Minutes

11/7/61

Memorandum No. 53(1961)

Subject: Study No. 52 - Sovereign Immunity

You have now received Part III of the study prepared by Professor Van Alstyne relating to Sovereign Immunity. Part III deals with the common law--that is, nonstatutory--bases for the liability and immunity of governmental entities and officers in California. Part III also discusses the relevant policy considerations affecting the development of an over-all approach to the problems of Sovereign Immunity.

The first portions of the study dealt with statutory liabilities and immunities. The questions presented in Memorandum No. 54(1961) were based upon the first portions of the study. Therefore, they were not developed upon the basis of any over-all policy. So that these problems may be approached from a uniform frame of reference, it is suggested that Part III be considered first. An understanding of the principles discussed in Part III (Pages 279-376) is essential to a systematic resolution of the myriad problems presented in the first portions of the study. After the Commission has developed some general principles to guide its decisions upon the specific problems presented, these principles should be applied to the common law bases for the liability and immunity found in the first portion of Part III. (Pages 279-347.)

1. Should there be a general immunity of public officers and employees from liability for erroneous or mistaken conduct if

conceived honestly and in the exercise of reasonable care? Should the employing public entity enjoy an immunity under similar circumstances? (See discussion on Pages 330-35, 359-360.)

[Note: "negligence" in this context refers to "the failure to employ the standard of care which would be used by the average prudent individual under the same circumstances." When specific situations are discussed, the Commission should bear in mind that policy considerations may dictate an exception to the general rule for specific types of injury--for example, erroneous conviction of a felony.]

2. Upon what basis, if any, should the liability of governmental entities be created without fault? (Pages 360-62.)

3. Should the question of the incidence of loss upon the particular beneficiaries of the activity involved or upon the taxpayers generally be a relevant consideration in determining liability of governmental activities? Should entities be liable for the malicious acts of their officers and employees? Should the officers and employees themselves be liable for their malicious acts as a general rule? Should protection be provided the public for malicious acts of public officers and employees other than public liability? Should the availability of private insurance as a means of loss distribution be a relevant consideration in determining the extent to which governmental entities should be immune from liability? To what extent should the availability of other remedies be a basis for immunity of governmental entities and employees from liability? (Pages 362-368.)

4. To what extent should the deterrent effect of tort liability be considered in determining whether liability should be extended or restricted? (Pages 369-372.)

5. To what extent should the government be able to permit persons to use governmental property at their own risks? What conditions, if any, should be a prerequisite to immunity in these areas? What criteria should be used to determine those areas in which there should be immunity on this basis? (Pages 372-73.)

6. To what extent should the "importance to the public of the function involved" and the undesirability of impeding that function through the imposition of tort liability be made the basis for governmental immunity? If certain functions of government are so desirable that they should not be so impeded, should they be specifically identified in statutory form? What other methods should be used to protect governmental entities and employees from the undesirable deterrent effects of liability? (Pages 373-75.)

Upon the basis of the principles discussed in connection with the foregoing questions the Commission may turn to the common law bases for liability and immunity. In this connection the following questions may be discussed:

1. To what extent should the distinction between governmental and proprietary activities be retained if at all? (Pages 280-87.)

2. To what extent should the liability of public entities for injuries to surrounding property or to persons thereon--i.e., liability for nuisance--be continued? (Pages 287-94.)

3. To what extent should entities be liable for the "intentional" torts of their servants? (Pages 294-302.)

4. To what extent should entities be liable for the torts of officers or employees over whom they exercise no control? What entities should be liable for torts of such persons? (Pages 304-310.)

5. To what extent should the doctrine of "ultra vires" shield governmental entities from liability under the doctrine of respondeat superior? (Pages 310-17.)

6. To what extent should officers be immune from liability for their "discretionary" acts? Should they be liable for their "malicious" acts? If so, what procedures should be developed to protect them from vexatious litigation? (Pages 318-39.)

7. To what extent should failure of governmental officers or entities to act be the basis for liability? (Pages 339-47.)

The foregoing are not all of the problems presented in the study. However, it is believed that they will focus your attention on certain of the major problems and that from the discussion certain basic principles can be worked out with which the Commission may attack all of the problems in the sovereign immunity and liability area.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(52)

11/2/61

A STUDY RELATING TO TORT LIABILITY OF GOVERNMENTAL ENTITIES IN CALIFORNIA*

PART III

* This study was made for the California Law Revision Commission by Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons and the study should not be used for any other purpose at this time.

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PART III

NON-STATUTORY LAW OF GOVERNMENTAL TORT LIABILITY BEFORE 1961

"The rule of governmental immunity for tort," declares Mr. Justice Traynor in Muskopf, "is an anachronism, without rational basis, and has existed only by force of inertia."[778] The existence of the rule, however, has provided the legal background for the enactment of a body of legislation, surveyed above, which is impressive in scope if not in consistency or uniformity. As we have already seen, the abolition of the rule creates vast problems of interpretation and application of numerous statutes. Additionally, the end of common-law governmental immunity necessarily means a corresponding increase in governmental tort liability, except where existing statutory immunities fill the gap.

The extent of this increase in liability is, of course, of immediate and direct concern to the purposes of the present study. If, as Mr. Justice Traynor repeatedly intimates,[779] the courts have removed much of the force of the immunity rule by a continuous process of expansion of the "proprietary" and other exceptions to that rule, it should be of value to briefly review the relevant California cases. Such a review may assist in evaluating the usefulness and viability of the distinction between "governmental" and "proprietary" activities as a determinant of public responsibility in tort. It should also prove helpful in identifying the categories of governmental activities in which the principle of the Muskopf and Lipman cases would potentially work the greatest change, and in distinguishing

such activities from those in which little or no alteration of existing law would ensue. And it may serve to clarify the policy considerations which are relevant to the sound development of a legislative solution.

The Distinction Between Governmental and Proprietary Activities

Preliminarily, it should be noted that the classification of a particular activity of a governmental entity as "proprietary" or "governmental" is a question of law for the court to decide, and is not an issue to be submitted to the jury.[780] The courts, faced with the responsibility of drawing the line, have persistently declined to attempt to elucidate any general rule of decision and have instead preferred to decide each case "upon its own peculiar facts",[781] at least where a mere formal adherence to stare decisis is not available, due to the absence of a previous case in point, as a means of avoiding the problem altogether.[782] This ad hoc judicial approach undoubtedly reflects a felt desire on the part of judges to retain the maximum flexibility in the handling of precedents and in the disposition of "hard" cases; but it also has tended to produce an unusual degree of inconsistency between decisions and a corresponding decrease in the predictability of results.[783] Uncertainties such as these, moreover, are further exacerbated by the settled rule that the classification turns upon "the nature of the particular activity that leads to the plaintiff's injury" and is not concluded by the identity of the public entity carrying on the activity nor by the fact that the facilities in question are ordinarily employed for other purposes.[784]

Turning to the reported cases, we find at once that the extremes are reasonably well blocked out. A public entity which engages in a business-type enterprise closely resembling or in fact in competition with private enterprise is uniformly regarded as conducting a "proprietary" activity. Examples include the public operation of an electric power system,[785] water system,[786] airport,[787] harbors and docks,[788] railroad,[789] public transit system,[790] and public entertainments or spectacles.[791] At the other extreme are those "police power" activities of the government which are manifestly designed to protect life and property and promote public health and safety--activities which are uniformly classified as "governmental" in nature. Included in this category are such activities as the abatement of injurious plant or insect pests,[792] providing of public health services,[793] operation of a police force,[794] maintenance of a jail for law violators,[795] maintenance of public streets and highways,[796] vehicular traffic control,[797] operation of the courts,[798] fire prevention and suppression,[799] administration of public relief programs,[800] and enforcement of building inspection and safety regulations.[801]

The apparent ease with which activities on the outer edges of the legal spectrum may be classified tends to obscure the very real difficulties encountered in the broad penumbra which lies between. Since the operation of an activity in a business-like way, following ordinary commercial practices, and in competition with private enterprise, is typically "proprietary",[802] one might well conclude that a public hospital

accepting paying patients and charging the "going" rate, a municipal summer camp for children who pay camping fees comparable to those at competing private camps, a public swimming pool charging admission fees in competition with private pools, and a municipal garbage and rubbish collection service similar to private disposal services, would be deemed to be proprietary in nature. Yet each of these activities has been judicially classified as "governmental" and hence within the scope of the governmental immunity doctrine.[803] Similarly, in view of the repeated holdings to the effect that activities of government designed to afford pleasure or to amuse and entertain the public are "proprietary",[804] it would seem evident that the operation of a merry-go-round or a swimming pool in a park, the maintenance of a public art gallery, the conducting of a public zoo, or the running of a miniature train in a park would be "proprietary". Yet, again, each of these activities has been classified as "governmental".[805]

On the other hand, the protection of public health and safety is far from a reliable talisman of governmental immunity, for under some circumstances, the courts have assigned to the "proprietary" category such activities as maintenance of public streets,[806] demonstrations designed to attract enlistments into the National Guard,[807] the operation of a health-promoting recreational facility such as a golf course,[808] the operation of a housing project intended to eliminate slums and unsanitary living conditions,[809] operation of a municipal hospital,[810] and the conducting of a harbor pilot service to safely guide ships to berth.[811]

Manifestly, the attempted classification between "governmental" and "proprietary" functions is utterly useless as a rational guide to sensible law-making, at least in cases in which the proper results are not pretty obvious--and, of course, they are precisely the cases for which a rationally applicable test is most sorely needed. The dichotomy suggested by the very terminology of the test is at best highly artificial. It is founded on anachronistic concepts of the role of government which are out of touch with the realities of modern public administration, and unnecessarily presupposes that activities to promote public health, safety and welfare either cannot or will not be business-like or in competition with private enterprise. Its inherent fallacy lies, perhaps, in the assumption that both the objectives and methods of government are static and hence readily susceptible to rigid classification. In fact, however, public services ordinarily develop as a dynamic response to felt public needs; and all activities of public entities are intended to further the public welfare in one sense or another.

The distinction does not even serve as an adequate test for extending immunity to the more important and essential activities of public entities, which might be thought to need protection from the burdens of tort liability more than less significant or marginal functions. For example, the maintenance of a safe and dependable supply of water and power is, under modern urban conditions, nothing less than a matter of life and death to municipal residents; yet it is classified as "proprietary" in nature.[812] Art galleries, merry-go-rounds, swimming

pools, zoos and miniature trains, while undoubtedly desirable additions to society's cultural and recreational resources, can scarcely be deemed nearly as vital and indispensible; yet these activities are classified as "governmental".[813]

The distinction becomes most ludicrous where, as sound principles of public administration often require, both "proprietary" and "governmental" functions are intermixed. Injury caused by water leaking from a negligently maintained water main may be compensible in a tort action if the water was being transmitted for domestic or industrial consumption by "proprietary" customers of the municipal water department;[814] but how can the court logically classify the nature of the escaping water when the same main is used both for "proprietary" business and for "governmental" fire-fighting? Is some of the water "proprietary" and some of it "governmental"?

Again, a passenger injured through negligent maintenance of the city hall may not recover in the absence of statute if he was injured while waiting to testify in a courtroom, since courts are "governmental",[815] but may recover if injured while visiting the housing authority office to rent an apartment, since public housing is "proprietary".[816] But what if the injury occurred in the elevator, while plaintiff was on his way to pay an incidental visit to the latter office before entering the courtroom?

Still again, the motorist whose car is damaged by a negligently maintained chuckhole in a parking lot at the municipal park may not recover for the loss if he entered the lot for

such "governmental" objectives as an afternoon of swimming;[818] or to visit the art gallery[819] or zoo,[820] or to let his children ride the miniature train;[821] but if he had a "proprietary" purpose in mind, such as to play golf,[822] or witness a play in the community theater,[823] or observe a fireworks display,[824] his damages are fully compensable. One can only conjecture at the result if plaintiff's purpose was to engage in all of these activities during the same visit.[825]

Although one is forced to conclude that the "governmental - proprietary" distinction is unworkable and unrealistic, and that it should be discarded entirely, the judicial experience in manipulating the distinction is not devoid of practical significance for the future. The pattern of the decisions, for example, suggests certain relevant policy considerations which (with varying degrees of force) may have constituted the inarticulate judicial premises underlying particular results.

In practically all of the cases classifying particular activities as "proprietary" the public entity was in a position to distribute tort liabilities arising therefrom over the class of persons especially benefitted by such activities, through the imposition of fees and charges, and the economic feasibility of such loss distribution was reasonably assured by the fact that private persons were apparently able to do so or were actually doing so under comparable circumstances.[826] On the other hand, the types of activities classified as "governmental" typically appear to be in the realm of public services for which fees and charges are seldom exacted, or at best are nominal in amount, so that tort liabilities would presumably have to be

distributed over the body of taxpayers at large, thereby often imposing burdens disproportionate to direct benefits received.[827] Additionally, in some of the "governmental" situations, there would seem to be room for the belief that assumption of the risk of injury may have been regarded as not an unfair quid pro quo for continued public commitment to socially valuable activities having, at best, relatively marginal claims upon public financial support.[828]

In other cases, judicial classification as "governmental" appears to only slightly obscure a fundamental judicial reaction to the fact situation as being one in which recognition of tort liability would create an intolerable interference with discretionary powers which are essential to effective public administration.[829]

Finally, it is worth noting that nearly all of the cases which have sustained a defense of governmental immunity have involved a reasonably obvious exercise, in one form or another, of what might be deemed the accepted "hard-core" functions of government: criminal law enforcement, fire protection, public health and sanitation, and traffic safety. The difficulties which the courts have experienced in attempting to classify various types of activities designed for recreational, cultural or amusement purposes may, by contrast, be a manifestation of persistent lack of public agreement as to how extensively government should expend its resources in these somewhat peripheral directions. At the same time, the general restriction of the immunity doctrine to the limited "hard-core" areas tends

to document Mr. Justice Traynor's conclusion that the courts "by distinction and extension, have removed much of the force of the rule".[830]

Injury Caused by Nuisance

In discussing the extent of the legislative and judicial inroads upon the doctrine of governmental immunity, Mr. Justice Traynor, in Muskopf, concludes with the terse statement: "Finally, there is governmental liability for nuisances even when they involve governmental activity."[831] Although undoubtedly a correct statement of the case-law,[832] the laconic way in which the rule is stated fails to give even a hint of the remarkable way in which the so-called "nuisance exception" gradually developed or of the theoretical foundations for its acceptance.

The early California cases involving alleged nuisances created or maintained by public entities are characterized both by the willingness of the appellate courts to sustain liability and by the paucity of any discussion of governmental immunity or of reasons why nuisance cases were deemed exceptions to the immunity rule. In perhaps the earliest case, decided in 1881, for example, the court held actionable the flooding of plaintiff's land by reason of the improper construction by the defendant city of a drainage canal.[833] No discussion of legal concepts prolongs the opinion: if the facts were as alleged in the complaint, it was too clear to warrant discussion that the city was liable.

Three years later, a judgment for damages was sustained in behalf of a property owner injured by reason of the

maintenance nearby of an open sewer ditch carrying noxious and offensive wastes from a public hospital.[834] Only the briefest hint of legal theory is conveyed by the court's brief comment to the effect that the city "had such proprietorship of the . . . hospital as to render it liable in damages".[835] Although these cases were marking the foundations for a long line of later decisions, they failed to articulate in any meaningful way the logic and rationale of the exception.[836]

Finally, in 1885, the Supreme Court grappled with the theoretical problems involved, but with only limited success. The obstruction by a city of a natural watercourse in a manner which had resulted in injury to property, held the court, was "a most flagrant trespass on the rights of [plaintiff] in the shape of a direct invasion of his land amounting to a taking of it . . . occasioning inconvenience and damage to him and thus constituting a nuisance."[837] Although the court's language appears to treat as practically synonymous the distinguishable legal principles relating to trespass, nuisance and inverse condemnation, and thereby is less than helpful, the balance of the opinion appears to positively rest liability upon the theory of inverse condemnation--that is, on the theory, which was consistent with the facts, that the injury to plaintiff's property had resulted from the construction of a public improvement for public use and hence was damage for which just compensation was required to be paid under section 14 of article I of the Constitution.[838]

Students of the judicial process have often noted the remarkable generative powers of legal doctrines. The history

of the "nuisance exception" is a case in point. The court's attempt in 1885 to rest the exception on an inverse condemnation rationale was reinforced, but only feebly, by a few later opinions showing recognition of this theory.[839] The general stream of decisions, however, ignored the doctrinal content introduced in the 1885 decision, and simply followed its holding.[840] Various forms of governmental activity were thereby found to be actionable nuisances, including both negligent maintenance of facilities like sewers and storm drains,[841] as well as deliberate construction of improvements,[842] which caused foreseeable flooding or other injurious consequences to private property.

In recent years several decisions[843] have emphasized that in order to recover under the "nuisance exception" the plaintiff must allege and prove facts which bring the case within the statutory definition of a nuisance as set forth in section 3479 of the Civil Code;[844] but the courts (and apparently counsel as well) have ordinarily treated the legal theory of liability as settled. With only one notable exception, the recent opinions merely cite previous decisions, deeming it unnecessary to indulge in either legal analysis or doctrinal discussion, to support the rule of liability for nuisance even where a governmental activity is involved.

The one exception is the recent case of Vater v. County of Glenn.[845] Prior to this litigation, practically all of the nuisance actions against public entities had dealt with either an actual physical invasion or injury to property, or with such an interference with its comfortable and usual

enjoyment as to impair its value.[846] Thus, although the underlying inverse condemnation rationale advanced in 1885 had apparently been lost sight of, the actual decisions were generally consistent with the basic theory that there was a taking or damaging of private property for public use.

The Vater case involved an action for wrongful death--a type of action which, at least for inverse condemnation purposes, has never been regarded as one for injury to property.[847] The concept of inverse condemnation, however, is wholly inapplicable unless some property has been either taken or damaged.[848] Yet, since governmental immunity barred relief on ordinary tort grounds, plaintiff in Vater sought to adopt the "nuisance exception" theory as a plausible basis of recovery in the absence of a statutory waiver. The issue was thus presented whether liability for nuisance was merely an aspect of inverse condemnation (in which case Mrs. Vater could not recover since no property was taken or damaged) or whether its persistent judicial acceptance had generated a basis for nuisance liability which was independent of property postulates.

The District Court of Appeal analyzed the nuisance precedents and concluded that they were either founded on the concept of inverse condemnation or were instances of proprietary activities for which governmental tort liability was recognized to exist, and held that wrongful death in the course of a governmental function could not be remedied on the nuisance theory asserted by plaintiff.[849] On hearing by the Supreme Court, however, the availability of the nuisance theory as an exception to the

governmental immunity doctrine was expressly affirmed, despite the Court's recognition that inverse condemnation would not support plaintiff's action; but, on the facts pleaded, the Court concluded that no nuisance as defined by law had been shown to exist.[850] By accepting the plaintiff's legal premise that the nuisance theory was perfectly appropriate in a personal injury or wrongful death action, and denying relief solely on the facts, the Court thus clearly demonstrated that the "nuisance exception" was an independent vehicle for redressing all types of tortious injuries to which it was logically applicable. Cases decided subsequent to Vater have followed this view.[851]

Thus, even before Muskopf a person injured as a result of a "governmental" activity of a public entity could recover in tort, notwithstanding the immunity doctrine, if the injury resulted from a nuisance. The significance of this "nuisance exception" stems from the fact that many tort situations involving ordinary negligence, for which governmental immunity would otherwise be a complete defense, may reasonably be construed as within the concept of nuisance. For example, when county employees through negligence obscured a public highway with smoke from weed-burning operations, the court in a recent case found a basis for liability in the Public Liability Act of 1923;[852] but when mosquito abatement crews of a mosquito abatement district did substantially the same thing, the court, finding the Public Liability Act inapplicable to such a district, affirmed liability on a nuisance theory.[853] Again, negligent maintenance of a public rubbish dump in such a way as to permit fire to

escape therefrom may be actionable either under the Public Liability Act,[854] if applicable, or may be regarded as an obstruction to the free use of adjoining property which interferes with its comfortable enjoyment, and hence an actionable nuisance.[855] Similarly, ordinary negligence in the routine maintenance of a sewage or storm drainage system will not support an action in inverse condemnation for resulting property damage,[856] but relief may be obtained under the Public Liability Act,[857] or where that statute does not apply, in an action founded on a nuisance theory.[858]

In these and other cases, in other words, the courts have employed the nuisance rationale as a technique for retreating from governmental nonliability for negligence.[859] Even the express statutory admonition that "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"[860] was effectively eliminated as a barrier to this result by the simple expedient of holding that general statutory authority to engage in the particular activity (as distinguished from explicit authority to create the nuisance itself) would not be construed to authorize the creation of a nuisance.[861] The practical consequence of the development of the "nuisance exception" was thus to cut down the area of "governmental" immunity. Unfortunately, by assimilating ordinary negligence within the definition of a nuisance, a substantial degree of uncertainty and confusion was introduced into the law, thereby tending to invite unnecessary litigation.

Relevant to the purposes of the present study is the

predominance of nuisance cases which involve either sewage or storm drain systems, or public improvements which obstruct natural watercourses and cause flooding of property.[862] To the extent that the nuisance concept provides an auxiliary remedy where inverse condemnation is insufficient to supply complete relief, these decisions appear to indicate a recurrent and deep-seated judicial consensus as to the need for some device for rendering justice in such cases. Water pollution, noxious odors, flooding of property and the like are hazards of property ownership which may be endurable in an economy founded upon private property if legal redress is generally available; but if such interferences must be borne by the injured person alone, the risk of disrupting or frustrating the legitimate and desirable expectancies of property ownership may be deemed so great as to demand the strongest possible justification for its existence.

