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CALIFORNIA PUBLIC ENTITY IMMUNITY FROM TORT CLAIMS BY PRISONERS

Prior to 1961, the doctrine of sovereign immunity was a part of the law of California.¹ In 1961, the doctrine was abruptly abrogated by judicial decision.² The reaction to this abrogation was the enactment of the California Tort Claims Act.³ Within this Act, there is granted to public entities an immunity from liability for injuries to prisoners.⁴ The theory behind this immunity is that

no tort liability should be admitted for damages sustained as the consequence of conditions which are common to all inmates and which simply represent a reasonable application of general policy determinations by responsible prison or jail authorities with respect to the administration of such institutions.⁵

The immunity is intended to prevent a prisoner from recovering from a public entity for injuries caused by its employees. This note will seek to determine the extent to which the public entity is protected by this immunity. Additionally, the court decisions interpreting the statutory exceptions will be examined to establish the need and desirability of such an immunity.

Civil Death⁶

Before examining this aspect of sovereign immunity, it is necessary to determine the extent to which a prisoner is prevented from bringing suit by the concept of civil death. If civil death is absolute and irrevocable, the prisoner cannot sue and the immunity is unnecessary. On the other hand, if civil death only affects certain prisoners and is revocable,⁷ then the immunity has a serious effect on

¹ Stanton, *Sovereign Immunity*, 38 CAL. S.B.J. 177 (1963). For a brief history of the doctrine of sovereign immunity see *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 214-17, 359 P.2d 457, 458-60, 11 Cal. Rptr. 89, 90-92 (1961).

² *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

³ Claims and Actions Against Public Entities and Public Employees (California Tort Claims Act), CAL. GOV'T CODE §§ 810-996.6. This Act was enacted after a 2-year moratorium on the effect of the *Muskopf* and *Lipman* cases as declared by Cal. Civ. Code § 22.3, Cal. Stats. 1961, ch. 1404, § 1, at 3209 (expired 1963), during which time a study was made on the need for sovereign immunity: 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES (1963).

⁴ CAL. GOV'T CODE § 844.6.

⁵ 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 425 (1963).

⁶ Although the use of the term "Civil Death" is technically correct only when referring to persons incarcerated in a state prison for life, CAL. PEN. CODE § 2601, for the purposes of this note it will include all persons incarcerated in a state prison, due to the fact that the right to bring civil suit has been suspended for prisoners with a sentence of less than life, CAL. PEN. CODE § 2600, as well as for those with life sentences. "Civil Death" is generally used herein to mean that the prisoner is unable to bring civil suit.

⁷ CAL. PEN. CODE § 2600 provides in part: "A sentence of imprisonment

a prisoner's right to bring suit.

It is customary for a prisoner to suffer a loss of rights.⁸ The courts have recognized that a state has the power to cause such a loss of rights, even to the extent of impinging upon a prisoner's constitutionally guaranteed rights.⁹ This impingement is within the power of the state legislature as long as its purpose is to guarantee the proper maintenance, operation and security of the prison.¹⁰ In California, the loss of rights includes a statutory pronouncement of civil death upon imprisonment in a state prison.¹¹ The civil death statutes¹² are applicable to felons¹³ only, not to persons incarcerated in city or county jails.

The California courts have held that civil death prohibits a felon from instigating civil actions.¹⁴ However, the Tort Claims Act has tempered the effect of civil death by extending the statute of limitations on a prisoner's cause of action for 6 months beyond the termination of civil death.¹⁵ This extension is allowed only when proper steps have been taken within the normal statute of limitations.¹⁶ The effect of the extension is to permit all prisoners in California to bring civil suit once their civil death, if any, has terminated. Therefore, a prisoner's right to recover against the public entity is determined by the immunity created by law.

Section 844.6¹⁷

The principal effect of the California Tort Claims Act is to cause public entities to be generally liable for the torts of their employees.¹⁸ The Act imposes liability upon the public entity under the doctrine of respondeat superior unless there is a statute creating an immunity for the entity or its employees.¹⁹ Section 844.6(a) of the

in a state prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment. But the Adult Authority may restore to said person during his imprisonment such civil rights as the Authority may deem proper, except the right to act as a trustee, or hold public office or exercise the privilege of an elector or give a general power of attorney." See also CAL. PEN. CODE § 2601.

⁸ *Estep v. United States*, 327 U.S. 114, 122 (1945).

