the dangerous conditions statute for conditions of the vast amounts of property, title to which has vested in the State because of its sovereignty, but which it has never occupied or improved. The descriptions of the property are taken from Public Resources Code Sections 6301 and 7301.

Article 2. Liability of Public Entities

835. Notwithstanding subdivision (b) of Section 815.2 and except as provided in Sections 835.4 and 835.6, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, that the public entity did not take adequate measures to protect against the risk and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Note: This section is similar to the Public Liability Act of 1923 under which cities, counties and school districts are liable for the dangerous conditions of their property.

Although there is no provision similar to subdivision (a) in the Public Liability Act of 1923, the courts have held that entities are liable under that Act for dangerous conditions created by the negligent or wrongful acts of their employees. Pritchard v. Sully-Miller Contracting Co., 178 Cal.App.2d 246 (1960).

Subdivision (b) declares the traditional basis for holding an entity liable for a dangerous condition of property: failure to protect against the hazard after notice. Unlike the 1923 Act, this section does not leave the question of notice to judicial construction. The requisite conditions for notice are stated in Section 835.2.

The section is not subject to the discretionary immunity declared in Section 815.2, for this chapter itself declares the limits of a public entity's discretion in dealing with dangerous conditions of its property.

The reference to Sections 835.4 and 835.6 is to indicate that liability does not necessarily exist if the evidentiary requirements of this section are met. Even if the elements stated in the statute are established, a public entity may avoid liability if it shows that it acted reasonably in the light of the alternative courses of action available to it and the practicability and cost of pursuing such alternatives.

This section requires the plaintiff to show that the injury suffered was of a kind that was reasonably foreseeable. Thus, a person landing an airplane on a public road might not be able to recover for an injury resulting from striking a chuckhole, whereas a motorist might be able to recover for the injury resulting from striking the same hazard; for it is reasonably foreseeable that motorists will be injured by such a defect, but it is highly unlikely that airplanes will encounter the hazard.

This section also requires the plaintiff to show that whatever measures the entity took in regard to the hazard were not sufficient to protect against the risk of injury, i.e., that the condition still created a substantial risk of harm to those who foreseeably would be using the property with due care. Thus, a plaintiff would be required to show not only that a hole in the street was dangerous, but also that lights and barriers either were not placed around the hole, or were inadequate to protect street users from the hazard created by the hole.

Under this section, if an entity placed lights and barriers around a hole sufficient to remove any substantial risk to persons who would be foreseeably using the street with due care, the entity could not be held liable for any injuries caused by the condition, for the condition would not be "dangerous" within the meaning of Section 830. If the lights subsequently failed to function, a person injured from striking the hazard would have to show either that there was some negligence in preparing the lights or that, although the lights failed without fault on the part of the entity, the entity had notice of the failure and did not take appropriate precautions.

835.2. (a) A public entity had actual notice of a dangerous condition within the meaning of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b) Subject to subdivision (c) of this section, a public entity had constructive notice of a dangerous condition within the meaning of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

(c) Notwithstanding subdivision (b) of this section, a public entity did not have constructive notice of a dangerous condition within the meaning of Section 835 if it establishes either:

(1) The existence of the condition and its dangerous character would not have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or

(2) The public entity maintained and operated such an inspection system with due care and did not discover the condition.

Note: This section sets forth the matters that must be established before a public entity may be charged with notice of a dangerous condition.

Under the Public Liability Act of 1923, the knowledge necessary to charge a public entity with notice of a dangerous condition has to be the knowledge of "the legislative body, board, or person authorized to remedy the condition." Subdivision (a), however, permits an entity to be charged with knowledge under the ordinary agency rules of imputed knowledge that would be applicable to a private person.

Under subdivision (a) as under the pre-existing law, actual knowledge by an entity of the existence of a particular condition is not a basis for the imposition of liability unless the entity also knew or should have known of the danger created by the condition. Ellis v. City of Los Angeles, 167 Cal.App.2d 180 (1959).

Under the Public Liability Act of 1923, public entities are at times charged with "constructive notice" of a defect because it would be obvious upon an inspection and because it has existed for a substantial period of time. Subdivision (b) continues these rules. However, subdivision (c) recognizes that public entities cannot reasonably be expected to know of all substantial defects in their property, even where such defects may be obvious to any observer or may have existed for a substantial period of time. This subdivision permits an entity to show as a defense on the issue of notice that a reasonable inspection system--one designed to inform the entity whether its property is safe--would not have informed the entity of the particular defect. And to encourage public entities to exercise reasonable diligence in inspecting their property to discover hazards, the careful operation of a reasonable inspection system by the entity is made a complete defense to the issue of notice if such inspection system did not disclose the condition. In determining whether an inspection system is reasonable, the jury is permitted to consider the problems faced by the particular entity: the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger. The Public Liability Act does not provide public entities with any similar defenses on the question of notice.

