#52.20 8/18/69

Memorandum 69-105

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

The entire consolidated recommendation relating to sovereign immunity was previously sent out together with Memorandum 69-104. The background material and stautory provisions relating to prisoners and mental patients are found in the consolidated recommendation at pages 19-28 and 50-70. At the last June meeting, the Commission reviewed this portion of the recommendation and the comments that had been received at that time, and approved this portion for printing. However, since then, we have received a letter from Professor Van Alstyne (attached Exhibit I) commenting on these provisions. He raises a number of issues that the staff believes the Commission will certainly wish to consider and in response to which the staff has already made several tentative substantive changes in the earlier recommendation. Each of his suggestions and our changes are reviewed below.

You will recall that Sections 844.6 (page 50) and 854.8 (page 64) give to public entities a broad, general immunity from liability for injuries to, or caused by, prisoners and mental patients respectively. (These are parallel sections and for convenient reference we will henceforth refer only to Section 844.6; the discussion, however, applies equally to Section 854.8.) Section 844.6 and the immunities it provides were not contained in the Commission's original recommendation but were added at the very outset by the Legislature to the comprehensive governmental liability act. There seems to have been no subtle policy behind this addition; the Legislature apparently intended simply to close the public purse to all

claims advanced by prisoners without regard to their merit. It should be noted, however, that the section expressly provides that nothing in it "exonerates a public employee from liability for injury proximately caused by his negligent act or omission" and authorizes any public entity to pay any judgment or settlement against such an employee. We are told by representatives of the entities that the practice of the entities is to pay almost invariably and thus waive the immunity afforded. Nevertheless, the section exists and judging from the jealous manner in which it is guarded, it can be presumed that its immunities do have a substantial impact. With this brief introduction, we turn to the first of the problems discussed by Professor Van Alstyne.

(1) Action for wrongful death of a prisoner. Section 844.6 presently provides: "a public entity is not liable for . . . an injury to any prisoner." "Injury" is defined in Section 810.8 to include death. However, subdivision (c) of Section 844.6 provides that:

> Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for an injury resulting from the dangerous condition of public property . . . .

The Court of Appeal, taking the position that a wrongful death action is a separate, distinct statutory cause of action arising from an injury not to the decedent but to the heirs and based on the exception stated in subdivision (c), has permitted an action for the wrongful death of a prisoner arising out of an allegedly dangerous condition. Garcia v. State, 247 Cal. App.2d 814, 56 Cal. Rptr. 80 (1967). The decision is carefully limited, however, to that situation and the court expressly states that "no liability is imposed upon a public entity by reason of the death of

a prisoner resulting from . . . acts of other prisoners, [or] acts of prison employees. . . ." 247 Cal. App.2d at 817, 56 Cal. Rptr. 82. Professor Van Alstyne suggests that the rationale should be carried to its logical extreme. That is,

> the real reason why the heirs should be able to recover in wrongful death . . . is that the injury sustained by the prisoner's death is an injury to the heirs, and not to the prisoner. Only the prisoner's own cause of action for personal injuries is abolished by § 844.6(a)(2), since only that cause of action is for the injury to the prisoner. The heirs should be able to sue for wrongful death in any situation where a prisoner is killed under liability-producing circumstances, unless some statutory immunity stands in the way.

Moreover, he would eliminate one such statutory immunity. Section 844.6 now provides immunity for injuries caused by any prisoner. Professor Van Alstyne would emasculate this immunity by providing entity liability where the "prisoner was acting in the course and scope of some agency relationship with the public entity . . . or where some tortious act or ommission of a public employee was a concurrent proximate cause of the death." One uses the term "emasculate" because it is difficult to imagine any circumstance except the two stated where even without the immunity, the entity could be held liable for injuries caused in whole or in part by a prisoner.

It seems plain that the section as presently drafted is at best ambiguous. The basic policy decision to be made is whether claims against a public entity for the wrongful death of a prisoner (and mental patient) should be allowed. It seems highly doubtful that the Legislature intended such claims to be allowed when the present section was drafted. On the other hand, the Commission has received criticism of the broad, indiscriminate immunites provided by this section and there has been some sympathy for these veiws expressed by members of the Commission. Nevertheless, in

the belief that it would be difficult, if not impossible, to secure passage of legislation that narrowed the immunity by providing wrongful death recovery and that, on the contrary, this is an area where something could be given to the public entities, the staff has revised Section 844.6 to eliminate completely direct recovery for the wrongful death of a prisoner from a public entity. This will not, of course, affect the liability of public employees or the provisions for their indemnification.