In most such cases, however, intelligent planning and conscientious performance of duty, with decent consideration for the welfare of property-owners, would permit public officers to minimize the risk, if not eliminate it entirely. The ever-present problems of public health and sanitation are not significantly advanced toward solution by the easy expedient of dumping raw sewage into a nearby stream or into an open field. A desire for street improvements doesn't justify the obstruction of a natural watercourse with fill, thereby causing the inundation of neighboring land, when an intelligent use of culverts and drainage ditches could avoid the difficulty.

public entities possess only those powers directly conferred upon them by statute or constitutional provision, together with such other powers as are necessary for the implementation of those expressly granted.[920] Cases of this type are few in number, for public entities seldom, if ever, embark upon programs for which no legal authority can be discerned. The issue has been raised, however, on demurrer to a complaint alleging a wilful and malicious destruction of private property by city officials without authority in law,[921] as well as by a defense contention that an activity not expressly authorized by law was beyond the scope of the entity's implied powers.[922] The decision in the first of these two cases, affirming the immunity of the city for the ultra vires acts of its officers, meant in functional terms that the plaintiff was compelled to look solely to the officers in their personal capacity for redress. The decision in the latter case, holding that the activity was not wholly ultra vires as a matter of law, had the effect of permitting the injured plaintiff to recover from the public treasury, the tortious conduct being classified as "proprietary."

It is dubious whether the ultra vires doctrine, as applied in this class of situations, tends to implement sound public policy. It may be argued that fear of personal liability has a desirable deterrent effect upon public officers whose disposition is to build empires without regard for their basic authority so to do. Undoubtedly, the expenditure of public funds and the investment of time and energy of public employees in unauthorized activities should be discouraged; but the real

issue is whether such discouragement can best be effectuated through the medium of denying recovery to an otherwise deserving victim of the enterprise, or through other mechanisms, such as the taxpayer's suit for injunctive relief.

To argue that public funds are trust funds held and allocable solely to authorized purposes, and hence should not be subjected to tort liability arising out of unauthorized activities, may have theoretical appeal.[923] But, in practical terms, unauthorized activities seldom if ever are initiated without the approval, if not the active participation, of politically responsible officers--in short, by the very persons through whom the corporate entity speaks and acts. For violations of the public trust, the voters and taxpayers, as beneficiaries thereof, have ample political and legal remedies. Where they fail to assert such remedies, and accordingly continue to enjoy whatever benefits may flow from the unauthorized activity, little justification can be found for a rule which permits, in effect, the faithless trustees to assert their own wrong as a means for protecting the beneficiaries from the burdens thereof. Indeed, since under the ultra vires rule the taxpayers can have their cake and eat it too, that rule may actually exercise a subtle influence in the direction of disregarding the boundaries of governmental power rather than conforming thereto--for tort liability will impair public finances where the law has been obeyed, but exacts no such penalty for disobedience. The imposition of tort liability without reference to whether the injurious act was infra or

ultra vires might well be a more salutary instrument of public policy than the present rule in this respect.

Viewing the doctrine as an instrument for allocating the risks of tort loss, all rational justification vanishes. Perhaps the concept of ultra vires may have relevance to contractual arrangements, for parties to volitional transactions ordinarily have both the opportunity and incentive to investigate in advance the authority of the entity with which they are proposing to deal.[924] The person injured in a nonvolitional context, through the tortious conduct of someone who is a stranger to him under circumstances where opportunity for investigation and suitable precaution is ordinarily wholly lacking, is in an entirely distinguishable situation. The policy of risk distribution as well as that of allocating responsibility in terms of fault are both as fully applicable to such ultra vires torts as to torts which are clearly infra vires. The question whether the public entity whose enterprise caused the harm should be liable therefor logically should be determined without reference to the irrelevant issue whether the enterprise was an authorized one.

It may be reasonably concluded that, in this first sense at least, any possible justification underlying the ultra vires doctrine is overborne by the fact that it may be implemented through other alternative and possibly more efficient means, while its continuance as a limitation on tort liability tends to unnecessarily frustrate and nullify fundamental policies of tort law. The desirability of continued

retention of the doctrine should thus be explored and evaluated as part of the more general issues raised by the judicial elimination of governmental immunity.

A second meaning which has been attributed to "ultra vires" by the decisions relates to situations in which general or fundamental authority to engage in the particular activity exists, but the entity has failed to adhere to the procedural mode prescribed for its exercise or has violated express limitations thereon. The great bulk of the cases represent illustrations of this aspect of the rule. The government is empowered to destroy diseased animals, after an inspection or test leading to a finding that the disease exists; hence destruction of a healthy animal, where the requisite test and finding was not made, is ultra vires and the entity is not liable.[925] A county may be authorized to operate a public hospital for governmental pruposes of promoting health and safety within the county and providing medical care to indigents and others unable to secure such care through private facilities; but since it has no power to operate such a hospital in a proprietary capacity, any torts committed in such capacity are ultra vires and not a basis for liability.[926] A city may be authorized to construct water distribution facilities as part of a public water supply system, but when it employs construction workers without following statutory competitive bidding requirements it is acting ultra vires, and a tortious injury sustained by one of its workers is thus noncompensible.[927] Other illustrations are set out below.[928]

This manifestation of "ultra vires" lends itself to the same analysis employed with respect to the first type. If anything, the policy considerations opposed to its continuation are even stronger here, for the deficiency is not one of lack of power but only of irregular exercise of power which

clearly exists. To identify the defect as purely technical does not mean it has no importance for other reasons, but does serve to emphasize its relative insignificance as a basis for denying tort liability and thereby frustrating the underlying policies of tort law.

Moreover, this form of the ultra vires doctrine tends to perpetuate the very distinction between "governmental" and "proprietary" functions which Muskopf purported to eradicate. As indicated above, for example, a county is not liable in tort for negligence in the operation of a county hospital in a proprietary capacity because such operations are ultra vires. Under the Muskopf decision, however, the county would be liable for its hospital operations in a governmental capacity. The stage is thus set for a switch in roles, but the same old distinctions will be advanced by the same protagonists. The only difference is that it will now be the plaintiff (rather than the defending public entity) who will seek to persuade the court that the hospital is strictly "governmental" in nature, and that the county is thus liable; while the defendant entity will strenously assert that it is "proprietary" and hence ultra vires, so that no liability will attach. Although a prophylactic application of estoppel to preclude the entity from setting up its own wrong as a defense would perhaps ameliorate the difficulty here suggested, the cases are remarkably free from even a suggestion that the defense is in any way unavailable. This second form of the ultra vires doctrine thus also clearly deserves careful evaluation in connection with

the larger issues of governmental immunity.

The third variation of the concept of ultra vires, as it has appeared in the cases, is simply the general rule which precludes the application of respondeat superior where the employee tort-feasor was acting beyond the scope of his authority. Here the problem is not to determine whether the employee was actually empowered to commit the tort with which he is charged, but whether the employer has authorized him to act "in the sense that he has entrusted him with the performance of a duty in whose performance it is possible" for him to commit a tort.[929] The issue is whether the risk of harm was one fairly typical of or incidental to the performance of the responsibilities given to the employee, and whether the tort was committed in the course of performing those responsibilities to further the interests of the employer.[930] If so, the employer is liable. If not, the employer is not liable, since the tort is deemed to be a personal delict unrelated to the employer's enterprise. The legal principles applicable in connection with this aspect of ultra vires appear to be identical with respect to a public employer as where a private employer is involved.[931] No substantial differences of result appear to be attributable to this phase of the rule. In short, uniformity of public and private law already exists. Accordingly, no apparent reason exists for believing that substantive modification in this area deserves further consideration, for unlike the first two formulations of ultra vires, no significant policy issues relating to the basic problem of governmental tort immunity are present.

Official immunity for discretionary conduct. An extensive body of case law has developed in California holding various types of public officers immune from suit in tort founded upon acts or omissions involving an exercise of discretionary authority.[932] Although the present study is primarily concerned with the tort liability of public entities, rather than of public officers and employees, this discretionary immunity of public personnel is directly and immediately relevant to the basic issue of governmental immunity as such.

In Lipman v. Brisbane Elementary School District (the companion case to Muskopf) the Supreme Court recognized and applied the doctrine of official immunity, holding individual public officers immune from personal liability, so far as the alleged tortious conduct involved discretionary conduct within the scope of their official duties. The secondary issue was then presented whether the defendant school district was nevertheless liable, in view of the holding of Muskopf that governmental immunity was no longer a defense against public responsibility for the torts of public employees. Only the doctrine of governmental immunity had been abrogated; the doctrine of personal immunity for discretionary official conduct was still applicable. It was thus theoretically possible to hold that the school district was now liable for its officers' torts, even though those officers might be personally immune. On the other hand, if Muskopf were construed to make the employing entity liable only when one of its officers or employees was liable, the discretionary immunity of the latter would logically inure to the benefit of the entity.

The Court resolved the issue by taking an intermediate position between the two extremes. The public entity employer, according to Lipman, is not always liable for the torts of its personnel in the course of discretionary conduct, but neither does it share in a coextensive immunity with its officials in all instances. Whether the employer is liable in a particular case instead requires a careful appraisal and evaluation of relevant policy considerations, the nature of which are suggested in the following passage from the Lipman opinion:[933]

> The danger of deterring official action is relevant to the issue of liability of a public body but is not decisive of that issue. It is unlikely that officials would be as adversely affected in the performance of their duties by the fear of liability on the part of their employing agency as by the fear of personal liability. The community benefits from official action taken without fear of personal liability, and it would be unjust in some circumstances to require an individual injured by official wrongdoing to bear the burden of his loss rather than distribute it throughout the community. Although it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity, such as the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages.

An analysis of the doctrine of official immunity for discretionary conduct is thus relevant to the present study for several reasons. To the extent that such immunity exists, public entities in some situations are still immune from liability in tort, notwithstanding Muskopf, where such a result is indicated by the policy-balancing approach approved in Lipman. To the

extent that the discretionary immunity doctrine is inapplicable, and thus does not protect public officials from personal liability, their public entity employers may not be liable under the Muskopf doctrine. Not only is the problem of entity immunity and liability thus intimately bound, under the cases, to the doctrine of discretionary official immunity, but the policy considerations advanced to justify the official immunity rule may prove to be revealing with respect to the larger problem of entity immunity or liability.

The historical growth of the discretionary immunity doctrine constitutes a striking illustration of the generative powers of law as judicially formulated and applied. California developments commenced modestly enough in the early case of Downer v. Lent,[934] in which the Supreme Court ruled that the members of a Board of Pilot Commissioners were not personally liable for an allegedly wrongful decision terminating the plaintiff's license as a pilot. Observing that the duties of the Board were to consider evidence and make decisions of the very type which was complained of, the Court quite reasonably was of the opinion that[935]

> Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he be protected from any consequences of an erroneous judgment.

The crux of the Downer decision was the fact that the administrative board there involved was exercising "quasi-judicial" powers, having been created for the express purpose of making decisions involving judgment and discretion. The court

evidently perceived that it would be intolerable if the members of the Board could subsequently be called to account individually in civil damages for mistaken or erroneous decisions--that is, for decisions which another tribunal subsequently found to be erroneous or mistaken. Few persons of competence and experience could be found who would be willing to lend their talents to public service under such conditions.

In principle, the Downer decision was easily found to be applicable to other public officers charged with the duty to make decisions of the same general nature, such as grand jurors[936] and judges.[937] Somewhat unobtrusively, however, the scope of the immunity was gradually broadened--first to extend its protection not merely to officers charged with mistaken exercises of judgment and discretion, but also to those accused of malicious and intentional abuse of discretionary powers.[938] Its application was then broadened to cover various types of offices which were well beyond the judicial or quasi-judicial ranks to which it was originally applied.[939] Concurrently, the courts also enlarged upon the kinds of activities which could be regarded as "discretionary" and hence a basis for immunity.[940]

The spectrum of public officers protected by the California doctrine today ranges from the judge[941] to the building inspector,[942] legislator[943] to game warden,[944] county supervisor[945] to local health officer,[946] public prosecutor[947] to policeman on the beat.[948] It extends to such public personnel as a city engineer,[949] county clerk,[950] county counsel,[951] court reporter,[952]

civil service administrator,[953] city manager,[954] building and loan commissioner,[955] superintendent of schools,[956] tax assessor,[957] county surveyor,[958] school trustees,[959] and city councilman.[960]

The kinds of tortious activities deemed to be discretionary and hence within the doctrine is equally broad and seemingly all-inclusive. Immunity, for example, has been held to obtain where responsible public personnel were alleged to have fraudulently misrepresented that a sewer line would be relocated at city expense,[961] conspired to injure a property-owner by wrongfully enforcing building code requirements,[962] negligently failed to enforce proper quarantine precautions against a contagious disease,[963] assaulted a witness appearing before a legislative investigating committee,[964] wrongfully published a defamatory letter,[965] conspired to interfere with established contractual relationships,[966] fraudulently changed the location of a county courthouse after condemning the originally chosen site,[967] maliciously prosecuted various types of criminal charges,[968] wrongfully induced a breach of contract,[969] and maliciously procured the dismissal of a subordinate public employee.[970] In Lipman itself, the court held that the immunity doctrine absolved three school trustees, the county superintendent of schools and the district attorney from liability for publishing certain allegedly malicious and defamatory statements for the purpose of discrediting plaintiff's reputation and forcing her out of her position as district school superintendent, so far as such statements were made in the course of official duty.

The present law has been summarized generally as extending personal immunity not only to judicial and quasi-judicial personnel but to "all executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment."[971] For torts committed outside the scope of authority, of course, personal liability would obtain as in the case of others who are not public employees.[972] The mere existence of corrupt or sinister motives contrary to the public welfare which the office or employment is intended to serve, however, will not be deemed per se to take the case outside of the immunity rule, for the policy underlying the rule could too easily be defeated by such a limited view. In the words of Chief Justice Gibson,[973]

> It should be noted in this connection that "What is meant by saying that the officer must be acting within his power [to be entitled to immunity] cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

It appears, therefore, that the concept of "scope of authority" for purposes of applying the immunity doctrine is exceedingly broad, embracing not only those duties which are squarely within or essential to the accomplishment of the purpose for which the office exists, but also incidental and collateral activities which, if engaged in with proper motives, would reasonably be deemed to serve to promote those underlying purposes.[974] Even conduct which is malicious and corrupt often will be within the immunity under this test.

On its face, it appears to be difficult to justify

a legal doctrine which seems so contrary to the dictates of distributive justice. The original formulation in Downer v. Lent of a rationale of immunity from liability for honest mistakes by an officer charged with the duty of making judgments[975] manifestly cannot explain the present breadth of the rule. The modern explanation offered in Lipman is this:[976]

> The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation.

This justification is not entirely convincing. Immunity readily commands acceptance when a mistaken exercise of judgment is the basis of the tort claim; but to extend the same immunity to injuries resulting from venality, corruption or malice is something quite different.[977] In what is perhaps the leading case on the subject,[978] Judge Learned Hand conceded that civil liability should exist where improper motives prompted the official tort, but nevertheless held that it did not. Justification for denying such liability was found in the belief "that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[979] Thus, he concluded, in balancing the alternative evils, "it has been thought in the end better to

leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[980]

Several difficulties with this proposed justification for the rule may be advanced. First, it presupposes that public officers will necessarily be in fear of actual pecuniary disaster resulting from their official actions if unprotected by immunity. Such is not always the case. As the present study has shown, there are numerous statutory provisions which obligate public entities to satisfy tort judgments against their officers and employees,[981] and there seems little reason to doubt that other entities probably could legally follow suit if they wished to do so as a matter of policy.[982] Moreover, the fear of personal loss can easily be, and undoubtedly widely is, mitigated by insurance protection.[983] Secondly, the proposed justification assumes that the present system of administration of justice is incapable of effectively eliminating the groundless actions from those brought in good faith except by a full-dress trial on the merits. This assumption merits skepticism in view of the wide variety of available protections against unfounded litigation which have been utilized successfully in other areas of the law. (These possibilities are discussed below.)

Moreover, possibly because of the deficiencies in its theoretical underpinnings together with inherent judicial reluctance to accept its logical implications in all cases, the doctrine of official immunity is not as firmly rooted in the case law as some of the decisions might suggest. A

substantial number of opinions have contained strong intimations that the principle of immunity is intended to protect only good faith official conduct, and hence does not apply to corrupt or malicious acts.[984] Although such intimations cannot be taken as representing accurately the current state of the law, they may portend occasional judicial efforts to curtail the scope of the doctrine. Various devices for doing so are not difficult to find.

Certain kinds of intentional torts, for example, may be classified as outside the scope of official authority, or as in violation of explicit statutory limitations upon such authority, and hence not within the protection of the immunity rule.[985] Again, the particular conduct which caused the injury may be construed as not involving discretion or judgment, but as wholly "ministerial" duty, to which the doctrine does not apply.[986] Another technique is to distinguish conceptually between the decision to act (which may be conceded to be "discretionary") from the ensuing official conduct (which is treated as "ministerial" once the basic decision has been made), so that liability can be predicated upon the latter notwithstanding the immunity attached to the former.[987]

The artificiality of the grounds advanced in favor of liability in the cases just cited is apparent. The settled breadth of the "scope of authority" concept[988] strongly suggests that judicial attempts to classify an official act as ultra vires the officer, in order to evade the immunity, will ordinarily be patently specious, except in the rarest instances; while attempts to distinguish between various types of official conduct as

being on the one hand "discretionary" and on the other "ministerial" inevitably constitutes more of a play on words than an analysis of discrete facts. It would seem to be self-evident that every public office involves some discretionary duties, just as every official duty involves some elements of discretion.[989] The exceptional grounds of decision exemplified in the cited cases are thus believed to be chiefly significant in that they represent a judicial striving for a respectable theoretical basis upon which to avoid the logical consequences of the discretionary immunity rule where the court is satisfied that a departure is desirable in the interests of substantial justice. The very existence of such exceptions, moreover, tends to encourage the very litigation which the immunity rule was designed to prevent.

The theoretical exceptions which have been noted are accompanied by other departures from official immunity which are difficult to rationalize on any basis consistent with that doctrine. For example, as pointed out above,[990] the doctrine of official immunity was originally formulated largely in the context of judicial decision-making, but was soon expanded to confer immunity for even a grossly corrupt and malicious exercise of judicial power. How does one explain, then, the cases[991] holding that a judge may be personally liable for an ordinary mistake made in bona fides as to the extent of his judicial jurisdiction to act? Is such a good faith error deemed more blameworthy in a system of tort law founded on fault than one which is malicious and evil?

Again, police officers are immune from tort liability for the consequences of a refusal or failure to make an arrest of a person committing a crime in their presence, even though the miscreant thereafter proceeds unrestrained to commit the same criminal act to the injury of the plaintiff. Such non-liability is founded on the theory that the decision not to make an arrest involves judgment and discretion and hence is within the immunity doctrine.[992] But what can be said for the cases holding a police officer personally liable when he exercises his discretion to make the arrest in good faith, but does so wrongfully?[993] By the same token, it is not easy to understand why the courts will readily sustain a police officer's personal liability for wrongful arrest or imprisonment, when a judge charged with the same tort,[994] as well as the district attorney who is alleged to have wrongfully prosecuted the arrested person through spite and malice,[995] are uniformly held to be wholly immune? Why should the imprisonment motivated by malice result in immunity while an arrest in good faith but occasioned by mere mistake leads to personal liability?

Other comparable anomalies may be cited. For example, the undeniable fact that a decision to discharge a subordinate public officer ordinarily involves discretion and judgment logically supports the cases affirming the immunity of the superior officer for such an act, even where it was allegedly malicious.[996] But a comparable decision not to discharge a subordinate after notice of his unfitness apparently does not involve discretion and judgment in the eyes of the law, for in such cases the official who decided not to invoke the ultimate

disciplinary sanction is held to be personally liable for injuries caused by the employee, although the alleged nonfeasance was at most merely negligent.[997] And while the cases treat the negligent failure of a publicly employed medical officer to properly take precautions against the spread of a disease as non-actionable,[998] since discretionary, the negligent diagnosis and treatment of a disease is, for unaccountable reasons, merely "ministerial" despite the manifestly high degree of medical judgment and discretion involved therein, and hence is actionable malpractice.[999]

It may be possible to explain this apparently erratic line of decisions by reference to various distinguishing factors, such as the nature of the interest invaded by the defendant's conduct, the importance of preserving complete freedom of action for the defendant official, the capacity of a rule of liability to provide a healthy "preventative law" effect upon officials similarly situated, and the degree to which the conduct in question clearly deviated from accepted standards of sound public administration. The point to be observed here, however, is that none of the decisions has attempted to articulate any standards or rationale for departing from the immunity rule in the types of cases here cited.

One may conjecture that the noted deviations from the strict application of official immunity represent a judicial revulsion to a system of justice which may leave a seriously injured person doubly beyond the purview of remedial justice,

barred from recovery against the public officer (malicious and corrupt though he may be) by virtue of the discretionary immunity doctrine, and barred from recovery against the employing entity by virtue of the governmental immunity doctrine. Lipman, while conceding the continued vitality of the former bar, at least offered some promise of alleviating the latter. In the development of a comprehensive legislative solution to the public tort liability problem, however, what is manifestly needed is a careful reappraisal of the extent to which the official immunity doctrine represents a just and adequate compromise between the interest in distribution of the risk over the beneficiaries of the risk-creating enterprise, on the one hand, and the interest in promoting unimpaired and fearless exercise of official duty on the other. To be sure, the general abolition of the governmental immunity doctrine would eliminate the prevalent injustice of requiring the injured person always to bear the entire burden of the loss; but, as Lipman indicates, there may be significant policy reasons in some cases why the public entity ought not to be held liable in damages even though its officials are still immune from personal liability.

A preliminary analysis of the policy issues, it is suggested, might well commence by recognizing that all public officers and employees exercise some measure of discretion. It is possible, however, to distinguish between the exercise of official discretion in good faith and its exercise with malice or other wrongful motives. Enormous harm would be done to the effective operations of government if officials whose

very function and duty requires the making of decisions involving judgment and discretion were to be held answerable in damages for mistakes or poor judgment in the honest performance of their duty. Personal liability in such cases would often mean the officer is liable without fault, for his error may have been perfectly reasonable in light of the circumstances; indeed, it may even mean the officer is liable when his decision was entirely correct in fact but a judge or jury, often lacking the expert training and experience of the officer, later decides otherwise.[999a] Manifestly, public officials should not be exposed to risks of this magnitude. The policy behind the immunity doctrine--to promote fearless performance of duty--as well as the practical impossibility of drawing any rational dividing line between discretionary and ministerial acts, strongly argue that personal immunity should attend all public officers and employees in the good faith performance of acts within the scope of their authority.

