

## Memorandum 2010-6

**Tort Liability and Immunity Under the Government Claims Act**

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This memorandum continues the Commission's study on the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act. 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

Although these provisions are often referred to as the "Tort Claims Act," the California Supreme Court now refers to the statute as the "Government Claims Act," because the claims presentation requirements also apply to contract claims and other non-tort claims. *City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 171 P.3d 20, 68 Cal. Rptr. 3d 295 (2007). The Commission will follow the Court's practice.

The topic of governmental immunity is complex because it balances the needs served by traditional theories of tort law with the needs served by governmental immunity. It is important to understand the competing policies embodied in the Government Claims Act before analyzing whether charter schools should be subject to it.

This memorandum examines the policies underlying tort liability and sovereign immunity. It also begins to examine the embodiment of these policies in the Government Claims Act by reviewing the liability and immunity provisions of the Government Claims Act most likely to apply to charter schools and the policies served by those portions of the Act.

All statutory references in this memorandum are to the Government Code unless otherwise indicated.

## THEORIES OF TORT LIABILITY AND SOVEREIGN IMMUNITY

**Theories of Tort Liability**

Tort liability developed as a civil remedy for injuries caused by others. Fault and risk are the two primary theories of tort liability. The fault theory requires the party who breached a duty of care and caused an injury to compensate the injured party. The fault theory serves three purposes: (1) it shifts losses away

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from an innocent injured party and to the responsible party, (2) it deters behavior likely to cause injury, and (3) it encourages the use of precautions to prevent injury. Arvo Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm'n Reports 1, 271-72 (1963) (hereinafter, *A Study Relating to Sovereign Immunity*).

An important variation on the fault theory is vicarious liability. Vicarious liability places the burden of the loss on the party considered most likely to be able to (1) bear the cost of the loss, and (2) prevent recurrence of the tortious behavior, even though the party is not directly responsible for the injury. In general, employers are vicariously liable for the acts of their employees, and often an employer is also the intended beneficiary of the act or omission and should therefore bear some responsibility for a resulting injury. See, e.g., *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.*, 130 Cal. App. 4th 1, 8, 29 Cal. Rptr. 3d 665 (2005); 29 Cal. Jur. 3d § 130 (2009).

The risk or strict liability theory of torts spreads the cost of a loss among all those who might benefit, regardless of actual culpability. An inherently dangerous activity, such as the use and handling of explosives, is an example of a situation in which strict liability applies. *Id.* at 274.

### **Theories of Sovereign Immunity**

Applying the policy rationales of traditional tort liability to government entities can be problematic. Government plays a unique role in society. It makes and enforces the laws. It also engages in many activities that serve the public at large. These activities are mandated by law and reflect policy decisions made by the people through their legislators. A public entity does not have the luxury of halting a service simply because it is deemed too costly or risky. A public entity also does not benefit from its conduct in the same manner as private entities. It receives its revenue from the taxpayers rather than directly from the users of its services. As a result, the traditional tort objectives of requiring the culpable party to compensate the injured party, deterring the tortious behavior, or using the risk theory to spread costs are not necessarily appropriate. See *Recommendation Relating to Sovereign Immunity, Number 1 — Tort Liability of Public Entities and Public Employees*, 5 Cal. L. Revision Comm'n Reports 801, 810 (1963) (hereinafter, *Number 1 — Tort Liability of Public Entities and Public Employees*).

Even when a public entity provides a service that is analogous to a privately offered service, traditional tort theories can be difficult to apply, because the

government version of the service often contains constraints not applicable to private entities. *Id.*

A comparison between public and private schools provides an example of how two apparently analogous services can be quite different. Public schools must provide an education to all who qualify and must abide by non-discrimination rules. Private schools may have selective admissions policies. Public schools may not charge tuition but private schools have no such financial constraint. Cal. Const. art. IX, § 5; see also, Educ. Code § 200; *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 810.

