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FACTS

Plaintiff is the mother of a young woman, severely disabled mentally and physically, who died of head trauma after falling while trying to get up from her bed and walk across the room. She fell at Bedlam Development Center, a California state facility in Redwood County, where she was a patient and resident. A Bedlam physician examined her and judged her injury not to be serious. Two days later, however, she became less alert and responsive and was sent to the hospital where, after two days, she died.

The complaint alleges causes of action for negligence and dependent adult abuse. The theories are that the patient should have been supervised more closely and should have been sent to the hospital sooner. To avoid the $250,000 MICRA damages cap, medical malpractice is not alleged, but counsel intends to file a government claim against the attending physician so as to preserve the possibility of amending to include such a claim if the other claims fail.

The State has demurred, claiming as expected immunity from liability for negligence and for injury (other than injury from medical malpractice) to an in-patient at a mental institution (see Gov. Code § 854.8). The latter immunity does not apply to liability arising from staffing and equipment that fell below the minimum required by statute or regulation.

The facts are relatively undeveloped, as discovery has not begun and plaintiff has limited information about the situation at Bedlam. But it is known that the patient's individual education plan (IEP) provided that she have one-to-one supervision at all times to protect her from harm such as the harm that occurred.

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ISSUES

1. Does § 854.8 immunity apply to Bedlam?

2. Do any statutes or regulations apply that might trigger § 855's exception to immunity?

3. Might the Elder Abuse and Dependent Adult Civil Protection Act interact with §§ 854.8 and 855 in such a way as to limit immunity?

4. Might individual employees be liable even if the State is immune?

SUMMARY

1. Yes. Gov. Code § 854.2; Welf. & Inst. Code § 7500.

2. Maybe. Bedlam appears to be subject to detailed regulations as an "Intermediate Care Facility for the Developmentally Disabled." In addition DDSS clients have broadly phrased "rights" under the Lanterman Act and its implementing regulations.

3. No. Section 854.8 immunity is absolute, except as specifically provided therein. Section 855 liability is limited to breaches of minimum standards specifically imposed on a health services department.

4. Yes. Section 854.8(d) provides that individual employees may be liable for negligence.

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DISCUSSION[1]

1. Section 854.8 applies to Bedlam.

With certain exceptions, the state is immune from liability for injuries to inpatients in its "mental institutions." Gov. Code § 854.8(a)(2).[2] Section 854.8 "embodies an absolute, broad immunity prevailing over all other provisions of the Tort Claims Act." *Guzman v. County of Los Angeles* (1991) 234 Cal.App.3d 1343, 1348.

By statutory definition, state facilities for the care and treatment of the developmentally disabled are "mental institutions." *Id.*, § 854.2 ("As used in this chapter, 'mental institution' means any state hospital for the care and treatment of the mentally disordered or the mentally retarded, the California Rehabilitation Center referred to in Section 3300 of the Welfare and Institutions Code, or any county psychiatric hospital.") See also Welf. & Inst. Code § 7500 (in any statute, "mentally retarded" and similar terms mean "developmentally disabled") and subd. (d), listing Bedlam State Hospital as one of seven state hospitals for the care and treatment of the developmentally disabled.

Plaintiff was injured while a resident of Bedlam Developmental Center, which is presumably Bedlam State Hospital under a different name. On this basis, it appears that § 854.8 applies to her case.

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[1]Beyond mere staffing deficiencies, reports have recently surfaced of abuse at Bedlam and California's other institutions for the developmentally disabled. See <http://californiawatch.org/dailyreport/developmental-centers-police-need-immediate-fixes-state-officials-say-15297> (in-house police have been lax in investigating abuse reports).

[2]All statutory citations are to the Government Code unless otherwise stated.

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2. Government Code § 855 may provide an exception to § 854.8 immunity where an injury is caused by equipment, personnel, or facilities that fall below the minimum standards established by statute or regulation.

Section 855 creates an exception to § 854.8 immunity where an injury is due to equipment, personnel, or facilities that fall short of statutory or regulatory requirements:

> A public entity that operates or maintains any medical facility that is subject to regulation by the State Department of Health Services, Social Services, Developmental Services, or Mental Health is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel or facilities required by any statute or any regulation of the State Department of Health Services, Social Services, Developmental Services, or Mental Health prescribing minimum standards for equipment, personnel or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation.
>
> *Id.*, § 855(a).