(2) Injuries to a third person proximately caused by the act of a prisoner within the scope of his employment as an employee of the public entity. Professor Van Alstyne comments:

> If a prisoner, acting as a jail or prison employee (e.g., a prison trusty; or a prisoner engaged in assigned custodial duties) injures a visitor, I see no reason why the public entity should not be liable to the same extent as if a full-time employee . . . had committed the tort.

The staff concurs in this observation and has accordingly revised subdivision (c) to provide for entity liability for injuries proximately caused by the negligent or wrongful act or omission of a prisoner within the scope of his employment as an employee of the entity.

(3) Injuries to a third person caused by the tortious act of a prisoner operating concurrently with the tortious act of a public employee. With respect to this issue, Professor Van Alstyne comments in part as follows:

> If there was concurrent tortious conduct by a public employee, then the mere fact that a fellow-prisoner's act or omission was also a partial cause of the death should not serve to shield the public entity from liability to the heirs. The immunity from liability for an injury "proximately caused by any prisoner" presumably would be construed--in light of the liberal interpretation rule favoring liability and disfavoring immunity which was relied on in Johnson v. State of California, 73 Cal. Rptr. 240--as applicable only when the prisoner's tortious conduct was the sole proximate cause of the injury. Certainly nothing in the wording of § 844.6 suggests that the well-settled doctrine of concurrent liability and concurrent causation was intended to be abolished.

> For example, if a visitor to a jail is set upon and beaten by a vicious deputy sheriff acting as a jailor, the injured visitor would have a cause of action against the public entity employer of the deputy. (Assume no other statutory immunity applies.) It should make no difference, I would submit, if a jail prisoner should happen to join in and assist the deputy in beating up the visitor. The tort of the deputy is a concurrent proximate cause of the plaintiff's injuries for which he should be able to recover, even though the injuries caused by the prisoner would not be a basis of recovery.
>
> Yet, under the language of § 844.6, as it now reads, a court could conceivably hold that there would be no liability in the case I have supposed, since the injury was "proximately caused" by a prisoner --at least in part. The issue was actually presented in Datil v. City of Los Angeles, [263 Cal. App.2d 655] 69 Cal. Rptr. 788 (1968), by the facts before the court, but was apparently not argued by counsel. The court, by denying liability for an injury caused by a fellow-prisoner (even though concurrent negligence of city employees was alleged), appears to have assumed that the concurrent negligence of the city did not preclude application of the immunity. To be sure, since the opinion doesn't even mention the point, much less discuss it, the Datil case cannot be deemed authoritative. The point, however, seems so obvious that it is hard to explain how the court could have overlooked it. Datil, therefore, is to me a troublesome decision. See also the views of Professor Van Alstyne, in California Government Tort Liability Supplement § 7.15 (1969).

Professor Van Alstyne concludes "that § 844.6 should be amended to make it clear that the immunities thereby established are not intended to do away with liabilities that would otherwise be proper, under the Act, where there was concurrent causation."

Datil is a somewhat obscure opinion. It was a case tried to a judge sitting without a jury on the basis of a written stipulation of facts. The court prepared findings of fact which included one that Datil's injury (death) was not caused by negligence of the city and concluded that the sole proximate cause of Datil's death was the act of his fellow-prisoner. Apparently no claim was made on appeal that the evidence was insufficient to support the findings, nor that the findings failed to support the

conclusions of law. One certainly doubts therefore that the appellate court felt that the issue of concurrent causation was presented to it or even that the issue of the city's negligence was properly raised. The Court of Appeal does, however, state that one of the grounds asserted for reversal of the defense judgment was that "the defendant City was guilty of negligence in not providing Datil adequate protection." This ground could be disposed of as a matter of law under Section 845.2, if the latter section is constitutional. (Section 845.2 provides that "neither a public entity nor a public employee is liable for failure to provide a prison . . . or, if such facility is provided, for failure to provide sufficient equipment, personnel or facilities therein.") Apparently not wishing to engage in an extended discussion of the point, the court did dispose of the ground by holding the entire Tort Claims Act of 1963, including Sections 844.6 and 845.2, constitutional. By failing to be specific, the court permitted speculation as to the exact basis for its ruling, but it seems reasonable to conclude that the court properly reasoned that Section 844.6 precluded vicarious entity liability for the acts of the fellow-prisoner and that Section 845.2 precluded direct entity liability for failure to provide adequate protection, hence holding both these sections to be constitutional was sufficient to affirm the judgment. In short, the issue of concurrent causation was not presented to the Datil court because the preliminary step of finding negligence by the public entity or its employee was never taken.