Sovereign immunity accommodates the unique nature of government. It is a concept that dates back to the English feudal system, where the king was the highest authority and there was no appeal from his decision. That principle carried over to the United States, where the courts have long accepted sovereign immunity for governmental activities. See, e.g., Erwin Chemerinsky, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 5 Stan. L. Rev. 1201, 1201 (2001).

#### *Primary Arguments for Sovereign Immunity*

Although sovereign immunity is grounded in the idea that government entities are sovereign and cannot be sued without permission, a number of other rationales have developed to justify the application of sovereign immunity. See *A Study Relating to Sovereign Immunity, supra*, at 17.

Two closely related arguments constitute the primary justifications for governmental immunity: protection of the public fisc and the need to allow government to govern.

Protecting the public fisc is important for several reasons. The costs of defending actions for injuries or perceived injuries caused by government activity could be very expensive. Resources may be diverted from important government activities or tax rates may increase. Further, when a public entity is involved, shifting losses away from an innocent injured party places the burden on another arguably innocent party — the taxpayer. See, e.g., *Alden v. Maine*, 527 U.S. 706, 750-51 (1999).

The potential of having to allocate a large portion of the public fisc to money damages may significantly impinge on the government's ability to govern. Resources are limited and the government should be allowed to decide how to best allocate those resources. A public entity cannot effectively carry out its

duties if too many of its resources are devoted to defending lawsuits and paying claims, or if the entity constrains important activities in order to avoid potential claims. See *id.* at 750.

Another, more subtle, justification for sovereign immunity is that lawmakers should not be unduly burdened by the specter of judicial interference in the development of public policy. For example, the state might make a policy decision about an affordable level of risk involved in a particular government program. If the state could be sued for any resulting injuries, the court might find itself ruling on the reasonableness of the state's policy. Under this theory, the proper remedy for bad law is repeal or removal of lawmakers from office, not judicial second guessing. See *id.* at 750; Chemerinsky, *supra*, at 1217-19.

The argument for sovereign immunity can be extended to government employees. Individual employees should not carry the burden for activities that benefit the public as a whole, and if government employees could be personally liable for carrying out their duties, few would be willing to accept government jobs. *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 221, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Number 1 – Tort Liability of Public Entities and Public Employees*, *supra*, at 812-15.

#### *Primary Arguments Against Sovereign Immunity*

Arguments for sovereign immunity are generally balanced by arguments that the public must share both the benefits and burdens of government activities. Thus, the public should bear some of the costs associated with the receipt of government services, including the inevitable injuries to individuals. Forcing an innocent injured party to bear the entire cost of an injury can be very harsh. See, e.g., Chemerinsky, *supra*, at 1215.

Another argument against sovereign immunity is that it frustrates deterrence. A public entity has no incentive to implement any safety measures at all if it knows that it cannot be sued. See *id.* at 1213.

### BRIEF HISTORY OF THE GOVERNMENT CLAIMS ACT

In California, the Government Claims Act embodies the competing policies of governmental immunity and liability. The impetus for the Government Claims Act was two decisions by the California Supreme Court in 1961: *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) and

*Lipman v. Brisbane Elementary School District*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

In *Muskopf*, the Court suspended sovereign immunity for public entities, making them civilly liable for their torts. In *Lipman*, the Court held that discretionary immunity, which protects public employees, would not necessarily extend to the employing public entity.

The Legislature responded immediately to these two decisions by taking the very unusual step of suspending the effects of the decisions for a period of two years. It then made a high priority assignment to the Commission to recommend comprehensive legislation to deal with the problems of governmental liability and immunity before the two-year moratorium expired. During this time, the Commission dedicated substantially all of its resources to the development of a comprehensive statute on governmental liability and immunity to fill the gap created by the court's decisions. *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 803-04, 807-08.

The Legislature then enacted the Government Claims Act on the recommendation of the Commission. 1963 Cal. Stat. ch. 1681.