⁹ *E.g.*, *In re Ferguson*, 55 Cal. 2d 663, 670, 361 P.2d 417, 420-21, 12 Cal. Rptr. 753, 756-57 (1961); *Snebold v. Justice Court*, 201 Cal. App. 2d 152, 19 Cal. Rptr. 704 (1962).

¹⁰ *In re Ferguson*, 55 Cal. 2d 663, 670, 361 P.2d 417, 420-21, 12 Cal. Rptr. 753, 756-57 (1961).

¹¹ CAL. PEN. CODE §§ 2600-01.

¹² *Id.*

¹³ CAL. PEN. CODE § 17 (defines felons as persons imprisoned in state prisons).

¹⁴ *Snebold v. Justice Court*, 201 Cal. App. 2d 152, 19 Cal. Rptr. 704 (1962); *In re Robinson*, 112 Cal. App. 2d 626, 246 P.2d 982 (1952). See also *McCullom v. Mayfield*, 130 F. Supp. 112, 116 (N.D. Cal. 1955).

¹⁵ CAL. GOV'T CODE § 945.6(b).

¹⁶ For proper steps to be taken, see CAL. GOV'T CODE §§ 900-35.6.

¹⁷ CAL. GOV'T CODE § 844.6.

¹⁸ Cobey, *The New California Governmental Tort Liability Statutes*, 1 HARV. J. LEGIS. 16, 19-20 (1964).

¹⁹ CAL. GOV'T CODE § 815.2.

Government Code creates such an immunity:

(a) Notwithstanding any other provisions of law, except as provided in subdivisions (b), (c), and (d) of this section, a public entity is not liable for:

- (1) An injury proximately caused by any prisoner.
- (2) An injury to any prisoner.

Subdivision (a) creates an immunity that is intended to prevail over all other provisions of the statute,²⁰ with the exceptions as created in subdivisions (b), (c), and (d).

Subdivision (b) provides that:

Nothing in this section affects the liability of a public entity under Article 1 (commencing with section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

This exception specifically provides that the public entity will not be immune from liability where death or injury to person or property is proximately caused by the negligent operation of a motor vehicle by a public employee within the scope of his employment.²¹ The exception created by this subdivision is necessary and vital to the maintenance of the liability created by the Vehicle Code,²² due to the broad interpretation given the word "law"²³ in subdivision (a). "Law" is interpreted as including both statutory enactments and the common law of the state as determined by the courts.²⁴ Therefore, the liability created by section 17001 of the Vehicle Code would be within the purview of the immunity granted in section 844.6,²⁵ if such liability had not been expressly excluded.

Subdivision (d) provides that:

Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee licensed in one of the healing arts under Division 2 (commencing with Section 500) of the Business and Professions Code for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action based on such malpractice to which the public entity has agreed.

The effect of this subdivision is to exclude from the immunity the liability for malpractice of a public employee licensed in one of the healing arts. It serves to negate the immunity from such liability

²⁰ CAL. GOV'T CODE § 844.6, Legislative Comm. Comment.

²¹ CAL. VEHICLE CODE § 17001 provides: "A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment."

²² *Id.*

²³ CAL. GOV'T CODE § 811 provides: "'Law' includes not only enactments but also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States."

²⁴ *Id.*, Law Revision Comm'n Comment.

²⁵ A. VAN ALSTYNE, GOVERNMENTAL TORT LIABILITY 295-96 (Cal. Cont. Educ. Bar, 1964).

as would have been granted by subdivision (a) of section 844.6. This subdivision also continues California law as it was before enactment of the Tort Claims Act.²⁶

Subdivision (c) is taken up last due to its complexity and due to the fact that it presents an interesting example of judicial interpretation which to some extent avoids the effect of section 844.6. Subdivision (c) provides:

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 under Chapter 2 (commencing with Section 830) of this part.