The staff believes that Professor Van Alstyne is correct when he states above that "the immunity from liability for an injury 'proximately

caused by any prisoner' presumably would be construed . . . as applicable only when the prisoner's tortious conduct was the sole proximate cause of the injury." No case to date raises any real doubt about this conclusion and the staff does not believe that Section 844.6 need be amended to make this point any clearer.

(4) Escape of arrested person. You will recall that the Commission has recommended that Section 846 (at page 57 of the consolidated recommendation) be amended to insure that both the entity and its employees will be immune from liability for injuries caused by an arrested person in the act of escaping.

Professor Van Alstyne comments on this recommendation as follows:

> I find it somewhat anomalous that the Commission's comment to the proposed amendment of Govt C § 846 undertakes to find any support in the Ne Casek decision. As I read Ne Casek, it seems clear that Judge Kaus did not think Section 846 was applicable, since he fails to cite it, discuss it, or rely upon it--although he does mention § 845.8(b), which seems quite clearly to cover the issue of an injury caused by an escaping prisoner. (The arrested persons were not "prisoners," however, within the meaning of § 845.8.) Moreover, Ne Casek was decided on the basis of discretionary immunity; and, it seems quite clear, the decision was disapproved on that score in Johnson v. California, 73 Cal. Rptr. 340.
>
> Thus, I think Ne Casek provides no support for the proposed amendment to Section 846, and its citation in the Comment is misleading.
>
> In any event, I doubt that the amended version of Section 846 would result in liability [sic; immunity?] in the Ne Casek situation anyway. First, the amended language only grants immunity for injuries resulting from the "escape" or "attempted escape" itself. Since Section 845.8 clearly covers the problem of injuries caused by an escaping prisoner, a court would, I should think, limit Section 846 (as amended) to injuries claimed to have resulted from the act of escape itself. For example, the escape of an arrested person, who had been taken into custody under body attachment or pursuant to a bench warrant to enforce a subpoena to testify, could well result in injury to the person who procured the arrest. This kind of injury would be covered by Section 846. The kind of injury that resulted in

Ne Casek would probably not be so covered, except possibly that a court might read the Ne Casek situation into Section 846 because of the citation in the Comment.

If the Commission's purpose is to codify the result in Ne Casek, I conclude that (a) Section 846 has not been well-drafted to make that intent clear--the amendment should have been to Section 845.8; and (b) the Comment, by a misleading and, to my way of thinking, improper citation to Ne Casek, seeks to achieve the result by a process of "legislation by comment," which I regard as undesirable. The comments should explain the meaning of the statute, not change its meaning.

Section 845.8 which is referred to provides:

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

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determinining whether to revoke his parole or release.

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

Perhaps the criticism expressed by Professor Van Alstyne is justified but the staff does believe that Section 846 as amended would accomplish the desired result. A possible alternative that should satisfy these criticisms would be to leave Section 846 as it presently exists alone and instead amend Section 845.8(b) as follows:

(b) Any injury caused by an escaping or escaped prisoner or arrested person or a person resisting arrest .

Comment. The phrase "or arrested person or a person resisting arrest" has been added to subdivision (b) of Section 845.8 to extend the immunity provided by that subdivision to include persons resisting or escaping from arrest. This probably codifies former law. See Ne Casek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965)(city not liable to pedestrian injured by escaping arrestee). But see Johnson v. State, 69 Adv. Cal. 813, ___ Cal. Rptr. ___ (1968).

