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RECENT LEGISLATION

GOVERNMENTAL LIABILITY FOR TORTS OF EMPLOYEES—THE END OF SOVEREIGN IMMUNITY IN CALIFORNIA

In 1963 the California Legislature enacted the first general law dealing with the liability of governmental entities for the torts of their employees.¹ The basic objective was to immunize governmental entities. Liability would attach only by statutory exception, as determined by the Legislature.² Sovereign immunity, an ancient common law doctrine largely rejected in other important jurisdictions, was to be reaffirmed in California law.³ This objective was not attained. Rather than general immunity, the concept of general liability has resulted. Immunity, instead of liability, attaches only by statutory exception. It is the purpose of this article to examine those provisions of the 1963 enactment which bring to an end the doctrine of sovereign immunity in California.⁴

THE PROBLEM

The California Supreme Court decided two cases early in 1961 which evoked an immediate reaction from the California Legislature. In *Muskopf v. Corning Hospital District*⁵ the court held that the doctrine of sovereign immunity would no longer protect public entities from civil liability for their torts. The Supreme Court in *Lipman v. Brisbane Elementary School District*⁶ stated that the doctrine of discretionary immunity, which protects public employees from liability for their discretionary acts, might not protect public entities from liability in all situations where the employees are immune. The Legislature reacted at once, passing Chapter 1404 of the Statutes of 1961, which suspended the effect of these decisions until

¹ CAL. GOV'T CODE §§ 810-895.8.

² 4 Cal. Law Revision Comm'n Rep., Rec. & Studies 811 (1963).

³ *Id.* at 812.

⁴ Other bills passed in Stats. 1963 include:

Chapter 1715, Claims, Actions and Judgments against Public Entities and Public Employees. Chapter 1682, Insurance Coverage for Public Entities and Public Employees. Chapter 1683, Defense of Public Employees. Chapter 1684, Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers.

⁵ 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

⁶ 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

the ninety-first day after the final adjournment of the 1963 Legislature. For the next two years the California Law Revision Commission studied the problem of sovereign immunity. It submitted proposals to the 1963 session of the Legislature, most of which were enacted into law with minor changes.⁷ The most important provision states that a public entity is liable for the tort of its employee within the scope of his employment, to the extent that the employee is personally liable, and, unless an enactment declares a contrary rule, the entity is immune from liability for an act or omission of its employee if the employee himself is immune from liability.⁸ Of the many provisions conferring immunity, the most significant provides that a public employee is not liable for discretionary acts within the scope of his employment.⁹

These provisions have a twofold effect: (1) the entity is liable as a private person except where given immunity by statute; (2) the liability of both entity and employee is based on the determination of whether the act of the employee is discretionary or ministerial. Therefore, the question is: What is a discretionary act?

The Background: Discretionary v. Ministerial

Prior to 1961 California law regarding the liability of a public entity for the torts of a public employee was determined by one of two related doctrines. An entity was liable for proprietary activities, and immune from liability for strictly governmental activities.¹⁰ An employee was liable for ministerial actions, and immune from liability for discretionary acts.¹¹ Generally, the protection granted to the employee, for torts resulting from discretionary acts or omissions, extended also to the employer.¹²

Both *Muskopf* and *Lipman* left untouched the "discretionary act" rule to the extent that it protected the employee. However, the protection formerly available to the public entity was abolished. *Muskopf* imposed general liability upon the public entity, thereby eliminating the need to determine whether the activity involved was proprietary or governmental. *Lipman* suggested that the liability of the entity would not be coextensive with the liability of the employee-tortfeasor, but would depend upon various other factors—the importance of the public functions, the extent to which liability might impair free exercise of these functions, and the

⁷ 4 Cal. Law Revision Comm'n Rep., Rec. & Studies Report, at 219-224 (1963).

⁸ See note 3 *supra*.

⁹ *Ibid.*

¹⁰ PROSSER, TORTS, 774 (2d ed. 1955).

¹¹ *Id.* at 781.

¹² See note 2 *supra*, at 815.

presence of remedies other than tort suits for damages.¹³ Under *Lipman* a finding that the employee's act was discretionary would not protect the entity. It would have been necessary to show in addition that some vital public interest would be threatened if immunity was denied the entity. The 1963 enactment forecloses this possibility by providing that a public entity is not liable for an injury resulting from an act or omission of its employee where the employee is immune from liability.¹⁴

Under the liability provisions of the new legislation, the employee is liable as a private person for his tortious conduct unless otherwise provided, and he is accorded the defenses normally available to private persons.¹⁵ The primary exception is for discretionary acts.¹⁶ Under the same provisions, the entity is liable if the employee is liable, and is immune if the employee is immune.¹⁷ The entity is liable as a private person, therefore, except where immunity has been granted by statutory exception. The question that will continue to confront the California courts is whether the act or omission was discretionary or ministerial.

One of the purposes of the new legislation was to restate the pre-existing law on discretionary immunity.¹⁸ A brief review of the California decisions indicates that the doctrine of discretionary immunity, like the concept of the reasonable and prudent man, is often mentioned but only vaguely understood.¹⁹ A need to protect public officials from damage suits when injuries result from the exercise of official judgment and discretion has long been recognized.²⁰ But there has been little uniformity in applying the doctrine to specific cases. The modern trend seems to protect public employees who act in good faith in exercising discretion, but to withhold protection when bad faith is encountered.²¹

The pre-existing law on discretionary immunity may be summarized as follows: 1. Any exercise of judgment may be construed as discretionary. Proof that the duty was unqualifiedly required is usually necessary in order to establish liability.²² A workable con-

¹³ 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

¹⁴ CAL. GOV'T CODE § 815.2(b).