The Dangerous Condition Exception

Dangerous Condition

There are two definitions which are important in determining the scope of subdivision (c). The first is that of a dangerous condition. It is essential to know the types of conditions that will give rise to liability for injuries caused thereby. A dangerous condition on property, as defined by statute, is one that creates a substantial risk of injury when the property or adjacent property is used in a foreseeable manner.²⁷ The danger can be caused by a condition of either personal or real property.²⁸ However, neither the public entity nor its employee is responsible for a dangerous condition arising from natural conditions of unimproved land.²⁹

For there to be recovery under the "dangerous condition" exception, the plaintiff must prove that the injury was proximately caused by the dangerous condition, and that it presented a foreseeable risk of the kind of injury that occurred.³⁰ And the plaintiff must show that the public entity had actual or constructive notice of the condition with sufficient time to prevent injury or that the negligence or wrongful act or omission of an employee within the scope of his employment had caused the danger.³¹

If any of the above statutory requirements are not met by the plaintiff, the public entity will have a valid defense to a cause of action brought under subdivision (c) of section 844.6. If all the requirements have been met, there are still two possible statutory defenses to such an action. Any act or omission that was "reasonable" will not be grounds for liability,³² and there will be no liability for injury caused by a plan or design for construction or improvement that has been properly approved.³³

²⁶ Cal. Gov't Code § 2002.5, Cal. Stats. 1955, ch. 1785, § 1, at 3294-95 (repealed 1963).

²⁷ CAL. GOV'T CODE § 830(a); Pfeifer v. County of San Joaquin, 67 A.C. 201, 430 P.2d 51, 60 Cal. Rptr. 493 (1967).

²⁸ CAL. GOV'T CODE § 830(c).

²⁹ CAL. GOV'T CODE § 831.2.

³⁰ CAL. GOV'T CODE § 835.

³¹ *Id.*

³² CAL. GOV'T CODE § 835.4.

³³ CAL. GOV'T CODE § 830.6.

Injury

The other definition important to the application of subdivision (c) is that of the word "injury." This word has been broadly defined to include such things as death, damage to property, and injury to person, reputation or estate.³⁴ The breadth of this definition makes it clear that the public entity, barring an immunity, is to be liable for the injuries to the kinds of interests that would be protected in actions between private citizens.³⁵

No distinction can be drawn between an individual's cause of action for injury to his person and his action for the wrongful death of another.³⁶ Both injuries are personal to the plaintiff and are normally protected. Professor Van Alstyne, in his work on governmental tort liability, suggests that the legislature intended that there be no distinction.³⁷ He indicates that subdivision (c) of section 844.6 was carefully worded to avoid stipulating that the injury for which recovery is sought could not stem from an accident involving a prisoner.³⁸ The wrongful death action is not derivative³⁹ and therefore is not defeated by the prohibition of actions by prisoners. Thus, in any of the injuries to a spouse, child or parent (loss of support, consortium and others)⁴⁰ resulting from an injury to a prisoner, such other person can recover if the injury is due to a dangerous condition of the property. The change from the word "visitor," as subdivision (c) was originally proposed, to the word "person,"⁴¹ as finally enacted, indicates that this is the correct interpretation. This change in wording broadens the exception to the immunity, thus permitting the inclusion of a wrongful death action, even though the plaintiff was not on or near the public entity property at the time of the death.

An example of the application of subdivision (c) of section 844.6 is *Garcia v. State*.⁴² Garcia was incarcerated in the state prison at Tehachapi. He was killed when a negligently maintained weight suspension rack collapsed upon him. Had Garcia lived, subdivision

³⁴ CAL. GOV'T CODE § 810.8 provides: "'Injury' means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person."

³⁵ *Id.*, Law Revision Comm'n Comment.

³⁶ *Flournoy v. State*, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962); *Ziegler v. Santa Cruz High School Dist.*, 168 Cal. App. 2d 277, 335 P.2d 709 (1959); *Wilson v. City & County of San Francisco*, 106 Cal. App. 2d 440, 235 P.2d 81 (1951); *Hanson v. Reedley etc. School Dist.*, 43 Cal. App. 2d 643, 111 P.2d 415 (1941). *But see Sanders v. County of Yuba*, 247 A.C.A. 875, 878 n.1, 55 Cal. Rptr. 852, 854 n.1 (1967).

³⁷ A. VAN ALSTYNE, *supra* note 25, at 296.

³⁸ *Id.*

³⁹ 2 B. WITKIN, *SUMMARY OF CALIFORNIA LAW Torts* § 374, at 1977 (7th ed. 1960).

⁴⁰ W. PROSSER, *TORTS* § 119, at 918-19 (3d ed. 1964).

⁴¹ "Visitor" is used in section 844.6(c) as originally included in the Act (March 19, 1963) and as reincluded in the Act (April 22, 1963) before approval by the Senate. 1963 JOURNAL OF THE SENATE 903, 1782. "Visitor" was changed to "Person" as section 844.6 was reincluded in the Act in the Assembly (June 15, 1963). 1963 JOURNAL OF THE ASSEMBLY 5487.