835.4. (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was not unreasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was not unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Note: Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else.

This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the

cost and decide not to engage in it. Government cannot "go out of the business" of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable.

No similar defense is provided to public entities by the Public Liability Act of 1923.

835.6. A public entity is not liable under Section 835 for injury caused by a dangerous condition of its property if the public entity establishes either or both of the following defenses:

(a) The person who suffered the injury assumed the risk of the injury in that he (i) knew of the dangerous condition, (ii) realized the risk of injury created thereby and (iii) in view of all the circumstances, including the alternatives available to him, acted unreasonably in exposing himself to the risk of such injury.

(b) The plaintiff or his decedent was contributorily negligent.

Note: This section merely declares the pre-existing law--that assumption of risk and contributory negligence are defenses to causes of action grounded on dangerous conditions of public property.

Article 3. Liability of Public Employees

840. Except as provided in this article, no public employee is personally liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The liability established by this article is subject to any immunity of the public employee provided by statute.

Note: Government Code Section 1953 has provided the exclusive basis for the liability of public officers and employees for dangerous conditions of public property since its enactment in 1919. This article supersedes Section 1953 and the provisions of that section that restrict liability to the conditions set forth therein are carried forward, in substance, in this section. Hence, liability, if any, of a public employee for a condition of public property must be grounded upon this article and upon no other statute.

On the other hand, the general liability of public employees that is described here is subject to statutory immunities from liability that are found in other statutes such as the immunities of Article 1 of this chapter and the immunities found in Article 2 of Chapter 1.

840.2. Subject to the same defenses that are available under Section 835.6, an employee of a public entity is personally liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, that no adequate measures were taken to protect against that risk, and that either:

(a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the means immediately available to take alternative action which would not have created the dangerous condition; or

(b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Note: Subdivision (a) of this section subjects a public employee to liability for injuries caused by conditions which he has negligently created. The cases that have arisen under Government Code Section 1953 are in conflict upon the question whether public employees are subject to such liability; although the more recent authority seems to indicate that they are not.

Under this section, a public employee who has negligently created a dangerous condition may not be held liable for injuries caused thereby if someone other than the employee has taken adequate measures to protect against the condition. For example, if an employee through negligence creates a dangerous condition in a street, the

employee may not be held liable to an automobile passenger who is injured when the auto strikes the condition if the entity has placed lights, warnings or barriers sufficient to prevent injury to careful motorists, even though the defense of contributory negligence may not be available against the passenger.

Subdivision (b) is comparable to Government Code Section 1953. However, unlike Section 1953, this section does not leave the question of notice to judicial construction. The requisite conditions for notice are stated in Section 840.4.

Under this section a public employee may not be held liable for injuries caused by a dangerous condition of public property if it was not reasonably foreseeable that the particular type of injury incurred would occur. There is no similar provision in Section 1953. See the note under Section 835.

840.4. (a) A public employee had actual notice of a dangerous condition within the meaning of Section 840.2 if he had actual personal knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b) Subject to subdivision (c) of this section, a public employee had constructive notice of a dangerous condition within the meaning of Section 840.2 only if the plaintiff establishes that (1) the public employee had the authority and it was his responsibility as a public employee to inspect the property of the public entity or to see that inspections were made to determine whether dangerous conditions existed in the public property, (2) that the means for making such inspections or for seeing that such inspections were made were immediately available to the public employee, and (3) the dangerous condition had existed for such a period of time and was of such an obvious nature that the public employee, in the exercise of his authority and responsibility with due care, should have discovered the condition and its dangerous character.

(c) Notwithstanding subdivision (b) of this section, a public employee did not have constructive notice of a dangerous condition within the meaning of Section 840.2 if he establishes either:

(1) The existence of the condition and its dangerous character would not have been discovered by an inspection system that was reasonably adequate within the meaning of Section 835.2 (c); or

(2) The public employee, in the exercise of his authority and responsibility as a public employee, maintained such an inspection system with due care and did not discover the condition.

Note: This section prescribes the conditions under which a public employee may be charged with notice of a dangerous condition. See the discussion under Section 835.2.

840.6. (a) A public employee is not liable under Section 840.2 (a) for injury caused by a dangerous condition of public property if he establishes that the act or omission that created the condition was not unreasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or protecting against the risk of injury.

