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Note: We plan to take up the material in the order listed on the agenda.

Place of Meeting

Sunday evening: State Bar Building  
601 McAllister  
San Francisco  
  
Monday and  
Tuesday: Far East Room  
Fairmont Hotel  
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

September 22, 23 and 24, 1963

September 22 (meeting starts at 7:00 p.m. and continues to 10:00 p.m.)

1. Minutes of August meeting (sent 9/9/63)
2. Administrative matters (if any)  
(Comments on revised schedule of deadlines in study of URE (if any)  
(sent 9/9/63))
3. Study No. 34(L) - Uniform Rules of Evidence

Bring to meeting: Report of the New Jersey Supreme Court Committee on Evidence (this has a blue cover--you already have received a copy)

Witnesses (Article IV--Rules 17-22)

Materials in binder

- Memorandum No. 63-44 (enclosed)
- Memorandum No. 63-43 (in your binder)
- Tentative Recommendation (enclosed)
- Research Study (in your binder)

September 23 and 24 (meeting starts at 9:00 a.m. each day. Meeting will end at 5:00 p.m. on September 23 and at 4:30 p.m. on September 24.)

4. Continuation of item 3.

Extrinsic Policies Affecting Admissibility (Article VI--Rules 41-55)

Materials in binder

Memorandum No. 63-45 (sent 9/15/63)

Tentative Recommendation (sent 9/15/63)

Research Study (in your binder)

Presumptions (Article III--Rules 13-16)

Materials in binder

Memorandum No. 63-47 (enclosed)

Research Study (in your binder)

General Provisions (Article I--Rules 1-8)

Materials in binder (some to be sent)

Memorandum No. 63-46 (to be sent)

Research Study (in your binder)

mtg

MINUTES OF MEETING

OF

SEPTEMBER 22, 23 and 24, 1963

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on September 22, 23 and 24, 1963.

Present: Herman F. Selvin, Chairman  
Hon. James A. Cobey  
Hon. Pearce Young  
Joseph A. Ball (Sept. 22 and 23)  
James R. Edwards (Sept. 23 and 24)  
Richard H. Keatinge  
Sho Sato  
Thomas E. Stanton, Jr.  
Angus C. Morrison, ex officio (Sept. 23 and 24)

Absent: John R. McDonough, Jr., Vice Chairman

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present. Professor Ronan E. Degnan of the School of Law, University of California (Berkeley), the Commission's consultant on the integration of the rules of evidence with existing California law, was present on September 22 and 23, 1963.

Minutes of the August Meeting.

The minutes of the August meeting were approved.

Future meetings of the Commission.

It was pointed out that it appears likely that there will be a conflict between the October meeting and the meeting of the State Bar's Board of Governors, for both the Commission and the Board of Governors are likely to be meeting in Los Angeles on the same weekend. This conflict would make the State Bar building unavailable for the Commission meeting. Unless an adjustment is made, the conflict will continue throughout the

Minutes - Regular Meeting  
September 22, 23 and 24, 1963

year because the meetings of both the Commission and the board alternate between Los Angeles and San Francisco each month. The meeting schedule of the board has not finally been determined.

The staff was directed to suggest a meeting place and date after the Board of Governors has finally determined its meeting schedule. A postcard poll will be taken to determine if the suggested date and place are acceptable. Consideration may be given to meeting on the fourth weekend of the month.

Commissioner Sato indicated that he would inquire about the availability of a meeting place at Lake Tahoe during the winter months.

ADMINISTRATIVE MATTERS

Study No. 26 - Escheat.

The study on Escheat was assigned to the Commission to resolve the problem that arises when a domiciliary of another state dies without heirs leaving personal property in California. Under existing California case law the property escheats to the state of domicile; but under the law of several other states, the property escheats to the state where the property is located. Thus, California loses both the property of its own domiciliaries who leave personal property elsewhere and the property of domiciliaries of other states who leave personal property in California.

The Executive Secretary reported that representatives of several states are working on an interstate compact to determine which state is entitled to obtain property by escheat when the owner dies without heirs leaving personal property in a state in which he is not domiciled. The Executive Secretary was authorized to call the matter to the attention of the Attorney General and suggest that California should be properly represented in the matter.

The approval of a compact might obviate the need to study and report on the matter.

Study No. 52(L) - Sovereign Immunity.

The Executive Secretary reported that a letter was received from the State Board of Control requesting the following information: (1) a brief statement of the history of sovereign immunity in California; (2) the effect of the Muskopf decision; (3) the effect of the moratorium legislation; (4) the status of claims arising during the moratorium;

(5) a synopsis of the new legislation and its intended effect; and  
(6) the status of claims arising after the effective date of the new legislation. The Executive Secretary advised the board that the Commission would take the matter up at its September meeting and would reply thereafter.

The Commission objected to acting as an advisory body interpreting the law for governmental agencies. The chairman was authorized to reply to the request and state that the Commission cannot advise them concerning the law, but that it has authorized its executive secretary to confer with Mr. Heinzer or another appropriate person and to provide him (on an informal basis) with such information as is needed.

Study No. 34(L) - Uniform Rules of Evidence.

The Executive Secretary reported that Kansas has adopted the URE substantially as drafted. In addition, a new drafting committee has been appointed by the Commissioners on Uniform State Laws to review the URE. The attention of the Uniform Laws Commissioners has been directed to the fact that New Jersey and California are both making intensive, critical studies of the URE.