A statutory rule of immunity of this breadth should prove helpful in reducing litigation addressed to the officer or employee; and this would tend to achieve the policy objectives of the present common-law immunity rule. Where sound legislative policy suggests the need for special incentives for care and prudence, exceptions may be spelled out by statute law. For example, all public personnel conceivably should still be held personally liable for careless operation of public motor vehicles in the course of their duties, subject to the same limitations as are currently in effect precluding liability arising from the operation of an authorized emergency vehicle.[1000] In such cases, the liability already is or easily may be funded by

insurance; and the frequency of motor vehicle accidents argues strongly against a rule of immunity which might prove to be a trap for the unwary plaintiff who proceeded solely against the defendant driver only to learn (after his action against the employer was barred) that the defendant was a public employee acting in the course of his duties, and hence immune.

The proposed broad statutory grant of personal immunity for public officers and employees moreover, should be accompanied by a carefully planned evaluation of the extent to which the employing public entity should be liable for good faith tortious acts or omissions of its personnel. This question manifestly is part of the larger problem of governmental liability in general. However, certain tentative observations may be advanced as possibly indicating the standards which should determine when entity liability is a sound corollary to official personal immunity for good faith torts.

First, it may be possible to distinguish between injury caused by a deliberately conceived but nevertheless incorrect exercise of personal judgment and discretion, and injury caused by a careless or negligent exercise thereof. Viewing negligence in its primary sense as the failure to employ the standard of care which would be used by the average prudent individual under the same circumstances, it appears to be fundamentally a different (although the difference may often be exceedingly subtle) quality of conduct from honest mistake or error. For present purposes,

the latter may be deemed to refer to a decision which is later found to be incorrect in the light of subsequent events or information later discovered, but which at the time the original decision was made was neither irrational nor unsupportable and might well have been made by a reasonably prudent person. For example, a decision of a judge or jury which is later reversed on the ground that there was no substantial evidence to support it (possibly even described, in words often employed by appellate courts, as a determination upon which "reasonable minds could not differ") would be only a mistaken and not a negligent exercise of judgment under the view here suggested. Notwithstanding the hyperbole of appellate opinion-writing technique, such a decision could not be regarded realistically as anything but an erroneous exercise of judgment. The erroneous criminal conviction of an innocent man provides another useful illustration. The suggestion is that there should be no liability of the public entity, as a general rule, for reasonable mistake or error of its personnel, but that there ordinarily should be entity liability for negligence. The supporting policy argument is that while citizens may be expected to assume the risk of injury from mistakes which occur when due care is employed, the risk from negligence is too great and hence should be borne by the enterprise as a whole.

In connection with the foregoing proposal, it is probable that some specific recurring situations can be identified in which a statutory exception may be desirable

to the public entity's general immunity from liability for its reasonable employees' mistakes. Examples are already at hand in present legislation. Sections 4900-4906 of the Penal Code, for example, provide a form of liability for mistaken conviction of a felony.[1001] The Public Liability Act of 1923 in effect provides for liability which, in some cases, may essentially be founded upon a reasonable but mistaken decision not to repair, or a reasonable but erroneous decision as to the location or design of an improvement to, public facilities.[1002] Underlying the statutory imposition of absolute liability for injury to property from mob violence may be the notion that such injury would not ordinarily occur unless law enforcement officials made a mistake in calculating the need for or extent of police protection required in the circumstances.[1003] The characteristic feature of statutes such as these is the implicit legislative determination that the particular kind of activity which is the subject of the legislation exposes the public to such a high risk of harm whether done negligently or merely mistakenly (albeit in good faith) that compensation via the channels of tort liability law should be provided. Other types of activities may be identified in which a similar policy of personal immunity and entity liability might well be justified (e.g., wrongful arrest and imprisonment by a police officer; trespass and injury to private property by policemen under circumstances later found to be in violation of constitutional guarantees).

The basic suggestion here advanced is postulated on the belief that the financial risk of erroneous decision-making

by public personnel is one which (as in so many other walks of life) the citizen ordinarily expects to and will readily assume, so long as he has available alternative remedies to minimize the risk--such as the right to appellate review as a means to correct judicial mistake, removal of incompetent officials through the ballot box, injunctive relief against oppressive official action, and the influencing of public opinion through political activity and the media of publicity. In addition, the threat of internal disciplinary proceedings spurred by pressure upon department heads resulting from incompetence of subordinates, may be expected to aid in reducing the risk.

Turning next to the other aspect of the official immunity rule, where good faith is missing one must concede, as the courts have frequently done,[1004] that it would be "monstrous" to deny recovery to a person injured by corrupt or malicious abuse of official power, if such recovery could be provided in a way which would not frustrate the interest in stimulating unimpeded and vigorous action by public officials. The crux of the problem thus posed is manifest: how can the need for distributive justice be satisfied in favor of the injured party and against the miscreant official without exposing honest officials to undue harassment from spiteful, vengeful or litigation-prone individuals?

It is believed that such mala fides injuries may best be approached with the presumption that personal liability of the tort-feasor should be the objective if possible, for that result would tend to best effectuate the three-fold

policies of the law, in such a context, of compensation, deterrence and retribution. The search should then center upon procedural techniques which offer promise of "weeding out" the unmeritorious and groundless actions from those which may have some basis in fact. (Parenthetically, it might be noted that some of the cases in which the courts have invoked the discretionary immunity rule on behalf of allegedly malicious public officials appear, on their face, to be wholly groundless and utterly without the remotest possibility of being provable.)[1005] If such an elimination process could be devised which was reasonably effective, much if not all of the theoretical justification behind the cases which extend the immunity rule to allegations of corrupt and malicious conduct would be dissipated. After such a preliminary winnowing of the wheat from the chaff, it is difficult to conclude that a trial inquiry into an allegation of malice would be more detrimental to the public good than the possibility that actual malice existed in fact. In addition, techniques for reducing the incentive for bringing such actions, save in complete good faith, may be devised; and reasonable measures may be taken to reduce or eliminate the burden and interference with duty which defense of such actions might entail to the accused officer. Were this done, it is suggested, the last vestiges of justification for official immunity would be gone.

It is believed that the law is equal to the task of developing adequate protective devices of the type needed. Numerous suggestions may be drawn from experience. For example, a litigation-prone individual may be deterred from instituting

promiscuous litigation by the requirement that an undertaking be posted to guarantee payment of costs and a reasonable attorney's fee if the action proves to be unsuccessful.[1006] Incentive to sue may be further reduced by limiting recovery to actual damages incurred and, possibly, by precluding recovery of exemplary or punitive damages.[1007] Unfounded litigation might be partially eliminated in the pleading stage by strict enforcement of a rule (analogous to that which presently applies in civil fraud cases)[1008] which demands detailed evidentiary pleading in a verified complaint of the facts upon which the claim of malice or intentional wrongdoing is predicated, together with a clear statutory direction that the burden of rebutting the presumption of legality and regularity of official conduct is on the plaintiff. Rules along these lines could be expected to enhance the general demurrer, motion to strike and motion for judgment on the pleadings as effective measures to eliminate most of the unmeritorious actions without trial.[1009]

Harassment of the public officer being sued, moreover, may be substantially reduced by permitting him, at his discretion, to request that counsel for the public entity provide a free defense in his behalf and that the entity pay the costs and other expenses of the defense, subject to reimbursement by the officer if the court ultimately finds that he was guilty of malice or other intentional and wrongful abuse of his authority. authority.[1010] (Perhaps it would be not only appropriate, but necessary to the preservation of the officer's full freedom to secure what he deems the best possible representation, to provide that in lieu of the services of the attorney for the entity, the

officer may secure counsel of his own choice, subject to reimbursement by the entity of a reasonable attorney's fee (less any sums realized with respect to attorney's fees from the plaintiff's undertaking) in the event the court exonerates him of any wrongdoing.)[1011]

The burden of the foregoing suggestions is that justice and sound public policy alike require as a general rule that public officials not be immune from either suit or personal liability for their malicious and corrupt acts.[1012] Procedural techniques may be invoked to minimize the adverse effects upon honest officials of permitting such litigation. Again, it should be noted, special situations may be identified in which exceptions to the proposed general rule of personal liability may be justified on balance--but it is believed desirable that these exceptions be specifically identified in statutory form. Possible candidates for such exceptional treatment are the allegedly malicious acts of judges and legislators, the effective administration of whose duties might be so seriously interfered with by any litigation at all founded upon their official conduct that complete immunity may plausibly be deemed not too high a price to pay in light of the extremely slight possibility that any action brought against such officials might ever be meritorious.

The foregoing discussion also presupposes (as appears to be accepted by much existing legislation)[1013] that public entities should not be liable for malicious and fraudulent torts of their personnel. Conceding this policy to be sound, decent

protection for the injured citizen suggests that legislation should require that all public personnel be covered, if not by insurance against such liability, at least by an adequate faithful performance bond inuring to the benefit of any member of the public injured by abuse of authority.

Nonfeasance as a basis of governmental tort immunity. The California courts apparently have not developed any major doctrinal distinction, as have certain other jurisdictions,[1014] between governmental torts involving nonfeasance as compared with those involving misfeasance. In general, the California cases have applied the general doctrine of immunity from liability for "governmental" torts to instances of both tortious conduct and tortious omissions.[1015]

When one examines some of the decisions holding public entities immune from liability for injuries sustained as a consequence of the failure of public officials to take certain kinds of action within the scope of their responsibilities, it is at once apparent that critical issues of fundamental policy are involved. Immunity in the past in such cases has resulted from an almost mechanical classification of the particular nonfeasance as involving a "governmental" function for which there is no tort liability of the public entity.[1016] If the Muskopf principle of abolition of the doctrine of governmental immunity were to become settled law, it would seem to follow, on the basis of the language in which the earlier opinions are couched at least, that a contrary result would be reached in such cases in the future. This would seem to mean, for

example, that a public entity would be liable for damages sustained because of its failure to enact[1017] or repeal[1018] an ordinance, to abate a nuisance,[1019] to build a bridge,[1020] to provide medical care for its prisoners,[1021] to maintain or adequately supervise its jail facilities,[1022] to issue building permits,[1023] to enforce safety regulations,[1024] to direct traffic at a crowded intersection after failure of the traffic signal,[1025] or to provide speedy ambulance service.[1026]

Common sense rebels at some of the potential results just postulated. It would, for example, be an intolerable interference with the effective exercise of responsible legislative power to hold a city liable in damages upon the basis of a finding that the city council had negligently (or wilfully) failed to enact a regulatory ordinance which, had it been in effect, would have prevented the plaintiff's injury or at least would have made it unlikely. The determinations of a legislative body upon a proposed item of legislation should be freely exercised upon the intrinsic merits and public need for the regulation, divorced from any concern for possible tort liability stemming from the decision to enact the measure or not. The underlying principle which assigns legislative and judicial functions to different organs of government, moreover, would manifestly be violated if the courts were allowed to make a binding adjudication as to the correctness, wisdom or prudence of the legislative decision. As the Court observes in Muskopf, "it 'is not a tort for government to govern' ... and basic policy decisions of government within constitutional limitations

are therefore necessarily nontortious...".[1027]

In other situations, however, liability for failure to act may be justifiable. It can be persuasively argued, for instance, that an award of damages payable out of the public treasury for personal injuries sustained as a consequence of the negligent failure of public officers to provide medical attention on request of a prisoner in their custody, or because of their negligent failure to assert sufficient supervisory control to prevent one prisoner from being seriously injured by others, would tend to promote sound public policy. Liability under such circumstances would be an incentive to decent and humane treatment of persons in official custody, many of whom, it should be remembered, may not be guilty of any crime. Moreover, in this type of case, the issues to be explored would be the familiar grist of ordinary tort litigation with which the courts are thoroughly competent to deal, and would not involve the basic incongruities inherent in any judicial reexamination of fundamental policy determinations such as those involved in the legislative decision to adopt or reject a proposed regulation.

The problem of nonfeasance--that is, the extent to which governmental entities should be held liable for damages sustained as a consequence of an injurious refusal or failure to act, as distinguished from injurious conduct in the course of taking positive action--is thus not a simple one. To some extent the problem is undoubtedly one of semantics. To speak of the city's allegedly culpable act as the failure to enact an ordinance is to use the terminology of nonfeasance; yet a

moment's reflection suggests that it may just as easily be described as a deliberately conceived (although allegedly erroneous) decision to reject the regulatory ordinance as contrary to the public interest--which is the terminology of misfeasance. Is the death of a prisoner in the city jail more accurately described as resulting from a negligent failure to provide medical care (i.e., nonfeasance) or from negligent supervision and operation of the jail facility (i.e., misfeasance)?

The verbal trap is accentuated by the deceptive appearance of the words themselves; for "nonfeasance" and "misfeasance" possess such a striking etymological similarity as to suggest that they connote analogous legal concepts possessing doctrinal symmetry. Clearly they do not, however, since it is obvious that only <u>improper</u> nonfeasance could rationally furnish a basis for liability in a system of tort law based on fault, and that mere nonfeasance as such--that is, doing nothing--would ordinarily be a wholly neutral circumstance.[1028] The basic inquiry, then, is to try to determine appropriate standards for ascertaining when the failure to act is tortious--that is, when it unjustifiably exposes others to such an unreasonable risk of harm as to warrant the imposition of liability for ensuing injuries. (It is here assumed that an adequate relationship between the non-action and the injuries can be established to meet the ordinary tests of proximate causation.)[1029]

An appropriate starting point for the inquiry might well be the identification of the extent to which the public

entity has assumed, or has been delegated, responsibility for the particular area of activity out of which the injury arose. Where there is no clear duty to take action--as in the case of the vesting of regulatory powers in the legislative body of the public entity with an implied responsibility to legislate to the extent that the public welfare requires--the failure to enact a particular ordinance is manifestly not improper nonfeasance. Possession of power to construct a bridge does not mean that a failure to do so should be treated as tortious. Similarly, the authority to abate public nuisances, like the authority to enforce regulatory measures by police action or by prosecution, is a power which is not expected to and probably should not be employed in every conceivable instance where it might be asserted. In situations of this type, the responsible officers of the entity are impliedly vested with discretion to decide whether as a matter of policy the power should or should not exercised in an individual instance. A decision in a particular factual context not to abate a nuisance, or not to enforce a traffic regulation, or not to arrest or prosecute a criminal suspect, would thus be a decision which, assuming good faith, the officer has full power to make, and which is a normal exercise of his duties. The particular nonfeasance, then, would necessarily be deemed nonactionable since not improper.

It will be observed that we here are dealing with the kinds of policy considerations which are discussed above in relation to the doctrine of discretionary immunity of public officers.[1030] Where public officials are vested with the

responsibility to make basic decisions of policy, and their authority requires them to decide either to act or not to act in specific instances, neither they nor their employer public entity should be answerable in damages for a merely erroneous decision, except in narrowly defined cases where the risk of harm is especially great and the general policy of risk distribution justifies a statutory exception. On the other hand, where the duty to act is clear and positive, as where it has been spelled out by statute or administrative practice in such terms as to admit of little or no individual discretion and judgment on matters of underlying policy, it would seem to be reasonable to insist that the duty be performed, and to assess damages where the purpose behind the duty has been frustrated by a negligent or otherwise improper failure to act.

The duty of the officer in charge of a jail to prevent "kangaroo court" proceedings and to provide medical aid to prisoners,[1031] for example, would appear to constitute a sufficient basis for imposing damages upon the employing entity for a negligent failure to perform that duty. Public policy demands the exercise of reasonable care according to civilized standards where otherwise helpless prisoners are concerned. Similarly, when a public agency has responsibility for marking highways to warn of sharp curves or other hazards to safe driving of automobiles, motorists should be entitled to expect that the duty has been carried out in a reasonable and reliable fashion, at least in the absence of some warning to the contrary.[1032] The reason why this is so is that motorists as a whole actually act upon such an assumption. It accords with reality and

practice, and tends to minimize the likelihood of injuries resulting from unfamiliarity with highway conditions. When the governmental body undertakes to mark the highway by employing its familiar array of painted lines, warning signs, directional signals, flashing lights, reflector buttons, and the like, an unreasonable risk of injury to the motoring public results when such warnings and signals are negligently omitted at a dangerous point along the road. Imposition of tort liability not only distributes this risk more fairly, but creates incentives to the responsible officers to ensure that the task of marking highway dangers is performed carefully and thoroughly, thereby preventing such injuries in the future.

The problem of attempting to draw the line between those kinds of good faith (albeit negligent or mistaken) official omissions for which tort liability is consistent with sound public policy, and those for which it is not, thus appears to be essentially a matter of identifying as accurately as possible the degree to which official duty should be regarded as mandatory. Intentional refusal to perform official duty for wrongful motives, however, would appear to be of a different order. In general, public policy demands that public officials act with proper and honest motives at all times; hence, where a failure of duty is shown to be malicious and motivated by intent to injure, or by wanton disregard for the consequences, personal liability may appropriately be imposed upon the individual officer or employee and upon his official bond, subject to the exceptions and safeguards suggested previously

with respect to public personnel charged with intentional torts.

This suggested approach to the nonfeasance problem is admittedly not without its difficulties. The relevance between policy-level decision-making and non-liability is not likely to be a simple one to apply in practice, nor to spell out in legislation. It does, however, direct attention to the controlling issues that primarily should be considered, namely, the issues of the nature and extent of duty to act and the degree of justifiable public reliance thereon.

Some indication of past acceptance of this approach may be derived from existing statutes. The Public Liability Act of 1923, for instance, may be said to represent a legislative determination to place upon cities, counties and school districts an affirmative and relatively nondiscretionary duty to maintain public property in a safe condition.[1033] Where, after notice, the duty is not carried out (i.e., nonfeasance) liability for resulting injuries may be imposed provided the trier of fact determines that the nonfeasance in question was improper--that is, that it was not reasonably prompt or that whatever steps were taken were not reasonably adequate.[1034] The chief criticism which may be levied against the Public Liability Act is that the scope of duty thereby imposed, as expanded through judicial development of the "constructive notice" doctrine, may be unrealistic when compared to the often limited resources and personnel available to carry it out, with the result that the act has thus in many cases resulted in making cities, counties and school districts practically insurers of

the safety of users of public property.[1035] To the extent this criticism has merit, it may be disposed of by amendment of the statute; but the underlying principle of liability for non-performance of a clearly defined duty would nonetheless appear to represent a sound approach to the problem of how to draw the line between nonfeasance which is proper (and hence non-actionable) and nonfeasance which is improper (and hence actionable). Indeed, once the conditions establishing the duty to act are specifically defined, the use of misleading terminology such as "nonfeasance" is no longer appropriate, for the controversy is now focussed on the factual issues of existence of duty and violation thereof.

If the proposed approach is accepted as sound in principle, it poses difficult drafting problems. One solution would attempt to define the boundaries between liability and non-liability in general terms, thereby delegating responsibility to the courts to ascertain the precise contours of the law as individual cases are presented. An alternative solution would seek to identify and spell out in the legislation all possible specific instances where nonperformance of duty should be deemed actionable (or possibly nonactionable), excluding all other cases from the operation of the rule. Since in either event, periodic reexamination of the rules in the light of experience would seem to be desirable (obviously it will be impossible to anticipate in the drafting state all conceivable situations which might arise) the latter approach, while more tedious and exacting, would seem to be preferable since it would not only lend itself easier to necessary amendments but also would focus upon specifics rather than often obscuring generalities.

POLICY DETERMINATION: FORMULATION OF A LEGISLATIVE SOLUTION

The preceding pages of this study conclude our survey of California's statutory and judicially formulated law relating to substantive tort liability of governmental entities. It is proposed at this point to pause and examine the fundamental policy considerations which deserve to be weighed in the development of a comprehensive legislative solution to the problems arising from the Muskopf and Lipman cases. This examination will proceed on four levels: (a) policy considerations relevant to substantive liability problems; (b) policy considerations relevant to financial administration of governmental tort liability; (c) policy considerations relevant to procedural handling of governmental tort liability claims; and (d) policy considerations relevant to the development of mechanisms for orderly future evolution of the law of government tort liability.

Following our investigation of the policy considerations conceived as relevant in the light of existing California law, it is proposed to evaluate them against experience in other jurisdictions, particularly in New York and under the Federal Tort Claims Act, in which statutory waivers of governmental immunity have existed for a number of years. Such an evaluation may prove helpful in adducing additional policy considerations and in identifying practical problems which are likely to arise in the future.

The concluding portion of the study will attempt to identify specific areas of liability and immunity under current (i.e., pre-Muskopf)

California law, and to suggest the appropriate directions for legislative action with respect thereto.

Policy considerations relevant to substantive liability

The decisions of the Supreme Court in Muskopf and Lipman offer three alternative directions for the future development of the law of California relative to governmental tort liability.

First, the legislature could conceivably declare that the law as it existed prior to these two decisions is restored and shall continue to be applied as the law of California. This, in effect, is what was done for an expressly limited period of time in the "two-year moratorium" statute enacted by the 1961 Legislature.[1036] A permanent solution along these lines, however, would be neither just nor practicable. It is clear from the preceding survey of existing law that a comprehensive statutory solution is badly needed to give direction and bring some degree of consistency and uniformity to the applicable statutory and common law principles. In addition, a restoration of the pre-Muskopf rules would either "freeze" the law so that it could not effectively evolve as conditions change, or would simply delegate back to the courts once again the power through judicial decision to modify or abolish the governmental immunity doctrine. This alternative must clearly be rejected.

Second, the legislature could simply repeal the existing moratorium, or permit it to expire according to its own terms, without adopting any affirmative legislative program. The failure of the legislature to take action, in other words, would constitute a decision to permit the future evolution of the law of governmental liability and immunity to be guided by judicial conceptions of sound public policy in a case-by-case approach.