Authority to adopt or enforce such regulations must be provided by statute. *Id.*, § 855(c). One court has held that the only regulations that trigger liability are those promulgated by one of the four specified departments:

> A plaintiff seeking to avoid public entity immunity under its terms must rely on a statute or regulation of the State Department of Health Services, Social Services, Developmental Services, or Mental Health; enactments by other bodies are irrelevant. Unless a statute or regulation of one of those four departments sets forth the standard allegedly breached, or incorporates it by reference, there can be no liability. In this case, plaintiff relies on various federal regulations, the County Manual, and the JCAHO [Joint Commission on Accreditation of Health Organization] standards. None are within the scope of Government Code section 855, therefore, none can form the basis of liability.

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> *Lockhart v. County of Los Angeles* (2007) 155 Cal.App 4th 289, 306 (footnotes omitted).

But see *Baber v. Napa State Hospital* (1989) 209 Cal.App.3d 213, 220-221 (plaintiff may prove violation of department's minimum standards by reference to other standards). *Baber* and *Lockhart* are further discussed below.

Section 855 is a specific instance of the general policy established in § 815.6: that a public entity is liable for damages resulting from the failure to exercise reasonable diligence to discharge mandatory duties imposed by statute or regulation.[3] *Baber, supra*, 209 Cal.App.3d at 218; *Lockhart, supra*, 155 Cal.App.4th at 308.

Courts construing § 815.6 have disagreed as to the scope of "mandatory duties" that may give rise to liability. Some have limited such duties to those that are specifically and objectively defined. See, e.g., *County of Los Angeles v. Superior Court (Terrell R.)* (2002) 102 Cal.App.4th 627, 639. Others have extended it to duties that are more generally defined. See, e.g., *Elton v. County of Orange* (1970) 3 Cal.App.3d 1053; *AE v. County of Tulare* (9th Cir. 2012) 666 F.3d 631, 639-640. *Baber* and *Lockhart* disagree along similar lines in construing § 855.

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[3]Section 815.6 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.

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A. *Baber v. Napa State Hospital* held that general standards in the departments' statutes and regulations can be fleshed out as "minimum" standards by reference to more specific standards in other sources.

In *Baber*, while involuntarily hospitalized as a gravely disabled conservatee under the Lanterman-Petris-Short Act (Welf. & Inst. Code § 5000 et seq.), the plaintiff was attacked and blinded by two other patients in the same ward. He alleged that the state was negligent in placing him in a ward designated for violent patients; failing to segregate violent from nonviolent patients; inadequately training staff; inadequately supervising the plaintiff and his attackers; and various other breaches. Although he cited pertinent regulations, the trial court found that he did not state a prima facie case of § 855 liability and nonsuited him.

On appeal, the plaintiff contended that the hospital was liable because it had violated regulations requiring, among other things, that "[a] sufficient number of appropriate personnel shall be provided for the safety of patients" and that "[m]aintenance shall include provision and surveillance of services and procedures for the safety and well-being of patients, personnel and visitors." The state responded that these standards were insufficiently quantifiable or objective to support § 855 liability, but the appellate court disagreed. Acknowledging that the standards were not very specific, the court said: "This may well render it more difficult for appellant to meet his ultimate burden of proof, but it does not support a nonsuit on his opening statement." 209 Cal.App.3d at 220.:

> The adequacy of the standards has been entrusted to the Department of Health Services, which has sole authority, and presumably the expertise, to establish minimum standards of operation for state hospitals. Health & Safety Code § 1276 states that standards should be "based on the type of health facility and the needs of the persons served thereby." This implies an

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> understanding by the Legislature of the necessity of creating *standards flexible enough to meet the variety and changing needs of psychiatric hospitals and patient populations*.
>
> *Id.* (emphasis added).

From this starting point—legislative recognition that the applicable "minimum standards" must be "flexible"—the court indicated kinds of evidence that might prove that the hospital had violated such standards. Such evidence, the court held, could come from many sources that might put flesh on the broad, bare regulatory bones.

