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Governmental liability: Defenses, immunities and how to avoid them

A look at the 1963 Tort Claims Act regarding government liability of public entities and their employees

Before 1963, governmental tort liability was scattered among legal decisions and statutes. In 1963, in an effort to clarify and simplify the law, the California Legislature enacted several interrelated statutory provisions which have come to be known as the "Tort Claims Act."

This article is an overview of the Act and not a comprehensive discussion of the law governing government claims. For a complete analysis of Government liability, I recommend CEB's California Government Tort Liability Practice (formerly known as Van Allstyn's) which was used liberally for this article.

Public employees

Generally, liability and immunity provisions apply equally to any public entity or public employee in the state government. Public employees are liable for torts to the same extent as a private person, unless a statutory exception applies. (Gov. Code, § 820, subd. (a).) The immunities from liability however, only apply when the tort occurred in the

course and scope of employment. A public employee is subject to any defenses that public employee would have if he/she were a private individual. (Gov. Code, § 820, subd. (b).) Thus, if a similarly situated private individual would be entitled to a non-statutory defense, then the public employee may also take advantage of the defense.

A public employee is not liable for any injury caused by that person's subordinates. (Gov. Code, § 820.8.) Additionally, mayors, city councilpersons, school boards, boards of directors, governing boards or advisory bodies of public entities are not vicariously liable for injuries caused by the public entity or advisory body. (Gov. Code, § 820.9.)

Public entities: Respondeat superior

The principle of respondeat superior is the basis for most of the detailed rules of liability and immunity found in the Act. Every independent public entity is responsible, within statutory limits, for the actionable torts that its employees

commit within the scope of their employment. (Gov. Code, § 815.2 (a).) This principle is not limited to negligent acts, but includes intentional torts as well. In addition, respondeat superior applies when the employee is liable under a statutory provision, not just common law torts.

Negligence: Application of respondeat superior depends upon a breach of a duty of care owed by a public employee to the plaintiff.

Intentional Torts: To establish liability of a public entity for the acts of its employee, the employee must have been acting within the "scope of employment." (Gov. Code, § 815.2 (a).) This depends upon whether (a) the act performed was either required or incident to his or her duties or (b) the employee's misconduct could be reasonably foreseen by the employer in any event.

In order to apply the rules of respondeat superior, the plaintiff must also determine that the individual is a public employee, and employed by the

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entity which is being sued. The Act defines “public employee” as an employee of a public entity, including an officer, judicial officer, servant, whether or not compensated, but does not include an independent contractor. (Gov. Code, §§ 810.2, 811.4.)

Caveat: Public employees are immune from personal liability in a substantial number of situations, and their personal immunity usually transfers to the public entity with whom they are employed. For example, emergency medical care (Bus. & Prof. Code, §§ 2395-2398) and false arrest and false imprisonment by police officers. (Civ. Code, § 43.55; Pen. Code, § 847.)

The general rule of respondeat superior is subject to the qualification in the Government Code section 815, subdivision (b) that statutory liabilities are subordinated to statutory immunities. Even though a public employee is liable in a certain case, the entity employer may be protected from vicarious liability by a statutory immunity.

On the other hand, the entity may be held liable even though its employees enjoy statutory immunity. For instance, the liability of a public entity for dangerous property conditions is directly imposed by statute without regard for the liability of its employees, and the statutory conditions of employee liability in such cases are more restrictive than those that govern entity liability.

Note that public entities are not liable for punitive damages under any circumstances. (Gov. Code, § 818.)

Public entities and independent contractors

A public entity is liable for the torts of its independent contractors to the same extent that the public entity would be subject to such liability if it were a private person. Furthermore, a public entity cannot be liable for an independent contractor’s act or omission if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity. (Gov. Code, § 815.4.) However, public entities are liable for torts of their independent contractors that involve a failure to discharge a non-delegable duty of the employer. (Gov. Code, § 815.4.)