### **Government Liability and Immunity Before the Government Claims Act**

Before *Muskopf* and *Lipman*, the civil liability landscape for public entities and public employees in California was confusing and inconsistent. Some immunities and liabilities were based on statute, which sometimes overlapped or conflicted. Other immunities and liabilities were determined by case law. *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 807.

The end result of this patchwork of rules is that some public entities and employees were subject to greater liability than others without good justification for the differing treatment. For example, both swimming and golf are recreational activities. However, before the Government Claims Act, the standards used to determine liability meant that a person injured in the parking lot of a public swimming pool could not be compensated while a person injured in the parking lot of a public golf course could be compensated. *Id.* at 807-08.

### **Commission Study on Governmental Liability and Immunity**

#### *Basis for Commission Recommendations*

The Commission's study was a comprehensive and in-depth treatment of governmental liability in California. It considered the following issues:

- The state of the law before *Muskopf* and *Lipman*, including the various gaps, overlaps, and inconsistencies.
- The experience of other states and the Federal Tort Claims Act.
- The activities most likely to cause complaints against public entities.
- The policies associated with government immunity and liability.

The Commission's recommendations are a synthesis of all of those considerations. *Id.* at 811.

*Recommended Approach to Public Entity Liability and Immunity*

The Commission concluded that the best approach for public entities was a presumption of non-liability except by statute or constitution. *Id.*

Total immunity for public entities was rejected, because of the harsh consequences to injured parties and the lack of deterrence in public entity behavior. Full liability was also rejected as likely to be too costly and likely to interfere with efficient functioning of government. A presumption of liability except by statute was rejected as likely to result in too many unforeseen situations of liability, which would be unpredictable and costly. *Id.*

The Commission carefully considered the ramifications of liability. Ultimately, it recommended allowing limited liability only if budget safeguards are available. See *id.* at 808-09.

The primary budget safeguards incorporated into the Commission's recommendations included short statutes of limitations, a prohibition on payment of exemplary and punitive damages, authorization for judgments to be paid out over time, and the authorization to purchase insurance. *Recommendation Relating to Sovereign Immunity, Number 3 — Insurance Coverage for Public Entities and Public Employees*, 4 Cal. L. Revision Comm'n Reports 1202, 1205-07 (1963).

The Commission expected that its recommendation would:

- Result in more certainty of outcome for both public entities and those injured by government activities.
- Allow public entities to better assess potential sources of liability and obtain reasonably priced insurance.
- Provide some assurance that claims without merit are unlikely to go forward.
- Provide the Legislature with better control over future areas of liability, which can be added by statute.

*Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 811.

The limited immunity approach also has some advantages for the injured party.

- The injured party has an avenue for obtaining compensation for an injury, unlike a rule of total immunity.
- A public entity does not have an incentive to pursue a remedy through the courts in the hope that the courts will create additional immunity, as would happen with a general rule of non-immunity.

*Id.* at 809.

#### OVERVIEW OF STATUTORY SCHEME

The purpose of the Government Claims Act is to define and limit public employee and public entity tort liability. It abolished common law tort liability for public entities, making all public entity liability statutory. See Section 815 & Comment; *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 932, 968 P.2d 522, 80 Cal. Rptr. 2d 811 (1998).

The Government Claims Act can be categorized into three broad areas: (1) liability and immunity of public entities and employees, (2) public employee rights to indemnification, and (3) claim presentation. Sections 810-998.3. These areas balance the traditional tort theories with the unique needs of government.

The liability and immunity provisions provide an avenue of compensation for those injured by governmental activities. At the same time, they protect the public fisc by limiting the activities for which compensation is allowed, and they allow the government to govern by minimizing interference with governmental activities.

The indemnification provisions encourage public employees to execute their employment duties with zeal by limiting their personal tort liability. They also remove the risk of making a public employee personally liable for risks created by public employment when the public entity is not liable. *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 814. See Memorandum 2010-7 for further discussion.