A legislative abdication along these lines would appear to be extremely unwise. It would not only constitute an invitation to extensive and expensive litigation which could, in large part, be avoided by appropriate statutory enactment; it would also leave in the hands of the judiciary the responsibility for balancing policy considerations and striking a practical solution to issues which are essentially political in nature and thus particularly within the competence and experience of legislators. This alternative is also manifestly undesirable.

The third possible alternative is for the legislature to adopt an entirely new and comprehensive approach to the entire problem. The need for such an approach is apparent. The statutory patterns presently in existence are full of inconsistencies and anomalies, and it is often difficult to perceive any thread of uniform principle at work. The case law is often disorderly and at times approaches a state of doctrinal chaos, as the courts have grappled with the conceptual distinctions between "governmental" and "proprietary" activities, "discretionary" and "ministerial" conduct of public officers, "nuisance" and "negligence", and acts which are "ultra vires" as contrasted with "infra vires".

As we have already seen, the mere abolition of the doctrine of governmental immunity by Muskopf did not alleviate many of the most difficult problems in this area,[1037] and in fact created new and perplexing problems of interpretation of statutes and of application of pre-Muskopf case law.[1038] The need for order and predictability is great; for efficient and foresighted planning of governmental activities and their fiscal ramifications becomes extremely difficult if not impossible when the threat of possibly immense but unascertainable tort obligations

hangs like a dark cloud on the horizon. Moreover, it would seem entirely likely that the danger of tort liability may, in certain areas of public responsibility, so seriously burden the public entity as to actually interfere with the prosecution of programs deemed essential to the public welfare. A comprehensive legislative solution, formulated on a sound theoretical foundation and modified to meet the exigencies of practical public administration of the powers vested in government, appears to be the only acceptable alternative.

A comprehensive legislative solution, however, could take any one of a number of possible forms. In a somewhat oversimplified (but analytically useful) sense, the range of legislative action would seem to lie between the extremes of a broad blanket waiver of governmental immunity which would declare public entities liable in tort to the same extent as private persons,[1039] and, at the opposite end of the spectrum, a detailed specification of all conceivable tort situations coupled with an explicit legislative determination of the tort liability consequences to public entities involved therein.[1040] The blanket waiver approach would be tantamount to no legislative action at all, for in effect it would delegate to the courts the responsibility for formulating public policy. The selective approach, on the other hand, if carried too far might well impose undue rigidity upon the law and an inability to cope with new and unanticipated situations as they arise. The soundest line to take, it would seem, would be intermediate between the indicated extremes. Valid reasons exist, however, for believing that the best solution would, taken as a whole, exhibit more of the characteristics of the selective than the general approach.

Objections to the blanket waiver approach. Apart from the fact that a general waiver of governmental immunity would be an abdication of legislative responsibility, two other substantial objections to this approach may be advanced.

In the first place, the notion that ordinary concepts of tort liability law, as developed in the context of litigation involving private persons, are readily applicable to public entities is founded upon an inacceptable premise. It presupposes that public agencies are not substantially unlike private persons of a comparable nature, such as private corporations. In ways which are highly relevant to tort liability, however, there are in fact certain striking differences between private entities and public entities. The latter are vested by law with powers, often coupled with mandatory duties, to engage in a variety of activities which have no counterpart in the voluntary activities of private persons.

The power to prescribe what conduct is unlawful, and to arrest, prosecute and imprison persons for violations thereof, for example, is solely allocated to public and not to private agencies. Similarly, one finds no exact counterpart in private life to the power and duty to assess, levy and collect taxes, or the power to promulgate and invoke civil sanctions (e.g., licensing systems) in aid of many types of regulatory measures. Certain types of public welfare activities, including such protective measures as fire prevention and suppression, flood control and water conservation, and water and air pollution control, as well as beneficial services in the areas of public health, recreation, sanitation, education, and local transportation, are also typically engaged in by

public entities to a greater degree than private persons. Often the public entity is under legal duty to do certain things within the scope of its unique powers which it cannot properly refuse to do, despite the risks which such action may entail; whereas a private person ordinarily may choose whether to act or not upon the basis of his own independent appraisal of the potential risks as compared with the possible advantages. The public entity may have a statutory duty to act, and yet, because of the refusal of the voters to authorize adequate revenues, may lack the finances necessary to support such action. Its personnel (or at least some of its personnel) are often selected on the basis of political alignments and patronage, and not, as in the case of well-managed private businesses, on the basis of ability, training or experience. In view of these and other like differences, public entities are often exposed to the possibility of far more extensive tort liability than are private entities, and yet do not possess equal capability or authority to protect themselves against such risks as do private organizations possessing full freedom of action.

The indicated differences between public and private entities suggest the unwisdom of treating them alike for tort liability purposes. A blanket waiver of governmental immunity might, for example, interfere drastically with the ability of some public entities to perform effectively the duties with which they are charged, and diminish the capability of or incentive for others to inaugurate new programs in areas of emerging public need. These adverse effects might result not only from the impact of tort liability upon the public revenues, but also in some cases from the dampening of the ardor of budget and tax conscious public officials under the apprehension of tort liability and its political consequences.

The point here is not that some relaxation of the immunity doctrine is not justified. It is that the blanket waiver approach embraces the possibility of adverse consequences to the public interest in such high degree that careful and detailed analysis of specific situations and a conscious evaluation of policy considerations relevant thereto would seem to be the sounder way to proceed. Few persons would contend that government should be an insurer of all injuries sustained by private persons as a result of governmental activity, even though such a policy would spread the losses occasioned by such injuries over the largest possible base. The basic problem is to determine how far it is desirable and socially expedient to permit the loss distributing function of tort law to apply to governmental agencies, without thereby unduly interfering with the effective functioning of such agencies for their own socially approved ends. The blanket waiver approach tends to resolve this problem by ignoring it.

A second basic objection to the blanket waiver approach is founded on the premise that legislation should, so far as possible, clarify and simplify the law so that persons affected thereby may with some assurance arrange their affairs accordingly. The blanket waiver of immunity would actually create as many uncertainties as it would resolve.[1041] In view of the differences between public and private action already noticed above, difficult questions undoubtedly would arise as to whether a particular governmental activity was more closely analogous to one rather than to another type of private activity. In addition, since most of the existing statutes governing public tort liability were drafted upon the assumption that the doctrine of sovereign immunity would continue in

effect, complex and delicate problems of statutory interpretation, and of the interrelationship between legislative and judicial action, would undoubtedly arise. Finally, it should be noted that even Muskopf and Lipman did not go the whole way toward an equivalence of tort liability between private and public entities. All that was abrogated was the doctrine of governmental immunity, and its corollary distinction between "governmental" and "proprietary" activity; but other bases for nonliability in tort have frequently been adumbrated by the courts where public entities have been sued,[1042] and Lipman expressly invoked and applied one of them (i.e., the discretionary function rationale) as a basis for holding the defendant school district therein to be not liable for the torts of its officials. It may be concluded, therefore, that the blanket waiver approach to the present problem is simply not appropriate to the task. What is required is not a bludgeon but a scalpel.

Logic of the selective approach. The development of a legislative solution through a discriminating identification of specific sub-problems and a careful analysis of policy considerations deemed relevant thereto is not an easy task. This approach, however, does not have the intellectual deficiencies of the blanket waiver, and is more readily adaptable to the realities of public administration. It focuses attention upon discrete facts rather than abstract ideas. It seeks to postulate statutory policy upon experience rather than theory alone, and hence should be more readily capable of alteration where need exists without danger of disturbing underlying basic policy. A specific program, moreover, may be more easily tailored and fitted into the existing statutory framework; and may be formulated upon the basis of existing statutory provisions with

a minimum of dislocation of the policies already legislatively expressed therein. With careful draftsmanship, the additional detail inherent in the selective approach may well prove to be advantageous as a means to reduction of unnecessary litigation and more frequent, as well as more expeditious, disposition of deserving claims by administrative action. Finally, since the selective approach demands an intensive analysis of practical problems of relatively narrow dimensions, it may serve to identify collateral reforms or protective devices which are appropriate and expedient to implement the substantive determinations made. For example, it may conceivably be determined that in certain types of situations, procedural devices should be employed to discourage litigation which is peculiarly susceptible of abuse; in other types of cases, limitations upon liability may be deemed appropriate, or special statutory provisions may be felt to be desirable to protect the public treasury against the risk of unusually large damage judgments; while in still other areas, policy considerations found to be uniquely significant may suggest the need for alternative methods for shifting the risk from the public treasury to other financially responsible sources.

Theory of tort liability of governmental entities. Two basically different philosophic theories of tort liability have been identified by scholars as competing for acceptance in American law today. The older and traditional theory, founded upon common law conceptions of individualism and self-reliance as ultimate standards of social policy, imposes tort liability primarily upon the basis of fault.[1043] A more recent tendency, as exemplified in the Workmen's Compensation Acts, is to impose liability without regard to fault on the theory that the victims of an enterprise should be compensated for their loss and the costs distributed over the beneficiaries of the enterprise which created the risk.[1044] Although fault is still the dominant rationale, various exceptions have developed, and the tremendous growth of liability insurance as a risk-distributing mechanism has tended to influence the practical administration of tort liability in certain areas (e.g., automobile accidents) along lines characteristic not of the fault concept but of the risk concept.[1045] In effect, modern tort law appears to consist of an amalgam of both fault and risk theories, with steadily developing pressures in favor of extending the latter approach.

Leading scholars have suggested that in the law of governmental tort liability there may be even more justification for expanding upon the risk theory than in respect to private torts, for government is the ideal loss-spreader, "especially", we are told, "if its taxes are geared to ability to pay" and the governmental entity is "large enough."[1046] The qualifications thus stated, however, underscore the fact that the resolution of the problem cannot be predicated

wisely upon theoretical concepts of the role of tort law. Other significant and often overriding policies of great importance to the general welfare are also at stake. Taxes, for example, are not always geared to ability to pay, and ordinarily are fixed at a level which represents a tentative working compromise between political interests engaged in furthering diverse objectives. A program of governmental tort liability which is not carefully integrated into existing fiscal patterns, or which does not take adequately into account the other extensive demands upon the limited revenues available, may from a broad point of view do more harm than good. The admonition that the entity be "large enough" simply accentuates the same point; for public entities are of varying sizes and of differing financial capacities, and because they engage in a bewildering range of activities are exposed to dissimilar risks of causing injuries to the public. Here, as in so many other aspects of life, generalizations are treacherous. It may be true that some governmental entities under some circumstances and for some purposes would be good instruments for spreading the losses resulting from their activities; but under other circumstances and for other purposes the opposite may be equally true.

A sound theoretical approach to government tort liability, it would appear, should thus keep in mind both the accepted fault theory and the proposed risk theory of liability, but should insist upon a careful evaluation of both concepts with relation to identifiable categories of injuries likely to result from governmental activities. Where found to be appropriate, modification of the fault approach may be determined upon for reasons rooted in a pragmatic analysis of actual facts bolstered by the lessons of experience. In all situations, moreover, it must also be constantly remembered that other policies conceived for purposes

not necessarily relevant to tort law must also be evaluated and balanced. The task which must be undertaken is to locate the specific boundaries within which tort liability may be imposed upon public entities without unduly frustrating or interfering with the accomplishment of the other accepted ends for which such entities exist.

If this two-fold approach is accepted, the following general policy considerations may be identified as pertinent to the empiric evaluation of specific tort situations:

(a) The tort liability consequences of governmental action may rationally differ where there are differences in the degree of fault. In our discussion of the doctrine of official discretionary immunity, supra, the suggestion was advanced that erroneous or mistaken conduct, if conceived honestly and in the exercise of reasonable care, ordinarily should not result in liability of the public agency.[1047] (It will be recalled that in some cases good faith decisions of this type have resulted in personal liability of public officers and employees.[1048]) As a general rule, the risks attached to errors made in good faith are tolerable in a society which has determined, by the very act of vesting some of its officials with the power to make such decisions, that the public benefit to be achieved outweighs the individual danger. Where the risk is too great (as in the case of the conviction of innocent men for felonies, for example) special statutory exceptions may be articulated whereby the loss is distributed over society as a whole. Mistakes in the performance of public duty which are attributable to negligence, however, ordinarily should, under the fault theory, be a basis for liability unless other policy considerations clearly preclude that result in specific situations.

Finally, it may be argued that malice (i.e., personal enmity, hostility, and spleen) and corruption (i.e., dishonesty, fraud, and cupidity) constitute a third level of fault, for which the public treasury should not be directly liable, although the individual officer or employee should be personally answerable (with adequate protection against abuse). However, the public entity may, in order to satisfy the risk theory of liability, be required to finance the defense against the charge and even purchase insurance or a faithful performance bond at public expense to provide a responsible source for satisfaction of the judgment.[1049]

(b) The tort liability consequences of governmental action may rationally differ where there are differences in the degree of risk of harm. All types of governmental activity do not expose members of the public to the same risks; and the nature of governmental action is such that certain types of public functions do expose the public to risks which are greater than is the case with private conduct. The underlying issue is whether the danger of injury from the particular public activity, even where conducted with reasonable and ordinary care, is unusually large or widespread, or the nature of the injury unusually severe or permanent, in proportion to its social desirability.

An affirmative answer in a particular situation would suggest that the public entity may properly be charged with the risk of losses which result from its decision to engage in the activity. In circumstances of this type, the cogency and persuasiveness of the risk theory of liability is at a maximum, and the fault theory is at a minimum. Private tort liability law already recognizes the relevance of the degree of risk, for there are numerous instances in which

private liability is adjudged without regard to fault (e.g., ultra-hazardous activities), and the operation of special rules of law, such as the principle of implied warranty and the doctrine of res ipsa loquitur, may in practical effect achieve the same result in many other instances where fault is still theoretically at issue. The California decisions involving the concept of nuisance[1050] and the remedy of inverse condemnation[1051] illustrate a judicial disposition to find some basis for liability where normal expectations of property ownership are frustrated in a severe and permanent manner by action of public agencies, even though the action thus held to be a basis of liability may have been completely reasonable under the circumstances. California legislation also at least partially accepts the basic policy, for public entities are in some circumstances (e.g., under the mob violence statute, Cal. Govt. Code §50140, and the statute providing for indemnity for livestock killed by dogs, Cal. Agric. Code § 439.55) declared liable in damages without regard to fault.[1052] Our workmen's compensation law, which we have seen is applicable to public personnel,[1053] is perhaps the most pervasive example of this concept. On the whole, however, liability without fault is accepted only in carefully defined and relatively narrow factual situations.[1054] The task is to identify situations in connection with the activities of governmental agencies in which the risk of harm is of such magnitude that, barring other applicable policy considerations, the rule may be appropriately incorporated into a comprehensive legislative program. At the same time, there may also be situations at the other extreme in which the risk of harm is relatively slight, or where other policy considerations loom so large, that the scales may well be tipped in favor of continuing

governmental immunity. Indeed, some of the existing legislation granting tort immunity (e.g., the provisions of the California Disaster Act,[1055] and the Unclaimed Property Act[1056]) may be explained on this basis.

(c) The tort liability consequences of governmental action may rationally differ where practical alternatives to liability are available. The fault theory of liability ordinarily is deemed to serve the underlying objectives of retributive loss-shifting, compensation, and deterrence.[1057] These objectives are not always of equal significance, but may vary from one type of case to another, and are subject to being subordinated by other overriding policies in certain circumstances (such as the policy that tort law should not be applied in such a way as to interfere with desirable kinds of activity). Variations of this sort suggest the possibility that practical alternatives to governmental liability may be identified in some situations which will substantially implement the basic objectives to be served by such liability. If these objectives can thus be equally well (or almost as well) served by other means, the justification for a rule of tort liability is at a minimal level, and other relevant policy considerations may indicate that a rule of immunity is preferable. Two general categories of such practical alternatives to tort liability deserve consideration.

First, it is possible to identify situations in which the risk of loss from governmental activities can be more equitably distributed by means other than imposing liability upon the public entity. It has already been suggested above[1058] that the traditional distinction between "governmental" and "proprietary" conduct may have had elements of this principle embedded therein, since "proprietary" activities ordinarily proved

to be those in which the public entity was in a position to spread the risk over the particular beneficiaries of the activity through imposition of fees and charges (e.g., a municipal utility system) while "governmental" activities often were those which could not do so and hence, if liable, were bound to distribute the loss over the body of taxpayers at large irrespective of differences in the benefits received. The point, of course, is that the taxpayers (whether they be property taxpayers, sales taxpayers, business license taxpayers, or contributors to the public revenues in other ways) are not always nor necessarily the same persons as those benefited by the governmental activity out of which the injury arose. If practical means exist for distributing the risk of loss over the actual beneficiaries of the activity, rather than the taxpayers generally, the compensation function of tort liability may be satisfied both fully and more equitably without undue disregard for the other functions.

The complex problems involved in utility relocation cases might well lend themselves to solutions grounded upon these considerations.[1059] The element of fault is at an absolute minimum in such cases, thereby drastically diminishing if not entirely eliminating the impact of the moral retribution and the deterrence objectives of tort liability law. The basic problem is simply one of distributing the losses arising from the impossibility of two important physical structures (e.g., sewers, storm drains, water pipelines, underground electrical cables, telephone circuits, gas mains, etc.) occupying the same street subsurface space at the same time. The public entity seeking to extend its facilities into the locus already occupied by another subsurface user is neither negligent nor malicious, but is simply acting with sound discretion

and pursuant to accepted engineering standards. The issue is: "Who should pay for the relocation costs?"

The practical dimensions of the utility relocation problem are suggested in an interesting dictum in a recent case arising in Contra Costa County.[1060] At the request of the county Flood Control District, the County of Contra Costa had relocated a sewer line owned and operated by a sanitary district in order to make way for a drainage improvement project of the Flood Control District. The court held that the sanitary district was not liable for the relocation expense as claimed by the county, since its sewer line was in place beneath the county road under property rights which were prior in time to the acquisition by the county of its road easement. The opinion concludes, however, by quoting the trial court's memorandum of decision, in which the policy judgment was expressed that[1061]

> The cost of relocation should not be borne by the taxpayers of the County generally nor by the taxpayers of the Sanitary District, but rather by the people resident within the Flood Control zone benefited by the improvement.

This dictum indicates the basis for an equitable solution. No relocation expense would have been incurred at all had it not been for the new improvement being constructed by the Flood Control District for the benefit of its residents. The most equitable way to distribute the loss is thus to require the Flood Control District to assume it, thereby passing it on to its taxpayers who are the beneficiaries of the loss-producing activity. If the Sanitary District were held liable (as it presumably would have been, had it not been for the antecedent proprietary rights which it was able to establish) the loss would be distributed over its taxpayers (or payers of fees and charges), some

or most of whom might not be residents of, and hence might receive no benefit from the loss-producing enterprise of, the Flood Control District. On the other hand, to the extent that the relocation of the sewer line resulted in betterments to existing facilities and realization of salvage value from the superseded facility, it would seem equitable to relieve the Flood Control District taxpayers of the burden and to require this portion of the gross expense to be assumed by the Sanitary District which obtained the advantage thereof.

The policy of equitable distribution which characterizes the solution of the utility relocation problem just suggested is believed to be equally applicable in all such cases, without regard for whether the utility facility being displaced is being maintained beneath the streets pursuant to a franchise or some other more significant authorization. Moreover, it is already incorporated in substance in some of the applicable statutes,[1062] and would not appear to be difficult to formulate in a general statutory rule.

Where public agencies are the owners of subsurface facilities which are being displaced, the policy here outlined would lead to immunity from liability (except as to betterments and salvage value)--and an equivalent result would seem to be justified as to private franchise occupiers as well. Where public agencies are the improvers whose activities make the relocation work necessary, the policy would lead to liability for the costs thereof (less betterments and salvage). A uniform policy along these lines manifestly would be preferable to the chaotic inconsistencies which presently exist in the statutory law governing utility relocations.

The intentional tort problem presents another area within which the possibility of alternatives to entity liability has interesting implications. The functional objectives of deterrence and moral retribution are at their maximum where deliberate wrongdoing, malicious misconduct and corruption in public office are concerned. A rule of law imposing personal liability upon the miscreant public officer for such mala fides acts would seem to possess greater potential capability of deterring them than a rule which held the employing public entity liable, and surely the moral aspect of liability would be better served by the former result. Thus, immunity for the employing entity, coupled with personal liability for the officer, would seem to be indicated, provided the compensation function is adequately served by funding the officer's personal liability through the medium of a faithful performance bond, and the policy of preventing undue harassment and unjustified litigation is preserved through establishment of appropriate procedural safeguards along the lines indicated previously in the text, supra.[1063]

A third area wherein entity immunity from liability may be justified by the existence of a practical alternative to liability is suggested by the case of Stang v. City of Mill Valley.[1064] The Supreme Court here held the defendant city not liable for negligently maintaining its water mains and hydrants in such a condition that the water pressure was inadequate to permit the fire department to extinguish a fire in plaintiff's house. In view of the almost universal availability of adequate insurance coverage against fire losses, and the potentially crushing costs (often wholly impracticable from a political standpoint alone) which might result if the municipality were required to be, in effect, an insurer against fire losses, a defensible argument can be advanced that it is more equitable and sounder public policy to

distribute such losses through the medium of fire insurance premiums than through imposition of liability upon the public treasury.

The funds in the treasury, it should be remembered, are not necessarily derived from the same persons who are benefited by the fire protection activity (except in the very broadest sense), nor are the benefits received from that activity necessarily proportional to the contributions made by those benefited to the public treasury. A tax-exempt institution may pay little into the municipal revenues, yet receive large fire protection benefits. A large real property owner may pay large amounts of taxes, yet, since his property is undeveloped land, derive only negligible benefits from a fire protection system geared primarily to extinguishing structural conflagrations. The consumers who pay substantial sums in the form of sales taxes may, in significant numbers at least, actually reside outside the boundaries of the public entity and thus derive at best only indirect and peripheral advantage from the fire protection services of the community in which they do their shopping. On the other hand, those who pay the premiums upon fire insurance policies obviously include the persons who receive the most immediate and substantial benefits from the entity's activities in this area; and hence, in line with the general philosophy underlying the risk theory of tort liability, they should be the ones upon whom the losses arising from those activities should be distributed. The moral and deterrent functions would not be entirely disregarded by this result, either; for the owners of fire insurance, in their capacity as voters, may be assumed to have adequate political power to insist that negligence and mismanagement in the fire (or water) departments is punished and to provide incentives to careful and efficient management. Indeed, to the extent that political pressures succeed

in improving fire protection services, the improvement may well be reflected in lower fire insurance premiums.

