#52 3/1/68

Memorandum 68-36

Subject: Study 52 - Sovereign Immunity (Liability for Damages Caused by Riots)

Exhibit I (pink) attached is a student note from the December 1967 issue of the Lincoln Law Review relating to liability of California municipalities for damages caused by riots. Upon recommendation of the California Law Revision Commission, the Legislature (in 1963) repealed the statute that imposed absolute liability on cities and counties for property damage caused by riots. The note concludes: "Clearly, then, the rejection of the liability of the municipality for riot damages is illogical and against public policy."

In its recommendation to the 1963 Legislature, the Commission recommended the repeal of former Government Code Sections 50140-50145, stating:

9. An essential function of government is the making and enforcing of laws. The public officials charged with this function will remain politically responsible only if the desirability of enacting and enforcing particular laws is not subject to court review through the device of deciding tort actions. Hence, the statutes should make clear that public entities and their employees are not liable for any injury flowing from the adoption of or failure to adopt any statute, ordinance, or regulation, or from the execution of any law with due care.

For similar reasons, public entities and their employees should not be liable for inadequate enforcement of any law or regulation or for failure to take steps to regulate the conduct of others. The extent and quality of governmental service to be furnished is a basic governmental policy decision. Public officials must be free to determine these questions without fear of liability either for themselves or for the public entities that employ them if they are to be politically responsible for these decisions.

The remedy for officials who make bad law, who do not adequately enforce existing law, or who do not provide the people with services they desire, is to replace them with other officials. But their discretionary decisions in these areas cannot be subject to review in tort suits for damages if government is to govern effectively.

Public entities and public employees should not be liable for failure to make arrests or otherwise to enforce any law. They should not be liable for failing to inspect persons or property adequately to determine compliance with health and safety regulations. Nor should they be liable for negligent or wrongful issuance or revocation of licenses and permits. The government has undertaken these activities to insure public health and safety. To provide the utmost public protection, governmental entities should not be dissuaded from engaging in such activities by the fear that liability may be imposed if an employee performs his duties inadequately. Moreover, if liability existed for this type of activity, the risk exposure to which a public entity would be subject would include virtually all activities going on within the community. There would be potential governmental liability for all building defects, for all crimes, and for all outbreaks of contagious disease. No private person is subjected to risks of this magnitude. In many of these cases, there is some person (other than the public employee) who is liable for the injury, but liability is sought to be imposed on government for failing to prevent that person from causing the injury. The Commission believes that it is better public policy to leave the injured person to his remedy against the person actually causing the injury than it is to impose an additional liability on the government for negligently failing to prevent the injury. And where no third party is liable—as in the case where a license application is denied—the aggrieved party has ample means for obtaining relief in the courts other than by tort actions for damages. Far more persons would suffer if government did not perform these functions at all than would be benefited by permitting recovery in those cases where the government is shown to have performed inadequately.

Sections 50140 through 50145 of the Government Code are inconsistent with the foregoing recommendations. These sections impose absolute liability upon cities and counties for property damage caused by mobs or riots within their boundaries. These sections are an anachronism in modern law. They are derived from similar English laws that date back to a time when the government relied on local townspeople to suppress riots. The risk of property loss from mob or riot activity is now spread through standard provisions of insurance policies. Accordingly, these sections should be repealed.

It is true that it is not now possible to spread the risk of mob damage through standard provisions of insurance policies in areas where the risk of mob damage is great. To this extent, the reasoning justifying the Commission's recommendation can be questioned. Nevertheless, the staff believes that the decision to repeal the mob damage statute was a sound one. The solution to this problem is not found in imposing liability on public entities. The solution lies in solving the problems that lead to the riots and in providing other means for spreading the risk of loss other than governmental tort liability. The problem is one that is now under study, both as to preventive measures and as to risk spreading measures. A special presidential commission has just concluded its study of the causes of riots. In addition, the February 26, 1968, issue of the Weekly Law Digest reports:

> Insurance and Riots--A special presidential commission, noting the difficulty of getting insurance coverage in core areas where riots have occurred, has come up with a plan for "fair access to insurance requirements" to be known as FAIR. It would permit insurance company pools, with federal reinsurance "against the risk of extraordinary loss from civil disorders" and with special tax rights.