Mandatory duty liability

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity established that it exercised reasonable diligence to discharge the duty. (Gov. Code, § 815.6.)

This duty must be imposed by a constitutional provision, statute, charter provision, ordinance, or regulation. (Gov. Code, § 810.6.) A regulation is defined as a rule, regulation, order, or standard, having the force of law, adopted by an employee or agency of the United States pursuant to the federal Administrative Procedure Act. (Gov. Code, § 811.6.)

The plaintiff must remember to specifically allege a cause of action for breach of the particular enactment that created the mandatory duty. However, whether an enactment is intended to create a mandatory duty is a question of interpretation for the court. The court will only impose a mandatory duty if the statutory language imposes an obligatory provision upon the defendant, but not if it is permissive, discretionary or a general recitation.

In addition, the injury which is caused must be of the particular kind the enactment was designed to protect against. Proximate cause must also be proven between the discharge of the mandatory duty and the injury.

This section provides a basis of direct entity liability entirely independent of the derivative liability created in Government Code, section 815.2. In addition, even if the employees who failed to discharge the mandatory duty are immune from personal liability, the employing entity may still be liable under Government Code section 815.6.

Indemnification

The Tort Claims Act requires a public entity, under certain circumstances, to provide a defense for, and pay any judgment, compromise, or settlement based on a claim against one of its employees, or former employees, for an injury arising out of an act or omission occurring

within the scope of employment. The employee must make a formal request for this assistance not less than 10 days before the day of trial.

Despite the section which states that public entities are not liable for punitive damages, a public entity, other than the state, may pay that part of a judgment against an employee or former employee that is for punitive damages. This will be paid if the public entity finds that the act or omission occurred during the scope of employment; the employee failed to act in good faith, without malice and in the best interest of the entity; and payment would be in the best interest of the public entity.

However, a public entity that has been held liable for its employee’s tort is forbidden by statute to seek indemnification from the culpable employee in most cases. (Gov. Code, § 825.4.) Furthermore, the entity’s liability insurer has been held precluded from any right of subrogation or equitable contribution against an insurer of the employee under a policy covering the same risk.

The public entity may obtain reimbursement from a third party under the Labor Code for workers’ compensation benefits paid by the entity. In addition, under the holding of *American Motorcycle*, a public entity defendant may cross-complain or otherwise seek comparative equitable indemnity against a concurrent tortfeasor.

Proposition 51 (Civ. Code, § 1431.2) limits the liability of public entity defendants by ending joint and several liability for noneconomic damages in any action for personal injury, property damage, or wrongful death, based upon the principles of comparative fault.

Non-tortious liability

Nothing in the Act’s substantive provisions affects liability based on contracts. (Gov. Code, § 514.) Therefore, governmental immunity does not preclude enforcement of contract obligations of public entities. A tortious act or omission for which statutory immunity may be available may thus be actionable if the facts lend themselves to pleading and

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proof on a recognized contract theory. For example, the Act declares public entities immune from liability for an injury caused by misrepresentation by their employees. (Gov. Code, § 818.8.) But such tortious misrepresentation may give rise to a cause of action in contract because Government Code section 814 preserves the contractual remedy. However, a plaintiff seeking to recover money or damages for a breach of contract must timely comply with the claim presentation requirements of the Act.

The right to obtain specific non-monetary relief (e.g. injunction, mandamus) against public entities or employees is not affected by the Act. (Gov. Code, § 814.) Thus, persons adversely affected by continuing official acts that enjoy statutory immunity from tort liability may obtain injunctive relief.

The liability provisions of the Act are not intended to repeal by implication any provisions of the Workers' Compensation Act. (Gov. Code, § 814.2.)

Public entity/employee immunity

It should be noted that the statutory liabilities must be considered in the aggregate; the liabilities of public entities are cumulative in nature, so that the absence of liability under one provision does not preclude liability under another.