The deadlines for completing various portions of the URE have been revised. The new schedule calls for completion of the preliminary work on all of the tentative recommendations at the December 1963 meeting. Work on the articles on judicial notice and opinion evidence should be completed in November; work on the two remaining articles, presumptions and general provisions, should be completed in December.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE  
(Article IV. Witnesses)

The Commission considered Memorandum 63-44 and the tentative recommendation relating to Witnesses. The following actions were taken:

Rule 17.

The Commission approved the revision of this rule with the restoration in subdivision (1)(b) of the original URE language relating to the "duty of a witness to tell the truth." This language was restored because of its simplicity and the possibility of unnecessarily changing the present law, particularly in regard to children as witnesses.

The Commission considered whether the rule should be revised to restate the present law by including as preliminary requirements the ability to perceive and to recollect. To the extent that these matters are included under Rule 19 by reason of required personal knowledge, the present law would be retained; to the extent that they are not included in Rule 19, the Commission approved the URE scheme of minimum preliminary screening of witnesses for purposes of competency.

Rule 18.

The Commission approved this rule in the form as set out in the tentative recommendation with the understanding that the present cross-reference would be replaced with a proper reference to the new sections setting out the forms for the oath, affirmation and declaration when these are renumbered in the revised evidence code.

Rule 19.

The Commission approved subdivision (a) in principle but agreed that the "prerequisite" language be deleted because it connotes the

necessity of a formal foundation before a witness may give testimony. Accordingly, the rule and Comment are to be revised to exclude any suggestion that a formal foundation is required before a witness may testify.

Subdivision (b) was approved with the deletion in the second line of the words "from sufficient evidence."

Subdivision (c) was approved in the form submitted.

Rule 19.5.

The Commission agreed that, as it applies to trial courts, this rule should be revised to state a rule of impossibility rather than merely improbability or incredibility. Hence, a trial judge should have the power to rule on credibility by rejecting the testimony of a witness only where such testimony discloses an impossible situation under the circumstances. The Comment is to be revised to state clearly that the rule of impossibility stated in Rule 19.5 in no way affects the appellate courts in their power to reject incredible testimony where each testimony is so inherently improbable that no trier of fact could reasonably believe it.

Rule 20.

The Commission discussed this rule at length. Insofar as this rule states a rule of admissibility of evidence, it duplicates Rule 7 and is, therefore, unnecessary. It appears, however, that the rule does more in that it specifically sets out the rule of admissibility in regard to a witness' credibility.

A motion to combine Rules 20, 21 and 22 so as to deal with the matter of credibility of witnesses solely by way of exception to Rule 7 failed for lack of a second.

It was then agreed that the rule should be restated by referring specifically to persons only and eliminating the reference to evidence. Hence, the Commission approved in substance the following language: "Any party, including the party calling him, may impair or support the credibility of any witness."

The Commission specifically approved the principle that a party should be permitted to impeach a witness called by him. With respect to support of witnesses, the Commission agreed that the general rule should be that a party may not be permitted to support a witness until the witness' credibility has been attacked (by prior inconsistent statements, recent fabrication, character evidence, and the like), thereby restating the present California law.

Rule 21.

The Commission approved this rule in substance. The traits of character mentioned in the original URE language, namely, "dishonesty or false statement," were restored. It was agreed that these traits of character must be an essential element of the crime. Hence, the first sentence of this rule was approved in substance as follows: "Evidence of the conviction of a witness for a crime is inadmissible for the purpose of impairing his credibility unless an essential of the crime is dishonesty or false statement."

With respect to the classification of crime involved, the Commission approved making no distinction between felonies and misdemeanors, but agreed to state specific rules in regard to the use of convictions as follows:

- (1) If a pardon has been granted based upon the innocence of the person convicted, then such conviction may not be used to impair his credibility.

- (2) If a certificate of rehabilitation and pardon has been granted under Penal Code Section 4852.01 et seq. (completion of confinement and/or parole), then the conviction may not be used to impair credibility.
- (3) If the conviction was set aside under Penal Code Section 1203 et seq. (completion of or discharge from probation), then the conviction may not be used to impair credibility.

It was further agreed that this rule should follow in substance the rule formerly suggested by the State Bar Committee on the Administration of Justice and the rule recommended for approval in New Jersey in regard to having to prove the crime and its character to the judge before impeaching examination or evidence of such crime may be admitted.

Rule 22.

Subdivision (a) was revised to make it applicable to oral as well as written inconsistent statements. The subdivision was further revised to eliminate the judge's discretionary power to require that time, place and person be shown. As so revised, the subdivision was approved in principle.

The staff was directed to revise subdivision (b) to limit the power of the judge to exclude evidence of prior inconsistent statements where the witness was given no opportunity to explain. The revised subdivision is to permit such exclusion only when the witness has been unconditionally excused and not previously given the opportunity to explain. The revised rule will permit effective impeachment in

at least two specific situations: (1) Where witnesses A, B and C all may be impeached by a single inconsistent statement made by any one or all of them (for example, a conspiracy), the subdivision should permit the examination of witness A, witness B and witness C before any one of them is given the opportunity to identify, explain or deny a prior inconsistent statement, but all three should be given the opportunity to identify, explain or deny the statement at a later time.

(2) Where a witness has testified fully and for one reason or another a party does not wish to introduce the impeaching evidence until later in the trial, the original witness should be given the opportunity to identify, explain or deny the statement at the later time. As so revised, subdivision (b) was approved in principle.

Subdivision (c) was approved with a direction that the staff make consistent the traits of character mentioned here and in Rule 21.

Subdivision (d) was approved in the form submitted.