Second, it may be possible to identify situations in which the monetary compensation aspect of tort law is of diminished importance, and the other functions may be adequately served by other forms of legal remedies. The Lipman case is itself an example, for there the court found the existence of nontort remedies available to the plaintiff school employee a partial reason for denying liability of the district for the torts of its officers committed for the alleged purpose of procuring plaintiff's wrongful suspension or dismissal from employment. In the words of Chief Justice Gibson:[1065]

> It is also significant that, without holding a school district liable in tort for acts like those complained of, an employee from the outset has protection, in the form of mandamus or recovery for breach of contract, against consequences which would be among the most harmful and tangible, i.e., wrongful dismissal or suspension.

Although the Lipman holding of nonliability may also be supported on the ground the conduct there alleged was intentional and malicious (and thus would justify a holding of personal liability of the officers but immunity for the district under the approach previously suggested,[1066] the basic thought that alternative remedies should be considered appears to have considerable merit. In various types of nuisance situations attributable to public action, for example, the dictates of sound policy might well be served fully be relegating the plaintiff to an action for injunctive relief and abatement of the nuisance, without necessarily awarding money damages. Consideration might be given, where reliance on such nonpecuniary remedies is made the sole protection of the injured party, to a statutory allowance of a reasonable attorney's fee to a successful plaintiff, so that the cost of litigation may not preclude the alternative remedy from fulfilling its purpose.

(d) The tort liability consequences of governmental action may rationally differ where the deterrent effect of such liability differs. One of the principal justifications for tort liability is that it tends to deter conduct which tends to cause accidents, and provides an economic incentive to employment of safety procedures. Everyone presumably would agree that prevention of harm is better than ex post facto redress. The policy of deterrence, however, does not always operate with the same intensity in all situations. Its significance, and hence the potentially sound tort liability consequences, may vary in different types of cases.

For example, it would be pertinent to inquire to what extent the prospect of tort liability may actually serve effectively as a spur to safety-promoting and accident reducing precautions. If the range of liability is too wide, its impact upon safety measures may be de minimis since the personnel and financial resources to do the job simply are not politically feasible. Judge David, for example, points out that part of the resistance of public officials to extensions of tort liability of governmental entities arises "where the officials feel there is no possibility of meeting the standard with funds and facilities provided".[1067] Deterrence, in other words, may be a two-way street. Tort liability is likely to serve as an effective incentive for safety measures if the responsible public officers, who ordinarily want to do their duty, are in a position to actually take and enforce adequate safety precautions. The studies made by Judge David suggest that the existing scope of liability for dangerous and defective conditions of public streets and highways under the Public Liability Act, for example, is far too broad to effectively serve the objective of promoting safety.[1068] Restricting liability

thereunder to cases of actual notice might well prove to be a worthwhile change, in that it would provide a dual incentive, one to the public generally to call actual defects to the attention of responsible officials, and the other to public officers to provide ample funds and facilities to make immediate corrections upon receipt of such notice.[1069]

Another aspect of the same policy consideration deserves attention. There would seem to be some situations in which there are incentives to the taking of adequate safety precautions which are inherent in the nature of the activity itself. Where this is true, the need for tort liability as a spur in the same direction is decreased; where it is not, tort liability may be the most efficient incentive available. Reasonably effective incentives to care and diligence, for example, are inherent in the functioning of judges and legislators. The former are controlled to a very large degree by legal tradition, desire for respect of fellow judges and members of the bar, personal pride to avoid grounds for appellate reversal, and the indirect threat of removal from office for misconduct; the latter are controlled by the realistic forces of politics and the temper of the electorate. The structural and physical safety of facilities in public buildings, such as a courthouse, city hall, or administration building, for example, is reasonably assured by the fact that the principal users thereof are public personnel who, in the absence of safe conditions, would themselves be exposed to injury to a degree even greater, in some respects, than the public. (It should be noted that the incentives to maintain streets and highways in a safe condition are far weaker from this standpoint, and the risks are pretty much on the public users generally.) Public employees who work in and around the wild animals in a public zoo would seem to have an immediate personal interest, because of their much

greater exposure to the risks, in safety precautions which will protect also the public visiting the premises.

On the other hand, there are other types of situations in which the risk is almost entirely upon persons other than the public personnel who would ordinarily have the duty to take the desired safety precautions. The indigent patient in the public hospital, for example, as well as the inmate in the city or county jail, is in a very real sense at the mercy of those who administer to his needs; and the personal interest in preventative measures which was identifiable in the situations illustrated in the preceding paragraph is wanting. Similarly, private property which is threatened by weed burning operations nearby, or by the possibly negligent maintenance of an adjoining public garbage dump, derives little protection from any equivalent dangers which it shares with the public entity and which might serve as an incentive to reduce the risk.

It should be borne in mind that competent studies have shown than incentives to safety are greatest where tort liability is imposed upon large corporate defendants rather than upon individual employees whose negligence or other misconduct caused the accident.[1070] The reasons for this are rooted in pragmatic considerations: individuals often are "accident-prone" without realizing it, thereby reducing the role of conscious agency in the prevention of accidents. The large corporate employer (such as a transportation company or governmental entity) is in an ideal strategic position to do something constructive about accident-prone employees, through testing to detect presence of the condition, reassignment to jobs which have a lower accident potential, special training courses, and the adoption of safety rules and procedures. In addition, the large unit ordinarily is in a better

position to finance adequate insurance coverage; and the very existence of such coverage is in itself an incentive to safety, for the insurance carrier's desire to avoid large pay-outs may cause it to assume the role of expert safety instructor or, possibly, to provide financial inducements in the same direction by tempering premium charges to loss experience.

(e) The tort liability consequences of governmental action may rationally differ in proportion to the degree of public assumption of the risks of the activity. Among the types of activities in which governmental entities engage are many which are peripheral to the main stream of governmental services and which may expose members of the public (or certain segments thereof) to special risks of injury, but which are of such a nature that a general public assumption of the risk is commonly understood as the price necessary for the activity to proceed at all. For example, hiking and riding trails are often opened up or made available to persons with a love of outdoor life by public entities; yet it is reasonable to expect that persons using such trails do so at their own risk. To impose upon the public entity a duty to take the necessary precautions to adequately prevent foreseeable injuries under such circumstances would in most cases be so extremely burdensome to the public treasury that the choice would often be resolved in favor of closing down the trails entirely rather than assume the duty. Similarly, a public entity should not necessarily be bound to provide an expensive lifeguard service before it may open its public beaches to use; a reasonable decision may be reached in some cases not to incur such expense, and to substitute instead a posted notice that users of the beach must do so at their own risk.

Liability of the public entity, it may be suggested, should be adjusted to the realities of public administration in cases such as those hypothesized. When the risk arises in large part from the hazards which are inherent in the public's own participation in the particular activity (e.g., riding, swimming, etc.), and reasonable notice is provided that the entity does not purport to assume any duty to protect against such risks, nonliability seems to be appropriate. Such a result, moreover, would be even more strongly indicated when the activity can assert at best only marginal claims upon public financing or is designed for the special benefit of a relatively narrow segment of the general populace, for in such circumstances the distributing of the losses resulting therefrom over the entire taxpaying population seems less than equitable.

(f) The tort liability consequences of governmental action may rationally differ in proportion to the potentiality of such liability to act as a deterrent to or interference with socially desirable governmental activities. The Lipman case designated, as two of the three factors there identified to be relevant to the issue whether a public entity should be held liable for the discretionary acts of its officers notwithstanding the immunity of such officers, "the importance to the public of the function involved" and "the extent to which governmental liability might impair free exercise of the function".[1071] These considerations of policy would appear to have a broader application than the limited question involved in Lipman. Weighty pragmatic objections may easily be advanced in opposition to a legislative rule of government liability in tort which operates in such a way as to discourage and hamper the effective implementation of desirable governmental programs. Accordingly, an effort should be made to minimize the force of any

such objection by taking it into account in the development of a legislative solution to the governmental immunity problem.

Such minimization may take either of two basic forms. One would be provision for complete immunity in connection with defined types of governmental activity which, unless immunized, might be particularly susceptible to the fettering impact of liability. The discussion, supra, of the "nonfeasance" problem included a suggestion that there be complete immunity from liability for good faith decisions by public officers who are vested with broad discretionary authority to appraise the potential risks and benefits from taking or refraining from taking specified action, and to decide the issue either way.[1072] Decisions of legislators to enact or not to enact legislation; decisions of prosecutors to prosecute or not to prosecute persons suspected of crime; decisions of judges to grant or not to grant judgment for a particular party--these and other comparable types of governmental activity are examples of the kinds of functions which imperatively require complete independence from threat of tort consequences to ensure their fearless and objective performance.

A second way in which the danger of interference may be reduced is to authorize appropriate means for funding the potential liabilities in advance, especially through insurance systems, so that the total financial obligation of the entity is already fixed with a reasonable degree of certainty in the form of a specified premium payment. The chief mechanism through which the threat of liability is likely to impede forthright governmental action is uncertainty--the concern of the responsible public officer that a possible tort judgment in an uncertain, but potentially very large, sum may wreak havoc with the current budget. Experience with the general waiver of tort liability

arising out of automobile accidents involving publicly owned or operated motor vehicles[1073]--a waiver originally enacted in 1929--as well as the general waiver of school district immunity for negligent torts[1074] since 1931 amply demonstrates that the device of insurance can effectively eliminate most if not all of the uncertainty; and if need be other techniques, such as statutory limitations upon the damages which are recoverable and provision for installment payments of judgments or funding them through bond issues, are available to further stabilize the threat to the budget. Further safeguards, if deemed necessary in certain kinds of situations, may be developed along the lines suggested in the text, supra, as possible ways to protect public officers from vengeful and harassing actions to establish personal liability (e.g., requirement of an undertaking from the plaintiff as a condition to suit; more effective use of pleadings and summary judgment procedures to weed out the obviously unmeritorious suits, etc.).[1075]

(g) The tort liability consequences of governmental action should, to the fullest extent possible, be formulated upon the foundations of existing law with such alterations as may be necessary to promote clarity, consistency and uniformity, and thereby discourage unnecessary litigation. In the formulation of a legislative program, care should be taken to avoid disturbing existing law except where deemed clearly necessary in the light of applicable policy considerations. Undoubtedly many public administrative procedures, much fiscal planning, numerous contractual arrangements inovlving not only insurance but other matters, and various forms of safety engineering programs have developed in response to existing statutes and judicial decisions relating to governmental tort liability. Since one of the objectives of a sound legal system is the fulfillment of legitimate expectations arising from

valid private agreements and plans, existing law should be the starting point for a legislative program.

From this starting point, however, attention should be directed to the elimination so far as possible of sources of unnecessary litigation and avoidable uncertainty as to legal rights and duties. Among the various ways in which this may be done, consideration should especially be given to the following matters: (1) Elimination of existing inconsistencies of policy as reflected in numerous closely similar statutes; (2) elimination of all remnants of the old "governmental" and "proprietary" classifications of activities of public entities; (3) avoidance of rules postulating liability and immunity upon purported distinctions between "intentional" and "negligent" torts; (4) elimination of the outmoded "ultra vires" doctrine as a basis for nonliability of public entities, except so far as it is simply an alternative formulation of the rule that the public officer or employee must be acting in the course and scope of his duties in order to make the doctrine of respondeat superior applicable; (5) development of precepts for retaining the doctrine of official immunity for discretionary conduct engaged in in good faith, and extending such immunity to all levels of public personnel; (6) development of precepts for eliminating the doctrine of official immunity for malicious and corrupt exercises of official discretion, accompanied by adequate protections against vengeful and harassing litigation possessing no substantive merit; (7) development of precepts for imposing liability upon public entities for negligent exercises of official discretion where the officer is personally immune; (8) clarification of the lines of responsibility between various public offices and public entities for purposes of applying the doctrine of respondeat superior.

778. Muskopf v. Corning Hospital District, 55 A.C. 216, 221, 11 Cal. Rptr. 89, 92 359 P.2d 457, 460 (1961).

779. Ibid. at 224, 11 Cal. Rptr. at 93-94, 359 P.2d at 461-462.

780. Carr v. City & County of San Francisco, 170 Cal. App.2d 48, 338 P.2d 509 (1959); Barrett v. City of San Jose, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); Hanson v. City of Los Angeles, 63 Cal. App.2d 426, 147 P.2d 109 (1944). Of course, it may be necessary in the event of conflicting evidence to submit certain subsidiary questions of fact, upon which the legal conclusion ultimately rests, to the jury with appropriate instructions. See, e.g., Beard v. City & County of San Francisco, 79 Cal. App.2d 753, 180 P.2d 744 (1947).

781. See Plaza v. City of San Mateo, 123 Cal. App.2d 103, 110, 266 P.2d 523, 528 (1954), declaring that "no rule of thumb has been evolved which can be applied with certainty as each case arises. For the present at least, each new activity claiming the courts' attention must be decided on its own peculiar facts." To the same effect, see Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac. 505 (1919).

782. Many of the opinions consist of little more than a citation of prior cases which are asserted to have resolved the classification problem, without consideration or

analysis of the frequently obvious factual differences urged by counsel. See, e.g., Barrett v. City of San Jose, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); Farrell v. City of Long Beach, 132 Cal. App.2d 818, 283 P.2d 296 (1955). Cf. Pianka v. State of California, 46 Cal.2d 208, 293 P.2d 458 (1956).

783. The volume of written commentary, almost all of which is highly critical of the distinction, is staggering. Some of the more valuable articles which have been consulted include: Borchard, Government Liability in Tort, 34 Yale L. J. 1, 129, 229 (1924-25); 36 id. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928); David, Municipal Liability in Tort in California, 6 So. Calif. L. Rev. 269, 7 id. 48, 214, 295, 372 (1933); Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Green, Municipal Liability For Torts, 38 Ill. L. Rev. 355 (1944); James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610 (1955). Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 Va. L. Rev. 910 (1936); Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41 (1949). One of the best contributions to the literature is Davis, Tort Liability of Governmental Units, 40 Minn. L. Rev. 751 (1956); and an extremely useful Symposium on the subject is contained in 9 Law & Contemp. Problems 179-367 (1942).

784. Guidi v. State of California, 41 Cal.2d 625-26, 262 P.2d 3, 5 (1953), and cases there cited.

785. Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760 (1906); Sincerney v. City of Los Angeles, 53 Cal.App. 440, 200 Pac. 380 (1921).

786. Ritterbusch v. City of Pittsburg, 205 Cal. 84, 269 Pac. 930 (1928); Nourse v. City of Los Angeles, 25 Cal.App. 384, 143 Pac. 801 (1914).

787. Pignet v. City of Santa Monica, 29 Cal. App.2d 286, 84 P.2d 366 (1938); Coleman v. City of Oakland, 110 Cal. App. 715, 295 Pac. 59 (1930).

788. Schwerdtfeger v. State of California, 148 Cal. App.2d 335, 306 P.2d 960 (1957); Ravettino v. City of San Diego, 70 Cal. App.2d 37, 160 P.2d 52 (1945); General Petroleum Corp. v. City of Los Angeles, 22 Cal. App.2d 332, 70 P.2d 998 (1937).

789. People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1 (1947).

790. Hession v. City & County of San Francisco, 122 Cal. App.2d 592, 265 P.2d 542 (1954).

791. Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3 (1953); Brown v. Fifteenth District Agricultural Fair Assn., 159 Cal. App.2d 93, 323 P.2d 131 (1958). See also, Pianka v. State of California, 46 Cal.2d 208, 293

P.2d 458 (1956); Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917).

792. Bright v. East Side Mosquito Abatement District, 168 Cal. App.2d 7, 335 P.2d 527 (1959); Hanson v. City of Los Angeles, 63 Cal. App.2d 426, 147 P.2d 109 (1944).

793. Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960), quarantine control of communicable diseases; Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951) and Manning v. City of Pasadena, 58 Cal. App. 666, 209 Pac. 253 (1922), collection and disposition of garbage and trash.

794. Chappelle v. City of Concord, 144 Cal. App.2d 822, 301 P.2d 968 (1956); Henry v. City of Los Angeles, 114 Cal. App.2d 603, 250 P.2d 643 (1952); Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545, 232 P.2d 26 (1951).

795. Carpena v. County of Los Angeles, 183 Cal. App.2d 541, 7 Cal. Rptr. 889 (1960); Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954); Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545, 232 P.2d 26 (1951).

796. Yarrow v. State of California, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); Zeppi v. State of California,

174 Cal. App.2d 484, 345 P.2d 33 (1959); Bettencourt v. State of California, 123 Cal. App.2d 60, 266 P.2d 201 (1954); Gillespie v. City of Los Angeles, 114 Cal. App.2d 513, 250 P.2d 717 (1952).

797. Goodman v. Raposa, 151 Cal. App.2d 830, 312 P.2d 65 (1957). See also, Seybert v. County of Imperial, 162 Cal. App.2d 209, 327 P.2d 560 (1958), control of motor boat operations on lake.

798. Dineen v. City & County of San Francisco, 38 Cal. App.2d 486, 101 P.2d 736 (1940).

799. Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980 (1952). See also, Johnson v. Fontana County Fire Protection District, 15 Cal.2d 380, 101 P.2d 1092 (1940).

800. Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

801. Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960); Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 999 (1958).

802. See Guidi v. State of California, 41 Cal.2d 623, 625, 262 P.2d 3, 5 (1953), referring to governmental liability for "torts committed while engaged in proprietary or business activities"; People v. Superior Court, 29 Cal.2d 754, 762

178 P.2d 1, 6 (1947), defining proprietary activities as those which are "commercial and non-governmental"; Schwerdtfeger v. State of California, 148 Cal. App.2d 335, 343, 306 P.2d 960, 965 (1957), holding activities to be proprietary where they were "in competition with" private enterprise; Muses v. Housing Authority of City & County of San Francisco, 83 Cal. App.2d 489, 502, 189 P.2d 305, 313 (1948), holding housing authority to be a proprietary activity since through it the State had "entered the commercial field" and had "created and operated a business enterprise". (Emphasis supplied in all quotations in this footnote.)

803. See Talley v. Northern San Diego Hospital District, 41 Cal.2d 33, 257 P.2d 22 (1953), public hospital charging prevailing fees for purpose of making profit; Kellar v. City of Los Angeles, 179 Cal. 605, 178 Pac, 505 (1919), children's summer camp charging fees; Barrett v. City of San Jose, 161 Cal. App.2d 40, 325 P.2d 1026 (1958), municipal swimming pool; Manning v. City of Pasadena, 58 Cal. App. 666, 209 Pac. 253 (1922), municipal collection service operated to produce revenue.

804. See Pianka v. State of California, 46 Cal.2d 208, 210, 293 P.2d 458, 460 (1956), classifying as proprietary governmental activities "designed to amuse and entertain the public"; Guidi v. State of California, 41 Cal.2d 623, 627, 262 P.2d 3, 6 (1953), stating that "the state is acting in a proprietary capacity when it enters into activities . . . to amuse and entertain the public";

Brown v. Fifteenth District Agricultural Fair Assn., 159 Cal. App.2d 93, 323 P.2d 131 (1958); Plaza v. City of San Mateo, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

305. See Carr v. City & County of San Francisco, 170 Cal. App. 2d 48, 338 P.2d 509 (1959), merry-go-round; Barrett v. City of San Jose, 161 Cal.App.2d 40, 325 P.2d 1026 (1958), swimming pool; Burnett v. City of San Diego, 127 Cal. App.2d 191, 273 P.2d 345 (1954), fine arts gallery; McKinney v. City & County of San Francisco, 109 Cal. App.2d 844, 241 P.2d 1060 (1952), municipal zoo; Meyer v. City & County of San Francisco, 9 Cal. App.2d 361, 49 P.2d 893 (1935), miniature train.

806. Brown v. Fifteenth District Agricultural Fair Assn., 159 Cal. App.2d 93, 323 P.2d 131 (1958), street connecting entertainment areas at fair grounds.

807. Pianka v. State of California, 46 Cal.2d 208, 293 P.2d 458 (1956), public shooting exhibition designed to attract recruits.

808. Plaza v. City of San Mateo, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

809. Muses v. Housing Authority of City & County of San Francisco, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

810. Beard v. City & County of San Francisco, 79 Cal. App. 2d 753, 180 P.2d 744 (1947). See also Bloom v. City & County of San Francisco, 64 Cal. 503, 3 Pac. 129 (1884). But cf. Madison v. City & County of San Francisco, 106 Cal. App.2d 232, 234 P.2d 995 (1951).

811. General Petroleum Corp. v. City of Los Angeles,22 Cal. App.2d 332, 70 P.2d 998 (1937).

812. Sincerney v. City of Los Angeles, 53 Cal. App. 440, 200 Pac. 380 (1921); Nourse v. City of Los Angeles, 25 Cal. App. 384, 143 Pac. 801 (1914). See also, Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651 (1937).

813. See cases cited supra, note 805.

814. See Nourse v. City of Los Angeles, 25 Cal. App. 384, 143 Pac. 801 (1914). Cf. Ritterbusch v. City of Pittsburg, 205 Cal. 84, 269 Pac. 930 (1928). Providing a water supply and hydrants for the purpose of fire protection, however, is clearly a governmental function under the cases. Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980 (1952).