Public entities may be immune from tort liability (as distinguished from being non-lie because of a failure of the plaintiff's proof or the establishment of a successful defense) if:

- 1) No statute imposes liability on the public entity;
 - 2) The public entity is declared by statute to be immune from liability under the circumstances of the case; or
 - 3) The culpable public employee, whose act or omission is the basis for a claim of vicarious liability of the public entity is declared by statute to be immune under the circumstances of the case, and the employee's immunity is imputable by statute to the public entity.
- (Gov. Code, § 815.2, subd. (b).)

General immunities

Discretionary acts and omissions of public employees

Government Code section 820.2 provides that "except as otherwise provided by statute," a public employee is not liable for an injury resulting from an act or omission that was "the result of the exercise of the discretion vested in him or her, whether or not such discretion be abused." The discretionary immunity of public employees pursuant to Government Code section 820.2 is made applicable to public entities by Government Code section 815.2 subdivision (b).

The discretionary immunity rule in section 820.2 is to ensure that public employees exercising discretionary acts within the scope of their employment will continue to remain immune from liability for those acts, unless otherwise provided by statute.

Note: Determining whether a particular act or omission of a public officer is within the discretionary immunity of Government Code section 820.2 depends on a sensitive and discriminating appraisal of the factual circumstances in light of the basic reasons for immunity. A mechanical, semantic, or literal approach emphasizing abstract definitions of "discretionary" is unacceptable. The central policy consideration is the need for "judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government." (*Johnson v. State* (1968) 69 Cal.2d 782 [73 Cal.Rptr. 240].)

In appropriate circumstances, discretionary immunity may protect any public officer, employee, or servant. (Gov. Code, § 810.2.) The availability of immunity, however, is not directly related to the employee's title or position, but turns on whether the act or omission constituted an exercise of discretion in the making of a basic policy decision at the planning rather than operational level of governmental decision making.

There are five criteria for identifying immune discretionary functions:

- 1) The relevant statutory provisions applying to discretionary immunity

prescribe the scope of duties and responsibilities of the public employee or officer in terms that explicitly confer broad discretionary authority to assess the relevant circumstances and, on the basis of that assessment, to choose between alternative courses of action for achieving general statutory objectives.

2) Discretionary immunity obtains if the action challenges the authorized prescription by legislative or executive-level management of institutional rules or decisions calculated to affect persons generally, rather than ad hoc decisions intended to apply such general rules or policies to specific individuals or factual events. Official implementing actions that may be necessary to apply a general policy to particular persons or circumstances, on the other hand, are presumptively nondiscretionary.

3) An official decision to act or not act, in the context of particular circumstances, is regarded as discretionary only if the act or omission in question was the result of an actual exercise of policy or planning-level discretion in which risks and advantages were deliberately weighed and a balance struck.

4) A function or activity is regarded as discretionary for purposes of tort immunity if its effective and vigorous performance is regarded as highly important to the public welfare, and imposition of tort liability for official errors would substantially inhibit official freedom of action, and remedies other than damages in tort are available to the complaining party.

5) A governmental decision involving essentially political considerations is regarded as discretionary and thus immune from liability. The category of political decision making includes questions of budgetary and fiscal policy, personnel administration standards, allocation of available resources according to variable priorities of need, and choices between competing plans for accomplishing approved objectives.

There are also other factors which determine if a function is nondiscretionary.

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An official omission or failure to act is likely to be regarded as nondiscretionary if an applicable statute makes its performance mandatory in the context of the relevant circumstances. Similarly, the performance of an official act that is contrary to a statutory requirement, or knowingly ignores a mandatory statutory standard for such performance, is also likely to be deemed nondiscretionary.

The statutory immunity for discretionary acts and omissions is limited in significant ways. It applies only when the public employee is acting in the scope of employment. This includes not only those essential to the main purposes of the office but also to incidental or collateral activities that serve to promote that purpose and are rationally related to official functions. In addition, the discretionary immunity does not exonerate from liability when otherwise provided by statute.