The staff concludes that the other approaches to this problem offer more promise for a satisfactory solution than would imposition of governmental liability for riot damage. Moreover, there appears, as a practical matter, to be no chance of obtaining enactment of a statute imposing governmental liability for riot damage.

In connection with this matter, see also Memorandum 67-15 (attached).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 68-36

EXHIBIT I

LIABILITY OF CALIFORNIA MUNICIPALITIES FOR DAMAGES CAUSED BY RIOTS

INTRODUCTION

Can the citizen injured in person or pocketbook by rioters seek indemnification from a municipality in which it occurs? Recent urban disturbances suggest that the prudent person should be aware of possible means of recovery. In exploring the field of municipal liability, historical, legislative and judicial factors must be examined, since theoretical and policy arguments assume great importance in light of the rapid change in statutory enactments and judicial interpretation in this area.

Municipal liability for riot damage is based on English Common Law concepts[1] which were first codified in the statute of Winchester, 1 Stat. 13 Edw. 1 p. 2 c. 3.[2] The substance of this statute was restated in 27 Eliz. c. 13.[3] and remained substantially unchanged until 1716 when the Riot Act. 1 Geo. 1. Stat. 2. c. 5.[4] was enacted. It was subsequently amended, then finally incorporated into the Riot Damage Act in 1886, 49 & 50 Vict. c. 38. Modern statutes are based on the Riot Act, which in Section 6 provided for civil liability of country citizens when a riot had resulted in injury to private property. This act, primarily penal in its application, made rioting and public tumults felonys; but Section 6 was primarily remedial in effect. That section covered injuries caused by rioters and not covered by insurance, whether the riot takes place in a public place or on public grounds.[5] Clearly the underlying motive for enactment of this statute was

[a] Note, 6 U.C.L.A.L.Rev. 124, 134 (1959).

[1] W. Finlason, History of English Law, 518 (1880).
[2] *Id.*
[3] *Id.*
[4] 13 W. Craies, Encyclopedia of the Laws of England, 16 (2d Ed. 1908).
[5] *Id.*

the encouragement of public responsibility for victims of mob violence and the encouragement of public diligence in the search for measures which would prevent conditions leading to mob violence.[6] However, apart from statutory liability, a municipal corporation was not liable at common law for damages caused by riot or by mob violence.[7]

Therefore, in the absence of statute, damages to the individual as a result of capricious mob action were, except for private insurance, non-compensable; and private insurance in an area of frequent disorders quickly became so expensive as to preclude its purchase by the average citizen. Recognition of this problem was demonstrated by the enactment of similar statutes in many states. The 1868 California statute is typical.[8] Such statutes have been liberally construed for the benefit of injured parties[9] and rather strictly construed against the defendant municipalities.[10]

TREATMENT OF THE PROBLEM IN OTHER JURISDICTIONS

Interpreting a statute similar to that in California at the time, a New York court in *Marshall v. Buffalo*[11] expressed disbelief that the extensive damage that occurred (buildings were torn down and removed by a mob) could have taken place in the heart of a metropolis without the knowledge of law abiding citizens and of the police, who had a duty to interfere. The court stressed the fact that the plaintiff and others were helping to maintain the police department through payment of taxes. And since the principal duties of the police department were to preserve peace and order, and to detect and prevent crime, the plaintiff taxpayer might reasonably have expected that the police department would protect his property from damage by mob violence or riot.

Presently in New York, the effect of the statute creating liability of a municipality for damages caused by mob violence[12] has been suspended until July 1st, 1968, by the War Emergency Act,[13] initially enacted in 1942[14] and reenacted each succeeding year. This suspension of liability precluded recovery by the plaintiff in *Finkelstein v. City of New York*[15] for damages sustained in the much publicized Harlem Riots of August, 1943. Recovery under the statute again was denied in *Harts Food Stores, Inc. v. City of Rochester* in 1965.[16]

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[6] *Id.*

[7] *Id.*

[8] Cal. Stats. 1867–68 ch. 344 §1, *amended* in 1949 by Cal. Stats. 49 ch. 81 §1, *repealed* in 1963 by Cal. Stats 1963 ch. 1681 §316.

