

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

A STUDY

relating to

Sovereign Immunity

January 1963

CALIFORNIA LAW REVISION COMMISSION

School of Law
Stanford University
Stanford, California

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

A STUDY

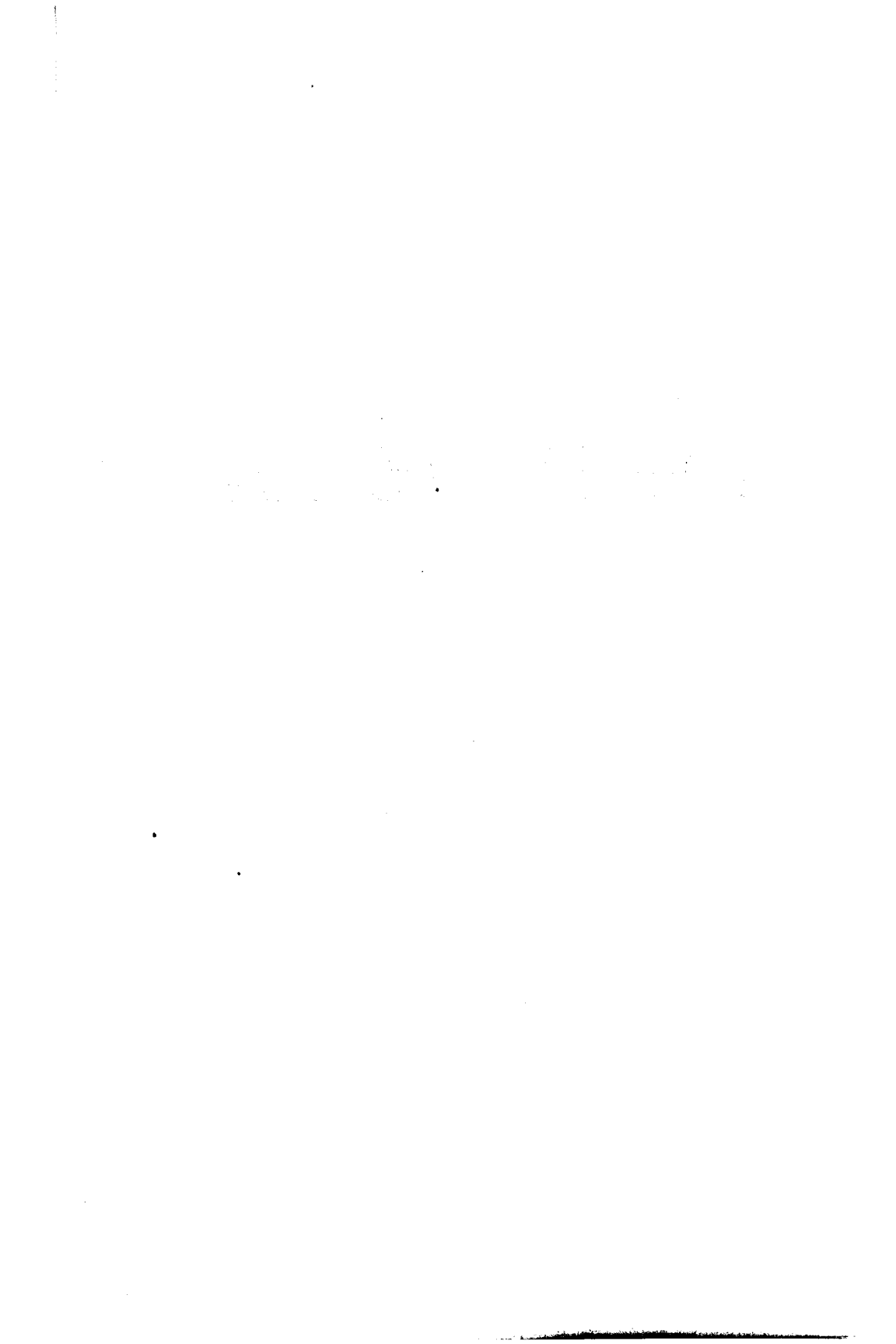
relating to

Sovereign Immunity

January 1963

CALIFORNIA LAW REVISION COMMISSION

School of Law
Stanford University
Stanford, California





STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

COMMISSION MEMBERS

HERMAN F. SELVIN
Chairman
523 West 6th Street
Los Angeles 14

JOHN R. McDONOUGH, Jr.
Vice Chairman
School of Law
Stanford University

JAMES A. COBEY
Member of the Senate
P. O. Box 1229
Merced

CLARK L. BRADLEY
Member of the Assembly
802 First National Bank Bldg.
San Jose 13