Subdivision (e), making evidence of religious belief or lack thereof inadmissible as affecting the credibility of a witness, was approved.

Amendments and Repeals.

The Commission approved the repeal of Section 1845.

The Commission approved amending Section 1846 to read as follows:

"A witness upon a trial can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine."

Action on Section 1847 was deferred until consideration of the URE article on presumptions.

Action on Section 1868 was deferred until consideration of Rules 7 and 45 in the Articles on General Provisions and Extrinsic Policies, respectively.

The Commission approved the deletion of subdivision (16) of Section 1870.

The Commission approved the repeal of Sections 1879, 1880, 2049, 2051, and 2052.

The Commission agreed that Section 1884 should be retained.

The Commission approved the conditional repeal of Section 2053 to the extent that it is superseded by the Uniform Rules.

The Commission tentatively approved the amendment to Section 2054, but directed that it be referred to the staff to determine the extent of, and to eliminate, any inconsistency.

The Commission approved the repeal of Section 2065.

It was agreed that the tentative recommendation should be revised in accord with the decisions set forth above and distributed to the State Bar Committee for its consideration.

In the course of discussing the limits of permissible impeachment of credibility, the Commission approved revising an exception to the Hearsay Article in regard to prior identification. This action is recorded on page 16 of these Minutes.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE  
(Article VI. Extrinsic Policies Affecting Admissibility)

The Commission considered Memorandum 63-45, relating to extrinsic policies affecting admissibility. The following actions were taken:

Rule 41.

The reference to an indictment was stricken because under existing California law indictments may not be attacked on the ground that events occurred that might have improperly influenced the grand jury. Rule 41 was then approved as modified.

Rule 42.

The staff was directed to revise the second sentence of Rule 42 to make clear that it applies only when objection is made to testimony by the judge. The rule was then approved.

Rule 43.

The language previously stricken from Rule 43--"sworn and empanelled in the trial of"--was restored to the rule and the word "trying" was deleted. The rule was then approved.

Rule 44.

The staff was directed to revise the second sentence of the comment to indicate that it is Rule 43 as revised together with Rule 7 that makes a juror competent to give evidence upon an issue as to the validity of a verdict. The rule was previously approved.

Rule 45.

The "except" clause at the beginning of Rule 45 was stricken as unnecessary. The only known exception is in Rule 47 and Rule 47 itself makes clear that it is not subject to Rule 45. The rule was approved as revised.

The word "too" was deleted from the third line from the bottom of the comment.

Rule 46.

Rule 46 was revised to read:

RULE 46. CHARACTER ITSELF IN ISSUE: MANNER OF PROOF

When a person's character or a trait of his character is itself an issue, any otherwise admissible evidence, including testimony in the form of opinion, evidence of reputation, and evidence of specific instances of such person's conduct, is admissible when offered to prove only such character or trait of character.

The rule was then approved.

Rule 47.

The staff was directed to revise Rule 47 to make character evidence of any kind inadmissible in any kind of case when sought to be introduced as circumstantial evidence of conduct; except that a defendant in a criminal case may introduce evidence of his good character to prove his innocence and the prosecution may introduce evidence of the defendant's bad character to prove his guilt if the defendant first introduces evidence of his good character. In criminal cases, the admissible character evidence is limited to opinion evidence and reputation evidence.

Rule 47, as revised, will change the existing California law in the following ways:

1. Evidence of bad character will be inadmissible in civil cases, while it is now admissible in some civil cases.

Valencia v. Milliken, 31 Cal. App. 533 (1916) (civil rape case, evidence of plaintiff's unchaste character admissible to show consent).

2. Evidence of the bad character of a person other than the defendant will be inadmissible in criminal cases; such evidence is now admissible in criminal cases to show the unchaste character of prosecutrix in sex prosecutions (People v. Battilana, 52 Cal. App.2d 685 (1942)) and to show the violent nature of victim in homicide and assault cases where self defense is the issue (People v. Lamar, 148 Cal. 564 (1906); People v. Yokum, 145 Cal. App.2d 245 (1956)).
3. Where admissible, character evidence to prove conduct may be in the form of opinion; under existing law, expert opinion only has been held admissible in one limited situation. People v. Jones, 42 Cal.2d 219 (1954) (expert psychiatric opinion admissible to show defendant unlikely to have violated Pen. C. § 288).
4. Evidence of specific acts are inadmissible to prove character as circumstantial evidence of conduct; under existing law, specific acts of violence are admissible against criminal defendant when he has first introduced evidence of his peaceable character. People v. Hughes, 123 Cal. App.2d 767 (1954). (Under existing law, specific acts are also admissible to show violent nature of victim of homicide or assault or to show unchastity of prosecutrix in sex case, but any character evidence relating to these persons is inadmissible under #2 above.)

Character evidence was made inadmissible as evidence of conduct generally because the evidence is of little probative value and of great potential prejudice. An exception is justified for evidence of the good

character of the defendant in a criminal case while no similar exception is made for a person charged with criminal conduct in a civil case because the burden of proof on the prosecution in a criminal case is heavier. Character evidence should be admissible to show the good character of the defendant because the defendant merely needs to raise a reasonable doubt as to his guilt. But the criminal defendant should not be able to introduce character evidence relating to the prosecutrix (in sex cases) or the victim (in support of self defense in assault and homicide prosecutions) because the evidence is of such little probative value and creates such a great danger of confusion of issues, collateral questions, etc. And the civil party should not be able to introduce evidence of either his own good character or any other person's bad character because of the potential prejudice to the adverse party, the confusion of issues, etc.

Rule 48.