> For instance, there may be correspondence, directives, inspection reports or other official memoranda indicating more specifically what was required of the hospital during the relevant time period. There may also be industry standards which were understood to apply.
>
> *Id.* at 221.

The minimum standards, defined from whatever sources, must be clear enough that the hospital could know what would constitute reasonable diligence in attempting to comply.

> Whether the hospital exercised reasonable diligence to comply is a matter of defense for respondent to establish, and clearly cannot be resolved by the instant motion for nonsuit. By the same token, if the ultimate proof fails to demonstrate that the standards were sufficiently specific to reasonably put respondent on notice of noncompliance, appellant will not have met his burden.
>
> *Id.*

B. *Lockhart v. County of Los Angeles* held that § 855 does not apply unless statutes or regulations from the pertinent state department set forth specific minimums.

In *Lockhart,* a psychiatric patient at a county hospital committed suicide in

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a locked bathroom while on suicide watch. The patient's son sued the county, alleging negligence and citing breaches of minimum standards imposed by regulations, including, for example, a requirement that there be "sufficient nursing staff . . . to meet the needs of the patients." The trial court granted summary judgment based on § 854.8 immunity, and the appellate court affirmed.

The first issue on appeal was whether § 855 could be extended to include federal standards, JCAHO standards, and a county's own manuals. The court held that it could not. 155 Cal.App.4th at 304-306. This holding is at odds with *Baber's* approach, which allowed for reference to other standards to flesh out general standards in the applicable statutes and regulations.

The second issue was whether statutes or regulations setting forth general requirements of "sufficient" equipment, personnel, or facilities could be considered as "prescribing minimum standards," triggering § 855. The court held that they could not. *Id.* at 307-310.

> The Law Revision Commission's recommendations are instructive. . . . 'A public entity should be liable for an injury which results from the failure to comply with an applicable statute, or an applicable regulation . . . which establishes minimum standards, . . . unless the public entity establishes that it exercised reasonable diligence to comply . . . . Although decisions as to the facilities, personnel or equipment to be provided in public medical facilities involve discretion and public policy to a high degree, nonetheless, when minimum standards have been fixed . . ., there should be no discretion to fail to meet those minimum standards. [¶] This recommendation will leave determinations of the standards . . . in the hands of the persons best qualified to make [them] and will not leave those standards to the discretion of juries . . . . Hence, public entities . . . will continue to be able to make the basic decisions as to the standards and levels of care . . . . within the range of discretion permitted by state statutes and regulations.'" [Citations.] It is clear, then, that Government Code section 855 was not intended to

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> interfere with the exercise of a public medical facility's discretion to make decisions as to the standards and levels of equipment, personnel and facilities . . ., or to impose liability when the public medical facility's exercise of discretion resulted in injury. Instead, . . . section 855 was intended to impose liability only when the statute or regulation sets forth a specific standard that gives . . . clear notice as to the minimum requirements . . . .
>
> *Id.* at 307-308.

So holding, the court explicitly disagreed with *Baber*'s conclusion upholding liability based on general standards. *Id.* at 308-309. The issue, *Lockhart* said, was whether "general" or "flexible" regulations "'prescrib[e] minimum standards for equipment, personnel or facilities' such that their breach gives rise to tort liability." Again citing the Law Revision Commission recommendations on § 855, the court held that liability exists only "when minimum standards have been fixed by statute or regulation." *Id.* at 309.

C. The Lanterman Act

The Department of Developmental Disability Services operates under the authority of the Lanterman Act (Welf. & Inst. Code § 4500 et seq). It provides that it is the Legislature's intent that developmentally disabled persons have rights to, among other things, dignity, privacy, and humane treatment; prompt medical care and treatment; freedom from harm, including neglect; and freedom from hazardous procedures. *Id.*, § 4502(b), (d), (h), and (i). The Department can cite a private party for violating these rights. See *Res-Care v. Roto-Rooter Services Co.* (N.D.Cal. 2010) 753 F.Supp.2d 970, 979 (Department cited plumbing company where resident in care center was scalded while taking a shower). But it is doubtful that they provide a basis for § 855 liability. A regional center might conceivably be

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liable for Lanterman Act violations under the broad *Baber* approach, but these "rights" look less like "standards" than the rather general regulations that provided the outline for the plaintiff in *Baber* to try to fill in. A court that followed *Lockhart* would not find liability.