⁴² 247 A.C.A. 950, 56 Cal. Rptr. 80 (1967).

(a) of section 844.6 would have prevented him from recovering for his injuries. However, in the wrongful death action by his widow and child, recovery was permitted.⁴³ Injury from a dangerous condition of public property was interpreted as including wrongful death.

The Exception for the Negligent Failure to Furnish Medical Care

A fourth exception to section 844.6 has been added by the California courts through their interpretation of legislative intent in the enactment of sections 844.6 and 845.6.⁴⁴ Section 845.6 creates a duty to provide medical care:

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.

Section 845.6 is one of the sections⁴⁵ creating liability that seems to be excluded by the statutory language:

Notwithstanding any other provisions of law, except as provided in subdivisions (b), (c), and (d) of this section, a public entity is not liable for:

- (2) An injury to any prisoner.⁴⁶

However, this is not the interpretation applied by the courts. Two courts have agreed that sections 844.6 and 845.6 should be reconciled, but they were apparently unable to agree on a method of reconciliation.

Sanders v. County of Yuba⁴⁷

In *Sanders*, the action was based on a negligent failure to provide medical care. Sanders, a prisoner, injured his eye on a towel rack. Subsequently, he lost all vision in that eye due to the jailer's failure to provide medical care. The court found that he had stated a cause of action based on section 845.6 and that the suit was not prevented by section 844.6 as had been found by the trial court.⁴⁸

In reconciling sections 844.6 and 845.6, the court described the "put and take"⁴⁹ process of these sections as the bill⁵⁰ passed through the legislature. Briefly, the history of the two sections is that section 844.6 was not in the Tort Claims Act as originally proposed in the

⁴³ *Id.* at 953, 56 Cal. Rptr. at 82.

⁴⁴ CAL. GOV'T CODE § 845.6.

⁴⁵ For other excluded sections, see A. VAN ALSTYNE, *supra* note 25, at 598, 609.

⁴⁶ CAL. GOV'T CODE § 844.6(a) (emphasis added).

⁴⁷ 247 A.C.A. 875, 55 Cal. Rptr. 852 (1967).

⁴⁸ *Id.* at 882, 55 Cal. Rptr. at 857.

⁴⁹ *Id.* at 880, 55 Cal. Rptr. at 855.

⁵⁰ S.B. 42 (1963).

Senate, nor was the clause creating the duty in section 845.6.⁵¹ After section 844.6 had been included, it was excluded on April 3, 1963, the same day that section 845.6 was amended to include the duty to furnish medical care. From then on, section 845.6 remained unchanged while section 844.6 was again included in the Act before it passed the Senate. In the Assembly, section 844.6 was again excluded and then reinstated before final passage.⁵²

From this history, the court concluded that it was difficult to rationalize an intent to repeal section 845.6 by the enactment of section 844.6.⁵³ Instead, the court based its harmonization on the fact that section 845.6 was strengthened while section 844.6 was being added and deleted. The *Sanders* court also accommodated the sections by relying on a distinction between physical impact injuries and non-physical impact injuries.⁵⁴

The court's reconciliation based on the history of sections 844.6 and 845.6 is not supported by any rule of construction. The court admits that these rules are defeated by the "notwithstanding" clause of section 844.6.⁵⁵ And, while a reviewing court may rely on legislative history to show legislative intent,⁵⁶ the conclusions drawn by the *Sanders* court do not logically flow from the history of the two sections involved. The fact that section 844.6 was included later than section 845.6 leads to the inference that the legislature was aware of section 845.6.⁵⁷ And, since the legislators were aware of section 845.6, they may be presumed to have intended to include it within the scope of the immunity, as it was not specifically excepted. This interpretation is consistent with the Legislative Committee Comment to section 844.6,⁵⁸ indicating that this section is to prevail over *all* other provisions of law. Professor Van Alstyne,⁵⁹ one of the principal authors⁶⁰ of the Tort Claims Act and a recognized authority on California governmental tort liability and immunity,⁶¹ concurs with the assertion that section 844.6 was to prevail over all inconsistent sections of the Act.⁶²

The court's reconciliation based on a distinction between physical impact, and non-physical impact injuries is also refutable. It is refuted by reference to the broad definition of injury used in the

⁵¹ S.B. 42 (1963) (this bill followed recommendations in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES (1963)).