JOSEPH A. BALL
120 Linden Avenue
Long Beach 2

JAMES R. EDWARDS
599 Arrowhead Avenue
San Bernardino

RICHARD H. KEATINGE
3323 Wilshire Boulevard
Los Angeles 5

SHO SATO
School of Law
University of California
Berkeley

THOMAS E. STANTON, Jr.
221 Sansome Street
San Francisco

ANGUS C. MORRISON
Ex Officio
Legislative Counsel
3071 State Capitol
Sacramento 14

January 2, 1963

To HIS EXCELLENCY, EDMUND G. BROWN
*Governor of California
and to the Legislature of California*

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

The Commission herewith submits a research study on this subject prepared by the Commission's research consultant, Professor Arvo Van Alstyn of the School of Law, University of California at Los Angeles. The Commission's recommendations covering various aspects of this subject are contained in other published reports prepared for the 1963 legislative session. Only the recommendations submitted to the Legislature (as distinguished from the research study) are expressive of Commission intent.

Respectfully submitted,

HERMAN F. SELVIN, *Chairman*

COMMISSION STAFF
JOHN H. DeMOULLY
Executive Secretary

JOSEPH B. HARVEY
Assistant Executive Secretary

JON D. SMOCK
Assistant Counsel

GEORGE S. GROSSMAN
Administrative Assistant

Office of Commission and Staff
School of Law
Stanford University
Stanford, California



A STUDY RELATING TO SOVEREIGN IMMUNITY *

TABLE OF CONTENTS

	Page
INTRODUCTION	11
THE <i>Muskopf</i> DECISION	13
STATUTORY CONSENT TO SUE	17
Statutes Granting Unqualified Consent to Suit	21
General Consent Statutes	21
Comprehensive Consent Statutes	24
Implied Consent Statutes	27
Statutes Granting Qualified or Limited Consent to Suit	27
Public Entities for Which Consent to Suit Has Not Been	
Enacted	30
Conclusions	33
STATUTORY PROVISIONS GOVERNING SUBSTANTIVE TORT LIABILITY OF	
GOVERNMENTAL ENTITIES	35
Statutes Authorizing Governmental Liability	36
1. Vehicle Code Section 17001	36
2. Education Code Section 903	40
3. Public Liability Act of 1923	42
(a) Local agency	43
(b) Public property	44
(c) Dangerous or defective condition	44
(d) Knowledge or notice of defect	49
(e) Failure to remedy defect or protect public	53
(f) Proximate cause	55
4. Negligence of officers and employees of reclamation and	
flood control districts	59
5. Negligence of weed abatement crews	63
6. Statutory assumption by public entity of tort liability of	
its officers and employees	65
7. Damage from mob or riot	72
8. Livestock killed by dogs	73
9. Erroneous conviction of felony	74
10. Destruction of diseased animals and plants	75
11. Private property commandeered during emergency	77
12. Damages resulting from public improvement projects	78
(a) Relocation of utility facilities	79
(b) Restoration of crossings and intersections	91
(c) Miscellaneous provisions relating to damages arising	
from public improvement projects	96

* This study was made at the request of the California Law Revision Commission by Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles. The opinions, conclusions and recommendations are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions and recommendations of the Law Revision Commission.