815. Dineen v. City & County of San Francisco, 38 Cal. App.2d 486, 101 P.2d 736 (1940).

816. Muses v. Housing Authority of City & County of San Francisco, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

817. In Dineen v. City & County of San Francisco, 38 Cal. App.2d 486, 494, 101 P.2d 736, 740 (1940), the court, in dictum, expressed the view that "if a governmental agency permits part or whole of a building to be used for other than governmental purposes, then the agency is generally liable in tort to any person who is injured by reason of the negligent maintenance or operation of the building, if such injury occurs in the common hallways, passages, or yard of such building . . .". The court actually held, however, that the defendant was immune under the facts, since the plaintiff's injury had occurred in a portion of the building (court-room) used exclusively for governmental purposes.

818. Barrett v. City of San Jose, 161 Cal. App.2d 40, 325 P.2d 1026 (1958).

819. Burnett v. City of San Diego, 127 Cal. App.2d 191, 273 P.2d 345 (1954).

820. McKinney v. City & County of San Francisco, 109 Cal. App.2d 844, 241 P.2d 1060 (1952).

821. Meyer v. City & County of San Francisco, 9 Cal. App.2d 361, 49 P.2d 893 (1935).

822. Plaza v. City of San Mateo, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

823. Rhodes v. City of Palo Alto, 100 Cal. App.2d 336, 223 P.2d 639 (1950). See also, Sanders v. City of Long Beach, 54 Cal. App.2d 651, 129 P.2d 511 (1942); Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917).

824. Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3 (1953).

825. In Rhodes v. City of Palo Alto, 100 Cal. App.2d 336, 223 P.2d 639 (1950), plaintiff was injured in a parking lot adjacent to a community theatre in a public park, to which plaintiff was going at the time of the injury. Conceding that the same parking lot was also used by persons coming to the park to participate in the "governmental" activities conducted there, the court concluded that the plaintiff's purpose to attend the "proprietary" community theatre controlled the result: "The fact that the parking lot may also be used by persons using governmental facilities operated by appellant in the very park in which the Community Theater is located, would not seem to alter its proprietary character when used by patrons of the theater." Id. at 342, 223 P.2d at 643.

826. Reflections of this view may be found in many of the cases

which treat the term, "proprietary", as synonymous with "commercial". See cases cited, supra, note 802. Note especially the revealing statement in People v. Superior Court, 29 Cal.2d 754, 762, 178 P.2d 1, 6 (1947): "The considerations of an asserted subversion of public interests by embarrassments, difficulties and losses, which developed the doctrine of nonliability of the sovereign in former times, are no longer persuasive in relation to an industrial or business enterprise [i.e. the California State Belt Railroad being operated as a public carrier for hire around the San Francisco water-front] which by itself may be looked to for the discharge of all appropriate demands and expenses growing out of operation. . . . The additional fact that the expense of operation, including damages for negligent operation, is primarily a burden on industry and commerce, and the fact that the business of transportation for hire is usually undertaken by private individuals or corporations and not by government, support the conclusion . . ." that the operation of the railroad was proprietary. (Emphasis supplied.)

827. Perhaps some of the cases dealing with operation of parks and recreational facilities therein, for which nominal fees are sometimes charged, and which are probably frequented by only a fraction of the population (largely by children), may be understood from this viewpoint. See, e.g. Barrett v. City of San Jose, 161 Cal. App.2d 40,

325 P.2d 1026 (1958), municipal swimming pool; Carr v. City & County of San Francisco, 170 Cal. App.2d 48, 338 P. 2d 509 (1959), merry-go-round. Suggestive, also, is the following statement from Kellar v. City of Los Angeles, 179 Cal. 605, 610, 178 Pac. 505, 507, (1919), where, in holding that a summer camp for children was a governmental activity, the court, after emphasizing the fact that the camp primarily promoted the health and recreation of children, pointed out that: "By reason of its remoteness from the city it is essential to its enjoyment by the children that board and lodging be furnished to those enjoying the privileges thus afforded . . . .

That a small charge is made upon those children going to and staying at the camp for the purpose of assisting in defraying the cost of maintenance of such children while at the camp does not change the situation." By way of contrast, observe the language of the court in Plaza v. City of San Mateo, 123 Cal. App.2d 103, 266 P.2d 523 (1954), in holding that a public golf course was a proprietary activity: "A golf course does not serve the public generally but only those who play the game . . . . Many private golf courses are maintained, some for profit, and others as an adjunct to private clubs or associations. . . . It is actually in competition with other courses, and in its clubhouse commercial enterprises usually are carried on where commercial rates are charged for commodities and services."

828. See, e.g., Burnett v. City of San Diego, 127 Cal. App.2d 191, 192-93, 273 P.2d 345, 346 (1954), where the court, without analysis or explanation, held that the maintenance of a fine arts gallery was clearly a governmental function, but where, in the court's statement of facts the following significant circumstances are emphasized: "The accident occurred on the premises of the Fine Arts Gallery in Balboa Park, which was built by private persons on land owned by the city and turned over to the city as a gift. The gallery was being used by the Fine Arts Society, for educational and cultural purposes, under an informal agreement with the city. Under this arrangement the city budgeted a certain amount for the operations of the Society, and the Society's director and curator and all of the maintenance men and guards, with one exception, were listed as employees of the city and paid by the city." (Emphasis supplied.)

829. See, e.g., Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960), enforcement of building and safety regulations; Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960), administration of public assistance programs by county Department of Charities; Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960), administration of public health services by a county for a city under contract; Seybert v. County of Imperial, 162 Cal. App.2d 209, 327 P.2d 560 (1958), regulation of

speed boats using county recreational lake; Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 999 (1958), enforcement of municipal electrical building code by permit system. Cases of this type often reflect the implications of the distinction, often recognized in other jurisdictions, between misfeasance and nonfeasance. See discussion in text, infra, pp. 339-47.

830. Muskopf v. Corning Hospital District, 55 A.C. 216, 226, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

831. Muskopf v. Corning Hospital District, 55 A.C. 216, 224, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

832. To the same effect, see Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625 (1945); Hassell v. City & County of San Francisco, 11 Cal.2d 168, 78 P.2d 1021 (1938); Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083 (1901).

833. Davis v. City of Sacramento, 59 Cal. 596 (1881).

834. Bloom v. City & County of San Francisco, 64 Cal. 503, 3 Pac. 129 (1884).

835. Id. at 504, 3 Pac. at 129. Emphasis supplied.

836. The quoted language from Bloom v. City & County of San Francisco, supra note 835, has occasionally led courts to

the conclusion that the true basis of liability in that case was not nuisance but negligence in a proprietary capacity. See, e.g., Beard v. City & County of San Francisco, 79 Cal. App.2d 753, 756-57, 180 P.2d 744, 746 (1947); and cf. Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917). On the other hand, the Bloom case has been authoritatively cited as one of the leading decisions on nuisance liability as an exception to the governmental immunity doctrine. See, e.g., Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958); Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

837. Conniff v. City & County of San Francisco, 67 Cal. 45, 49, 7 Pac. 41, 44 (1885).

838. For a full discussion of inverse condemnation, see the text, supra, pp. 109-19.

839. See, e.g., Tyler v. County of Tehama, 109 Cal. 618, 42 Pac. 240 (1895); Stanford v. City & County of San Francisco, 111 Cal. 198, 43 Pac. 605 (1896); Guerkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570 (1896).

840. In addition to the cases cited infra, notes 841 and 842, see Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac. 557 (1897), pollution of stream by municipal sewage. See also, to the same effect, People ex rel Lind v. City of San Luis Obispo, 116 Cal. 617, 48 Pac. 723 (1897); People v. City

of Reedley, 66 Cal. App. 409, 226 Pac. 408 (1924).

841. Spangler v. City & County of San Francisco, 84 Cal. 12, 23 Pac. 1091 (1890), negligent maintenance of sewer line; Kramer v. City of Los Angeles, 147 Cal. 668, 82 Pac. 334 (1905), negligent maintenance of storm drain; Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720, 317 P.2d 33 (1957), negligent maintenance of sewer outfall line; Mulloy v. Sharp Park Sanitary District, 164 Cal. App.2d 438, 330 P.2d 441 (1958), negligent inspection and maintenance of sewer lines. See also, Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959), negligent maintenance of rubbish dump; Bright v. East Side Mosquito Abatement District, 168 Cal. App.2d 7, 335 P.2d 527 (1959), negligent mosquito abatement activities.

842. Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458 (1892), obstruction of natural watercourse; Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437 (1895), sewage disposal system; Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083 (1901), open sewer ditch; Dick v. City of Los Angeles, 34 Cal. App. 724, 168 Pac. 703 (1917), obstruction of watercourse; Weisshand v. City of Petaluma, 37 Cal. App. 296, 174 Pac. 955 (1918), obstruction of watercourse; Hassell v. City & County of San Francisco, 11 Cal.2d 168, 78 P.2d 1021 (1938), comfort

station in public park; Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625 (1945), vacation and barricading of public road; Ingram v. City of Gridley, 100 Cal. App.2d 815, 224 P.2d 798 (1950), pollution of water in stream by discharge of sewage therein. See also, Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225 (1926).

843. Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958); Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); Zeppi v. State of California, 174 Cal. App.2d 484, 345 P.2d 33 (1959); Mulloy v. Sharp Park Sanitary District, 164 Cal. App.2d 438, 330 P.2d 441 (1958). See also, Womar v. City of Long Beach, 45 Cal. App.2d 643, 114 P.2d 704 (1941).

844. Cal. Civil Code § 3479 provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

845. 309 P.2d 844 (D.C.A. 3, 1957), vacated and superseded by 49 Cal.2d 815, 323 P.2d 85 (1958).

846. Of the nuisance cases cited supra, notes 832-842, the only one which may have involved personal injuries was Bloom v. City & County of San Francisco, 64 Cal. 503, 3 Pac. 129 (1884). Although the complaint alleged physical illness of the plaintiffs resulting from the nuisance complained of, the reported opinion is so brief that it is impossible to ascertain therefrom whether the damages awarded were for such physical injuries or for impairment of value of the land due to its being rendered uninhabitable. Also, that case may not, in fact, have been decided on a nuisance theory. See note 836, supra.

847. Although wrongful death has been regarded as a form of action for injuries to property for purposes of survival of actions, see Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946), it is not deemed to be within the rationale of inverse condemnation. Brandenburg v. Los Angeles County Flood Control District, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

848. See discussion in text, supra, pp. 109-112.

849. Vater v. County of Glenn, 309 P.2d 844 (1957).

850. Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958).

851. Bright v. East Side Mosquito Abatement District, 168

Cal. App.2d 7, 335 P.2d 527 (1959), holding that good cause of action for personal injuries was stated on nuisance theory against district engaged in clearly governmental function. See also, Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959), conceding that nuisance theory is appropriate in personal injury action, but holding that no nuisance was pleaded in fact; Zeppi v. State of California, 174 Cal. App.2d 484, 345 P.2d 33 (1959), semble.

852. Teilheit v. County of Santa Clara, 149 Cal. App.2d 305, 308 P.2d 356 (1957).

853. Bright v. East Side Mosquito Abatement District, 168 Cal. App.2d 7, 335 P.2d 527 (1959).

854. Anderson v. County of Santa Cruz, 174 Cal. App.2d 151, 344 P.2d 421 (1959). See also, Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951).

855. See Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959).

856. See Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), as discussed in the text, supra, pp. 115-116.

857. See Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779 (1945); Selby v. County of Sacramento, 139 Cal. App.2d 94, 294 P.2d 508 (1956). Cf. Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955).

858. Mulloy v. Sharp Park Sanitary District, 164 Cal. App.2d 438, 330 P.2d 441 (1958); Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720, 317 P.2d 33 (1957); Kramer v. City of Los Angeles, 147 Cal. 668, 82 Pac. 334 (1905); Spangler v. City & County of San Francisco, 84 Cal. 12, 23 Pac. 1091 (1890).

859. Accord: Prosser, Law of Torts 779 (2 ed. 1955).

860. Cal. Civil Code § 3482.

861. Hassell v. City & County of San Francisco, 11 Cal.2d 168, 79 P.2d 1021 (1938); Bright v. East Side Mosquito Abatement District, 168 Cal. App.2d 7, 335 P.2d 527 (1959); Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959); Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

862. See the cases cited, supra, notes 833, 834, 837, 840, 841 and 842.

863. See the discussions in the text of Public Liability Act,

pp. 41 - 52, supra, statutory liabilities in weed abatement work, pp. 60 - 60a, supra; damages resulting from public improvement projects, pp. 80 - 103. supra; Compare the statutory immunities from liability discussed at pp. 215 - 239, supra.

864. See Ruppe v. City of Los Angeles, 186 Cal. 400, 199 Pac. 496 (1921), city held liable for assault and battery committed by water and power department employee in course of duties; Bertone v. City & County of San Francisco, 111 Cal. App.2d 579, 245 P.2d 29 (1952), city held liable for conversion of customer's funds deposited in trust with city water department as security for payment of water charges which were in dispute.

865. Chapelle v. City of Concord, 144 Cal. App.2d 822, 301 P.2d 968 (1956). See also, Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954).

866. Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545, 232 P.2d 26 (1951). See also, Wood v. Cox, 10 Cal. App.2d 652, 52 P.2d 565 (1935).

867. Chapelle v. City of Concord, 144 Cal. App. 2d 822, 301 P.2d 968 (1956); Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545, 232 P.2d 26 (1951). See also, Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954).

868. Norton v. Hoffman, 34 Cal. App.2d 189, 93 P.2d 250 (1939).

869. Lertora v. Riley, 6 Cal.2d 171, 57 P.2d 140 (1936).

870. See Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 999 (1958), allegedly wilful and malicious refusal to city officers to issue electrical service permit; Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960), alleged malicious conspiracy to deprive owner of use of building. See also, Wood v. Cox, 10 Cal. App.2d 652, 52 P.2d 565 (1935), malicious failure to provide medical assistance to jail inmate.

871. See Kaufman v. Tomich, 208 Cal. 19, 280 Pac. 130 (1929); Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50 (1912); Black v. Southern Pacific Co., 124 Cal. App. 321, 12 P.2d 981 (1932).

872. 163 Cal. 782, 789, 127 Pac. 50, 53 (1912). Emphasis supplied.

873. The action in Perkins v. Blauth, supra note 872, was brought solely against the officers of a reclamation district, but the district itself had not been made a party. The opinion merely affirms a judgment holding such officers liable for injuries sustained by plaintiff's real property as a result of the negligent performance by said officers of their duties.

874. In support of the statement quoted in the text, supra, the court in Perkins cites Brownell v. Fisher, 57 Cal. 150 (1880) and DeBaker v. Southern California Railway Co., 106 Cal. 257, 39 Pac. 610 (1895). The Brownell case involved only the liability of public officers and not of the employing public entity, for an unauthorized trespass upon real property; and nothing in the court's opinion therein suggests that the entity itself would be liable. DeBaker was an action for injury to land resulting from a diversion of the natural flow of water by a levee constructed by the defendant city. The court therein, in dictum, intimated that "if the work was inherently and according to its plan and location a dangerous obstruction to the river, such as ordinary prudence should have guarded against," id. at 282, 39 Pac. at 615, the city would be liable provided the work was done in the city's proprietary capacity. The opinion is quite explicit, however, that there would be no liability, except possibly in inverse condemnation, if the improvement had been constructed in a governmental capacity. Manifestly, neither of these cases can be regarded as laying down any rule of common-law tort liability arising from inherently wrong acts in the performance of governmental functions.

875. The consistent development in the later cases of the notion that Perkins v. Blauth was merely defining an

aspect of inverse condemnation may be traced in Weisshand v. City of Petaluma, 37 Cal. App. 296, 174 Pac. 955 (1918); Newberry v. Evans, 76 Cal. App. 492, 245 Pac. 227 (1926); Kaufman v. Tomich, 208 Cal. 19, 280 Pac. 130 (1929); Marin Municipal Water District v. Peninsula Paving Co., 34 Cal. App.2d 647, 94 P.2d 404 (1939); Archer v. City of Los Angeles, 19 Cal.2d 19, 36-37, 119 P.2d 1, 11-12 (1941), per Carter, J., dissenting; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947); Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

876. The only significant deviation from the indicated pattern is in the case of Black v. Southern Pacific Co., 124 Cal. App. 321, 12 P.2d 981 (1932), where, in casual and unnecessary dictum, the court suggested that the "inherently wrong act" theory of liability might, in an appropriate case, be applicable to a personal injury action. It is well settled, however, that the concept of inverse condemnation (which was fully established as the underlying rationale of the "inherently wrong act" theory at the time of the Black decision, see cases cited in note 875, supra) is inapplicable to personal injury actions. See text, supra, p. 111, note 384.

877. Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal. App.2d 478, 485, 141 P.2d 46 (1943). To the

same effect, see Newberry v. Evans, 76 Cal. App. 492, 503, 245 Pac. 227, 231 (1926), "the acts of the defendants. . . constituted a trespass for which they were severally and jointly liable"; Stanford v. City & County of San Francisco, 111 Cal. 198, 204, 43 Pac. 605, 606-07 (1896), quoting from a Michigan case, with approval, wherein the reknowned Chief Justice Cooley stated, in part, that municipal corporations have no immunity from liability "'where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him'"; Coniff v. City & County of San Francisco, 67 Cal. 45, 49, 7 Pac. 41, 44 (1885), affirming municipal liability for a "flagrant trespass".

878. See Los Angeles Brick & Clay Products Co. v. City of Los Angeles, supra, note 877, at 485-86, 141 P.2d at 50 , in which the court predicates the city's liability in trespass upon "either the state or the federal Constitution", and concludes that the facts establish the existence of a nuisance per se; Newberry v. Evans, supra note 877, at 502, 245 Pac. at 231, where the court quotes Cal. Const. art. I, § 14 as the basis upon which the district's liability for "trespass" rested; Stanford v. City & County of San Francisco, supra note 877, at 204, 43 Pac. at 607, where the quoted language of Chief Justice Cooley, phrased in the terminology of "trespass", concludes by pointing out that liability in such cases flows from the fact that a municipal corporation has no authority "' to

appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of its streets or buildings, or by flooding it so as to interfere with the owner's possession"; and Coniff v. City & County of San Francisco, supra note 877, at 49, 7 Pac. at , where the court further described the "trespass" in question as "amounting to a taking" of plaintiff's land as well as a nuisance, and cites as determinative the inverse condemnation decision of Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166, 20 L. Ed. 557 (1872).

879. See Bertone v. City & County of San Francisco, 111 Cal. App.2d 579, 245 P.2d 29 (1952); Leach v. Dinsmore, 22 Cal. App.2d Supp. 735, 65 P.2d 1364 (1937); Union Bank & Trust Co. v. County of Los Angeles, 2 Cal. App.2d 600, 38 P.2d 442 (1934); Spencer v. City of Los Angeles, 180 Cal. 103, 179 Pac. 163 (1919); Trower v. City & County of San Francisco, 157 Cal. 762, 109 Pac. 617 (1910); Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150 (1899); Herzo v. City of San Francisco, 33 Cal. 134 (1867); Pimental v. City of San Francisco, 21 Cal. 351 (1863); Argenti v. City of San Francisco, 16 Cal. 255 (1860). Contra: Municipal Bond Co. v. City of Riverside, 138 Cal. App. 267, 32 P.2d 661 (1934).

880. See, e.g., Union Bank & Trust Co. v. County of Los Angeles, 2 Cal. App. 2d 600, 610, 38 P.2d 442, 446 (1934), holding that in an action for money had and received, the liability

of the county "can only be based on allegations and proof of receipt [of the plaintiff's money] or a conversion thereof to the use or benefit of the county"; Herzo v. City of San Francisco, 33 Cal. 134, 147 (1867), holding that to be held liable in assumpsit for money paid by plaintiff in void purchase of city property, the city "must have wrongfully converted it to her own use" by an appropriation of the money for municipal expenses. The underlying restitutionary theory of the cases is set forth at length in Pimental v. City of San Francisco, 21 Cal. 351, 362 (1863), "If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it. . . . The legal liability springs from the moral duty to make restitution." See, to the same effect, Argenti v. City of San Francisco, 16 Cal. 255, 282-283 (1860).

881. See Fountain v. City of Sacramento, 1 Cal. App. 461, 82 Pac. 637 (1905).

882. Touchard v. Touchard, 5 Cal. 306, 307 (1855), holding that in all matters of contract a municipal corporation "must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons"; Pacific Finance Co. v. City of Lynwood, 114 Cal. App. 509, 300 Pac. 50, 1 P.2d 520 (1941); Denio v. City of Huntington Beach, 22 Cal.2d 580, 140 P.2d 392 (1943).

883. See, e.g., Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34 (1942); Dynamic Industries Co. v. City of Long Beach, 159 Cal. App.2d 294, 323 P.2d 768 (1958).

884. Muskopf v. Corning Hospital District, 55 Cal.2d , , 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

885. For a discussion of the "discretionary act" immunity of public officers, see the text infra, pp.318-39.

886. See, e.g., Lipman v. Brisbane Elementary School District, 55 Cal.2d , , 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961), where Mr. Chief Justice Gibson states: "In Muskopf . . . we held that the rule of governmental immunity may no longer be invoked to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a public body has no immunity where the discretionary conduct of governmental officials is involved." It will be observed that the Court, in carefully chosen language, predicates its rules of liability and immunity squarely upon the noted distinction between "ministerial" and "discretionary" conduct; and that it avoids entirely any attempt to rely on the differences between "negligent" and "intentional" torts.

887. See, e.g., the Public Liability Act of 1923, now Cal. Govt.

Code § 53051, discussed in the text, supra, pp. 41-52; Cal. Vehicle Code § 17001, discussed supra pp. 32-37; Cal. Educ. Code § 903, discussed supra pp. 38-40; and other statutory provisions discussed supra, pp. 53-70.

888. See, e.g., the numerous statutes requiring public entities to pay tort judgments against their personnel, "except in case of actual fraud or actual malice", discussed supra pp. 63-64; statutes limiting liability of certain public officers to their own individual acts of dishonesty or crime, discussed supra pp. 175-77.

889. Sherbourne v. County of Yuba, 21 Cal. 113 (1862).

890. Id. at 115.

891. See cases cited infra, notes 892-96.

892. Crowell v. Sonoma County, 25 Cal. 313, 316 (1864). See also, to the same effect, Hoffman v. County of San Joaquin, 21 Cal. 426 (1863).

