

Exceptions to discretionary immunity for government employees

Ministerial actions and why derivative immunity should not always be presumed

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Under the California Tort Claims Act, a government entity can be held liable directly and derivatively through its employees. Government entities and their employees are subject to broad, statutory immunity from liability in tort. Finding exceptions to these sweeping immunities requires due diligence because they are scattered and inconspicuous throughout the Tort Claims Act and California Codes. Arguing for an exception to governmental tort immunity will largely depend on your specific case facts. There are several circumstances under which a public employee may not be protected by immunity. This article will discuss identifying exposure to a government entity based on the premise that their employee's actions were not subject to immunity for failures to perform mandatory duties and injuries caused by negligent acts and omissions.

Government Tort Claims Act and injuries caused by negligence

The specific statute that governs government employer liability in California is Government Code section 815, which bars liability for any public entity or employee for injuries caused by their act or omissions, unless otherwise provided by statute. (Gov. Code, § 815.) Enacted in 1963, Government Code section 815 abolished all common law forms of liability for public entities, except when liability is specifically provided for by federal or state constitution and when a statute declares them liable. Section 815, subdivision (b) states the liability of a public entity will be subject to any immunity available to the entity, in addition to any defenses that are available include those defenses available to private persons.

Government Code section 815.2, carves out liability for public entities for injuries caused by their employees in the scope of their employment, if the act or omission of the employee would, apart from section 815.2, give rise to a cause of action against the employee. This exception is narrowed by Government Code section 820.2, which provides government employees immunity for discretionary acts within the scope of



their employment, even when that discretion is abused. The immunity granted public employees for discretionary acts by Government Code section 820.2, is extended to the public entity through Government Code section 815.2, subdivision (b), so that where the public employee is immune, the public entity is also protected. Although it would appear that government employees are absolutely insulated from liability for their actions, a closer read and application of facts to the exceptions makes it clear that liability should be presumed and immunity needs to be proved.

The effect of Government Code section 815.2 is to incorporate general standards of tort liability as the primary basis for respondeat superior liability of public entities. Thus, in a cause of action for negligence, the existence and extent of an entity's vicarious liability under the statute will be determined by the scope of duty legally attributed to its employees. (*Torsiello v. Oakland Unified School Dist.*, 197 Cal.App.3d 41, 242.)

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Liability for failure to discharge a mandatory duty

Liability against a public entity can be established under Government Code section 815.6, which provides:

> 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 establishes that it exercised reasonable diligence to discharge the duty.

Pleadings should specifically identify mandatory duties and special relationships because these statuses will be considered in dispositive motions as litigation progresses. The term "mandatory" refers to obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which a governmental entity may exercise or not as it chooses. (*Fox v. County of Fresno*, 170 Cal.App.3d 1238.)

For example, the right to safe schools under article I, section 28, subdivision (c) of the California Constitution does not supply the necessary rule for its implementation, but is simply a declaration of rights; it imposes no mandatory duty on a school district or its employees to make a high school safe and supplies no basis for liability under Government Code section 815.6, for particular injuries proximately resulting from the failure to discharge such a duty. (*Leger v. Stockton Unified School Dist*., 202 Cal.App.3d 1448.)

An appropriate way to frame an argument for liability utilizing the Right to Safe Schools Act would be to substantiate the special relationship school districts have with students. Although not a mandatory duty giving rise to a cause of action if not followed, the Safe Schools Act makes clear the duty of care owed by school personnel to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally.

Discretionary immunity under section 820.2

Arguments against discretionary immunity provided for in Government Code section 820.2, will need to isolate and analyze the employee's acts as non-discretionary and thus not subject to immunity. *Johnson v. State of California*, 69 Cal.2d 782, a landmark case, discussed how to construe "discretionary actions" and unprotected "ministerial acts." (*Id.* at 793.) Although *Johnson* did not provide a mechanical test to determine whether certain acts are subject to liability, the court in *Johnson* emphasized that discretion must actually have been exercised beyond ministerial implementation of a policy in order to be immune. The California Supreme Court has noted that virtually every public act requires some element of discretion. As a result, the court distinguished between basic policymaking or planning on the one hand and ministerial or operational levels of decision making on the other hand, holding that the first category triggers immunity while the latter category does not. Although basic policy decisions warrant immunity, subsequent ministerial actions in the implementation of that basic policy still face case-by-case adjudication on the question of negligence. (*Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776, 776.)

Not all acts requiring a public employee to choose among alternatives entail the use of "discretion" within the meaning of Government Code section 820.2. (*Barner v. Leeds* (2000) 24 Cal.4th 676, 679.) The court in *Barner*, held "[t]here is no basis for immunizing lower-level decisions that merely implement a basic policy already formulated. (*Ibid.*) In fact, the court in *Regents of University of California v. Superior Court*, 29 Cal.App.5th 890 was clear in mandating the scope of the discretionary act immunity should be no greater than is required to give policymakers sufficient breathing space in which to perform their functions. In *Regents*, a university's decision to create programs and protocols qualified as planning or policy determinations, and thus discretionary within the meaning of Government Code section 820.2. However, as to the manner in which the university and its employees executed those programs constituted subsequent ministerial actions in the implementation of the discretionary policies, and were subject to negligence liability. (*Ibid.*)

Ministerial actions not subject to immunity

Therefore, if facts presented show that an employee negligently executed a policy directive from the governmental entity, it can be argued that there was no discretion and there is no immunity. Actions which have been found to be within the discretion of a public employee, and therefore immune under Government Code section 820.2, have included the decision to initiate dependency proceedings on behalf of a minor. Actions which have been found "ministerial" and thus not immune have included negligence in the supervision of a minor in foster care. Actions that are manifestly ministerial, because they amount only to obedience to orders which leave the officer no choice, plainly include actions governed by specific statutory or regulatory directives. Such actions have been found nondiscretionary, and thus not immunized, because they entail the fulfillment of enacted requirements. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 133.) Judges will need to consider the facts of each case in order to determine whether a cause of action against a government employee will continue to a jury.

Homing in on ministerial acts

In general, ministerial duties are those that are simple, clear, and specific tasks that involve no discretionary decision-making or judgment. These duties typically involve following established rules, regulations, or procedures.

For example, some ministerial duties of a government employee in California might include:

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- Processing paperwork or applications according to established guidelines
- Issuing permits or licenses as per established regulations
- Maintaining and updating records and databases
- Answering phone calls or emails and providing information to the public
- Performing routine inspections and evaluations

Thoroughly investigate the facts of each case and consider whether the ministerial exception to discretionary immunity is applicable and needs to be pled. Understanding the ministerial exception is critical in maintaining a common law action against a public entity employee. Derivative immunity for government employees should not always be presumed.



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