¹⁵ CAL. GOV'T CODE § 820.

¹⁶ CAL. GOV'T CODE § 820.2.

¹⁷ CAL. GOV'T CODE § 815.2.

¹⁸ See note 2 *supra*, at 843.

¹⁹ *Ham v. Los Angeles County*, 46 Cal. App. 148, 189 Pac. 462 (1920).

²⁰ *Downer v. Lent*, 6 Cal. 94 (1854).

²¹ *Galli v. Brown*, 110 Cal. App. 2d 764, 243 P.2d 920 (1952).

²² In *Ham v. Los Angeles County*, 46 Cal. App. 148, 189 Pac. 462 (1920), the court stated:

It would seem a fair application of the rule would be that any duty is ministerial which unqualifiedly requires the doing of a certain thing. To the

cept of discretionary action does not exist in California law. 2. Scope of authority includes anything collateral or incidental to the main duty of the office of the person acting, thereby creating a strong defense to the argument of ultra vires.²³ 3. The prevailing view is that the employee who acts within the scope of his authority in performing a discretionary duty will be immune from liability, even if motivated by malice, dishonesty, corruption or carelessness.²⁴ A strong and continuing minority holds to the contrary.²⁵ The legislation of 1963 deals with each of these characteristics in the pre-existing California law.

Discretionary Immunity, Scope of Employment and Improper Motive after 1963 Legislation

The Legislature did not define discretionary immunity. The scope of employment, however, has been clarified by provisions dealing with activities which the case law protected as discretionary. The purpose of these provisions is to help determine the scope of employment without having to rely on piecemeal judicial decisions, and to prevent the courts from redefining discretionary immunity to exclude these acts previously considered discretionary.²⁶ The scope of immunity includes the following types of activities: execution or enforcement of any law, or enforcement of enactments which are unconstitutional, invalid, or inapplicable; adoption or failure to adopt enactments; issuance, revocation or denial of licenses, permits and certificates of authorization; health and safety inspections of private property; injuries caused by other persons; prosecution of judicial or administrative proceedings; authorized

extent that its performance is unqualifiedly required, it is not discretionary, even though the manner of its performance may be discretionary.

In *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707 (1899), the court defined a ministerial act as non-feasance or negligence in performing a duty which is plain, when the means and ability to perform it are shown, and when the performance or non-performance, or the manner of its performance involves no question of discretion.

²³ 55 Cal.2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

²⁴ *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957); *Lipman v. Brisbane Elementary School District*, 55 Cal.2d 224, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In 77 HARV. L. REV. 224, Louis L. Jaffe states that in California immunity is absolute unless the officer has acted outside, or in defiance of, the established formal rules or in ways clearly beyond his competence.

²⁵ *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35 (1919) (public officer liable for negligence even though act was discretionary). See also *Silva v. MacAuley*, 135 Cal. App. 249, 26 P.2d 887, rehearing denied, 27 P.2d 791 (1933), and *Collenberg v. County of Los Angeles*, 150 Cal. App. 2d 795, 310 P.2d 989 (1957), holding that immunity of a county from liability for negligence does not relieve employees from individual liability. (The effect of this decision may be nullified by the 1963 legislation making employee and entity liability coextensive.)

²⁶ See note 1 *supra*, § 812.

entries upon private property; money stolen from official custody; misrepresentation.²⁷

An important final consideration is the standard of care required of the employee. This appears to vary with the type of activity. Due care is required in the execution of a law; good faith for acting under an enactment which is invalid, inapplicable or unconstitutional; good faith and probable cause for instituting or prosecuting a judicial or administrative proceeding (under another provision the entity is liable but can obtain indemnity from the offending employee).²⁸ The employee must indemnify the entity for recoveries made against the entity for the acts of the employee

²⁷ CAL. GOV'T CODE § 820.4. A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

§ 820.6. If a public employee 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.

§ 820.8. Except as otherwise provided by statute, a public employee is not liable for injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.

§ 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.

§ 821.2. A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, 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.

§ 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.

§ 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.

§ 821.8. 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. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

§ 822. A public employee is not liable for money stolen from his official custody unless the loss was sustained as a result of his own negligent or wrongful act or omission.

§ 822.2. A public employee is not liable for misrepresentation unless he is guilty of actual fraud, corruption or actual malice.

See also CAL. GOV'T CODE §§ 830.2, 830.4, 830.6, 830.8, 831, 831.2, 831.4, 831.6, 831.8, and 840.

²⁸ CAL. GOV'T CODE § 825.6.

(a) If a public entity pays any claim or judgment, or any portion thereof, either against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or

involving actual fraud, corruption or actual malice.²⁹ While this would seem to apply only to malicious prosecution and possibly to action under an invalid enactment, the question arises as to whether this may be a minimum standard bearing upon other types of tortious conduct.³⁰

CONCLUSION

The California Legislature has adopted a policy of general liability for torts committed by public employees and for the entities in whose behalf they perform. But even if general immunity were found, while the doctrine of discretionary immunity remains, either as an exception to general liability, or as the norm of general immunity, the practicing attorney and the courts will be faced with the task of determining whether this doctrine is or should be the proper basis for liability.

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

(b) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his act or omission, and if the public entity conducted his defense against the claim or action pursuant to an agreement with him reserving the rights of the public entity against him, the public entity may recover the amount of such payment from him unless he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice.

²⁹ *Ibid.*

³⁰ 5 Cal. Law Revision Comm'n Rep., Rec. § Studies 259 (1963). Arno Van Alstyne, the author of the study upon which the 1963 legislation was based, states that as a general rule public officials should not be immune from suit or personal liability for malicious and corrupt acts.