The Act does impose specific responsibilities on regional care centers (WIC §§ 4640-4659), including responsibilities for developing "individual program plans." The Act also provides specific minimum standards for coordinating and monitoring care that licensed third parties provide, but does not make a regional center responsible for directly providing care itself. *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482.

In *Morohoshi*, a regional care center placed a developmentally disabled adult with a private residential care provider. The resident suffered from diabetes and was insulin-dependent, and required blood-sugar checks morning and evening. A nurse failed to take an evening reading and the resident died. The court of appeal held that the regional care center had a nondelegable duty to provide for the resident's care and held the center vicariously liable, but the Supreme Court reversed. The Court held that direct provision of care is not a responsibility of regional care centers. Rather, the centers are responsible for determining potential clients' eligibility for care and services under the Act, formulating individual program plans (IPPs), and securing the care and services for each client that his or her IPP provides. A regional center ordinarily secures the necessary care and services by "vendorization" or contracting with private care providers. Regional centers are not intended to monitor the care provided by their contractors on the day-by-day—indeed, hour-by-hour—basis that would have been required to prevent the resident's death. *Id.*, 34 Cal.4th at 488-492.

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Regulations that implement the Act are found in 17 CCR Division 2. Chapter 1 contains general provisions, including provisions for client rights. Those provisions (*id.*, §§ 50510 and 50530) in some instances go beyond the rights guaranteed in § 4502 of the Code, but the regulations that might pertain to your case are hardly more specific than the corresponding Code provisions noted above. They include the right to

(a) dignity, privacy and humane care (§ 50510(a)(2));

(b) prompt and appropriate medical treatment and care (*id.*, subd. (a)(5));

(c) freedom from harm, including (among other kinds of harm) abuse and neglect (*id.*, subd. (a)(8)); and

(d) freedom from hazardous procedures (*id.*, subd, (a)(9)).

Section 50530 provides the limited circumstances in which some of the clients' numerous rights may be denied. The rights in subdivision (a), including all the rights noted above, may not be denied under any circumstances. *Id.*, § 50530(a).

It is clear that the rights enumerated in the Lanterman Act and its implementing regulations are intended to be enforceable. Whether or not they are intended to be enforceable *against the state,* despite § 854.8 immunity, is a different question. Under *Baber*'s reading of § 855, the answer—subject to proof of "minimum standards" from internal department documents or other sources—might be yes. Under *Lockhart*, it would be no.

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D. Other statutes and regulations

Somewhat confusingly, Bedlam Developmental Center is not a Lanterman Act regional care center, and "Developmental Center" is not a defined term in any statute or regulation. Bedlam Developmental Center appears to be Bedlam State Hospital under another name, and appears to remain state-run, not merely state-monitored. But considering the care and treatment provided, it seems to be regulated like a private facility that contracts with or is "vendorized" by a regional care center. Such facilities are regulated as "intermediate care facilities for the developmentally disabled." See 22 CCR (Social Security), Division 5 (Licensing and Certification of Health Facilities, Home Health Agencies, Clinics, and Referral Agencies), Chapter 8 (Intermediate Care Facilities for the Developmentally Disabled) (§ 76000 et seq) and Chapter 8.5 (Intermediate Care Facilities/Developmentally Disabled–Habilitative) (§ 76800 et seq.)

These two chapters contain 409 regulations. The regulations are organized, in each chapter, under Definitions, Licensing, Services, Administration, Physical Plant, and Violations and Civil Penalties. It may be possible to show that plaintiff's injury was proximately caused by failure to meet specific minimum requirements in some of these regulations.