The claims presentation provisions protect the public fisc and provide just compensation to injured parties by potentially allowing claims to be resolved before litigation ensues. This element of the Act will be discussed in a future memorandum.

The Government Claims Act provisions on liability apply only to actions for money or damages. A public entity may still have liability based on contract or right to relief other than money or damages. Section 814.

### **Application of Government Claims Act**

An important aspect of determining liability is determining who is subject to the Government Claims Act. It applies generally to a “public employee” or a “public entity.” A public employee is an employee of a public entity who is not an independent contractor. Sections 810.2, 811.4 & Comment.

A “public entity” includes

The State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

The definition is intended to include the state and all of its local and regional subdivisions. Section 811.2 & Comment.

Public entities are further characterized as the “state,” a “local public entity,” or a “judicial branch entity.” Sections 900.3, 900.4. A claim against the state is paid by the Controller. Sections 900.6, 940.6.

A local public entity includes political subdivisions or public corporations in the state, such as a county, city, or district, but does not include the state. Local public entities are independently liable for their torts. Sections 900.4, 905, 940.4.

A school district is considered a local public entity. See, e.g., *Wright v. Compton Unif. School Dist.*, 46 Cal. App. 3d 177, 181-82, 120 Cal. Rptr. 115 (1975).

### *Quasi-Public Entities*

On occasion, a private entity may perform delegated public functions. It is not always clear whether such an entity is to be treated as a public entity. In some instances, the Legislature has addressed that ambiguity. See, e.g., Section 831.5. For example, all charter schools are considered public agencies for purposes of risk pooling under a joint powers agreement. Section 6528. Charter schools are also considered public schools for purposes of funding and may be considered school districts in some instances. Educ. Code §§ 47615, 47650; see also *Wilson v. State Bd. of Educ.*, 75 Cal.App. 4th 1125, 1147, 89 Cal. Rptr. 2d 745 (1999).

### *Identification of Public Employee*

A public employee is an employee of a public entity. An employee includes an

officer . . . employee, or servant, whether or not compensated, but does not include an independent contractor.

The definition deliberately used the word “servant” instead of “agent,” because “servant” was considered a more restrictive definition that would further limit the liability of a public entity. Sections 811.4, 810.2 & Comment.

Compensation is not dispositive in determining employee status because the Legislature recognized that a public official may hold office without compensation. However, an unpaid volunteer is not considered a public employee. Section 810.2; see also *Munoz v. City of Palmdale*, 75 Cal. App. 4th 367, 372, 89 Cal. Rptr. 2d 229 (1999).

Similarly, an unpaid volunteer providing services for a private, nonprofit organization is not considered an employee. Lab. Code § 3352(i). However, in the private sector, an unpaid volunteer could be considered an employee. Lab. Code § 2850; *Eye v. Kafer, Inc.*, 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841 (1962).

Independent contractors are specifically excluded from the definition of a public employee and receive special treatment under the Government Claims Act. Sections 810.2, 815.4.

### LIABILITY AND IMMUNITY

The policies served by the Government Claims Act are implemented with a statutory scheme in which a public entity is presumed immune. Section 815(a); *Caldwell v. Montoya*, 10 Cal. 4th 972, 986, 42 Cal. Rptr. 2d 842 (1995).

However, public employees are presumed liable, and public entities are vicariously liable for the torts of their employees. Sections 815.2(a), 820(a). But, public entities are immune when their employees are immune. Section 815.2(b).

This basic structure is augmented by special rules for areas known to have a high incidence of liability, such as law enforcement, permitting or licensing, and dangerous condition of public property. See Sections 818.4, 844-846, 830-831.8, 850-850.8. Public entities also may be subject to liability from statutes outside the Government Claims Act. Section 815(b).

In effect, public entities and public employees are liable for torts that occur as a result of government activities unless a statutory immunity applies. *Caldwell*, 10 Cal. 4th at 980.