Other general immunities

Injuries resulting from the issuance, denial, revocation, or suspension of, or from the failure or refusal to issue, deny, suspend or revoke, a license, permit, certificate, approval, order, or similar official authorization are excluded from the scope of tort liability of a public entity or public employee when the entity or employee is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked. (Gov. Code, §§ 818.4, 821.2.)

Public entities are not liable for failure to inspect, or for inadequate or negligent inspection of property (other than their own property as defined in Gov. Code, § 830, subd.(c), to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety. (Gov. Code, § 818.6.) Public employees enjoy a comparable personal immunity. (Gov. Code, §, 821.4.)

Under the Act, a public entity is not liable for an injury caused by adopting an enactment. (Gov. Code, § 818.2.) Identical immunity is conferred on public employees. (Gov. Code, § 821.) This includes not only statutes and ordinances, but also charter provisions and

administrative rules and regulations having the force of law that have been adopted as indicated. (Gov. Code, §§ 810.6, 811.6.)

A public entity is not liable for an injury caused by failing to adopt an enactment. (Gov. Code, § 818.2.) A substantially identical immunity is conferred on public employees. (Gov. Code §821.) In addition, a public employee is not liable for injuries inflicted by his or her acts or omissions in the execution or enforcement of any law while exercising due care. (Gov. Code, § 820.4.) The public entity employer receives the same immunity. (Gov. Code, § 818.2 subd. (b).)

While a public entity is not liable for injuries caused by failing to enforce any law, the public employee is not liable for injuries caused by failure to enforce an enactment. (Gov. Code, §§ 818.2, 821.) Law is broader in scope than enactment, including not only statutes, ordinances, charter provisions, rules, and regulations, but also state and federal decisional law applicable in California.

Public employees acting within the scope of employment are personally immune from liability for the prosecution of judicial or administrative proceedings even if they act maliciously and without probable cause. (Gov. Code, § 821.6.) However, public entities may still be liable in some situations when statutes otherwise provide.

The Code provides a personal immunity for public employees who act in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable. The employee is liable only to the extent that he or she would have been liable had the enactment been constitutional, valid and applicable. (Gov. Code, § 820.6.)

The Code confers a limited immunity on public employees for injuries arising from entry upon any property where such entry is expressly or impliedly authorized by law. Public employees are not exonerated from liability under the section, however, for injury proximately caused by the employee's own negligence, wrongful act, or omission. (Gov. Code, § 821.8.)

Public entities are immune from liability for injuries caused by misrepresentation by their employees whether or not such misrepresentation is negligent or intentional. (Gov. Code, § 818.8.) This immunity is subject to important practical limitations and qualifications. A public employee does not enjoy as extensive an immunity for misrepresentation as does a public entity employer. Although immune in most cases, the employee may be liable if guilty of actual fraud, corruption, or actual malice. (Gov. Code, § 822.2.)

The Act precludes application of common law rules of vicarious liability to public officers based on torts of their subordinates. Government Code section 820.8 declares that a public employee is not liable for an injury caused by the act or omission of another person. However, this immunity does not protect a public entity from statutory liability for the acts and omissions of its employees.

A public employee is not liable for money stolen from his or her official custody unless the loss was a result of his or her own negligent or wrongful act or omission. (Gov. Code § 822.) This immunity extends to all public employees and entities.

Liabilities and immunities in specific functional areas

Police and correctional activities

In each case involving police and correctional activities, counsel should consider whether liability can be based on general statutory provisions or on specific statutory provisions governing police and correctional activities. Even if there is a statute creating a basis for liability, there may also be specific statutory immunities that apply.

Statutory liabilities

Public entities and public employees enjoy blanket immunity for failure to enforce the law. (Gov. Code, §§ 818.2, 821.) There is limited immunity for torts committed by public employees in execution or enforcement of the law while exercising "due care." (Gov. Code, § 820.4.) The general rule is that a public entity may be held liable, in the absence

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of a specific statutory immunity, for the negligence of its employees in the course of executing and enforcing the law. However, police officers are not required to exercise perfect judgment, but only to perform their duties with reasonable care. Generally, absent an applicable statutory immunity, public entities are liable for intentional torts committed by police officers in the course of executing or enforcing the law.