(5) Definition of county psychiatric hospital. Also attached to this memorandum is a letter from Robert C. Lynch, Assistant County Counsel

for Los Angeles County. (Exhibit II) His letter raises a point that the Commission has considered before, that is, that the definition of "county psychiatric hospital" (set forth in Section 854.3, at page 60 and referred to in the definition of "mental institution," see Section 854.2, at page 58) is not broad enough to embrace all facilities operated by counties for the detention, care, or treatment of mentally disordered or addicted persons. As Mr. Lynch views it, the fault probably lies in Section 7100 of the Welfare and Institutions Code. That section provides:

> 7100. The board of supervisors of each county may maintain in the county hospital or in any other hospital situated within or without the county, suitable facilities and hospital service for the detention, supervision, care, and treatment of persons who are * * * mentally disordered, mentally * * * retarded, or who are alleged to be such.
>
> The county may contract with public or private hospitals for such facilities and hospital service when they are not suitably available in any institution or establishment maintained or operated by the county.
>
> The facilities and services, unless subject to or provided under the Short-Doyle Act, shall be subject to the approval of the State Department of Public Health and each person having charge and control of any such hospital shall allow the department to make such investigations thereof as it deems necessary at any time.
>
> Nothing in this chapter means that * * * mentally disordered, or mentally * * * retarded persons may not be detained, supervised, cared for, or treated, subject to the right of inquiry or investigation by the department, in their own homes, or the homes of their relatives or friends, or in a licensed establishment.

Section 7100 is somewhat ambiguous but seems to contemplate that the facilities provided will be in a hospital of some sort. Mr. Lynch indicates in this letter and also in an earlier one, that the county is maintaining or will maintain some facilities that are not located in a "hospital," e.g., rehabilitation centers, halfway houses, facilities for treatment of drug abuse patients. To bring these latter facilities within the definition

of "county psychiatric hospital" (and thus within the definition of "mental institution" and in turn, therefore, within the scope of the broad general immunity conferred by Section 854.8), he suggests amending Section 7100 to provide general authority to maintain facilities providing all the various services mentioned in his letter. The staff is frankly reluctant to tinker with the provisions of the Welfare and Institutions Code which deal with substantive authority of public entities. The definition of "county psychiatric hospital" that we have used in Section 854.8 is exactly that set forth in Section 7101 of the Welfare and Institutions Code. Even if it is too narrow, this would only affect the broad general immunities conferred by Section 854.8 and not the specific ones proposed originally by the Commission--Sections 855-856.4. In response to Mr. Lynch's earlier comments, the Commission broadened the definition of "mental illness or addiction" set forth in Section 854.4 and used to describe the persons affected by the specific immunities of this chapter. Thus, the staff believes the only critical issue is whether the Commission wishes now to broaden the definition of "county psychiatric hospital" used in the broad, general immunity section. One suspects that Section 854.3 would not be given the narrow interpretation suggested by Mr. Lynch, but would rather be interpreted to include all county facilities furnishing inpatient care. The staff therefore suggests that no further changes be made in this regard.

(6) Injuries to escaped mental patients. Section 856.2 (at page 69) was previously amended to provide immunity for entities and their employees from liability for injuries to escaping or escaped mental patients. Professor Van Alstyne's earlier comments, while not directed towards this section, cast some doubt on whether this section will accomplish its

purpose in precluding actions for wrongful death. However, as noted above, (1) injury is defined to include death and (2) Section 856.2 has no exceptions regarding injuries to third persons in contrast to subdivision (c) of Sections 844.6 and 854.8, which subdivisions purportedly furnished the basis for the holding in Garcia v. State. These points may solve the problem here. Alternatively, the section could be amended, perhaps as follows:

856.2. (a) Neither a public entity nor a public employee is liable for :

(1) An injury caused by an escaping or escaped person who has been ~~committed~~ confined for mental illness or addiction.

(2) An injury to, or the wrongful death of, an escaping or escaped person who has been confined for mental illness or addiction.

(b) [no change]

Appropriate changes would have to be made in the Comment to this section.

At the September 1969 meeting we hope the Commission will be able to consider the above comments and suggestions and make final decisions regarding this portion of the recommendation.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memo 69-105 EXHIBIT I

THE UNIVERSITY OF UTAH
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COLLEGE OF LAW

July 10, 1969

John H. DeMoully
Executive Secretary
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Re: Tentative Recommendation No. 10
(Prisoners and Mental Patients)

Dear John:

Please accept my apologies for not having sent you earlier my suggestions as to the prisoner and mental patient tort liability modifications. Time pressures simply got too heavy.