The areas of statutory liability most likely to affect charter schools are vicarious liability for employees, liability for independent contractors, liability for a breach of a mandatory duty, and liability for dangerous condition of public property. Sections 815.4, 815.6, 815.2(b), 835. These liabilities are accompanied by a number of immunities.

### **General Rule of Liability**

The actions of a public employee are the greatest source of liability for public entities. The rule that a public entity is vicariously liable for the torts of its employees unless an immunity applies effectively makes a public entity generally liable for its activities. The presumption that a public entity is immune mainly serves to circumscribe the boundaries of liability. *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 811.

Public employees are presumed liable for their torts to the same extent as private individuals. A public entity is liable for the actions or omissions of its employees that are within the scope of employment and that would give rise to a cause of action against the employee. Limiting the liability of the entity to the liability of an employee makes that liability ascertainable. Section 815.2(a); see *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 812, 816.

Vicarious liability extends to an entity even if a specific employee has not been identified — as long as an employee clearly must have been responsible. Vicarious liability may also extend to intentional torts. Section 815.2(b) & Comment.

Injury is defined broadly to include anything actionable by a private person including injuries to person, reputation, character, feelings, or estate. Section 810.8 & Comment.

“Scope of employment” is not defined in the statutes. The courts usually apply the common law rules and the term is construed liberally. See *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 209, 814 P.2d 1341, 285 Cal. Rptr. 99 (1991).

Vicarious liability for an employee’s torts is similar to the *respondeat superior* liability of private entities. See Lab. Code §§ 2802, 2804. In both cases, the primary policies served are greater assurance that an injured party will be compensated for a loss and that future tortious behavior will be deterred.

## General Immunities

Although liability under the Government Claims Act appears very broad for both public entities and public employees, a number of immunities significantly constrain that liability. By limiting the broad rule of liability, the Government Claims Act protects the government fisc and limits disruption to government functions.

Immunities are extended to public employees to encourage them to fully perform their duties and because an employee should not be solely responsible for bearing the risks created by public employment. An immunity that applies to an employee also immunizes the employer. Granting this vicarious immunity to public entities avoids the problem created in *Lipman*, which allowed entity liability even when the employee is immune. Section 815.2; *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 812.

### *Limits to Vicarious Liability of Public Entity*

A public entity is not vicariously liable when the act or omission of an employee was outside the scope of employment or when an employee acts with “actual fraud, corruption, or actual malice.” Sections 995.2, 996.4; *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4th 992, 1000, 1013, 906 P.2d 440, 47 Cal. Rptr. 2d 478 (1995).

Private entities are also not liable when an employee acts outside the scope of employment. However, private entities may be liable even when an employee acted willfully, maliciously, or criminally, unless that action was for an employee’s personal purposes. 29 Cal. Jur. 3d § 146 (2009).

### *No Vicarious Liability for Public Employee*

A public employee is not vicariously liable for an injury caused by the act or omission of another person, unless otherwise provided by statute. This immunity also covers a mayor or member of a local government council, board, or commission for an injury caused by the act or omission of the governing body.

Liability may attach only if the individual’s own conduct causes an injury. This rule limits the public employee’s liability to his own conduct and nullifies some old cases that applied *respondeat superior* to some public officers as individuals. It also avoids subjecting public employees to greater liability than private employees, who also do not have *respondeat superior* liability for other employees. Sections 820.8 & Comment, 820.9; 29 Cal. Jur. 3d § 130 (2009).

### *Immunity for Discretionary Act*

Discretionary immunity is the broadest immunity available to a public employee. It allows public employees to exercise judgment in their jobs without fear of a suit. It also gives public entities broad authority to engage in governmental activities without undue interference. *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 812.

Although the Government Claims Act recognizes discretionary immunity, it does not provide any guidelines to distinguish discretionary acts from other acts. As a result, case law has developed to create guidelines for the application of discretionary immunity. See Section 820.2 & Comment.