893. Ibid.; see also, Winbigler v. City of Los Angeles, 45 Cal. 36 (1872); Hoagland v. City of Sacramento, 52 Cal. 142 (1877).

894. See Tranter v. City of Sacramento, 61 Cal. 271 (1882); Barnett v. County of Contra Costa, 67 Cal. 77, 7 Pac. 177 (1885).

895. Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364 (1889). Works, J., joined by Beatty, C. J., filed a dissent in this case pointing out explicitly that the cases relied on by the majority were distinguishable, and that the negligent act in the instant case was a direct act of the city itself. See also, Arnold v. City of San Jose, 81 Cal. 618, 22 Pac. 877 (1889), in which two of three justices, sitting in department, refused to join in an opinion expressly rejecting the distinction between liability where the duty was imposed by statute on the entity itself, and nonliability where the duty was on designated officers, but concurred in a judgment of nonliability solely by compulsion of the Chope case, supra.

896. Sievers v. City & County of San Francisco, 115 Cal. 648, 47 Pac. 647 (1897).

897. See, e.g., the approving quotations from Dillon, Municipal Corporations (Vol.2 (3rd ed. 1881) §997 as contained in Barnett v. County of Contra Costa, 67 Cal. 77, 7 Pac. 177 (1885). The influence of judicial adoption of the distinction between "governmental" and "proprietary" activities in other jurisdictions may be observed in the opinions in Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760 (1906) and Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917).

898. See Davoust v. City of Alameda, 149 Cal. 69, 84 Pac. 760 (1906), reinforced by Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917).

899. Davoust v. City of Alameda, supra note 898.

900. Perkins v. Blauth, 163 Cal. 782, 789, 127 Pac. 50, 53 (1912).

901. See Elliott v. County of Los Angeles, 183 Cal. 472, 191 Pac. 899 (1920); Union Bank & Trust Co. v. County of Los Angeles, 2 Cal. App.2d 600, 38 P.2d 442 (1934); Leach v. Dinsmore, 22 Cal. App.2d Supp. 735, 65 P.2d 1364 (1937).

902. Sacramento & San Joaquin Drainage District v. Superior Court, 196 Cal. 414, 238 Pac. 687 (1925); cases cited infra, notes 903 and 904. See also, 27 Ops. Cal. Atty. Gen. 338 (1956).

903. See Pickens v. Johnson, 42 Cal.2d 399, 267 P.2d 801 (1954).

904. See Martin v. Superior Court, 194 Cal. 93, 227 Pac. 762 (1924), jury commissioner of Superior Court; Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082 (1902) and Stevens v. Truman, 127 Cal. 155, 59 Pac. 397 (1899), Superior Court official reporter; Noel v. Lewis, 35 Cal. App. 658, 170 Pac. 857 (1917), secretary of Superior Court; Fewel v. Fewel, 23 Cal.2d 431, 144 P.2d 592 (1943), domestic relations investigator.

905. Dineen v. City & County of San Francisco, 38 Cal. App.2d 486, 490, 101 P.2d 736,740 (1940). Emphasis added.

906. Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302 (1910).

907. McNeil v. Board of Retirement, 51 Cal.2d 278, 284, 332 P.2d 281,283 (1958), holding that in performing reportorial duties outside of the courtroom, such as in the transcribing of grand jury proceedings or coroner's inquests, the reporter may be acting as an independent contractor, since "a contract is made every time a reporter responds to a call for [such] service".

908. Villanazul v. City of Los Angeles, 37 Cal.2d 718, 235 P.2d 16 (1951), holding that a marshal of the Los Angeles Municipal Court was a county employee for the purpose of imputing tort liability under Cal. Veh. Code § 400 (now Cal. Veh. Code § 17001); and opining in dictum that the same result would obtain under the reorganized inferior court system with respect to a marshal of the Municipal Court for the Los Angeles Judicial District.

909. See 27 Ops. Cal. Atty. Gen. 338 (1956) and authorities there discussed. But cf. 20 Ops. Cal. Atty. Gen. 78 (1952). It is to be noted that in Villanazul v. City of Los Angeles, supra note 908 at 722, 235 P.2d at 19 , the Supreme Court expressly conceded that "a municipal court

is a part of the judicial system of the state, and the constitution or control of such courts. . . is a state rather than a municipal affair".

910. The Joint Exercise of Powers Act, Cal. Govt. Code §§ 6500-6513, authorizes public entities to create boards or commissions, for the purpose of exercising some power or powers common to the contracting parties, which are designated by law as agencies "separate from the parties to the agreement", id. § 6507, and which may be authorized to incur liabilities which are not the liability of the contracting entities, id. § 6508. The statutory language of the Act is sufficiently broad and non-specific as to suggest the possibility that it may be utilized in certain cases for the purpose of discharging public responsibilities without incurring any risk of tort liability. Even apart from any purpose to escape tort liability, such agreements may possibly have that effect anyway, at least in some instances.

911. Counties operating under freeholders' charters are authorized, pursuant to the provisions of Cal. Const. art. XI § 7-1/2, to discharge certain municipal functions of cities within their boundaries under specified conditions. A description of the so-called "Lakewood Plan", under which many types of municipal services are rendered pursuant to contractual arrangement by

Los Angeles County is contained in an excellent Comment, 73 Harv. L. Rev. 526, 545-556 (1960), pointing out that the problem of tort liability thereunder is affected by a standard "save-harmless" clause. See also, Los Angeles County Chief Administrative Offices and Lakewood City Administrator, The Lakewood Plan (Jan. 1956, mimeo.).

912. See Handler v. Board of Supervisors, 39 Cal.2d 282, 286, 246 P.2d 671,674 (1952), holding that special assistants employed to perform expert services for the District Attorney were "neither officers nor employees, nor do they hold a position with the county. They are more akin to independent contractors." To the same effect, see Kennedy v. Ross, 28 Cal.2d 569, 170 P.2d 904 (1946); City & County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036 (1941). Decisions along these lines, it should be noted, have typically classified such specially employed personnel as not in an officer or employee status for the purpose of determining whether their employment was a violation of civil service provisions. For the purpose of tort liability, however, it could well be argued that such persons are servants of the employing entity and hence within the rationale of respondeat superior. For example, medical services and care may be legally provided in a county hospital by personnel engaged pursuant to contract without violating civil service requirements, see County of Los Angeles v. Ford, 121

Cal. App.2d 407, 263 P.2d 638 (1953); but whether the employment is by separate contract or by civil service recruitment would seem to be not necessarily relevant to the question whether the county is liable for the negligence of such medical personnel under Muskopf, where in fact they act under the supervision and direction of county officials and in all other respects display the general attributes of "employees".

913. The "independent contractor" classification, it should be noted, does not always lead to a holding of nonliability of the employing entity. See 2 Harper & James, The Law of Torts, § 26.11 (1956).

914. See, e.g., the typical provision found in the Mariposa County Water Agency Act, § 8: "All officers of the county, and their assistants, deputies, clerks and employees, shall be ex officio officers, assistants, deputies, clerks and employees respectively of the agency. . . . "

915. Union Bank & Trust Co. v. County of Los Angeles, 2 Cal. App.2d 600, 611, 38 P.2d 442, 447 (1934); see also, Leach v. Dinsmore, 22 Cal. App.2d Supp. 735, 65 P.2d 1364 (1937).

916. Lipman v. Birsbane Elementary School District, 55 Cal.2d , , 11 Cal. Rptr. 97, 100, 359 P.2d 465, 468 (1961).

917. The leading California cases are Healdsburg Electric Light & Power Co. v. City of Healdsburg, 5 Cal. App. 558, 90 Pac. 955 (1907) and Foxen v. City of Santa Barbara, 166 Cal. 77, 134 Pac. 1142 (1913). See also, the other cases cited infra, notes 918-929.

918. Ravettino v. City of San Diego, 70 Cal. App.2d 37, 160 P.2d 52 (1945).

919. See, e.g., Tyler v. County of Tehama, 109 Cal. 618, 625, 42 Pac. 240,243 (1895), holding that there was liability on the theory of inverse condemnation, where diversion of water by faulty placement of a bridge had caused a washing away of plaintiff's land; but opining that "if the board of supervisors had no authority under any circumstances to erect a bridge, respondent's contention would have a very different basis". See also, General Petroleum Co. v. City of Los Angeles, 22 Cal. App.2d 332, 70 P.2d 998 (1937), indicating that ultra vires is available as a defense only where properly so pleaded.

920. See San Vicente Nursery School v. County of Los Angeles, 147 Cal. App.2d 79, 304 P.2d 837 (1956); Upton v. City of Antioch, 171 Cal. App.2d 858, 341 P.2d 756 (1959).

921. Healdsburg Electric Light & Power Co. v. City of Healdsburg, 5 Cal. App. 558, 90 Pac. 955 (1907).

922. Ravettino v. City of Los Angeles, 70 Cal. App.2d 37, 160 P.2d 52 (1945).

923. This rationale for the rule has been expounded, somewhat unpersuasively, by David, Municipal Tort Liability in California, 7 So. Calif. L. Rev. 48, 70-71 (1933).

924. See Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34 (1942); Reams v. Cooley, 171 Cal. 150, 152 P.2d 293 (1915).

925. Lertora v. Riley, 6 Cal.2d 171, 57 P.2d 140 (1936).

926. Calkins v. Newton, 36 Cal. App.2d 262, 97 P.2d 523 (1939), followed in Latham v. Santa Clara County Hospital, 104 Cal. App.2d 336, 231 P.2d 513 (1951) and Madison v. City & County of San Francisco, 106 Cal. App.2d 232, 234 P.2d 995, 236 P.2d 141 (1951).

927. Foxen v. City of Santa Barbara, 166 Cal. 77, 134 Pac. 1142 (1913).

928. See Dunbar v. The Alcalde & Ayuntamiento of San Francisco, 1 Cal. 355 (1850), power to suppress fires did not authorize or include power to blow up a sound building whose destruction by the fire was not inevitable, as a means of preventing further spread of the blaze, hence city not liable for the ultra vires act; Herzo v. City of

San Francisco, 33 Cal. 134 (1867), conversion of citizen's moneys by city council's act of appropriation and expenditure for public purposes held not a basis of tort recovery against the city, where appropriation ordinance was not published as required by law and hence never legally authorized the conversion; Powell v. City of Los Angeles, 95 Cal. App. 151, 272 Pac. 336 (1928), illegal retention of street assessment bonds and money held ultra vires and hence not a basis of liability of city.

929. Ruppe v. City of Los Angeles, 186 Cal. 400, 403, 199 Pac. 496,497 (1921).

930. See, generally, 2 Harper & James, The Law of Torts 1374-1394 (1956), and cases there cited.

931. See, e.g., the application of respondeat superior in a private tort case by reliance on the similar result reached in an analogous public entity case. Fields v. Saunders, 29 Cal.2d 834, 180 P.2d 684 (1947), citing and following Ruppe v. City of Los Angeles, supra note 929. The liberal interpretation of the "scope of authority" test in private employment cases, see Monty v. Orlandi, 169 Cal. App.2d 620, 337 P.2d 861 (1959) obtains also in official immunity cases. Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957); White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

932. Recent studies have indicated that the doctrine of official immunity has been expanded, in both scope and coverage, by the California cases far beyond the limited degree to which it has been accepted in any other state, although the development in the Federal cases appears to match that in California. See: Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 346 (1959), concluding that "California stands alone among the states as having a substantial body of case law which adopts the federal courts' approach of extended immunity to administrative officers." See, generally, Davis, Administrative Officers" Tort Liability, 55 Mich. L. Rev. 201 (1956); Jennings, Tort Liability of Administrative Officers, 21 Minn. L. Rev. 263 (1936).

933. Lipman v. Brisbane Elementary School District, 55 Cal.2d ___, ____, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

934. 6 Cal. 94 (1856)

935. Ibid. at 95. It should be noted that although the second count of the complaint alleged that the defendants had acted maliciously, the first count omitted any such charge and was founded solely on the theory that the Board's decision had been erroneous and in that sense wrongful. From the reporter's summary of the arguments of counsel on the appeal, it appears that the trial court had rendered judgment for the plaintiff solely on the first

count; and this judgment, involving only findings of error without malice, was the one reversed by the Supreme Court.

936. Turpen v. Booth, 56 Cal. 65 (1880); Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933).

937. Pickett v. Wallace, 57 Cal. 555 (1881), Justice of Supreme Court; Wyatt v. Arnot, 7 Cal. App. 221, 94 Pac. 86 (1907), judge of Superior Court; Platz v. Marion, 35 Cal. App. 241, 169 Pac. 697 (1917), justice of the peace; Ceinar v. Johnston, 134 Cal. App. 166, 25 P.2d 28 (1933), justice of the peace. More recent cases involving immunity of judicial officers include: Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960), judge of Superior Court; Haase v. Gibson, 179 Cal. App. 2d 259, 3 Cal. Rptr. 808 (1960), Chief Justice of Supreme Court; Reverend Mother Pauline v. Bray, 168 Cal. App.2d 384, 335 P.2d 1018 (1959), Justice of District Court of Appeal; Frazier v. Moffatt, 108 Cal.App.2d 379, 239 P.2d 123 (1951), justice of the peace; Perry v. Meikle, 102 Cal. App.2d 602, 228 P.2d 17 (1951), judge of Superior Court; Prentice v. Bertken, 50 Cal. App.2d 344, 123 P.2d 96 (1942), justice of the peace; Malone v. Carey, 17 Cal. App.2d 505, 62 P.2d 166 (1936), city judge.

938. In the very next decision following Downer v. Lent, supra note 934, the immunity doctrine was applied to grand jurors who were alleged to have maliciously indicted plaintiff without probable cause. Turpen v. Booth, 56 Cal. 65 (1880). The following year, the same result was reached where a

Justice of the Supreme Court was alleged to have falsely and maliciously adjudged plaintiff guilty of contempt. Pickett v. Wallace, 57 Cal. 555 (1881). Both of these decisions relied heavily upon the opinion of the United States Supreme Court in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872), wherein the Court, per Mr. Justice Field, concluded that judges "are not liable to civil actions for their judicial acts, even when such acts . . .are alleged to have been done maliciously or corruptly." See also the cases cited below, notes 976-80.

939. See, e.g., Ballerino v. Mason, 83 Cal. 447, 23 Pac. 530 (1890), tax assessor held immune for wrongful assessment; Gridley School District v. Stout, 134 Cal. 592, 66 Pac. 785 (1901), school superintendent held immune for wrongful reapportionment of school funds. See also, cases cited below, notes 942-60.

940. See, e.g., South v. County of San Benito, 40 Cal. App. 13, 180 Pac. 354 (1919), negligent failure to maintain public road; Jones v. Richardson, 9 Cal. App.2d 657, 50 P.2d 810 (1935), allegedly wrongful procurement of appointment of a receiver in action for specific performance of a deed of trust brought by Building & Loan Commissioner. See also, cases cited below, notes 961-70.

941. See cases cited supra, note 937.

942. Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960); Dawson v. Rash, 160 Cal. App. 2d 154, 324 P.2d 959 (1958); Dawson v. Martin, 150 Cal. App.2d 379, 309 P.2d 915 (1957); White v. Briniman, 23 Cal. App.2d 307, 73 P.2d 254 (1937).

943. Allen v. Superior Court, 171 Cal. App.2d 444, 340 P.2d 1030 (1959); Hancock v. Burns, 158 Cal. App.2d 785, 323 P.2d 456 (1958).

944. White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951).

945. Levine v. Jessup, 161 Cal. App.2d 59, 326 P.2d 238 (1958); Dawson v. Martin, 150 Cal. App.2d 379, 309 P.2d 915 (1957); South v. County of San Benito, 40 Cal. App. 13, 180 Pac. 354 (1919).

946. Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

947. Prentice v. Bertken, 50 Cal. App.2d 344, 123 P.2d 96 (1942); Norton v. Hoffman, 34 Cal. App.2d 189, 93 P.2d 250 (1939); White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937); Pearson v. Reed, 6 Cal. App.2d 277, 44 P.2d 592 (1935).

948. Tomlinson v. Pierce, 178 Cal. App.2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App.2d 67, 336 P.2d 968 (1959).

949. Miller v. City & County of San Francisco, 187 A.C.A. 515, 9 Cal. Rptr. 767 (1960).

950. Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

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953. Cross v. Tustin, 165 Cal. App.2d 146, 331 P.2d 785 (1958); Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957).

954. White v. Brirkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937).

955. Jones v. Richardson, 9 Cal. App.2d 657, 50 P.2d 810 (1935).

956. Gridley School District v. Stout, 134 Cal. 592, 66 Pac. 785 (1901). Cf. Hardy v. Vial, 48 Cal. 2d 577, 311 P.2d 494 (1957), officers of State Department of Education.

957. Ballerino v. Mason, 83 Cal. 447, 23 Pac. 530 (1890).

958. Oppenheimer v. Arnold, 99 Cal. App.2d 872, 222 P.2d 940 (1950).

959. Lipman v. Brisbane Elementary School District, 55 Cal.2d , 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

960. Martelli v. Pollock, 162 Cal. App.2d 655, 328 P.2d 795 (1958).

961. Miller v. City & County of San Francisco, 187 A.C.A. 515, 9 Cal. Rptr. 767 (1960); see also Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960), alleged conspiracy to defraud.

962. Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960). See also, Dawson v. Rash, 160 Cal. App.2d 154, 324 P.2d 959 (1958), allegedly malicious prosecution for violation of building code.

963. Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

964. Allen v. Superior Court, 171 Cal. App.2d 444, 340 P.2d 1030 (1959). But cf. Hancock v. Burns, 158 Cal. App.2d 785, 323 P.2d 456 (1958).

965. Cross v. Tustin, 165 Cal. App.2d 146, 331 P.2d 785 (1958). Cf. Lipman v. Brisbane Elementary School District, 55 Cal.2d , 11 Cal. Rptr. 97, 359 P.2d 465 (1961), allegedly defamatory communications.

966. Martelli v. Pollock, 162 Cal. App.2d 655, 328 P.2d 795 (1958).

967. Lavine v. Jessup, 161 Cal. App.2d 59, 326 P.2d 238 (1958).

968. Dawson v. Rash, 160 Cal. App.2d 154, 324 P.2d 959 (1958);

Dawson v. Martin, 150 Cal. App.2d 379, 309 P.2d 915 (1957); White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); Prentice v. Bertken, 50 Cal. App.2d 344, 123 P.2d 96 (1942); White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937); Pearson v. Reed, 6 Cal. App.2d 277, 44 P.2d 592 (1935).

969. Hancock v. Burns, 158 Cal. App.2d 785, 323 P.2d 456 (1958).

970. Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957). See also, Lipman v. Brisbane Elementary School District, 55 Cal.2d , 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

971. Hardy v. Vial, 48 Cal.2d 577, 582, 311 P.2d 494,496 (1957).

972. Ibid.; see also White v. Towers, 37 Cal.2d 727, 235 P.2d 209 (1951); Caruso v. Abbott, 133 Cal. App.2d 304, 284 P.2d 113 (1955).

973. Hardy v. Vial, 48 Cal.2d 577, 583, 311 P.2d 494, 497(1957).

974. White v. Towers, 37 Cal.2d 727, 733, 235 P.2d 209,213(1951), quoting with approval from Nesbitt Fruit Products v. Wallace, 17 Fed. Supp. 141 (S.D. Iowa 1936). See also, Frazier v. Moffatt, 108 Cal.App.2d 329, 239 P.2d 123 (1951); Norton v. Hoffman, 34 Cal. App.2d 189, 93 P.2d 250 (1939).

975. See discussion in text, supra, at note 935.

976. Lipman v. Brisbane Elementary School District, 55 Cal.2d , , 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

977. Except in the federal decisions, there appears to have been little disposition on the part of courts outside California to grant official immunity for malicious or corrupt official conduct. See Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303 (1959); 2 Harper & James, The Law of Torts 1644 (1956).

978. Gregoire v. Biddle, 177 F.2d 579 (2 Cir. 1949). See also, Spalding v. Vilas, 161 U.S. 483 (1896); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Barr v. Matteo, 360 U.S. 564 (1959); Tenney v. Brandhove, 341 U.S. 367 (1951).

979. Gregoire v. Biddle, 177 F.2d 579, 581 (2 Cir. 1949), quoted with approval in Muskopf v. Corning Hospital District, 55 Cal.2d , , 11 Cal. Rptr. 89, 94-95, 359 P.2d 457, 462-63 (1961) and Hardy v. Vial, 48 Cal.2d 577, 582-83, 311 P.2d 494, 496-97 (1957).

980. Ibid.

981. See discussion in text, supra, pp. 61-70, under heading "Statutory assumption by public entity of tort liability of its officers and employees."

982. Notwithstanding the broad language of such early cases as Conlin v. Board of Supervisors, 114 Cal. 404, 46 Pac. 279 (1896), it is clear today that whether an application of public funds to a purpose for which no enforceable legal liability exists constitutes an illegal gift of public funds within the contemplation of Calif. Const. art. IV, § 31, depends upon a judicial evaluation whether the funds are being expended for a public or private purpose. See Dittus v. Cranston, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1960); Subsequent Injuries Fund v. Industrial Accident Commission, 48 Cal.2d 365, 310 P.2d 7 (1957); Smith v. Smith, 125 Cal. App.2d 154, 270 P.2d 613 (1954). Improved morale and loyalty to the public service would seem to be adequate public objectives to support the payment by public entities of tort judgments against their officers and employees, in light of the cited cases. See also, Patrick v. Riley, 209 Cal. 350, 287 Pac. 455 (1930); People v. Standard Accident Ins. Co., 42 Cal. App.2d 409, 108 P.2d 923 (1941). In any event, the constitutional prohibition upon gifts of public funds are not applicable to local governmental powers exercisable under home-rule charter authorization. Tevis v. City & County of San Francisco, 43 Cal.2d 190, 272 P.2d 757 (1954). If satisfaction of tort judgments were treated as a form of "fringe benefit" or collateral compensation for services rendered, the primary legal problem (in the absence of express statutory authority) involved in entering upon such a program would be the identification of adequate

implied powers in the form of general statutory or charter language. It would thus appear that the principal reasons why such reimbursement is not prevalent in California are reasons of policy rather than legal impediment.