Rule 48 was approved. The only effect of the rule in the light of revised Rule 47 is to prevent the defendant in a criminal case from introducing evidence of his own careful nature to rebut a charge of criminal negligence.

Rules 49, 50 and 51.

These rules were previously approved.

Rule 52.

The words "in compromise or from humanitarian motives" were restored to the rule.

The staff was directed to revise the rule to make admissions inadmissible if made during compromise negotiations. If the settlement

and compromise of claims and lawsuits is to be encouraged, all of the statements made during the negotiations--not merely the offers--should be inadmissible. This revision will change the California law as declared in People v. Forster, 58 Cal.2d 257 (1962), which held that an unconditional admission of a fact in dispute in the lawsuit, made as part of an offer to settle the case, was admissible.

Subdivision (2) was approved after deleting the words "to prove the crime" at the end of the subdivision and substituting therefor "in any action or proceeding."

Rules 53 and 54.

These rules were previously approved.

Rule 55.

The first sentence of Rule 55 was eliminated because the change made in Rule 47 prevents it from serving any function. The staff was directed to add the second sentence to Rule 47 itself.

Amendments and repeals of existing statutes.

C.C.P. § 657. Subdivision 2 was revised to delete the entire second clause, which provides that misconduct of the jury in returning a chance verdict may be proved by juror's affidavit. The deleted language is unnecessary because under the revised rules a juror is competent to give evidence concerning any misconduct and C.C.P. § 658 provides that misconduct of the jury may be proved by affidavit.

C.C.F. §§ 1883, 2053, 2078. The repeal of these sections was approved.

Pen. C. § 1120. This section was amended to make clear that the examination of the juror is for the purpose of determining his qualification to continue to serve and not for the purpose of receiving evidence in the cause.

Minutes - Regular Meeting  
September 22, 23 and 24, 1963

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE

(Article VIII. Hearsay Evidence)

The Commission approved a revision to its recommendation in regard to hearsay evidence. Under the revision, if a person who made a prior identification can no longer remember the person identified but is available and testifies that the prior identification was accurate, a witness who saw the prior identification may testify as to who was identified on the prior occasion. This revision will codify in part the decision in People v. Gould, 54 Cal.2d 621 (1960). The Gould case required corroborating evidence; but the requirement of corroboration will not be stated in the revised rules of evidence because the rules state only the conditions for the admission of evidence--they do not concern the question of what is sufficient evidence to support a verdict.

meeting

State of California

MEMORANDUM

To: California Law Revision Commission  
School of Law  
Stanford University, California

August 29, 1963

Attention: Mr. John H. DeMouilly  
Executive Secretary

From: State Board of Control

Subject: Tort Liability

The State Board of Control has requested that the following information concerning tort liability be obtained from your Commission:

- 1) A brief, simple historical statement of sovereign immunity in California.
- 2) Effect of the Supreme Court decision in the Muskopf case.
- 3) Effect of the legislation following said case.
- 4) Status of claims arising during that period.
- 5) A general synopsis of the current legislation and its intended effect.
- 6) Status of claims that will arise after the enacted legislation takes effect.

The board will appreciate receiving the above information at your earliest convenience.

B.V. Dittus  
Secretary

meeting

THE 1963 GOVERNMENTAL TORT LIABILITY STATUTE

BACKGROUND

Pre-Muskopf Law

Before January 27, 1961, the date of the Muskopf decision, the tort liability of governmental entities could be summarized generally (although in oversimplified terms) as follows:

The State, counties, cities, and other public entities in California were deemed immune from liability for torts committed by the public entity or by public employees in the performance of governmental functions, except to the extent that the immunity had been waived or judicially found to be inapplicable. In effect, this meant that tort actions could be successfully prosecuted against public entities only if (a) the injury complained of arose out of the performance of a "proprietary" activity as distinguished from a "governmental" one; or (b) the injury was the result of a nuisance created by the public entity; or (c) a statute could be found which waived immunity and imposed liability on the public entity; or (d) the claim related to "taking or damaging" of property under circumstances permitting the action to be formulated as one for "inverse condemnation." The range of tort claims which conceivably could be brought within one or another of these four exceptional situations was broad, but not coextensive with the law governing tort liability of private persons.

See Exhibit I (pink pages) for the most significant areas of liability of various types of public entities prior to the Muskopf case.

The Muskopf and Lipman Cases

On January 27, 1961, the California Supreme Court decided two cases that had a significant effect on governmental tort liability in California.

In the Muskopf case, the Court declared that "the doctrine of governmental immunity for torts for which its agents are liable has no place in our law." At the same time, the Court in the Lipman case recognized and applied the doctrine of "discretionary immunity," but declared that this doctrine might not protect public entities in all situations where the employee is immune. The Court did not indicate clearly the cases where entity liability would exist for discretionary acts of employees.

In response to these decisions, the Legislature enacted Chapter 1404 of the Statutes of 1961. This legislation suspended the effect of the Muskopf and Lipman decisions until the ninety-first day after the final adjournment of the 1963 Regular Session of the Legislature.

The 1963 legislation replaces the Muskopf and Lipman decisions, and applies to all claims, including, to the extent constitutionally permissible, claims that accrued prior to its effective date.

## SUMMARY ANALYSIS OF 1963 GOVERNMENTAL LIABILITY LEGISLATION

(All references are to the Government Code unless otherwise indicated.)

### Liability of Public Entity Must be Based on Statute

In order to impose tort liability on a public entity, a statute must be found which imposes such liability. § 815 (a) For example, common law liability based on "nuisance" as such is abolished. Unless otherwise provided by statute, statutory immunities prevail over statutory liabilities. § 815 (b).