The basic definition of a discretionary decision is one that requires a policy judgment and is made within the scope of employment. A policy judgment is deliberate and considered with a conscious weighing of the risks and benefits. Without these elements, a decision is considered ministerial and not immune. *Johnson v. State*, 69 Cal. 2d 782, 788, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

The courts have also used a variety of other criteria to determine whether a decision is discretionary. For example, a court may review the statutes governing the entity or employee to see whether they indicate discretion. A court may also determine whether a decision affects the public at large. If so, then the decision is often discretionary. Otherwise, the decision is likely to be considered ministerial. K. Hogue, *General Immunities of Public Entities and Employees, in California Government Tort Liability Practice, Vol. 1, §§ 10.8-10.21*, at 616-35 (Cal. Cont. Ed. Bar 2009).

In one example, a school board received immunity for its decision to fire a superintendent despite allegations of discrimination, because the board was given statutory discretion to hire and fire a superintendent. *Caldwell v. Montoya*, 10 Cal. 4th 972, 982, 897 P.2d 1320, 42 Cal. Rptr. 2d 842 (1995). However, in another example, a jailer who refused to release a prisoner after all charges had been dismissed was not immune. *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 527 P.2d 865, 117 Cal. Rptr. 241 (1974).

Discretionary immunity applies even when the employee abuses discretion. There was concern that, without such immunity, the definition of “abuse of discretion” could be construed broadly so as to significantly expand governmental liability. *Id.* at 816; Section 820.2 & Comment; see also *Caldwell*, 10 Cal. 4th at 985.

The public entity may be liable when an employee's acts are not discretionary. *Elton v. Orange County*, 3 Cal. App. 3d 1053, 1060, 84 Cal. Rptr. 27 (1970).

#### *Immunity for Misrepresentation*

A public employee's misrepresentation, whether negligent or intentional, is not grounds for liability if it was within the scope of employment. Such immunity prevents a judicial expansion of the definition of "misrepresentation" to increase a public entity's liability and serves to provide a public entity with absolute immunity from a resulting injury. Section 818.8; *Johnson*, 69 Cal. 2d at 799.

A misrepresentation under this provision is an act or omission that interferes with financial or commercial interests. Thus, immunity for misrepresentation would not apply if, for example, a public employee had a duty to disclose the violent tendencies of a youth to his foster parents and the employee did not do so. *Id.* at 800.

Immunity for misrepresentation does not extend to actual fraud, corruption, or actual malice.

This immunity from tort liability does not preclude a cause of action under contract for misrepresentation. See Section 814; *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 294, 466 P.2d 996, 294, 85 Cal. Rptr. 444 (1970).

#### *Payment of Punitive or Exemplary Damages*

The liability of a public entity is limited to the payment of compensatory damages. A public entity is exempt from damages awarded primarily for the purpose of example and punishment, because such damages are intended to punish a defendant for oppression, fraud, or malice. As noted above, a public entity is not vicariously liable for an employee's tort that includes oppression, fraud, or malice. It would therefore not make sense to hold the entity liable for punitive damages for such conduct. What's more, even if a public entity's employees have acted in such a manner, the true burden of the punishment would fall on innocent taxpayers rather than the entity. Section 818; Civ. Code § 3294; see *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 817.

Under some narrow conditions, a public entity may opt to pay punitive damages. The entity must find that (1) doing so would be in its best interests,

(2) the act or omission giving rise to the judgment was within the scope of employment, and (3) the public employee acted in good faith, without actual malice, and in the apparent best interests of the public entity. Section 825(b). The discretion to pay punitive damages is a consumer protection provision that allows the public entity to mitigate an otherwise harsh result. 1995 Cal. Stat. res. ch. 799.