3. The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) does not expand the scope of Bedlam's liability.

Section 854.8 immunity is absolute, except as specifically provided therein. Section 855 liability is limited to breaches of statutes and regulations that govern the four departments protected by § 854.8. *Baber, supra,* 209 Cal.App.3d at 218 (§ 855(a) is a specific application of the general policy established in

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§ 815.6); *Lockhart, supra,* 155 Cal.App.4th at 305 (same). The EADACPA (Welf. & Inst. Code § 15600 et seq.) establishes statutory liability for various forms of abuse and neglect, but it is not specific to those four departments. Rather, it protects elders and dependent adults in *any* setting, even a completely private one.

Further, the EADACPA's standards are no more specific than the "rights" provided in the Lanterman Act and its regulations. It defines "abuse" as including "neglect" (*id*., § 15610.07). "Neglect" means "the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." *Id.*, § 15610.57(a)(1). It adds that "neglect" includes "failure to provide medical care for physical and mental health needs" and "failure to protect from health and safety hazards." Even under *Baber's* broad approach, these definitions do not help bring your case within the scope of § 855.

4. An individual employee may be liable for plaintiff's injury, even if Bedlam is not, and the state may elect to pay any resulting judgment. But employees may have discretionary act immunity under the Lanterman Act.

Section 854.8 immunity does not extend to individual employees. "Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent act or omission." *Id.*, subd. (d). But except for medical malpractice, an immune public entity is not vicariously liable.

> The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section [but the entity must pay a judgment or settlement for medical malpractice.

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Id.

Apart from § 854.8, the Lanterman Act immunizes *regional center employees* from liability arising from discretionary acts or omissions:

> (a) Any regional center employee shall not be liable for civil damages on account of an injury or death resulting from an employee's act or omission where the act or omission was the result of the exercise of the discretion vested in him or her, in good faith, in carrying out the intent of this division, except for acts or omissions of gross negligence or acts or omissions giving rise to a claim under Section 3294 of the Civil Code. This section shall not be applied to provide immunity from liability for any criminal act.
>
> (b) This section is not intended to change, alter, or affect the liability of regional centers, including, but not limited to, the vicarious liability of a regional center due to a negligent employee.
>
> Welf. & Inst. Code § 4519.7.

This provision is confusing because, as discussed above, regional center employees do not provide direct care. Rather, they evaluate clients' needs and arrange for necessary care and services. It seems unlikely that negligent performance of such functions, as opposed to negligence in direct care, could proximately cause injury or death.

If § 4519.7 were taken to apply to developmental center employees, it would raise the possibility that plaintiff might face a discretionary act immunity defense similar to the defense available to individual employees generally under Government Code § 820.2. For example, to the extent liability was based on an aide's negligence in supervising plaintiff, the defense would have no merit. But to the extent it was based on an employee's discretionary staffing decision, the defense might succeed. It might also be asserted by plaintiff's examining physician, who decided that the patient did not need a thorough examination for brain injury until she showed unmistakable deterioration.

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As written, however, § 4519.7 does not apply to Bedlam employees. The statute covers "regional center employees" but, as noted above, Bedlam is not a regional center as the Lanterman Act uses that term.

CONCLUSIONS

1. Section 854.8 immunity covers Bedlam.

2. No specific standards exist in the Lanterman Act or its implementing regulations that would trigger the § 855 exception to immunity. A court, following the *Baber* decision, might allow plaintiff to prove the exception, if she could, based on DSS internal standards or other sources. Bedlam is subject to detailed regulations as an "intermediate skilled nursing facility for the developmentally disabled," and one or more of these regulations might provide a basis for liability.

3. The EADACPA does not appear to help plaintiff overcome § 854.8 immunity.

4. Individual Bedlam employees may be liable and the state must pay any judgment or settlement based on malpractice. It may also, but need not, pay damages based on other causes of action.

5. To the extent that plaintiff sues supervisory or professional staff, the defendants might try to assert the Lanterman Act's special discretionary-act immunity defense (WIC § 4519.7). That defense resembles the general discretionary-act immunity provided in the Tort Claims Act (§ 820.2 immunity). The scope of § 820.2 immunity has been vigorously contested in many reported cases, but no reported case discusses the special Lanterman Act immunity. Section 4519.7 refers to "regional center employees." Thus, as written, it does not cover employees of a direct care provider such as Bedlam.

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