In each case, counsel should consider whether entity tort liability in connection with police and law enforcement functions may be based on specific statutory provisions, such as:

- False arrest or imprisonment (Gov. Code, § 820.4)
- Intentional and unjustified interference by a public employee with the right of a prisoner to obtain judicial review (Gov. Code, § 845.4)
- Failure to summon medical care for a prisoner under certain circumstances (Gov. Code, § 845.6)
- Dangerous condition of public property, except regarding an injury to a prisoner (Gov. Code, §§ 835-835.4)
- Negligent operation of a motor vehicle by a public employee acting within the scope of his or her employment (Veh. Code, §17001)

The federal Civil Rights Act (42 USC §1983) provides an additional basis for suit, in appropriate cases, for damages by persons injured in the course of law enforcement and correctional activities. Areas include abusive conduct by police or prison guards, false arrest or imprisonment, and unlawful search and seizure.

Statutory immunities

The police, law enforcement, and correctional activities of public entities are protected against potential tort liabilities by a number of specific statutory immunity provisions. The most significant of the general immunities relates to acts and omissions that result from the exercise of discretion vested in the public employee responsible for them. (Gov. Code §820.2.)

Other general immunities that may be significant in law enforcement situations include immunities for:

- Wrongful suspension or revocation of a license and wrongful failure to revoke or suspend a license (Gov. Code, §§ 818.4, 821.2)
- Misrepresentation (Gov. Code, § 818.8)
- Police officer's or law enforcement official's decision not to render assistance or to respond to an emergency (Gov. Code, § 820.25)
- Malicious prosecution (Gov. Code, § 821.6)

In addition to the general statutory immunities, police and law enforcement activities may be protected by other specific immunities in the Tort Claims Act. These include:

- Injuries to and by prisoners (Gov. Code, § 844.6)
- Failure to provide police protection (Gov. Code, § 845)
- Failure to provide prison, jail, or correctional facilities (Gov. Code, § 845.2)
- Determinations relating to parole and release of prisoners (Gov. Code, § 845.8)
- Injuries caused by escaped or escaping persons (Gov. Code, § 845.8)
- Failure to arrest a suspect or failure to retain an arrested person in custody (Gov. Code, § 846)

An important group of immunity-granting provisions outside the Tort Claims Act, which might apply to law enforcement and correctional activities during a natural, human-made, or war-caused disaster, is the California Emergency Services Act (Gov. Code, §§ 8550-8668).

California Vehicle Code section 17004.7 grants immunity to the public entity when a vehicle being pursued by peace officers is involved in collision, under certain conditions.

Fire-protection activities

Fire service activities may constitute a basis for tort liability of both public employees and public entities, to the extent that the Tort Claims Act or some other statute so provides, subject to applicable statutory immunities.

Although general immunity provisions and specific immunity provisions may apply in connection with fire service activities, there still may be liability for:

- Dangerous condition of public property (Gov. Code, §§ 835-835.4)
- Failure to discharge a mandatory duty imposed by enactment (Gov. Code, § 815.6)
- Negligence (Gov. Code, § 815.2)

When public entities provide fire protection or firefighting services outside their normal operational area, they are statutorily liable to the same extent as if they were operating within their own service boundaries, and the entity receiving extraterritorial assistance is not liable. (Gov. Code, § 850.6.)

Government Code section 850.8 grants immunity to firefighting personnel and public entities for liability caused by transporting a person injured by fire or by a firefighting activity to a doctor or hospital if the injured person does not object. However, the public employee will be liable if the injury is proximately caused by his/her willful misconduct in transporting the injured person or arranging for such transportation.

Public entities may also be found liable for injury-causing accidents caused by the negligent operation of motor vehicles used in connection with fire-protection services. (Veh. Code, § 17001.) They will also be liable for injuries sustained by persons engaged in firefighting and fire-prevention work, whether as volunteers or under summons from an authorized fire official. (Pub. Resources Code, §§ 4153, 4436.)