TABLE OF CONTENTS—Continued

	Page
13. Liability assumed by contractual agreement	97
14. Workmen's compensation	101
15. Inverse condemnation	102
STATUTORY IMMUNIZATION FROM TORT LIABILITY	109
Entry on Private Property to Perform Official Duty	110
Limitations on Personal Liability of Public Officers for Dangerous or Defective Conditions of Public Property	120
Generally	120
Street and Sidewalk Defects	125
Defective School Buildings and Structures	129
Statutory Immunity of Public Officials for Acts of Subordinates	130
Generally	130
Limitations on Liability of City, County and School District Officers for Torts of Subordinate Personnel	133
Government Code Section 1953.6	133
Government Code Section 1954	136
Limitation of Liability of Special District Personnel for Torts of Subordinates:	
Type 1	137
Type 2	139
Type 3	141
Type 4	145
Limitation of Liability of Public Personnel to Own Negligence	146
Limitation of Liability of Public Personnel to Own Acts of Dishonesty or Crime	148
Miscellaneous Statutory Immunities of Public Personnel	149
Business and Professions Code Section 2144 (second paragraph)	150
Education Code Section 1041	151
Education Code Section 31301	153
Government Code Section 1953.5	154
Government Code Section 1955	155
Government Code Section 1957	157
Civil Code Section 1714.5 (second paragraph)	159
Military and Veterans Code Section 1587 (second paragraph)	161
Military and Veterans Code Section 1591 (paragraph (a))	162
Military and Veterans Code Section 1591 (paragraph (b))	163
Vehicle Code Section 17004	166
Military and Veterans Code Section 392	166
Welfare and Institutions Code Section 6005	168

TABLE OF CONTENTS—Continued

	Page
Welfare and Institutions Code Section 6610.3 (second paragraph) -----	169
Welfare and Institutions Code Section 6610.9 -----	171
Welfare and Institutions Code Section 6624 -----	172
Water Code Section 8576 -----	172
Water Code Section 8535 -----	174
Unclaimed Property Act (Sections 1335, 1378 and 1379 of the Code of Civil Procedure; Penal Code Section 5065; Sections 166.4 and 1019 of the Welfare and Institutions Code) -----	174
Express Statutory Immunities of Public Entities -----	174
Immunity for Injuries Resulting From Defective Public Property -----	174
Streets and Highways Code Section 941 (second paragraph) -----	175
Streets and Highways Code Section 1806 -----	176
Streets and Highways Code Sections 943 and 954 -----	176
Government Code Section 54002 -----	177
Civil Code Section 1714.5 (first paragraph) -----	179
Streets and Highways Code Section 5640 -----	181
Inglewood City Charter, Article XXXVI, Section 33 -----	183
Water Code Section 8535 -----	184
Immunity From Liability for Relocation of Facilities of Franchise Holders -----	186
Streets and Highways Code Section 680 -----	187
Public Utilities Code Section 6297 -----	187
Public Utilities Code Section 7812 -----	188
Municipal Charter Provisions -----	188
Miscellaneous Statutory Immunities From Liability -----	191
Government Code Section 1408 -----	191
Streets and Highways Code Section 942.5 -----	191
Unclaimed Property Act -----	192
Immunity by Implication From Statutory Language -----	193
Statutory Disclaimers of Intent to Enlarge Liability -----	193
Statutory Declaration of Nature of Entity's Functions -----	199
Statutory Limitations Upon Financial Ability of Entity to Satisfy Judgments -----	205
Functional Immunity of Nonindependent Entities -----	214
NONSTATUTORY LAW OF GOVERNMENTAL TORT LIABILITY BEFORE 1961 -----	219
The Distinction Between Governmental and Proprietary Activities -----	219
Injury Caused by Nuisance -----	225