### **Liability for Act or Omission of Independent Contractor**

An independent contractor who performs work for a public entity is not considered a public employee. Section 810.2. Instead, a public entity has the same liability for an injury caused by an independent contractor that a private person would have. Section 815.4. In general, that means the entity has no liability for the actions of an independent contractor, unless a non-delegable duty or peculiar risk was involved. See, e.g., *Park v. Burlington N. Santa Fe Ry. Co.*, 108 Cal. App. 4th 595, 603-04, 133 Cal. Rptr. 2d 757 (2003).

This treatment of independent contractors prevents a public entity from avoiding liability by contracting out dangerous work to a private entity. Section 815.4; *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 816.

### **Liability for Breach of Mandatory Duty**

Statutes outside the Government Claims Act may override the general rule of immunity for public entities. Section 815.6. Often such statutes or regulations set minimum standards that an entity must meet. These standards constitute a mandatory duty to protect against a particular kind of injury. *Number 1 — Tort Liability of Public Entities and Public Employees, supra*, at 816.

An entity is liable if it fails to discharge a mandatory duty and an injury results. Under this theory of liability, the public entity may be liable even if the public employee is not liable. See Section 815.6; *Bradford v. State*, 36 Cal. App. 3d 16, 19, 111 Cal. Rptr. 852 (1973).

There is no liability, however, if the public entity can establish that it exercised reasonable diligence to discharge its duty. Section 815.6.

A mandatory duty may also arise if a special relationship exists. For example, a special relationship has been found between a school district and its students, such that a school district must take reasonable steps to protect its students. See,

e.g., *Hemady v. Long Beach Unified Sch. Dist.*, 143 Cal. App. 4th 566, 579-80, 49 Cal. Rptr. 3d 464 (2006).

In fact, the Commission added that rule in part to cover the supervisory duties of public schools. Educ. Code § 44807; *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra*, at 816.

However, this duty is not unique to public schools. A private school is held to a similar standard. *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1461-62, 249 Cal. Rptr. 688 (1988).

The mandatory duty rule overrides the broad reach of discretionary liability, which covers most decisions about personnel, facilities, or equipment.

### **Injury Caused by Dangerous Condition of Public Property**

The original Commission study on sovereign immunity identified dangerous conditions of public property as a major source of lawsuits against the government. Previous case law on this topic was confusing and inconsistent. For those reasons, liability for a dangerous condition of public property was given separate treatment from the general rules of liability and immunity. *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra*, at 820.

#### *Structure of Dangerous Condition Provisions*

The basic structure of the dangerous condition provisions reverses the general rules of liability and immunity for public entities. A public entity is presumed to be liable and the public employee is *not*. Section 835; *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra*, at 822.

These provisions encourage entities to maintain safe conditions on public property. *Id.* at 812; *A Study Relating to Sovereign Immunity*, *supra*, at 280.

#### *Basis for Liability*

Public entity liability for a dangerous condition of public property does not depend on a plaintiff's status as a trespasser, licensee, or invitee. *Swaner v. City of Santa Monica*, 150 Cal. App. 3d 789, 809, 198 Cal. Rptr. 208 (1984); see also, *Number 1 — Tort Liability of Public Entities and Public Employees*, *supra*, at 824.

To establish liability, the plaintiff must show that the dangerous condition existed at the time of the injury, proximately caused the injury, and created a reasonably foreseeable risk of the kind of injury that resulted. In addition, the plaintiff must establish one of the following facts:

- (1) A negligent or wrongful act or omission of an employee of the public entity in the scope of employment created the dangerous condition. Section 835(a).
- (2) The public entity had notice of the dangerous condition in sufficient time to have taken protective measures. Section 835(b).

A dangerous condition is one that creates a substantial risk of injury when the property is properly used with due care in a reasonably foreseeable manner. Section 830(a).

The definition of a dangerous condition is broad, and may include injury to intangible interests as long as the injury is of the type that a private individual would be responsible for. Sections 810.8, 830 & Comment. The requirement for a risk to be “substantial” serves to minimize the burden to a public entity. See Section 830.2 & Comment.