### Grounds on Which Public Entity May Be Held Liable

Subject to qualifications and immunities, a public entity is liable for an injury caused by:

- (1) Negligent or wrongful act or omission of employee within scope of employment. (See immunities listed on pages 5-9.) § 815.2.
- (2) Dangerous condition of public property. (See detailed analysis, pages 10-14.) §§ 830-835.4.
- (3) Negligent operation of motor vehicles. Veh. Code § 17000 et seq. (Not clear whether ownership liability exists under Veh. Code § 17151.)
- (4) Mandatory duty imposed by enactment. (Not liable if exercised reasonable diligence to discharge duty) § 815.6.
- (5) Failure to conform medical facilities to prescribed standards. § 855.
- (6) Act or omission of independent contractor. (Entity immune if it would not have been liable if act were done by an employee.) § 815.4.
- (7) Joint and several liability arising out of an agreement with another public entity. § 895.2.
- (8) Certain other acts or omissions (law unclear as to whether liability exists). These are (a) interference with prisoner's legal rights (§ 845.4), (b) failure to provide medical care to prisoners (§ 845.6), and (c) interference with legal rights of medical inmates (§ 855.2).

Grounds on Which Public Employee May Be Liable

Except as otherwise provided by statute, a public employee is liable to the same extent as a private person. § 820. In addition, the statute indicates that an employee is liable for:

- (1) False imprisonment. § 820.4 (by inference).
- (2) Fraudulent, corrupt or malicious misrepresentations. § 822.2.
- (3) Interference with legal rights of prisoners. § 845.4.
- (4) Negligent failure to obtain medical care for prisoners. § 845.6.
- (5) Wilful misconduct in transporting injured person from scene of fire to obtain medical aid. § 850.8.
- (6) Interference with legal rights of medical inmates. § 855.2.
- (7) Medical malpractice. §§ 844.6, 854.8, and 855.8 (by inference).

## Immunities

As a general rule the public entity is immune where the employee is immune except as otherwise provided by statute.

§ 815.2. The following is a list of immunities contained in Chapter 1681, Statutes of 1963 (Senate Bill No. 42).

<u>Immunity</u>	<u>Entity</u>	<u>Employee</u>	<u>Exceptions</u>
Adoption or failure to adopt enactment	yes 818.2*	yes 821	
Issue or failure to issue license or permit	yes 818.4	yes 821.2	
Inspection of property	yes 818.6	yes 821.4	
Misrepresentation	yes 818.8	yes 822.2	Employee liable if misrepresentation is based on actual fraud, corruption or actual malice
Discretion	yes 815.2 (b)	yes 820.2	Liability exists if imposed by statute
Execution of law	yes 815.2(b)	yes 820.4	Employee and entity liable for false arrest or false imprisonment
Tort of another person	yes 815.2(b)	yes 820.8	If not the entity's employee (815.2(a)) or independent contractor (815.4)

\* References are to Government Code, unless otherwise noted.

Immunity	Entity	Employee	Exceptions
Malicious prosecution	yes 815.2(b)	yes 821.6	
Entry on property	yes 815.2(b)	yes 821.8	Employee and entity liable for negligent or wrongful act or omission while on property
Stolen money	yes 815.2(b)	yes 822	Employee and entity liable if money lost by negligent or wrongful act or omission of employee
Plan of construction	yes 830.6	yes 830.6	Entity and employee liable if plan or construction is unreasonable
Failure to provide traffic signs	yes 830.8	yes 830.8	Entity and employee liable if necessary to warn of dangerous condition (other than signs described in 830.4)
Effect of weather	yes 831	yes 831	Entity and employee liable if effect not apparent to reasonable person
Natural condition of unimproved property	yes 831.2	yes 831.2	
Unpaved roads and trails	yes 831.4	yes 831.4	
Tidelands and school lands	yes 831.6	yes 831.6	
Reservoirs	yes 831.8	yes 831.8	Entity and employee liable for dangerous condition constituting a trap or attractive nuisance.

Immunity	Entity	Employee	Exceptions
Punitive or exemplary damage	yes 818	no	
Unconstitutional enactment	yes 815.2(b)	yes 820.6	Entity and employee liable to extent that employee would have been liable if enactment valid
Injury caused by prisoner	yes 844.6	no	Entity liable for vehicle operation and dangerous conditions of property
Injury to a prisoner	yes 844.6	no	Entity liable for vehicle operation and medical malpractice
Injury caused by person committed or admitted to mental institution	yes 854.8	no	Entity liable for vehicle operation and dangerous conditions of property
Injury to person committed or admitted to mental institution	yes 854.8	no	Entity liable for vehicle operation and medical malpractice.
Failure to provide police protection service	yes 845	yes 845	
Failure to provide prison or similar detention facility or sufficient facility or personnel or equipment	yes 845.2	yes 845.2	Does not give immunity for dangerous conditions of property (but see 844.6)
Interference with legal rights of prisoners	yes 845.4	yes 845.4	Employee and entity liable if intentional and unjustified (but see 844.6)
Failure to provide medical care to prisoner	yes 845.6	yes 845.6	Employee and entity liable if know in need of immediate medical care (but see 844.6)

