52(L) 6/24/66

First Supplement to Memorandum 66-44

Subject: Study 52(L) - Sovereign Immunity

The student note in 39 SO. CAL. L. REV. 470 states:

> It is doubtful that the [specific liability and immunity] provisions [of the 1963 Governmental Liability Act] "eliminate the need to determine the scope of discretionary immunity by piecemeal judicial decisions" as was hoped for by the Law Revision Commission, for the previous case law which is continued by the act furnishes an expanded and inconsistent concept of discretionary action, and the specific grants of immunity are unaccompanied by any guiding principles regarding the purposes of classifying conduct as disretionary.

When the Commission drafted the 1963 Act, the Commission believed that the specific immunity and liability provisions covered the major areas of potential claims. The actual facts giving rise to hundreds of claims presented to the state were considered and the vast majority of these situations were found to be covered by the specific immunity and liability provisions. However, the soundness of the statutory scheme developed by the Commission can be tested only by a consideration of the way the act has worked in actual practice.

We do not know how the act has worked at the trial court level, but we have examined the cases that have been considered by the appellate courts since 1963. The results are summarized in Exhibit I (attached). Many of these cases were appealed to determine the extent to which the 1963 statute could constitutionally be applied retroactively. Nevertheless, it is interesting to note that a great number of the cases were determined by the application of the specific immunity and liability provisions. Only in rare cases has the general discretionary immunity provision been used as a basis for immunity and in those few cases we believe that the results reached have been sound.

Accordingly, we believe that the experience under the existing scheme of the statute does not indicate that a change is needed at this time. Moreover, as a practical matter, we doubt that legislation to impose additional liability in any particular area would be enacted by the Legislature. Hence, we suggest that any attempt to revise the substantive rules governing liability and immunity be deferred for a number of years until the cases indicate that the statute needs revision.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

Case	Basis of Holding
Ne Casek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965)(two policemen were alleged to be negligent in allowing two arrested persons to escape from custody). Petition for hearing denied by Supreme Court.	Held - no liability. Govt. Code § 846 was intended to provide immunity. ("Neither a public entity nor a public employee is liable for an injury caused . . . by the failure to retain an arrested person in custody.") (This immunity provision was not relied upon by the court; the court apparently was not aware of its existence. The court was, however, primarily concerned with the law prior to the 1963 Governmental Liability Act rather than with the 1963 statute.)
Glickman v. Glasner, 230 Cal. App.2d 120, 40 Cal. Rptr. 719 (1964)(State Kosher Food Law Representative sent allegedly malicious letter to retail merchants). Petition for hearing denied by Supreme Court.	Held - no liability. Govt. Code § 820.2 (the general discretionary immunity) provides immunity. The statutory duties of the Kosher Food Law Representative specifically include advising interested persons on the application of the State Kosher Food Law. The various statutory duties involve the exercise of discretion in deciding what facts he should gather, what investigations would be made, and what reports in his reasoned judgment should be made to bring about compliance with the State Kosher Food Law.
Shakespeare v. City of Pasadena, 230 Cal. App.2d 375, 40 Cal. Rptr. 863 (1964)(Action against a city for false arrest, malicious prosecution, and false imprisonment). Petition for hearing denied by Supreme Court.	Held - complaint states no cause of action against city for false arrest. "By express statute, the officers under these circumstances are not liable for their actions (Pen. Code § 847) and, in fact, the officers would themselves have been criminally liable had they refused to take plaintiff into custody. (Pen. Code § 142) (emphasis added)". Held, city not liable for malicious prosecution. Express immunity provided by Govt. Code § 821.6 and 815.2(b). Held, liability for false imprisonment could be imposed on two bases: (1) Employees are liable for false imprisonment and entity is liable if employee is (Govt. Code §§ 815.2, 820); (2) Failure to comply with mandatory duty to release on bail (Govt. Code § 815.6--entity liable for failure to comply with mandatory duty).