[9] Agudo v. Monterey County, 13 Cal.2d 285, 89 P.2d 400 (1939).

[10] 13 A.L.R. 751.

[11] 50 App.Div. 149, 64 N.Y. Supp. 411 (1900).

[12] Finkelstein v. City of New York, 157 Misc. 157, 283 N.Y.S. 335 (1935).

[13] Laws of New York, 1965, ch. 398 §12.

[14] Laws of New York, 1942, ch. 544 §40.

[15] *See* note 12 *supra*.

[16] Harts Food Stores, Inc. v. City of Rochester, 44 Misc.2d 938, 255 N.Y.S.2d 390 (1965).

New Hampshire, on the other hand, has very recently allowed recovery under a similar statute[17] in *Roy v. Hampton*.[18]

In 1965 Massachusetts liberalized its statute creating similar municipal[19] liability by amending the statutory definition of the term Riot to require only five participants in a public tumult instead of the original requirement of twelve.

STATUTORY APPLICATION IN CALIFORNIA CASES

The first case brought under the California statute was *Clearlake Water Works Company v. Lake County*.[20] Here it was determined that a claim for damages to property destroyed by a mob need not be presented to the Board of Supervisors for consideration as a prerequisite to recovery of a judgment. The court stated that the statute had created a new right and provided a new remedy which was, in itself, sufficient and did not require approval by the Board of Supervisors.

In 1872, in the case of *Wing Chung v. The Mayor and Common Council of the City of Los Angeles*,[21] recovery under the statute was denied, as the plaintiff had not used reasonable diligence in giving notice of the impending mob violence to the sheriff or mayor. Interestingly enough, the plaintiff in this case was a participant in the riot. Plaintiff was held to have had notice of the impending riot and had an opportunity to notify the authorities.

In *The Bank of California v. Shober*,[22] an 1880 case, a Writ of Mandamus was issued to compel the respondent, as its treasurer, to make payment for damages to property caused by a riot.

Agudo v. Monterey County[23] is a leading case interpreting the 1868 statute[24] providing for the liability of municipal corporations for damages caused to property by riot. The plaintiff was the assignee of the choses in action of 53 laborers whose personal property had been destroyed when a mob of 75 persons burned their lodgings. The statute was construed to be remedial rather than punitive; and, because of provision for actual damages rather than a fixed amount, the cause of action was held assignable and the plaintiff allowed recovery.

In 1907, the California Legislature amended Section 4452 of the Political Code of California to read as follows:

> Every County and municipal corporation is responsible for injury to real or personal property situate within its corporate limits, done or caused by mobs or riots.

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[17] N.H. Rev. Stats., ch. 31 §53 (1955).

[18] 108 N.H. 51, 226 A.2d 870 (1967).

[19] Mass. Gen. Laws, ch. 269 §8 (1959), *as amended* by Massachusetts Statutes 1965 ch. 647 §3.

[20] 45 Cal. 90 (1872).

[21] 47 Cal. 531 (1874).

[22] 55 Cal.2d 211, 359 P.2d 457, 11 Cal.Rptr. 89 (1961).

[23] 89 P.2d 400, 13 Cal.2d 285 (1939).

[24] *See* note 8 *supra*.

In 1949 Sections 50140 and 50145, based upon former Political Code Section 4452, were added to the California Government Code.[25]

In 1963, the California Legislature profoundly altered the substantive aspects of governmental tort liability.[26] Although a public entity still may be sued under the 1963 enactment, the legislature restated the basic principle of sovereign immunity by abolishing the tort liability of all included public entities, excepting only that liability as provided by the enactment.[27]

CONCLUSION

Clearly, then, the rejection of the liability of the municipality for riot damages is illogical and against public policy. The inhabitants of a municipality or municipal corporation tacitly agree to abide by municipal regulations; in return they expect a safe and secure environment. When this expectation is not met and mob rule results in damages, reason and morality demand redress.

Rod Wong

[25] Cal. Stats. 1907 ch. 290 §1. Amended in 1949, and repealed 1963.

[26] Nellis, *Retroactivity of the 1963 California Governmental Tort Laws, A Legislative Triumph*, 1 Lin. L. Rev. 46 (1965).

[27] Cal. Gov. Code §810.