⁵² For complete history of S.B. 42, see 1963 JOURNAL OF THE SENATE and 1963 JOURNAL OF THE ASSEMBLY.

⁵³ 247 A.C.A. at 880, 55 Cal. Rptr. at 855.

⁵⁴ *Id.* at 881, 55 Cal. Rptr. at 854.

⁵⁵ *Id.* at 880-81, 55 Cal. Rptr. at 855-56.

⁵⁶ See *Rich v. State Bd. of Optometry*, 235 Cal. App. 2d 591, 603, 45 Cal. Rptr. 512, 519-20 (1965).

⁵⁷ *Garcia v. State*, 247 A.C.A. 950, 56 Cal. Rptr. 80 (1967).

⁵⁸ 1963 JOURNAL OF THE SENATE 1893; CAL. GOV'T CODE § 844.6, Legislative Comm. Comment.

⁵⁹ Author of *Governmental Tort Liability*, note 25 *supra*.

⁶⁰ *Sanders v. County of Yuba*, 247 A.C.A. 875, 878 n.1, 55 Cal. Rptr. 852, 854 n.1 (1967).

⁶¹ See *Cabell v. State*, 67 A.C. 174, 185-86, 430 P.2d 34, 42, 60 Cal. Rptr. 476, 484 (1967) (dissent of Justice Peters referring to Professor Van Alstyne).

⁶² A. VAN ALSTYNE, *supra* note 25 at 598-99.

Tort Claims Act.⁶³ The definition makes it clear that "injury" includes both physical impact injuries and non-physical impact injuries, as both would be compensable in an action between private persons. Therefore, both grounds of reconciliation suggested by the *Sanders* court fail to comply with legislative intent, leaving the court's harmonization of sections 844.6 and 845.6 tenuous at best.

Hart v. County of Orange⁶⁴

The heirs of Hart brought a wrongful death action based on a negligent failure to provide medical care under section 845.6. Hart was brought in "too drunk to book" and was placed in a drunk tank. The next morning he was taken to the hospital. The medical care that he finally received was too late to prevent his death.⁶⁵ The court held that the employees of the public entity had been negligent in not obtaining medical care for Hart.⁶⁶

In support of its decision, the court agreed with the result in *Sanders*, which interprets section 844.6 to say "a public entity shall not be liable for an injury to any prisoner except as provided under subdivisions (b), (c), and (d) of *this* section and as hereinafter provided in section 845.6."⁶⁷ However, this court based its reconciliation of the two sections on a more tenable ground. The court in *Hart* relied on a distinction between the subject matter of the two sections.⁶⁸ It said that section 845.6 deals with the creation of a liability, rather than with the creation of an immunity as in section 844.6.⁶⁹ The court contended that section 845.6 creates a duty, the breach of which is not an injury within the meaning of the word as used in the Tort Claims Act.⁷⁰ The distinction is based on the fact that a breach of the duty created in section 845.6 would not give rise to a cause of action between private persons, and therefore is not within the meaning of the word "injury."⁷¹

The court's distinction seems credible. However, even if this distinction is conceded, the court's reconciliation is not irrefutable. The distinction would be valid grounds for reconciling the two sections except for one factor. The legislative intent behind the enactment of section 844.6 was that it should supersede all other liability-creating sections of the Tort Claims Act.⁷² This intent was emphasized in the discussion of *Sanders*⁷³ and applies with equal force to this case.

The courts in both cases seem determined to ignore the intent of the legislature in enacting section 844.6. The courts apparently look with disfavor upon the immunity and seek to avoid its application. A primary reason for the disfavor would appear to be that the public

⁶³ CAL. GOV'T CODE § 810.8.

⁶⁴ 254 A.C.A. 335, 62 Cal. Rptr. 73 (1967).

⁶⁵ *Id.* at 336, 62 Cal. Rptr. at 75.

⁶⁶ *Id.* at 341, 62 Cal. Rptr. at 78.

⁶⁷ 247 A.C.A. at 881, 55 Cal. Rptr. at 856.

⁶⁸ 254 A.C.A. at 339, 62 Cal. Rptr. at 77.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See CAL. GOV'T CODE § 810.8.

⁷² CAL. GOV'T CODE § 844.6, Legislative Comm. Comment.