(b) A public employee is not liable under Section 840.4 (b) for injury caused by a dangerous condition of public property if he establishes that the action taken to protect against the risk of injury created by the condition or the failure to take such action was not unreasonable. The reasonableness of the inaction or action shall be determined by taking into consideration the time and opportunity the public employee had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Note: This section makes available to a public employee a defense similar to that given public entities by Section 835.6. See the note to that section.

Chapter 3. Police and Correctional Activities

845. Except as otherwise provided in Section 815.6, neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

Note: This section grants a general immunity for failure to provide police protection or for failure to provide enough police protection. Whether police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions. The immunity provided by this section is subject, however, to Section 815.6 which requires a public entity to exercise reasonable diligence to comply with a mandatory duty.

845.2. Except as otherwise provided in Section 815.6 and in Chapter 2 (commencing with Section 830), neither a public entity nor a public employee is liable for failure to provide a jail, detention or correctional facility or, if such facility is provided, for failure to provide sufficient equipment, personnel or facilities therein.

Note: This section grants an immunity for failure to provide a jail, detention or correctional facility or for failure to provide sufficient equipment, personnel or facilities therein. This immunity is justified on the same ground as the immunity provided by Section 845. The immunity provided by this section is subject, however, to Section 815.6 which requires a public entity to exercise reasonable diligence to comply with a mandatory duty and to Chapter 2 which relates to liability for dangerous conditions of public property.

845.4. A public employee is liable for injury proximately caused by his interference with any right of an inmate of a jail, detention or correctional facility to obtain a judicial determination or review of the legality of his confinement only if such interference is intentional and unjustifiable.

Note: This section makes clear that liability exists for the intentional and unjustifiable interference with a basic legal right--the right of a person confined involuntarily to seek redress in the courts.

845.6. Notwithstanding Section 815.6, neither a public entity nor an employee of a public entity is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody unless he knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to see that the prisoner receives such medical care.

Note: This section limits the duty to provide medical care for prisoners to cases where there is actual or constructive knowledge that the prisoner is in need of immediate medical care. The standards of medical care to be provided to prisoners involve basic governmental policy that should not be subject to review in tort suits for damages. The immunity from liability for damages that is provided by this section exists even where some other statute might be construed to impose a mandatory duty to provide medical care to prisoners under other circumstances. In cases where another statute is so construed, the prisoner is left to the other remedies provided by law to compel public employees to perform their duties.

845.8. Neither a public entity nor a public employee is liable for:

(a) Any injury caused by negligence in determining whether a prisoner should be paroled or released or in determining the terms and conditions of his parole or release.

(b) Any injury caused by an escaping or escaped prisoner.

Note: The nature of the precautions necessary to prevent escape of prisoners and the extent of the freedom that must be accorded to prisoners for rehabilitative purposes are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability.

Chapter 4. Fire Protection

850. Notwithstanding Section 815.6, neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service.

Note: Sections 850, 850.2 and 850.4 provide for a broad immunity from liability for injuries resulting in connection with fire protection service.

Sections 850 and 850.2 provide an absolute immunity from liability for injury resulting from failure to provide fire protection or from failure to provide enough personnel, equipment or other fire protection facilities. Whether fire protection should be provided at all, and the extent to which fire protection should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions.

Section 850.4 provides for absolute immunity from liability for injury caused in fighting fires (other than from negligent operation of motor vehicles) or from failure to properly maintain fire protection equipment or facilities. There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combating fires by a fear that liability might be imposed if a jury believes such action to be unreasonable.

850.2. Notwithstanding Section 815.6, neither a public entity that has undertaken to provide fire protection service, nor an employee of such a public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities.

Note: See note to Section 850.

850.4. Notwithstanding Section 815.6, neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from condition of fire protection or fire fighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused in fighting fires.

Note: See note to Section 850.

850.6. Whenever a public entity, pursuant to a call for assistance from another public entity, provides fire protection or fire fighting service outside of the area regularly served and protected by the public entity providing such service, the public entity providing such service is liable for any injury for which liability is imposed by statute caused by its act or omission or the act or omission of its employee occurring in the performance of such fire protection or fire fighting service. Notwithstanding any other law, the public entity calling for assistance is not liable for any act or omission of the public entity providing the assistance or for any act or omission of an employee of the public entity providing the assistance; but the public entity providing such service and the public entity calling for assistance may by agreement determine the extent, if any, to which the public entity calling for assistance will be required to indemnify the public entity providing the assistance.

Note: This section makes clear which public entity is liable when one entity calls for the assistance of another in fighting a fire. Unless the entities otherwise agree, each entity is liable only for the torts of its own personnel.