My thoughts are as follows:

1) There are five problems which the revised version of Government Code § 844.6 doesn't seem to take care of adequately, but which, in my judgment, should be dealt with in the course of revision:

a. If a prisoner dies as the result of a dangerous condition of prison property, may his heirs maintain a wrongful death action against the public entity? See Govt. Code § 844.6(c).

Van Alstyne, California Government Tort Liability §7.12 (1964) takes the position that the entity should be liable in such a case, since the injury is to the heirs, and not to the prisoner. The case of Garcia v. State of California, 247 Cal. App. 2d 814, 56 Cal.Rptr. 80 (1967), reached the same result, holding the State liable for wrongful death to a prisoner due to a dangerous property condition.

On the other hand, a footnote in Sanders v. Yuba County, 247 Cal. App. 2d 748, 55 Cal. Rptr. 852, 854 n. 1 (1967), explicitly rejects the view that wrongful death is actionable under Section 844.6(c). See Van Alstyne, California Government Tort Liability Supp. § 7.12 (1969).

Thus, there is a conflict of case law which should be resolved. I would recommend that wrongful death actions be permitted, where a prisoner dies as a result of a dangerous condition of prison property. The incentive to keep jails and prisons in a safe condition, which threat of liability might provide, would be salutary and consistent with the basic purpose of allowing suit by third parties (e.g., visitors to prisons or jails) who are injured by dangerous conditions located therein. Moreover, recovery by heirs would not threaten prison discipline, as a suit by a living prisoner might do.

b. If a prisoner dies because of the negligent or wrongful act or omission of a public employee, may his heirs maintain a wrongful death action against the public entity?

The basic problem posed here is, in substance, the same as that posed in item a. above: should not the prisoner's heirs, who sustain an "injury" within the meaning of the Tort Claims Act by his death, be permitted to recover in a wrongful death action?

Garcia v. State of California, supra, reads Section 844.6 very narrowly, concluding that it permits a wrongful death action only when the prisoner dies as the result of a dangerous condition of public property. But, according to Garcia, "no liability is imposed upon a public entity by reason of the death of a prisoner resulting from . . . acts of . . . prison employees." 56 Cal. Rptr. at 82. This construction, I believe, is unduly narrow.

The reason why the heirs may recover in wrongful death, in the dangerous condition situation, is that the "injury" is [illegible]ted upon the heirs -- and they, of course, are persons other than the prisoner within the meaning of § 844.6(c). It is clear from the language of paragraph (c), however, that it does not impose any liability on the entity; on the contrary, it merely precludes § 844.6 from being construed to grant immunity (i.e., because the dangerous condition may have been caused by the acts of a prisoner). In Garcia itself, and in the great bulk of wrongful death cases based on dangerous conditions that kill prisoners, the heirs would be able to recover under the Act even if paragraph (c) had been omitted from § 844.6. Paragraph (c) was intended to take care of the rare case where this would not be true.

Thus, the real reason why the heirs should be able to recover in wrongful death -- whether or not there is a dangerous condition

that caused the death -- is that the injury sustained by the prisoner's death is an injury to the heirs, and not to the prisoner. Only the prisoner's own cause of action for personal injuries is abolished by § 844.6(a)(2), since only that cause of action is for injury to the prisoner.

The better view, I submit, is that a wrongful death action should lie against the public entity, based on the death of a prisoner, where the death was caused by the negligent or wrongful act or omission of an employee of the public entity (absent some statutory immunity other than § 844.6). Since Garcia casts doubt on this position by obiter dictum in the opinion -- and the same doubts are advanced also in dictum in Sanders, supra -- I submit that § 844.6 should be amended to clarify and make the rule explicit that wrongful death actions will lie.

c. If a prisoner dies because of the negligent or wrongful act or omission of a fellow prisoner, may his heirs maintain a wrongful death action against the public entity?

Under the analysis in points a. and b. above, the heirs should be able to sue for wrongful death in any situation where a prisoner is killed under liability-producing circumstances, unless some statutory immunity stands in the way.