983. Many statutory provisions authorize public entities to purchase liability insurance protection for their officers and employees with public funds. See, e.g., Cal. Govt. Code § 1956, as amended by Cal. Stat. 1961, ch. 40; Cal. Educ. Code § 1044, as amended by Cal. Stat. 1961, ch. 136; Cal. Govt. Code § 1231, as added by Cal. Stat. 1961, ch. 578. Cf. Estrada v. Indemnity Insurance Company of North America, 158 Cal. App.2d 129, 322 P.2d 294 (1958).

984. See Galli v. Brown, 110 Cal. App.2d 764, 243 P.2d 920 (1952), intimating that discretionary immunity did not embrace official conduct involving malice, corruption or sinister motives; People v. Standard Accident Insurance Co., 42 Cal. App.2d 409, 108 P.2d 923 (1941), semble; Jones v. Richardson, 9 Cal.App.2d 657, 50 P.2d 810 (1935), applying immunity doctrine, but suggesting that contrary result might obtain if plaintiff alleged and proved malice; Platz v. Marion, 35 Cal. App. 241, 169 Pac. 697 (1917), applying immunity doctrine in absence of showing of malicious or corrupt motives; Ballerino v. Mason, 83 Cal. 447, 23 Pac. 530 (1890), semble.

985. See, e.g., Caruso v. Abbott, 133 Cal. App.2d 304, 284 P.2d 113 (1955), held coroner and his deputies were not immune from personal liability for alleged conspiracy to restrain trade in undertaking business, for alleged disregard of statutory limitations with motive of personal financial gain took their conduct outside the scope of official authority; Boland v. Cecil, 65 Cal. App.2d Supp. 832, 150 P.2d 819 (1944), officer is personally liable for wrongful seizure of foodstuffs believed by him in good faith to be in violation of agricultural inspection laws, for his authority extends only to seizure of goods which in fact are in violation thereof; Silva v. MacAuley, 135 Cal. App. 249, 26 P.2d 887, 27 P.2d 791 (1933), accord, with respect to officer in good faith seeking to enforce Fish and Game Law restrictions. Cf. Lertora v. Riley, 6 Cal. 2d 171, 57 P.2d 140 (1936), dictum to effect that inspector of bovine tuberculosis who destroys animal in belief that disease exists is personally liable for mistake in so doing, since his authority only extends to the destruction of actually diseased animals.

986. See Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 899 (1958), city officers held personally liable for failure to issue electrical permit after inspection established that building for which permit was requested was in full conformity with electrical and building code.

987. See Collenberg v. County of Los Angeles, 150 Cal. App.2d 795, 310 P.2d 989 (1957), holding superintendent of forestry camp for juveniles to be personally liable for negligently ordering inexperienced youth to assist in fighting fire on the "hot line", on theory that "if discretion is exercised and a course of conduct begun, a failure to exercise ordinary care will give rise to liability." Id. at 803, 310 P.2d at 995. To the same effect, see Dillwood v. Riecks, 42 Cal. App. 602, 184 Pac. 35 (1919), disapproved on other grounds in Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3 (1953). The holding of liability in Wolfsen v. Wheeler, 130 Cal.App. 475, 19 P.2d 1004 (1933) is probably explainable on these grounds, too, although the defense of official immunity was apparently not asserted there.

988. See discussion in the text, supra, at notes 973-74.

989. See, e.g., Ham v. County of Los Angeles, 46 Cal. App. 148, 162, 189 Pac. 462, 468 (1920), per Sloane, J., pointing out that "it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." This remark is quoted approvingly by Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 322-23 (1959). To the same effect, see 2 Harper & James, The Law of Torts 1644 (1956).

990. See text, supra, at notes 936-38.

991. De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95 (1892); Inos v. Winspear, 18 Cal. 397 (1861).

992. Tomlinson v. Pierce, 178 Cal. App.2d 112, 2 Cal. Rptr. 700 (1960); Rubinow v. County of San Bernardino, 169 Cal. App.2d 67, 336 P.2d 968 (1959).

993. Dragna v. White, 45 Cal.2d 469, 299 P.2d 428 (1955), refusing to accept application of immunity doctrine as advanced in opinion of District Court of Appeal, 280 P.2d 817 (1955); Miller v. Glass, 44 Cal.2d 359, 282 P.2d 501 (1955); Wood v. Lehne, 30 Cal. App.2d 222, 85 P.2d 910 (1938).

994. Frazier v. Moffatt, 108 Cal. App.2d 379, 239 P.2d 123 (1951); Perry v. Meikle, 102 Cal. App.2d 602, 228 P.2d 17 (1951); Malone v. Carey, 17 Cal. App.2d 505, 62 P.2d 166 (1936); Ceinar v. Johnston, 134 Cal. App. 166, 25 P.2d 28 (1933); Platz v. Marion, 35 Cal. App. 241, 169 Pac. 697 (1917).

995. Prentice v. Bertken, 50 Cal. App.2d 344, 123 P.2d 96 (1942); White v. Brinkman, 23 Cal. App.2d 307, 73 P.2d 254 (1937); Pearson v. Reed, 6 Cal. App.2d 277, 44 P.2d 592 (1935).

996. Cross v. Tustin, 165 Cal. App.2d 146, 331 P.2d 785 (1958); Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957); Oppenheimer v. Arnold, 99 Cal. App.2d 872, 222 P.2d 940 (1950). See also, Lipman v. Brisbane Elementary School District, 55 Cal. 2d , 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

997. See Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943).

998. Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

999. Davie v. Board of Regents of the University of California, 66 Cal. App. 689, 227 Pac. 247 (1924).

999a. Cf. cases cited supra, notes 985, 991, 993. See the trenchant criticism in 3 Dairs, Administrative Law Treatise §26.05, p.531 (1958).

1000. See Cal. Veh. Code § 17004, discussed supra, p. 203.

1001. See discussion in text, supra, pp. 72-74.

1002. See discussion in text, supra, pp. 41-52.

1003. See discussion in text, supra, pp. 70-71.

1004. See Gregoire v. Biddle, 177 F.2d 579, 581 (2 Cir. 1949), quoted with approval in Muskopf v. Corning Hospital District, 55 Cal.2d , 11 Cal. Rptr. 89, 359 P.2d 457 (1961) and Hardy v. Vial, 48 Cal.2d 577, 311 P.2d 494 (1957).

1005. See, generally, 3 Davis, Administrative Law Treatise 528-29 (1958); Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303, 335-36 (1959). Cf. Lavine v. Jessup, 161 Cal. App. 2d 59, 326 P.2d 238 (1958).

1006. A similar policy apparently justifies the requirement that the plaintiff in a defamation action post an undertaking to secure costs and the statutory $100 fee to the defendant

if the plaintiff fails to prevail. See Cal. Code Civ. Proc. §§ 830-36; Shell Oil Co. v. Superior Court, 2 Cal. App.2d 348, 37 P.2d 1078 (1934). A somewhat comparable policy of discouraging litigation against the State is found in the statutory requirement that a plaintiff so doing must post a $250 undertaking, except in motor vehicle accident cases. Cal. Govt. Code § 647, as amended by Cal. Stat. 1961, ch. 2003. Other states occasionally require such undertakings also as a condition to suit. See, e.g., Utah Code Ann. § 78 - 11 - 10 (1953), requiring undertaking for costs and attorney's fees in action against peace officers or law enforcement officers for injuries resulting from performance of official duty.

1007. See, by way of analogy, Cal. Civ. Code § 48a, limiting recovery in defamation action to actual damages, where defendant newspaper or radio station was not timely served with a demand for retraction.

1008. See 2 Chadbourn, Grossman and Van Alstyne, California Pleading § 982, p. 67 (1961).

1009. A strong recommendation along these lines is made in 3 Davis, Administrative Law Treatise § 26.04, p. 529 (1958).

1010. This suggestion is founded upon the analogous provisions of Cal. Govt. Code § 2002, which, however, authorizes a free defense for State and county personnel only where the

attorney for the entity first determines that the officer or employee acted without malice; and even then, the entity is authorized to recover the costs and expenses of such defense if it ultimately develops that the officer or employee acted in bad faith or with malice. See also, Cal. Govt. Code §2001.

1011. The Attorney General has ruled that where the attorney for the employing entity is disqualified from representing an officer or employee under Cal. Govt. Code §§ 2001 and 2002, supra note 1009, the costs and expenses, including a reasonable attorney;s fee incurred by the employee in his own defense, are a legal charge against the public treasury. See 35 Ops. Cal. Atty. Gen. 103 (1960).

1012. See, in general agreement that malicious and corrupt conduct by public officers may rationally be treated differently from mere honest mistake, 2 Harper & James, The Law of Torts 1645 (1956); Gray, Private Wrongs of Public Servants, 47 Calif. L. Rev. 303 (1959), passim; 3 Davis, Administrative Law Treatise § 26.04, pp. 526-30 (1958).

1013. Most of the California statutes which require various types of public entities to satisfy judgments against their personnel, for example, contain an express reservation exonerating the entity in cases of "actual fraud and malice." See discussion in the text, supra, pp. 61 - 70.

1014. See Davis, Tort Liability of Governmental Units, 40 Minn. L. Rev. 751, 800 (1956).

1015. Ordinarily the rule of "governmental immunity" has been expressed in California cases as a rule of "immunity from liability for tort", without distinction as to whether the tort was one of commission or of omission. See, e.g., Pianka v. State of California, 46 Cal.2d 208, 293 P.2d 458 (1956). Where counsel apparently have emphasized the potential distinction, the courts have shown little disposition to regard it as making any legal difference. See Seybert v. County of Imperial, 162 Cal. App.2d 209, 327 P.2d 560 (1958), collecting and discussing instances in which the immunity doctrine has been applied to governmental failure to act. For a rare instance in which a court intimates that nonfeasance may be treated differently from misfeasance, see Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559 (1915). Ample evidence that the distinction has had no significant effect on the course of California law, however, is seen in the cases collected infra, note 1016.

1016. See: Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960), failure of health officers to establish adequate quarantine against contagious disease; Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959), failure of city to abate nuisance obscuring traffic intersection; Seybert v. County of Imperial, 162 Cal. App.2d 209, 327 P.2d 560 (1958), failure of county board of supervisors to enact appropriate regulatory ordinance governing operation

of speedboats on county-owned lake; Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 999 (1958), failure of city to issue electrical service permit to qualified applicant; Grove v. County of San Joaquin, 156 Cal. App.2d 808, 320 P.2d 161 (1958), failure of jail officials to protect prisoner from vicious beating by fellow-prisoners; Goodman v. Raposa, 151 Cal. App.2d 830, 312 P.2d 65 (1957), failure of police to direct traffic manually after failure of mechanical signal; Hoel v. City of Los Angeles, 136 Cal. App.2d 295, 288 P.2d 989 (1955), semble; Marshall v. County of Los Angeles, 131 Cal. App.2d 812, 281 P.2d 544 (1955), failure to provide medical treatment to injured prisoner in jail, on request; Lewis v. County of Contra Costa, 130 Cal. App.2d 176, 278 P.2d 756 (1955), failure to abate a mud nuisance on sidewalk; Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954), failure to prevent operation of "kangaroo court" among jail prisoners, and failure to provide medical assistance to injured prisoner; Bettencourt v. State of California, 123 Cal. App.2d 60, 266 P.2d 201 (1954), failure to post warning signs or barricades to warn motorists that drawbridge was open; Gillespie v. City of Los Angeles, 114 Cal. App.2d 513, 250 P.2d 717 (1952), failure to mark or warn of existence of dangerous curve on mountain highway; Greenberg v. County of Los Angeles, 113 Cal. App.2d 389, 248 P.2d 74 (1952), failure to deliver emergency patient in ambulance to hospital with adequate speed; Oppenheimer v. City of Los Angeles, 104 Cal.App.2d 545, 232 P.2d 26 (1951), failure to maintain fit and

sanitary jail; Shipley v. City of Arroyo Grande, 92 Cal. App.2d 748, 208 P.2d 51 (1949), failure to repeal outmoded traffic ordinance; Campbell v. City of Santa Monica, 51 Cal. App.2d 626, 125 P.2d 561 (1942), failure to enforce existing traffic regulations; Wood v. Cox, 10 Cal. App.2d 652, 52 P.2d 565 (1935), failure to provide medical aid to prisoner in jail on request; Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559 (1915), failure to construct bridge, and failure to provide warning signs or barricades to warn motorists that street came to an end at river's edge.

1017. Cf. Seybert v. County of Imperial, 162 Cal. App.2d 209, 327 P.2d 560 (1958).

1018. Cf. Shipley v. City of Arroyo Grande, 92 Cal. App.2d 748, 208 P.2d 51 (1949).

1019. Cf. Lewis v. County of Contra Costa, 130 Cal. App.2d 176, 278 P.2d 756 (1955).

1020. Cf. Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559 (1915).

1021. Cf. Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954); Wood v. Cox, 10 Cal. App.2d 652, 52 P.2d 565 (1935).

1022. Cf. Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545,

232 P.2d 26 (1951).

1023. Cf. Armstrong v. City of Belmont, 158 Cal. App.2d 641, 322 P.2d 999 (1958).

1024. Cf. Campbell v. City of Santa Monica, 51 Cal. App.2d 626, 125 P.2d 561 (1942).

1025. Cf. Hoel v. City of Los Angeles, 136 Cal. App.2d 295, 288 P. 2d 989 (1955).

1026. Cf. Greenberg v. County of Los Angeles, 113 Cal. App.2d 389, 248 P.2d 74 (1952).

1027. Muskopf v. Corning Hospital District, 55 Cal.2d , , 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961), quoting approvingly from the opinion of Mr. Justice Jackson, dissenting in Dalehite v. United States, 346 U.S. 15, 57 (1953). Qualified endorsement of the same viewpoint is contained in 3 Davis, Administrative Law Treatise, § 25.15, p. 496 (1958). See also, Borchard, State and Municipal Liability in Tort - Proposed Statutory Reform, 20 A.B.A.J. 747, 793 (1934).

1028. See 2 Harper & James, The Law of Torts 1645 n.39 (1956).

1029. Some of the cases denying liability for failure to exercise official duty may be explained as simply instances in which there was no showing of a proximate cause relationship

between the nonfeasance and the injury. See, e.g., Crone v. City of El Cajon, 133 Cal. App. 624, 24 P.2d 846 (1933), failure to employ more than one lifeguard at municipal swimming pool held nonactionable, where murky condition of water made it unlikely that drowning child would be discovered; Denman v. City of Pasadena, 101 Cal. App. 769, 292 Pac. 820 (1929), failure to inspect grandstands being erected pursuant to municipal permit along route of Rose Parade deemed not proximate cause of injuries sustained when stand suddenly collapsed.

1030. See text, supra, pp. 330-39.

1031. These duties are statutory in origin. See Cal. Penal Code § 4019.5 (jailer forbidden to permit "kangaroo court" or "sanitary committee" of prisoners to operate in jail), §§ 4011, 4011.5 and 4012 (duty of jailer to provide medical care to inmates). Cf. Bryant v. County of Monterey, 125 Cal. App.2d 470, 270 P.2d 897 (1954), holding county not liable for failure of jailer to carry out these statutory duties, with resulting injuries to prisoner.

1032. But cf. Gillespie v. City of Los Angeles, 114 Cal. App.2d 513, 250 P.2d 717 (1952), holding no liability for failure to warn of sharp curve on mountain highway. See also, Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559 (1915), criticized as "unfortunate" by 2 Harper & James, The Law of Torts 1626 n. 40 (1956).

1033. Prior to the enactment of the Public Liability Act, which is discussed in the text, supra pp. 41-52, the duty of the public entity to maintain its roads and streets in a safe condition was deemed a discretionary one and hence did not give rise to liability where not performed. See, e.g., Barnett v. County of Contra Costa, 67 Cal. 77, 7 Pac. 177 (1885).

1034. See discussion in text, supra, pp. 41-52, and cases there cited. In general, the decisions under the Public Liability Act have imposed liability for both misfeasance (i.e. creating a dangerous and defective condition in the course of constructing a public improvement, see, e.g., Pritchard v. Sully-Miller Contracting Co., 178 Cal. App.2d 246, 2 Cal. Rptr. 830 (1960) and nonfeasance (i.e. failure to take precautions or make repairs after notice of defect, see e.g., Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55 (1953). In only one case has the Court suggested that the scope of statutory liability for nonfeasance may be narrower under the Public Liability Act than for misfeasance. See Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980 (1952), city held not liable for failure to maintain water distribution system and fire hydrants in proper manner with adequate pressure to permit fire department to extinguish fire. Underlying this aberrational decision, however, may be the thought that it is more equitable to spread the risk of loss to buildings by fire through the premiums charged for fire insurance, for this method will impose the burden more

precisely on those persons who receive the benefit of fire protection service than would a judgment imposing tort liability payable out of the general fund in the city treasury much of which is contributed by non-propertied persons who receive little direct proprietary benefit from the fire protection service.

1035. See text, supra, pp. 46-47, for a discussion of the "notice" requirement under the Public Liability Act. For trenchant criticism, see David, Tort Liability of Local Government; Alternatives to Immunity from Liability or Suit, 6 UCLA L. Rev. 1, 14-18, 39-40 (1959).

1036. Cal. Stat. 1961, ch. 1404, adding Section 22.3 to the Civil Code, declaring the doctrine of governmental immunity from tort liability to be "re-enacted as a rule of decision in the courts of this State . . . to the same extent that it was applied in this State on January 1, 1961." Chapter 1404 was expressly limited in effect until the 91st day after the final adjornment of the 1963 Regular Session of the Legislature. Id. § 3.

1037. See, e.g., the issues explored in the discussion in text, supra, relating to intentional torts (pp. 299-302), the application of respondeat superior to the peculiar employment relationships found in some areas of local government (pp. 307-310), the operation of the often ambiguous "ultra vires" doctrine (pp. 310-317), the relationship between the doctrine of official immunity and the abolition of governmental immunity (pp. 323-339), and the proper scope of tort liability for nonfeasance (pp. 341-47).

1038. See, e.g., discussions in the text, supra, of the potential impact of the Muskopf case upon existing statutory provisions, including Cal. Veh. Code § 17001 (see pp. 36-37), Cal. Educ. Code § 903 (see pp. 39-40), the Public Liability Act of 1923, now Cal. Govt. Code § 53051 (see pp. 49-52), Cal. Water Code § 50152 (see pp. 55-60).

1039. This approach was recently adopted in Washington, see Wash. Stat. 1961, ch. 136, and has been the law of New York for many years. N. Y. Ct. Claims Act § 8. It has encountered serious difficulties in New York which have led to statutory and judicial exceptions. See text, infra, pp.

1040. No jurisdiction is known to have adopted this approach as yet. The Federal Tort Claims Act, 28 U.S.C.A. § 1346, however, approaches it in part by adopting a general waiver of immunity, and then prescribing a number of specific exceptions thereto. See discussion in the text, infra, pp.

1041. See the text, supra, at notes 1037 and 1038, and references cited therein.

1042. See text, supra, pp. 307-47, under heading, "Bases for Nonliability Other Than Governmental Immunity".

1043. See 2 Harper & James, The Law of Torts §§ 12.1 - 12.4 (1956), and authorities there collected.

1044. See Blachly and Oatman, Approaches to Governmental Liability in Tort: A Comparative Survey, 9 Law & Contemp. Prob. 181 (1942); James, Tort Liability of Governmental Units and Their Officers, 22 Univ. Chi. L. Rev. 654 (1955); 3 Davis, Administrative Law Treatise § 25.17 (1958).

1045. See 2 Harper & James, The Law of Torts §§ 13.3 - 13.7 (1956); Pedrick, On Civilizing the Law of Torts, 6 J. Soc. Pub. Teachers of Law (N. S.) 2, 3 (1961); James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L. J. 549 (1948).

1046. 3 Davis, Administrative Law Treatise 503 (1958).

1047. See text, supra, pp. 330-36.

1048. See cases cited, supra, notes 985 and 991.

1049. See text, supra, pp. 335-39 for a more detailed exploration of this suggestion.

1050. See text, supra, pp. 287-95.

1051. See text, supra, pp. 109-19.

1052. See text, supra, pp. 70, 71.

1053. See text, supra, pp. 107-08.

1054. The principal areas in which liability without fault plays a significant role in modern tort law relate to the accumulation of dangerous substances, such as ponded water; the handling and use of explosives; the keeping of animals, both domestic and dangerous; operation of aircraft; handling of fire; and use of poisonous sprays and insecticides. See 2 Harper & James, The Law of Torts §§ 14.1 - 14.16 (1956).

1055. See text, supra, pp. 221-26.

1056. See text, supra, pp. 238-39.

1057. 1 Harper & James, The Law of Torts § 11.5 (1956).

1058. See text, supra, pp. 285-86.

1059. See text, supra, pp. 81-95.

1060. County of Contra Costa v. Central Contra Costa Sanitary District, 182 Cal. App.2d 176, 5 Cal. Rptr. 783 (1960).

1061. Id. at pp. 179-80, 5 Cal. Rptr. at 786.

1062. See statutes cited in text, supra, p. 89.

1063. See text, supra, pp. 336-39.

1064. Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980 (1952).

1065. Lipman v. Brisbane Elementary School District, 55 Cal.2d , , 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

1066. See text, supra, pp. 335-36.

1067. David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit, 6 UCLA L. Rev. 1, 15 (1959).

1068. Ibid.

1069. This expedient has been adopted in New York pursuant to a recommendation of the New York Joint Legislative Committee on Municipal Tort Liability. See text, infra, pp.

1070. The data is summarized and the authorities collected in 2 Harper & James, The Law of Torts § 11.4 (1956).

1071. The full quotation is set forth in the text, supra, p. 319.

1072. See the text, supra, pp. 343-44. To the same general effect, see Peck, Federal Tort Claims-Discretionary Function, 31 Wash. L. Rev. 207, 225-226, 230-31, 240 (1956).

1073. See text, supra, pp. 32-37.

1074. See text, supra, pp. 38-40.

1075. See text, supra, pp. 336-39.