850.8. A public employee acting in the scope of his employment may transport or arrange for the transportation of any person injured by a fire, or by a fire protection operation, to a physician and surgeon or hospital if the injured person does not object to such transportation. Neither the public entity nor the public employee is liable for any injury sustained by the injured person as a result of or in connection with such transportation or for any medical, ambulance or hospital bills incurred by or in behalf of the injured person or for any other damages unless such injury or damages are proximately caused by the wilful misconduct of the public employee.

Note: This section is based on Section 1957 of the Government Code which provides a similar immunity to fire-fighting personnel for transporting persons injured by a fire or by a fire protection operation.

Chapter 5. Medical, Hospital and Public Health Activities

855. (a) A public entity that operates or maintains any medical facility that is subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation.

(b) A public entity that operates or maintains any medical facility that is not subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities substantially equivalent to those required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel or facilities applicable to a public medical facility of the same character and class, unless the public entity establishes that it exercised reasonable diligence to conform with such minimum standards.

(c) Nothing in this section confers authority upon, or augments the authority of, the State Department of Public Health or the State Department of Mental Hygiene to adopt, administer or enforce any regulation. Any regulation establishing minimum standards for equipment, personnel or facilities in any medical facility operated or maintained by a public entity, to be effective, must be within the scope of authority conferred and in accordance with the standards prescribed by other provisions of law.

Note: This section imposes liability upon a public entity operating or maintaining medical facilities where the public entity fails to comply with applicable minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply. The minimum standards for equipment, personnel or facilities may be established by statute or by regulations promulgated by the State Department of Public Health or the State Department of Mental Hygiene.

This section grants no authority to adopt or enforce regulations; such authority must be granted by some other statute. Paragraph (c), so providing, is based on Section 11373 of the Government Code.

855.2. A public employee is liable for any injury proximately caused by his interference with any right of an inmate of a medical facility operated or maintained by a public entity to obtain judicial review of the legality of his confinement only if such interference is intentional and unjustifiable.

Note: This section, like Section 845.4, makes clear that liability exists for the intentional and unjustifiable interference with a basic legal right--the right to obtain judicial review of the legality of confinement.

855.4. Neither a public entity nor a public employee is liable for failure to admit a person to a medical facility operated or maintained by the public entity unless the public entity or the public employee is legally required to admit the person and negligently or wrongfully fails to do so.

Note: This section provides that neither a public entity nor a public employee is liable for failure to admit a person to a public medical facility unless a legal duty to admit exists and the public entity or public employee negligently or wrongfully fails to perform the legal duty.

855.6. (a) As used in this section, "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.

(b) Neither a public entity nor a public employee acting within the scope of his employment is liable for injury resulting from:

(1) Diagnosing that a person is afflicted with mental illness or addiction.

(2) Prescribing for mental illness or addiction.

(3) Determining whether to confine a person for mental illness or addiction.

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

(5) Determining whether to parole or release a person from confinement for mental illness or addiction in a medical facility operated or maintained by a public entity.

(c) A public employee is liable for injury proximately caused by his negligent or wrongful act or omission:

(1) In administering or failing to administer any treatment prescribed for mental illness or addiction.

(2) In carrying out or failing to carry out a determination, made by a person authorized to make such determination, to confine or not to confine a person for mental illness or addiction.

(3) In carrying out or failing to carry out the terms or conditions of

confinement for mental illness or addiction in a medical facility operated or maintained by a public entity.

(4) In carrying out or failing to carry out a determination, made by a person authorized to make such determination, to parole or release a person from confinement for mental illness or addiction in a medical facility operated or maintained by a public entity.

(d) Neither a public entity nor an employee of a public entity is liable for carrying out with due care:

(1) The treatment prescribed for mental illness or addiction.

(2) A determination, made by a person authorized to make such determination, to confine or not to confine a person for mental illness or addiction.

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

(4) A determination, made by a person authorized to make such determination, to parole or release a person from confinement for mental illness or addiction in a medical facility operated or maintained by the public entity.

Note: This section declares an immunity from liability for diagnosing or prescribing treatment for certain mental or emotional conditions for which a person may be committed to a public hospital under the provisions of Welfare and Institutions Code Sections 5000 et seq. and 5100 et seq. (mental illness), 5075 et seq. (mental disorder bordering on mental illness), 5250 et seq. (mental deficiency), 5300 et seq. (epilepsy), 5350 (narcotic drug addiction), 5400 (habit forming drug addiction or dipsomanic or inebriety), 5500 (sexual psychopathy), and 5600 (such mental abnormality as to evidence utter lack of power to control sexual impulses). The section also provides immunity for determining whether to confine a person for such conditions, for determining the terms and conditions of any such confinement, and for determining whether to parole or release a person from confinement for such conditions. Diagnosis and treatment of the specified

conditions, and determination of the terms and conditions of confinement therefor, necessarily involve a very high degree of discretion because of inexact knowledge regarding such conditions.