The language of § 844.6(a)(1) appears to be precisely that kind of statutory immunity, for it denies entity liability for "an injury proximately caused by any prisoner." When a prisoner is killed by fellow-prisoners, the injury (to the heirs) is, clearly enough, an injury "caused by" prisoners.

This application of paragraph (a)(1) of § 844.6, however, is unfair and unjust, and should be eliminated by amendment. The reasons for doing so are:

(1) No rational reason can be advanced for permitting the heirs to recover in wrongful death in other situations (as the Act, properly construed, now permits) but not in the present one.

(2) The heirs, in any event, could not recover for wrongfrul death caused by a fellow-prisoner unless some basis of entity liability were present. Ordinarily, therefore, the heirs would have to establish either that the

fellow-prisoner was acting in the course and scope of some agency relationship with the public entity (e.g., he might have been acting as a prison trusty or in the scope of some work assignment or errand for prison authorities at the time of the tortious act that caused the death) or that some tortious act or omission of a public employee was a concurrent proximate cause of the death.

(3) If the culpable fellow-prisoner was acting as a prison agent or servant, then liability to the heirs should be governed by the analysis set out in point b. above.

(4) If there was concurrent tortious conduct by a public employee, then the mere fact that a fellow-prisoner's act or omission was also a partial cause of the death should not serve to shield the public entity from liability to the heirs. The immunity from liability for an injury "proximately caused by any prisoner" presumably would be construed -- in light of the liberal interpretation rule favoring liability and disfavoring immunity which was relied on in Johnson v. State of California, 73 Cal. Rptr. 240 -- as applicable only when the prisoner's tortious conduct was the sole proximate cause of the injury. Certainly nothing in the wording of § 844.6 suggests that the well-settled doctrine of concurrent liability and concurrent causation was intended to be abolished.

d. If a third person, other than a prisoner, is injured by the tortious act or omission of a prisoner which operates concurrently with the tortious act or omission of a public employee, may the injured plaintiff maintain an action against the public entity?

The analysis set out in the preceding paragraphs is not limited to wrongful death actions. It should follow that even if a third person (not a prisoner) was injured by a prisoner, he could still recover from the entity if he could prove the concurrent negligence or intentional wrong of an employee of the entity.

For example, if a visitor to a jail is set upon and beaten by a vicious deputy sheriff acting as a jailor, the injured visitor

would have a cause of action against the public entity employer of the deputy. (Assume no other statutory immunity applies.) It should make no difference, I would submit, if a jail prisoner should happen to join in and assist the deputy in beating up the visitor. The tort of the deputy is a concurrent proximate cause of the plaintiff's injuries for which he should be able to recover, even though the injuries caused by the prisoner would not be a basis of recovery.

Yet, under the language of § 844.6, as it now reads, a court could conceivably hold that there would be no liability in the case I have supposed, since the injury was "proximately caused" by a prisoner -- at least in part. The issue was actually presented in Datil v. City of Los Angeles, 69 Cal. Rptr. 788 (1968), by the facts before the court, but was apparently not argued by counsel. The court, by denying liability for an injury caused by a fellow-prisoner (even though concurrent negligence of city employees was alleged), appears to have assumed that the concurrent negligence of the city did not preclude application of the immunity. To be sure, since the opinion doesn't even mention the point, much less discuss it, the Datil case cannot be deemed authoritative. The point, however, seems so obvious that it is hard to explain how the court could have overlooked it. Datil, therefore, is to me a troublesome decision. See also the views of Professor Van Alstyne, in California Government Tort Liability Supplement § 7.15 (1969).

I conclude that § 844.6 should be amended to make it clear that the immunities thereby established are not intended to do away with liabilities that would otherwise be proper, under the Act, where there was concurrent causation.

e. If a third person, other than a prisoner, is injured by a prisoner who is acting as an agent or servant of the public entity, may the third person maintain an action against the entity?

If a prisoner, acting as a jail or prison employee (e.g., a prison trusty; or a prisoner engaged in assigned custodial duties) injures a visitor, I see no reason why the public entity should not be liable to the same extent as if a full-time employee of the jail or prison (i.e., a non-prisoner) had committed the tort. Nothing in § 844.6 creates an immunity for the entity in the latter event. If the entity elects to use its prisoners in an agency or servant relationship, it should also assume responsibility for their torts to third person

CONCLUSION: I would suggest that the problem I have outlined could be resolved by changing § 844.6(c) to read as follows:

"(c) Nothing in this section prevents a person, other than a prisoner, from recovering from the public entity for wrongful death of a prisoner, or for an injury proximately caused by the wrongful act or omission of any person (including a prisoner) while acting in the course and scope of employment as an employee of the public entity, or for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part."