Immunity	Entity	Employee	Exceptions
Release or escape of prisoner	yes 845.8	yes 845.8	
Failure to arrest	yes 846	yes 846	
Fighting fires, fire facilities and equipment, failure to provide fire protection	yes 850- 850.4	yes 850- 850.4	Does not give immunity for negligent operation of motor vehicles
Transporting injured person from scene of fire to obtain medical aid	yes 850.8	yes 850.8	Employee liable for wilful misconduct
Interference with legal rights of mental patients	yes 855.2	yes 855.2	Employee and entity liable if intentional and unjustified (but see 854.8)
Discretionary decisions in connection with promotion of public health	yes 855.4	yes 855.4	
Physical or mental examinations	yes 855.6	yes 855.6	Immunity does not cover examination or diagnosis for purpose of treatment
Diagnosis of mental illness or addiction or failure to prescribe therefor	yes 855.8	yes 855.8	Employee and entity liable if undertake to prescribe
Confining and releasing persons afflicted with mental illness or addiction	yes 856	yes 856	

Immunity	Entity	Employee	Exceptions
Escape of inmate of mental institution	yes 856.2	yes 856.2	
Failure to admit to public medical facility	yes 856.4	yes 856.4	Immunity does not apply if mandatory duty to admit
Instituting proceedings in connection with, and interpretation of, tax laws	yes 860- 860.4	yes 860- 860.4	

Analysis of Liability for Dangerous Conditions of Public Property\*

I. Entity liability - facts to be established by plaintiff:

1. Dangerous condition at time of injury (835)
  - a. of public property or adjacent property (830(a); 830(c))
  - b. which created a substantial risk of injury (830(a); and 830.2)
  - c. when property is used with due care (830(a))
  - d. in a reasonable foreseeable manner (830(a))
2. Injury proximately was caused by the dangerous condition (835)
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred (835)
4. A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition (835(a))

OR

The public entity had:

- a. actual notice of the dangerous condition: (835.2(a); 835(b))
  - (1) actual knowledge of condition and
  - (2) knew or should have known of its dangerous character,

OR

constructive notice of the dangerous condition: (835.2(b); 835(b))

  - (1) condition existed for a period of time
  - (2) condition was of obvious nature
  - (3) should have been discovered in exercise of due care
- b. a sufficient time after notice and prior to injury (835(b))
- c. to take measures to protect against the dangerous condition by either: (830(b))
  - (1) repairing, or
  - (2) remedying, or
  - (3) correcting, or
  - (4) providing safeguards or
  - (5) warning of the dangerous condition

\*References are to Government Code

II. Public employee liability - facts to be established by plaintiff:

1. Dangerous condition at time of injury (840.2)
  - a. of public property or adjacent property (830(a); 840.2)
  - b. which created a substantial risk of injury (830(a); 830.2)
  - c. when property is used with due care (830(a))
  - d. in a reasonably foreseeable manner (830(a))
2. Injury was proximately caused by the dangerous condition (840.2)
3. Dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and: (840.2)
4. a. dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee (840.2(a))
  - b. employee had the authority and funds and other means immediately available to take alternative action which would not have created the dangerous condition (840.2(a))

OR

- a. employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity (840.2(b))
- b. the funds and other means for doing so were immediately available to him (840.2(b))
- c. employee had:
  - (1) actual notice of the dangerous condition (840.4(a); 840.2(b)):
    - (a) actual personal knowledge of condition
    - (b) knew or should have known of its dangerous character

OR

constructive notice of the dangerous condition (840.4(b); 840.2(b)):

- (1). the employee had authority and it was his responsibility to inspect the property or to see that inspections were made to determine whether dangerous conditions existed
  - (2). funds and other means for making such inspections or for seeing that such inspections were made were immediately available to him
  - (3). that the dangerous condition existed for such a period of time and was of such an obvious nature that the public employee, in the exercise of his authority and responsibility with due care, should have discovered the condition and its dangerous character
- (2) a sufficient time after notice and prior to injury (840.2(b))
  - (3) to take measures to protect against the dangerous condition by either: (830(b))
    - (a) repairing, or

- (b) remedying, or
- (c) correcting, or
- (d) providing safeguards or
- (e) warning of the dangerous condition

Analysis of Immunities and Defenses to Liability for Dangerous Conditions of Public Property

Defenses	Entity	Employee	Exceptions
Any defenses available to a private person, e.g., assumption of risk and contributory negligence	yes 815(b)*	yes 820(b) 840	
Injuries due to easements or encroachments located on public property	yes 830(c)	yes 830(c)	
Trivial risk	yes 830.2	yes 830.2	
Failure to provide regulatory signs, signals or roadway markings	yes 830.4	yes 830.4	
Reasonable plan or design of public property	yes 830.6	yes 830.6	
Failure to provide warning signs, signals or devices	yes 830.8	yes 830.8	Unless necessary to warn of a dangerous condition not apparent to and not anticipated by a person using due care
Effects of weather	yes 831	yes 831	Unless effect of weather not apparent to and not anticipated by a person using due care
Condition of reservoir	yes 831.8	yes 831.8	Substantial risk of serious harm or death by trap or attractive nuisance

\* References are to Government Code

Defenses	Entity	Employee	Exceptions
Act creating condition was reasonable	yes 835.4(a)	yes 840.6(a)	
Action to protect against was reasonable	yes 835.4(b)	yes 840.6(b)	
Natural condition of unimproved property	yes 831.2	yes 831.2	
Unpaved roads and trails	yes 831.4	yes 831.4	
Tidelands and school lands	yes 831.6	yes 831.6	

## PRESENTATION AND CONSIDERATION OF CLAIMS

The new legislation provides a detailed procedure for presentation and consideration of claims.

The following is a summary of the significant time limitations provided in the new claims legislation. References are to Government Code Sections.