Property includes real or personal property under the control of the public entity. Section 830(c).

The public entity may defend against this liability if it can establish that the act or omission that caused the dangerous condition was reasonable or that the action taken to protect against the risk of injury created by the dangerous condition was reasonable. Section 835.4.

Reasonable action to protect against injury means fixing the dangerous condition, warning about it, or providing safeguards. Section 830(b). Thus, a public entity may defend by showing that the precautions were too costly or impractical, because the government often has no choice but to engage in a particular activity. Defenses normally available to private parties are also available. Section 835.4 & Comment; *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 825-26.

Private parties are also subject to a standard of ordinary care, regardless of a plaintiff’s status as a trespasser, invitee, or licensee. Civ. Code § 1714; *Rowland v. Christian*, 69 Cal. 2d 108, 119, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

However, the reasonableness standard available as an affirmative defense against negligence differs between public and private entities, because financial and political constraints may make it impossible for a public entity to accomplish what would be reasonably expected of a private entity. See, e.g., *Martinez v. Chippewa Enters*, 121 Cal. App. 4th 1179, 1183-84, 18 Cal. Rptr. 3d 152 (2004).

### *Employee Liability for Dangerous Condition*

Showing that a public employee is personally liable for a dangerous condition is similar to the requirements for a public entity, except that the complainant must specifically show that the employee was personally responsible for the dangerous condition and could have taken a safer alternative or had sufficient notice and the resources to remedy the problem. Section 840.2; see also, *Number 1 – Tort Liability of Public Entities and Public Employees, supra*, at 826.

Without a showing of personal culpability on the part of an employee, the employee cannot be individually liable. Practically speaking, public employees are unlikely to get sued because it is easier to establish entity liability than employee liability. K. Nellis, *Dangerous Condition of Public Property, in California Government Tort Liability Practice, Vol. 2, § 12.103, at 1008 (Cal. Cont. Ed. Bar 2009)*.

### CONCLUSION

The general scope of tort liability for public and private entities is similar, because the basic policies served by tort liability are similar. Liability fulfills the traditional tort functions of compensation and deterrence.

However, the immunities granted to public entities and public employees significantly limit public entity liability. These immunities were carefully designed to acknowledge the unique nature of government, protect the government fisc, and allow government to govern without undue interference in political decision making or the management of scarce public resources.

The primary immunity — discretionary immunity — gives public entities and their employees broad authority to carry out their governmental functions. The courts will not be called on to second guess policy judgments made by other branches of government. Other immunities, such as the prohibition on payment of punitive or exemplary damages, protect the public fisc, and reduce the perception that a public entity is a source of “deep pockets.”

Finally, the basic structure of the Government Claims Act gives the Legislature the flexibility to make a public entity liable for its torts when policy considerations dictate that compensation and deterrence retain their primary importance. This flexibility can be seen in the provisions relating to a dangerous condition of public property and the requirement for public entities to fulfill mandatory duties.

It will be important to consider the extent to which the policies governing charter schools make them subject to the same considerations that justify public entity immunity. Specifically:

- Should a charter school be immune from liability for discretionary decision making? Do the policies of protecting the government fisc, allowing government to govern, and encouraging employees to perform their jobs with zeal make sense when applied to a charter school?
- Should a charter school receive immunity for a misrepresentation? Is the underlying policy of protecting the government fisc and keeping government functions separate by limiting judicial ability to expand the definition of “misrepresentation” justified when applied to a charter school?
- Should a charter school be exempt from paying punitive or exemplary damages? Does the policy of protecting the government fisc and the recognition of the unique motivations of government apply to charter schools?
- Should a charter school be granted the same reasonableness standard as a traditional public school in defending against liability for an injury from a dangerous condition or a breach of a mandatory duty? Are charter schools subject to political and financial constraints that would justify a lower standard than that applied to private entities?

Respectfully submitted,

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