TABLE OF CONTENTS—Continued

	Page
Intentional Torts	231
Bases for Nonliability Other Than Governmental Immunity	237
The Public Officer as a "Servant of the Law"	237
Nonliability for <i>Ultra Vires</i> Torts	242
Official Immunity for Discretionary Conduct	246
Nonfeasance as a Basis of Governmental Tort Immunity	260
POLICY DETERMINATION: FORMULATION OF A LEGISLATIVE SOLUTION	267
Policy Considerations Relevant to Substantive Liability	267
Objections to the Blanket Waiver Approach	269
Logic of the Selective Approach	271
Theory of Tort Liability of Governmental Entities	271
Policy Considerations Relevant to Financial Administration of Governmental Tort Liability	283
Providing Assurance That Meritorious Claims Will Be Paid	284
Providing Assurance Against Disruptive Financial Conse- quences to Public Entities	288
(1) Insurance	293
(2) Official bonds	297
(3) Instalment payment of judgments	302
(4) Financing tort liabilities through bond issue or other evidence of indebtedness	303
(5) Reduction of the risk by controlling or shifting the damages	303
Policy Summation	306
Policy Considerations Relevant to Procedural Handling of Governmental Tort Liability Claims	311
The Choice Between Assumption of Judgments and Direct Liability	311
The Choice Between Administrative and Judicial Auditing of Tort Claims	313
Reduction of Technical Difficulties and Resultant Expense in Handling of Claims	316
Policy Considerations Relevant to Mechanisms for Orderly Evo- lution of Governmental Tort Law	330
DIRECTIONS FOR LEGISLATIVE ACTION: POLICY RESOLUTION IN SPE- SPECIFIC TORT SITUATIONS	333
Dangerous and Defective Conditions of Public Property	333
Entities Covered by Public Liability Act	334
Standard of Care Imposed Upon the Public Entity	338
(a) The status of the plaintiff	339
(b) What constitutes an actionable defect?	345
(c) The requirements of prior knowledge or notice	352

TABLE OF CONTENTS—Continued

	Page
Contributory Negligence as a Basis for Denial of Recovery ..	364
Assumption of Risk as a Basis for Denial of Recovery	369
Limitations Upon and Exceptions to Liability for Defective Property	369
(a) Third party negligence	369
(b) Reasonableness of entity action after receiving notice of defect	373
(c) Exceptions to general rule of liability for defective property	375
(d) Statutory limitations upon recoverable damages	377
Medical Treatment and Hospital Care	379
Introduction	379
Medical Malpractice	385
Inadequate Supervision of the Mentally Ill:	
Self-inflicted Harm	387
Accidental Injury	389
Injury Inflicted Upon Fellow Inmate	389
Torts of Escaped Patients	390
Torts of Mentally Ill Persons Discharged From Hospital	392
Wrongful Arrest or Restraint of Persons Suspected of Being Mentally Ill or Afflicted With Contagious Disease	394
Injury to Patient or Inmate From Assault Committed by Hos- pital Employee	395
Wrongful Interference With Patient's Legal Rights	396
Injuries Sustained by Reason of Administration of Public Health Functions	397
Summary	400
Recommendation	404
Police Protection and Law Enforcement	404
False Arrest and Imprisonment	406
Malicious Prosecution	411
Infliction of Physical Injuries Upon Suspect or Prisoner	415
Injuries Inflicted by Peace Officer Negligently Retained in Public Employment Although Known to Be Unfit	418
Inadequate Supervision of Jail and Prisoners	421
Negligent Failure to Provide Medical Aid to Prisoner	426
Negligence of Prison or Jail Officials in Permitting Escape ..	430
Wrongful Infliction of Personal Injury or Property Damage by Policemen in Line of Duty	433
Adoption and Enforcement of Police Regulations	434
Failure to Adopt Safety Regulations or Precautions	438

TABLE OF CONTENTS—Continued

	Page
Failure to Enforce Existing Law.....	443
Failure to Provide Police Protection Against Threatened Injury by Third Parties.....	447
Injuries Sustained by Citizens Aiding Police in Enforcing the Law	452
Violations of Federal Civil Rights Act.....	454
Firefighting and Fire Protection.....	456
Failure to Provide a System of Fire Protection.....	464
Failure to Take Adequate Precautions to Prevent or Suppress Fire	464
Negligent Maintenance of Firefighting Equipment or Water Supply System	466
Negligent Conduct in Course of Firefighting and Fire Prevention Activities	470
Extraterritorial and Mutual Aid Fire Service.....	475
Destruction of Property to Avert a Conflagration.....	480
Park, Recreation, Cultural and Amusement Functions.....	482
Dangerous and Defective Conditions of Recreation and Park Property	491
Exemption From Liability.....	493
(a) Hiking and Riding Trails and Recreational Access Roads	493
(b) Beaches, Lakes, Ponds and Streams.....	494
(c) Other "Undeveloped" Park and Recreation Grounds	495
Defense of Assumption of Risk.....	496
Absence or Inadequacy of Supervision.....	502
Negligent Supervision and Other Tortious Conduct.....	511
PROBLEMS RELATING TO CONSTITUTIONALITY OF LEGISLATIVE SOLUTION	515
Legislative Competence to Alter the Common Law.....	516
Validity of Retrospective Legislation.....	520
Summary	537
TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS.....	539
TABLE OF CASES.....	549
INDEX	557