Claims for death or for injury to persons or personal property, including claims arising under Vehicle Code Section 17001	Must be filed within 100 days (911.2)
All other claims	Must be filed within one year (911.2)
Claim by person under disability (minor or physically or mentally incapacitated)	Filing period may be extended to one year from date of accrual of cause of action even though entity may be prejudiced. Court permission to file late claim where justified will be granted where public entity denies application to present a late claim or fails to act on such application within 35 days of presentation. (911.4--912.4)
No claim filed because of mistake, surprise, inadvertence or excusable neglect	Filing period may be extended to one year from date of accrual of cause of action unless the public entity would be prejudiced. Court permission to file late claim where justified will be granted where public entity denies application to present a late claim or fails to act on such application within 35 days of presentation. (911.4--912.4)
Prior rejection before suit may be brought on claim	Required--45-day time limit on official consideration (except where extended by agreement) (912.4)
Waiver of insufficiency of content of claim by failure to object	Provided--must object within 20 days from presentation of claim (910.8)

Amendment of claim

Permitted--May be amended at any time before expiration of 100-day or one-year period, as case may be, or before final action by entity on claim, whichever is later. (910.6)

Time to sue after rejection

Within six months from rejection (or time claim deemed to be rejected) (945.6)  
(See also 945.8)

Other significant provisions of the new claims legislation include:

Content and form of claim (910, 910.2)

Optional claims forms provided by public entity (910.4)

Disposition claims by public entity (912.6--913.2)

Manner of presentation and of giving notices (915--915.2)

Undertaking for costs by plaintiff (946--suit against public entity, 951--suit against public employee defended by public entity)

Suit against employee generally barred unless claim presented to public entity (950--950.8)

Tort actions against State to be brought in county where injury occurred (changing prior rule) (955.2)

Procedure for payment of tort judgments against local public entities: Generally (970--970.4), payment in not more than 10 installments (970.6), funding judgments with bonds (975--978.8).

Delegation of claims functions to employees: State (912.8, 935.6, 948), local public entities (935.2, 935.4, 949)

## INSURANCE AND DEFENSE OF EMPLOYEES

Public entities are granted broad authority to insure themselves and their employees. Government Code Sections 11007.4 (State), local public entities 989--991.2. Education Code Section 1017 (school districts).

Generally speaking, public entities are required to defend claims and civil actions brought against public employees acting in good faith in the scope of their employment. Government Code Sections 995--996.6. Public entities authorized--but not required--to defend public employees against criminal proceedings and administrative proceedings. The defense may be provided by counsel for the public entity, by other counsel employed for this purpose, or by purchasing insurance which requires that the insurer provide the defense.

## APPLICATION OF NEW LEGISLATION TO PREVIOUSLY EXISTING CAUSES OF ACTION

Both the provisions relating to liability and immunity and the provisions relating to presentation and consideration of claims apply to causes of action that arose before the effective date of the new statute.

### Liability and Immunity Provisions

The application of the liability and immunity provisions to previously existing causes of action might be unconstitutional in some cases. The Commission's research consultant has made a careful analysis of the various factors and circumstances that would be pertinent in determining when the statute could not constitutionally eliminate tort claims existing before the effective date of the new statute. See A Study Relating to Sovereign Immunity, 5 Cal. Law Revision Comm'n, Rep., Rec. & Studies 520-538. His conclusions can be summarized as follows:

The Legislature appears to have ample constitutional authority to alter or eliminate common law tort liabilities of public entities, and to create new statutory liabilities or modify or eliminate existing ones, when such legislation is applied prospectively only.

The Legislature apparently could impose new tort liabilities, or expand the range or application of existing tort liabilities, of public entities with retrospective application to facts occurring subsequent to the effective date of the Muskopf decision without violation of constitutional limitations. Enlargement of governmental tort liability with retrospective application to facts occurring earlier than the Muskopf decision, however, would possibly be of doubtful validity.

The Legislature apparently could, without violation of constitutional limitations, abolish or curtail the range or application of all or any part of those common law tort liabilities of public entities arising from factual events occurring prior to the effective date of the Muskopf decision and for which public entities were then immune. Abolition or curtailment of either statutory or common law tort causes of action arising in the pre-Muskopf period for which public entities were then liable would appear to be unconstitutional.

The Legislature apparently could not constitutionally abolish or curtail the range or application of previously recognized statutory

or common law causes of action which arose between the date of the Muskopf decision and the effective date of the abolishing or curtailing legislation.

The Legislature could constitutionally impair or abolish any newly recognized causes of action which accrued between the effective date of the 1961 moratorium legislation (i.e., September 15, 1961) and the effective date of the new legislation purporting to do so. Newly recognized causes of action accruing in the interim period between the effective date of the Muskopf decision (i.e., February 27, 1961) and the effective date of the moratorium act (i.e., September 15, 1961), however, appear to be constitutionally protected against retrospective impairment or abolition.

Claims Presentation Procedures

The claims presentation procedures are applicable to all causes of action heretofore or hereafter accruing. Section 152 of Chapter 1715 of the Statutes of 1963 provides:

Sec. 152. (a) This act applies to all causes of action heretofore or hereafter accruing.

(b) Nothing in this act revives or reinstates any cause of action that, on the effective date of this act, is barred either by failure to comply with any applicable statute, charter or ordinance requiring the presentation of a claim or by failure to commence an action thereon within the period prescribed by an applicable statute of limitations.