Statutory immunities

In addition to certain specific immunities intended to limit the liabilities of public entities and public employees in connection with fire-protection activities, the general immunity provisions of the Act may be applicable in certain cases.

The Act provides that public entities and their employees are immune from liability for injuries resulting from failure to establish a fire department or otherwise to provide fire protection service or provide or maintain sufficient personnel, equipment or other fire protection facilities. (Gov. Code, §§ 850, 850.2.)

Immunity provisions outside the Act that may, in certain cases, be limitations

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on public entity or public employee tort liability for fire protection or firefighting activities include:

- Immunity of public employees, but not of public entities, for injuries caused by the negligent operation of fire engines or other authorized emergency vehicles in the line of duty (Veh. Code, § 17004)
- Immunity for injuries caused by fire-protection and firefighting personnel in the performance of emergency services or for injuries to any person while in premises being used as emergency centers, during a natural, human-made, or war-caused disaster (Civ. Code, § 1714.5; Gov. Code, §§8655-8660)

Medical, Hospital, Public Health

Statutory Liabilities

Pursuant to California Tort Claims Act, codified in the Government Code, there are certain immunities and carefully drafted limitations on the medical liabilities of public entities and their employees. However, the principal basis of the common law liability (negligence in rendering medical, hospital, and public health services), is continued in effect by the general liability provisions of the Act. (Gov. Code, §§ 815.2, 820(a).)

In addition to general liability statutes, the following are some of the Act's statutes that specifically provide for liability in the medical context:

- Failure to conform medical facilities to prescribed standards (Gov. Code, § 855(a))
- Interference with patient's right of judicial review (Gov. Code, § 855.2)

While public entities are immune from direct liability for injuries to inpatients of mental institutions, public employees may be liable in tort. (Gov. Code, § 854.8, subd. (d).) In addition to

negligence claims, the general principle of vicarious liability, in the absence of a statutory immunity, will also sustain intentional tort actions.

Statutory immunities

Except as specifically otherwise provided, the liabilities of public entities and public employees for torts committed in connection with medical and public health activities are subject to general statutory immunities, as are all such liabilities. (Gov. Code, §§ 815, subd. (b), 815.2, subd. (b).) In addition to the explicit medical immunities, the general immunity provisions of the Act are:

- Immunity for issuance or failure to revoke the license of an incompetent physician or pharmacist (Gov. Code, §§ 81S.4, 821.2)
- Immunity for failing to make a health inspection or for making a negligent or inadequate health inspection (Gov. Code, §§ 818.6, 821.4)
- Immunity for acts and omissions resulting from an exercise of official discretion vested in public employees (Gov. Code, § 820.2)
- Immunity for injuries caused by non-willful acts or omissions of physicians, dentists, nurses, and hospitals, while rendering medical services at the request of responsible public official during a state of emergency (Gov. Code, § 8659)

Injuries caused by motor vehicles

Vehicle Code section 17001 declares that public entities are liable for death, personal injury, or property damage caused by a negligent or wrongful act or omission in the operation of a motor vehicle by one of their employees acting within the scope of employment.

The negligence of a public employee would also be actionable pursuant to

Government Code section 820, subdivision (a) and section 815.2, subdivision (a).

However, a public employee engaged in operating an authorized emergency vehicle is exempt from compliance with certain speed laws, rules of the road, and other traffic regulations, provided certain statutory conditions, including the use of both siren and red light, are satisfied. (Veh. Code, § 21055.) Due care, however, must still be exercised for the safety of others using the highway. (Veh. Code, § 21056.)

In addition, all public employees are completely immune from liability arising out of the operation of an emergency vehicle, under substantially the same circumstances, when responding to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, or when responding to a fire alarm or other emergency call. (Veh. Code, § 17004; see also Veh. Code, § 17004.7.)

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