Case	Basis of Holding
Shakespeare v. City of Pasadena, 230 Cal. App.2d 387, 40 Cal. Rptr. 871 (1964)(decision of police officer to detain a suspicious person for short time pending inquiry with superiors). Petition for hearing denied by Supreme Court.	Held - no liability on the facts stated in the complaint. "It is well settled that an officer may, without making a formal arrest, detain a citizen as to whose conduct he entertains a suspicion for such reasonable time as is required to confirm or dissipate that suspicion. . . . No more appears to have happened here." Although the court refers to Govt. Code § 820.2 (General discretionary immunity), the real ground for the decision is that the officer acted reasonably.
Morgan v. County of Yuba, 230 Cal. App.2d 938, 41 Cal. Rptr. 508 (1964) (failure to warn of prisoner's release as expressly promised).	Held - complaint stated as cause of action against the county. General discretionary immunity not applicable. "No discretion is exercised in warning those whom one has promised to warn of the impending release of a dangerous prisoner." One who undertakes to warn the public of danger and thereby induces reliance must perform his task in a careful manner. Liable under Govt. Code §§ 820, 815.2.
Bell v. City of Palos Verdes Estates, 224 Cal. App.2d 257, 36 Cal. Rptr. 424 (1964)(plaintiff struck in face by projectile discharged from tear gas gun carried by policeman).	Held - complaint stated a cause of action against the city. Defense of discretionary immunity was not available under the facts stated in the complaint, which alleged negligent discharge of tear gas gun by policeman.
Wright v. Arcade School District, 230 Cal. App.2d 272, 40 Cal. Rptr. 812 (1964)(school district alleged to be negligent in failing to furnish crossing guard at intersection where pupil was injured while on way to school). Petition for hearing by Supreme Court denied.	Held - district not liable. No negligence for no showing of any duty to furnish such crossing guard and decision not to furnish guards at the particular crossing was "a matter of legislative policy and should not lie with juries." Various entities, including school districts, had authority, but not duty to furnish guards. Dicta - if had undertaken to furnish guard, would be liable for failure of guard to use due care.
County of Los Angeles v. Superior Court, 62 Cal.2d 839, 44 Cal. Rptr. 796, 402 P.2d 868 (1965)(patient was injured in admitting room of psychiatric unit of county hospital because of alleged negligence of registered nurse).	Held - county immune from direct liability. Govt. Code § 854.8 provides a specific immunity. However, county nurse could be held liable for negligence and county would have been required to pay malpractice judgment against nurse.

Case	Basis for Holding
Maxon v. Kern County, 233 A.C.A. 462, 43 Cal. Rptr. 481 (1965) (action to recover damages for death of plaintiff's spouse allegedly killed by mental patient while spouse was mental patient in county institution).	Held - county immune from liability under Govt. Code § 854.8.
Hejeck and Moran v. City of Modesto, 64 A.C. 238, 49 Cal. Rptr. 377, 411 P.2d 105 (1966) (action against city for fire damage wherein it was alleged that city employees while acting in scope of their employment closed water valve and left it closed without notifying city fire department or plaintiff so that water was not available at hydrants to extinguish fires in vicinity of plaintiff's premises). Also alleged negligence of city fire department in failing to summon tank trucks of county fire department upon learning there was no water supply available at hydrants.	Held - city immune from liability under Govt. Code §§ 850-850.4 for lack of water. City immune from liability for failing to summon county fire department for no duty to do so was shown.
Reed v. City and County of San Francisco, 237 A.C.A. 17, 46 Cal. Rptr. 543 (1966)(prisoner installing light bulb for city dropped it, it exploded and injured the plaintiff who was also a prisoner)	Held - city immune from liability under Govt. Code § 844.6. (Plaintiff contended Section 844.6 was unconstitutional.)
Loop v. State, 240 A.C.A. 657, 49 Cal. Rptr. 909 (1966)(Parents' action against state for death of their son allegedly due to lack of proper care in Napa State Hospital)	Held - State immune from liability under Govt. Code § 854.8.
Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965)(action against county for crop loss due to flooding caused by negligent maintenance of, and defects in, a water drainage channel). Hearing by Supreme Court denied.	Held - Judgment for plaintiffs affirmed. County liable on theory of inverse condemnation and on theory of negligence. (Case not tried under 1963 Governmental Liability Act, but same result would be reached under Governmental Liability Act.)
Calandri v. Ione Unified School Dist., 219 Cal. App.2d 542, 33 Cal. Rptr. 333 (1963)(high school student injured when he fired a toy cannon he made as part of school manual training project). Petition for hearing by Supreme Court denied.	Held - judgment for defendants reversed. Failure to instruct that teacher owed a duty to child to warn student of dangers in loading and firing the cannon was error. (1963 Governmental Liability Act not referred to, but same result would be reached under Governmental Liability Act.)

Case	Basis of Holding
Ellis v. City Council of City of Burlingame, 222 Cal. App.2d 490, 35 Cal. Rptr. 317 (1963)(building inspector refused to issue building permit where plaintiff had complied with all legal requirements entitling her to issuance of a permit and permit was refused as a means of coercing her to comply with separate and unrelated building and zoning regulations).	Held - building inspector liable. Discretionary immunity did not apply since issuance of permit was a ministerial duty. (Case not decided under 1963 Governmental Liability Act but liability would exist under Govt. Code § 821.2 which deals with issuance of permits.)
Martinez v. Cahill, 215 Cal. App.2d 823, 30 Cal. Rptr. 566 (1963) (plaintiff was prisoner who was injured by another prisoner. He brings action against mayor and deputy chief of police based on negligence in allowing incompetent jailors to remain in their positions.)	Held - mayor not liable. He had no power to remove or suspend employees in charge of jail. Held - deputy chief of police could be held liable if it were shown that he had the authority to assign policement to duty as jailors and to transfer them from such duty and that he knew or should have known of the incompetency of the jailors. (Case not decided under 1963 Governmental Liability Act but Govt. Code § 821.8 provides specific rules to determine liability in this type of case.)