⁷³ See text accompanying notes 55-63 *supra*.

convenience is no longer thought to outweigh individual compensation.⁷⁴ The feeling seems to be that the public entities should pay for injuries which they have caused. Another reason that the doctrine of sovereign immunity is looked upon with disfavor is that it has been so eroded by statutory exceptions that it operates illogically, causing serious inequalities.⁷⁵ In addition, the immunity prevents respondeat superior from being applied to public entities,⁷⁶ with respect to the maintenance and operation of their prisons.

Does California Need Section 844.6?

The immunity granted to public entities by this section appears to have been included in the Tort Claims Act for two reasons. The first, and probably the most important, was the fear that the exclusion of the immunity would lead to many negligence suits with large judgments against public entities.⁷⁷ A second reason appears to have been the expectancy of problems in the maintenance of prison discipline if suits by prisoners against public entities were to be permitted.⁷⁸

The experience of the federal government, which permits suit by prisoners,⁷⁹ has shown that the expectations of frivolous suits and the resultant damage to prison administration and discipline have failed to materialize.⁸⁰ Likewise, the fear of a higher cost of operation if prisoners are permitted to recover from public entities has also been shown to be unmerited. The California Senate Fact Finding Committee on Judiciary issued a report⁸¹ which should have illustrated to the legislature that the fear of prohibitive cost was groundless. New York had 486 tort claims filed against it in 1959, of which only 10 arose in the penal system.⁸² Of the 10, 6 were dismissed and the one in which recovery was allowed resulted in a verdict of only \$15,015.⁸³ Illinois, on the other hand, had a somewhat higher percentage of claims arising out of its penal system,⁸⁴ but dur-

⁷⁴ See *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 217, 359 P.2d 457, 459, 11 Cal. Rptr. 89, 91 (1961).

⁷⁵ *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

⁷⁶ *Morris, The Disappearing Doctrine of Governmental Immunity from Tort Liability*, 26 GA. B.J. 435 (1965); *Van Alstyne, Governmental Tort Liability: A Decade of Change*, 1966 UNIV. ILL. L.F. 919.

⁷⁷ The fact that section 844.6 was included at the last minute by the Senate Finance Committee would indicate that the fear of many negligence suits was an important consideration in its inclusion in the Act. 1963 JOURNAL OF THE SENATE 1893. California cases support this view. See *Hart v. County of Orange*, 254 A.C.A. 335, 339, 62 Cal. Rptr. 73, 77 (1967); *Reed v. City & County of San Francisco*, 237 Cal. App. 2d 23, 25, 46 Cal. Rptr. 543, 545 (1965).

⁷⁸ Cf. *Muniz v. United States*, 374 U.S. 150 (1963); *Tubor v. Hardwick*, 224 F.2d 526, 529 (5th Cir. 1955). See also *Reed v. City & County of San Francisco*, 237 Cal. App. 2d 23, 46 Cal. Rptr. 543 (1965).

⁷⁹ 28 U.S.C. § 2674 (1964).

⁸⁰ *Muniz v. United States*, 374 U.S. 150, 162-63 (1963).

⁸¹ *Governmental Tort Liability*, 1963 SUPP. TO THE APPENDIX OF THE JOURNAL OF THE SENATE.

⁸² *Id.* at 76-78.

⁸³ *Id.*

⁸⁴ *Id.* at 81-95 (27 of 168 tort claims arose therein).

ing the period from 1950 to 1960, the total award of damages was only about \$13,000.⁸⁵

Another factor to be considered in determining the need for the immunity granted in section 844.6 is the possible liability of public entities if section 844.6 had not been enacted. Prisoners would be able to recover from the public entity for the negligence of its employees,⁸⁶ as well as against the employee himself.⁸⁷ However, neither the public entity nor its employee would be made liable for an injury to a prisoner caused by another prisoner. Prior case law prevents this,⁸⁸ as does the California Tort Claims Act.⁸⁹

In addition, in the absence of section 844.6, the liabilities that were excepted from the immunity would still exist. Each subdivision is a part of California statutory law independent of section 844.6. Subdivision (b), as was pointed out previously,⁹⁰ is merely a codification of the liability created by the Vehicle Code.⁹¹ Subdivision (c) continues the law as it was before the Tort Claims Act was enacted,⁹² and is codified elsewhere within the Act.⁹³ And, subdivision (d), as was also pointed out,⁹⁴ likewise continues prior law⁹⁵ and is incorporated elsewhere into the Act.⁹⁶

Conclusion

Subdivision (a), which creates the public entity immunity from suit by prisoners, is the only part of section 844.6 which enacts statutory law that is not enacted elsewhere. Two of the principal reasons for the enactment of this part of section 844.6—cost and damage to prison discipline and administration—are not the problems that they were thought to be. Therefore, the implications of the maneuvering of the courts to avoid application of section 844.6 deserve serious consideration.