2) Under the foregoing analysis, any changes made to Govt C § 844.6 would also seem to be equally appropriate to introduce into Govt C § 854.8 (dealing with immunity for injuries by or to inmates of mental institutions). The two sections are exact parallels, and I believe the same rationale should apply to each.

3) I find it somewhat anomalous that the Commission's comment to the proposed amendment of Govt C § 846 undertakes to find any support in the Ne Casek decision. As I read Ne Casek, it seems clear that Judge Kaus did not think Section 846 was applicable, since he fails to cite it, discuss it, or rely upon it -- although he does mention § 845.8(b), which seems quite clearly to cover the issue of an injury caused by an escaping prisoner. (The arrested persons were not "prisoners," however, within the meaning of § 845.8.) Moreover, Ne Casek was decided on the basis of discretionary immunity; and, it seems quite clear, the decision was disapproved on that score in Johnson v. California, 73 Cal. Rptr. 340.

Thus, I think Ne Casek provides no support for the proposed amendment to Section 846, and its citation in the Comment is misleading.

In any event, I doubt that the amended version of Section 846 would result in liability in the Ne Casek situation anyway. First, the

amended language only grants immunity for injuries resulting from the "escape" or "attempted escape" itself. Since Section 845.8 clearly covers the problem of injuries caused by an escaping prisoner, a court would, I should think, limit Section 846 (as amended) to injuries claimed to have resulted from the act of escape itself. For example, the escape of an arrested person, who had been taken into custody under body attachment or pursuant to a bench warrant to enforce a subpoena to testify, could well result in injury to the person who procured the arrest. This kind of injury would be covered by Section 846. The kind of injury that resulted in Ne Casek would probably not be so covered, except possibly that a court might read the Ne Casek situation into Section 846 because of the citation in the Comment.

If the Commission's purpose is to codify the result in Ne Casek, I conclude that (a) Section 846 has not been well-drafted to make that intent clear -- the amendment should have been to Section 845.8; and (b) the Comment, by a misleading and, to my way of thinking, improper citation to Ne Casek, seeks to achieve the result by a process of "legislation by comment," which I regard as undesirable. The comments should explain the meaning of the statute, not change its meaning.

I hope these comments and suggestions will be of value, and are not too late to be given appropriate consideration.

Sincerely yours,

Arvo (mbs)

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July 30, 1969

Mr. John DeMoully, Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Dear John:

This is in answer to your recent letter asking that we suggest a definition of "County Psychiatric Hospital" which might be used in the Tort Claims Act.

We have discussed this matter at some length with our Department of Hospitals and it seems that they have such a wide variety of services for mental patients that it would be difficult to formulate a very brief comprehensive definition. This county maintains at the County Hospital and in other facilities, programs for evaluation, supervision, care, treatment and detention of persons afflicted with mental disorder or mental retardation, and those addicted to or dependent on drugs or alcohol.

These services and programs include inpatient services, outpatient services, partial hospitalization services such as day care, night care, or weekend care, emergency services, consultation and education services, diagnostic services, rehabilitative services including vocational and educational programs, precare and after-care services including foster home placement, home visiting and halfway houses, training programs, research and evaluation. This array of services is considerably broader than the services included in Welfare & Institutions Code Sections 7100 et seq., which is referred to in the

proposed amendment to the Tort Claims Act. It does not appear particularly appropriate to enumerate all of these particular activities in the Tort Claims Act although it would be appropriate to extend the exemptions from liability which public agencies have in the mental health field to all of their mental health activities.

It seems to me that probably the best approach would be to amend Welfare & Institutions Code Sections 7100 et seq., which provide the general authority to maintain facilities for mentally disordered or retarded persons to include all of the above mentioned activities. If this is done, then the definition suggested for the Tort Claims Act would pick them up.

Very truly yours,

JOHN D. MAHARG, County Counsel

By Robert C. Lynch
Robert C. Lynch
Assistant County Counsel

RCL:hv