The section also declares an immunity from liability for carrying out with due care the discretionary determinations that are made. Liability may be imposed, however, for failure to use reasonable care in carrying out whatever determination has been made, for the act or omission causing injury in this case would be a departure from a defined and recognized standard of care.

855.8. (a) Neither a public entity nor a public employee is liable for an injury resulting from the performance or failure to perform any act relating to the prevention or control of disease if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused.

(b) Except as otherwise provided in Sections 821.2, 821.4, 821.6 and 856, a public employee is liable for an injury proximately caused by his negligent or wrongful act or omission in performing or failing to perform any act relating to the prevention or control of disease that he was required by law to perform.

Note: This section declares a specific rule of discretionary immunity for acts or omissions relating to the prevention or control of disease. The section makes clear, however, that liability may be imposed for the negligent or wrongful breach of a legal duty relating to the prevention or control of disease, except for acts or omissions connected with inspection or licensing duties.

856. Nothwithstanding Section 815.6, except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or health examination, or to make an adequate physical or health examination of any person for the purpose of determining whether such person has a disease or physical condition that would constitute a hazard to the health or safety of himself or others.

Note: This section declares an immunity that has been recognized by the New York courts in the absence of statute. It grants an immunity for failure to perform adequately public health examinations, such as public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants. It does not apply to examinations for the purpose of treatment such as are made in doctors' offices and public hospitals. In those situations, the ordinary rules of liability would apply.

The immunity provided by this section relates only to the "adequacy" of the examination; the section does not provide immunity, for example, where a public employee negligently injures a person while make an examination.

Chapter 21. Tort Liability Under Agreements Between Public Entities

895. As used in this chapter "agreement" means a joint powers agreement entered into pursuant to Chapter 5 (commencing with Section 6500) of Division 7 to Title 1 of the Government Code, an agreement to transfer the functions of a public entity or an officer thereof to another public entity pursuant to Part 2 (commencing with Section 51300) of Division 1 of Title 5 of the Government Code, and any other agreement under which a public entity undertakes to perform any function, service or act with or for any other public entity or officer thereof with its consent, whether such agreement is expressed by resolution, contract, ordinance or in any other manner provided by law.

Note: This section provides a broad definition of the word "agreement."

895.2. Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any agency or entity created by the agreement for damages caused by a negligent or wrongful act or omission occurring in the performance of such agreement.

Note: This section makes each of the public entities that are parties to an agreement jointly and severally liable to the injured party for any torts that may occur in the performance of the agreement for which any one of the entities, or an agency created by the agreement, is otherwise made liable by law.

895.4. As part of any agreement, the public entities may provide for contribution or indemnification by any or all of the public entities that are parties to the agreement upon any liability arising out of the performance of the agreement.

Note: This section permits public entities that are parties to an agreement to allocate the ultimate financial responsibility among themselves in whatever manner seems most desirable to them. The section does not affect the right of the injured person to recover the full amount of his damages from any one of the public entities under Section 895.2.

895.6. Unless the public entities that are parties to an agreement otherwise provide in the agreement, if a public entity is held liable upon any judgment for damages caused by a negligent or wrongful act or omission occurring in the performance of the agreement and pays in excess of its pro rata share in satisfaction of such judgment, such public entity is entitled to contribution from each of the other public entities that are parties to the agreement. The pro rata share of each public entity is determined by dividing the total amount of the judgment by the number of public entities that are parties to the agreement. The right of contribution is limited to the amount paid in satisfaction of the judgment in excess of the pro rata share of the public entity so paying. No other public entity may be compelled to make contribution beyond its own pro rata share of the entire judgment.

Note: Where an agreement between governmental entities fails to specify how the responsibility for tort liability is to be allocated, this section requires each agency to contribute a prorata share of amount of any judgment based on a tort that occurs in the performance of the agreement. Where it would not be appropriate to determine contributions according to the formula set out in this section, the public entities may by agreement provide another method of allocating responsibility for tort liability. See Section 895.4.

895.8. This chapter applies to any agreement between public entities, whether entered into before or after the effective date of this chapter.

Note: This section makes this chapter apply to agreements made before its effective date. Thus, for example, where existing agreements do not contain any provision indicating which public entity is to bear the ultimate financial burden, this chapter will provide appropriate rules governing contribution.