If the legislature intended to make the public entities absolutely immune from liability for accidents involving prisoners, in spite of the objections expressed by the courts, further legislation is needed. The loophole permitting recovery by third parties for injuries arising out of accidents involving prisoners must be closed. Additionally, further legislation is necessary to make it clear to the courts that

⁸⁵ *Id.* at 81-95.

⁸⁶ CAL. GOV'T CODE § 815.2(a).

⁸⁷ CAL. GOV'T CODE § 820.

⁸⁸ *Grove v. County of San Joaquin*, 156 Cal. App. 2d 808, 320 P.2d 161 (1958); *Bryant v. County of Monterey*, 125 Cal. App. 2d 470, 270 P.2d 897 (1954).

⁸⁹ CAL. GOV'T CODE § 820.8 (employee); CAL. GOV'T CODE § 815.2(b) (public entity).

⁹⁰ See text accompanying note 22 *supra*.

⁹¹ CAL. VEHICLE CODE § 17001.

⁹² Cal. Gov't Code § 53051, Cal. Stats. 1949, ch. 81, § 1, at 285 (repealed 1963).

⁹³ CAL. GOV'T CODE §§ 835-35.4.

⁹⁴ See text accompanying note 26 *supra*.

⁹⁵ Cal. Gov't Code § 2002.5, Cal. Stats. 1955, ch. 1785, § 1, at 3294 (repealed 1963).

⁹⁶ CAL. GOV'T CODE §§ 825-25.6.

section 844.6 is not to be reconciled with section 845.6 or any other section.

However, if sovereign immunity is a disfavored doctrine and is ceasing to be accepted in the United States,⁹⁷ the above corrections probably will not prevent judicial maneuvering to avoid the effect of section 844.6. The courts will continually seek new ways to avoid the immunity created. Therefore, the best solution would be to recognize that the fears which led to the enactment of section 844.6 were without merit. This would permit the repeal of the section and would bring California in line with New York⁹⁸ and the federal government⁹⁹ on the issue of suit by prisoners.

Repeal of section 844.6 would permit the enforcement of the duty created in section 845.6, without the present difficulties. The courts and the legislature seem to agree that a jailer should be required to provide medical services for a prisoner when there is actual or constructive notice that the prisoner is in need of immediate medical care.¹⁰⁰ The fact that the legislature later saw fit to supersede the liability does not indicate that the duty was thought to be inappropriate, if monetarily feasible. Such a liability would serve to solidify the moral obligation of common decency to come to the aid of another human being who is in danger.¹⁰¹ But, more importantly, a repeal of section 844.6 would permit the doctrine of respondeat superior¹⁰² to be applied to public entities which provide and maintain prison facilities. Such an application of the doctrine would require the public entities to assume more responsibility in selecting, training and supervising their employees. This increased care might well eliminate many of the injuries giving rise to the actions from which the public entity is made immune by section 844.6.

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⁹⁷ The federal government, New York, Illinois, Alaska, Hawaii, Kentucky, North Carolina, Washington, Arizona, Florida, Connecticut, Michigan, Wisconsin, Minnesota, Nevada, Louisiana, and Utah have all made some move to do away with sovereign immunity. See Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 UNIV. ILL. L.F. 919; Morris, *The Disappearing Doctrine of Governmental Immunity from Tort Liability*, 26 GA. B.J. 435, 440 (1964); *Governmental Tort Liability*, 1963 SUPP. TO THE APPENDIX TO THE JOURNAL OF THE SENATE 24-28.

⁹⁸ *Paige v. State*, 269 N.Y. 352, 199 N.E. 617 (1935).

⁹⁹ 28 U.S.C. § 2674 (1964).

¹⁰⁰ CAL. GOV'T CODE § 845.6, Law Revision Comm'n Comment.

¹⁰¹ W. PROSSER, TORTS § 54, at 337-38 (3d ed. 1964).

¹⁰² CAL. GOV'T CODE § 815. See generally CAL. CIV. CODE § 2338.

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