(c) Subject to subdivision (b), where a cause of action accrued prior to the effective date of this act and a claim thereon has not been presented prior to the effective date of this act, a claim shall be presented in compliance with this act, and for the purposes of this act such cause of action shall be deemed to have accrued on the effective date of this act.

(d) Subject to subdivision (b), where a cause of action accrued prior to the effective date of this act and a claim thereon was presented prior to the effective date of this act, the provisions of this act so far as applicable shall apply to such claim; and, if such claim has not been acted upon by the board prior to the effective date of this act, such claim shall be deemed to have been presented on the effective date of this act.

A special report on this section by the Senate Committee on Judiciary states as follows:

No claim presented before September 20, 1963	Period for presenting claim commences to run on September 20, 1963, and time limits in Senate Bill No. 43 apply. (For causes of action not recognized by Senate Bill No. 42, Section 45 (d)(1) of Senate Bill No. 42 applies and may shorten time limits in some cases.)
Claim presented but not acted on by public entity before September 20, 1963	Claim is deemed to be presented on September 20, 1963, and time limits in Senate Bill No. 43 apply.

Claim presented and re-  
jected by public entity  
before September 20,  
1963

(a) Cause of action  
recognized under  
pre-*Muskopf* law  
and recognized  
under Senate Bill  
No. 42

Statute of limitations that applied when  
claim was rejected applies.

(b) Cause of action  
recognized under  
pre-*Muskopf* law  
not recognized un-  
der Senate Bill  
No. 42

Statute of limitations that applied when  
claim was rejected applies, except that  
Section 45 (d) (2) of Senate Bill No. 42  
applies and may shorten time limits in  
some cases.

(c) Cause of action  
not recognized un-  
der pre-*Muskopf*  
law, but recog-  
nized under Sen-  
ate Bill No. 42

Six-month statute of limitations provided  
by Senate Bill No. 43 applies, time com-  
mencing to run from September 20,  
1963.

(d) Cause of action  
not recognized un-  
der pre-*Muskopf*  
law and not recog-  
nized under Sen-  
ate Bill No. 42 but  
recognized under  
*Muskopf* and *Lip-  
man* cases

Six-month statute of limitations provided  
by Senate Bill No. 43 applies, time com-  
mencing to run from September 20,  
1963.

## EXHIBIT I

### LIABILITY UNDER PRE-MUSKOPF LAW (Principal areas of liability indicated)

#### State of California

Under pre-Muskopf law, the State was considered immune from tort liability. However, liability existed in a number of areas, the most significant of which were the following:

- (1) Dangerous conditions of property used for a "proprietary" purpose.
- (2) Negligence in carrying on "proprietary" activities (such as, for example, power systems, harbors and docks, railroads, public entertainments and spectacles, and demonstrations designed to attract enlistments in the National Guard).
- (3) Negligent and intentional torts of employees engaged in "proprietary" activities.
- (4) Negligent operation of motor vehicles.
- (5) Nuisance (including personal injury as well as property damage).
- (6) Inverse condemnation.
- (7) Malpractice by State medical personnel (Government Code Section 2002.5.)
- (8) Innocent person erroneously convicted and imprisoned. (Penal Code Sections 4900-4906.)

In addition, the University of California did not claim sovereign immunity as a defense in tort actions.

On the other hand, state employees were fully liable for negligent and intentional torts to the same extent as private persons, except for acts or omissions involving the exercise of discretionary authority.

#### School Districts

Under pre-Muskopf law, school districts were liable for:

- (1) Their own negligence (by statute).
- (2) Negligent torts of employees but not intentional torts (by statute).

- (3) Dangerous conditions of property (by statute).
- (4) Negligent operation of motor vehicles (by statute).
- (5) Nuisance and inverse condemnation.

School district employees were liable for both negligent and intentional torts, except for discretionary immunity.

#### Cities and Counties

Under pre-Muskopf law, cities and counties were liable for:

- (1) Dangerous conditions of property (by statute).
- (2) Negligence in carrying on "proprietary" activities.
- (3) Negligent and intentional torts of employees engaged in "proprietary" activities.
- (4) Negligent operation of motor vehicles (by statute).
- (5) Nuisance.
- (6) Inverse condemnation.
- (7) Negligence of weed abatement crews (by statute).
- (8) Absolute liability for property damage from mob or riot (by statute).

Employees were liable for negligent and intentional torts to the same extent as a private person, except for discretionary immunity.

#### Other Districts

1. Many districts, such as public transit districts and housing authorities, engage in "proprietary" activities and were liable to the same extent as a private person.
2. By specific statutory provision, a number of other types of districts were liable for the negligence of their employees:
  - (1) Approximately 144 reclamation districts.
  - (2) Approximately four Flood Control and Flood Water Conservation Districts.

3. By specific statutory provision, a number of other public entities were required to pay tort judgments that were recovered against their personnel, whether engaged in "governmental" or "proprietary" activities:

- (1) Approximately 85 community services districts (which engage in a broad variety of injury-causing activities).
- (2) Approximately 117 irrigation districts.
- (3) Approximately 168 county water districts.
- (4) Approximately 92 California water districts.
- (5) 1 water replenishment district.
- (6) Approximately 45 municipal water districts.
- (7) Approximately 18 various other types of districts.

4. For all other districts, the liability of the district depended upon the extent to which the district's activities were considered to be "proprietary" or "governmental." Many districts, although engaged in "governmental" activities, were bearing a substantial portion of the cost of tort liability in the form of insurance premiums on insurance carried for their employees. Similarly, numerous districts engaged in "proprietary" activities bore the cost of tort liability, since they were never protected by the common law doctrine of sovereign immunity.