INTRODUCTION

Abrogation in 1961 by the Supreme Court of California of the long-accepted judicially declared doctrine of governmental tort immunity has given rise to a legislative problem of considerable magnitude. The case of *Muskopf v. Corning Hospital District*,¹ discussed below, which effected this change in California law, was decided against a background of adjudicatory experience of limited scope and in the narrowly confined factual context of a specific lawsuit. Limitations of this type, it should be noted, are characteristic of the very process of judicial lawmaking and are derived from the inherent nature of the adversary system of administering justice. The potential scope of the legislative vision, however, is much broader. The range of relevant data is more expansive; transmutation of policy determinations into statutory form is more flexible; evaluation of practical considerations may be better informed. The purpose of this study is to explore the implications of governmental tort liability in the light of existing statutory provisions and of related case law developments both in California and other states in an attempt to identify and suggest appropriate applications of policy considerations deemed pertinent to the solution of the legislative problem created by *Muskopf*.

The study proceeds under three main divisions. First, the statutory and case law of California relating to governmental tort liability prior to the *Muskopf* decision is explored in detail, and the implications of abrogation of the immunity doctrine are evaluated.² Second, an effort is made to articulate and appraise the policy considerations deemed relevant to the general solution of the problem of governmental tort liability in the light of the attributes and functions of public entities operating within the existing governmental structure of California.³ In this portion of the study, attention is directed not only to policy considerations relevant to substantive liability, but also to the policy aspects of financial administration of such liability, procedural mechanics, and the need for orderly future development of the law. Third, specific types of governmental tort liability situations are examined in detail, with particular attention to experience in like areas in other jurisdictions; and proposals for legislative action are advanced.⁴

Within the limited time available prior to the 1963 legislative session, an exhaustive study of all possible injury-producing activities of government was manifestly impossible. Accordingly, in the third portion of this study,⁵ significant areas of governmental operations were selected for examination, including the tort-generating aspects of public property maintenance and operation, public hospital and medical care programs, police administration and law enforcement, public fire suppression and protection, and park and recreational activities. Other problems relating to liability for injuries arising from the operation

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

² See pp. 13-266 *infra*.

³ See pp. 267-332 *infra*.

⁴ See pp. 333-514 *infra*.

⁵ *Ibid.*

of government are not explored in detail, either because of the necessity of selecting the most prominent areas of injury-producing activity as revealed by experience or because such problems are already dealt with to some extent in existing law. Although the areas examined in the study are believed to cover the most urgent problems, other phases of the general subject not here treated in detail, such as liability for defamation, would appear to warrant future detailed examination so that the contours of the law of governmental tort liability may be shaped in a consistent and logical legislative pattern.

At the conclusion of the study, consideration is given to the constitutionality of legislation framed to meet the problems created by *Muskopf*. Since the *Muskopf* decision, in effect, declared the existence for the first time of numerous causes of action which under previous law were not judicially recognized, the principal constitutional issues appear to relate to the validity of possible legislation designed in whole or in part to curtail or eliminate such "new" causes of action retrospectively. These newly recognized causes of action, it should be noted, have arisen not only in the period before the *Muskopf* decision, but also during the two and one-half year "moratorium" period following that decision, as established by the 1961 legislation which added Section 22.3 to the Civil Code.⁶

⁶ See discussion in the text at 515-38 *infra*.

THE MUSKOPF DECISION

Before January 27, 1961, the law of California with respect to the tort liability of governmental entities could be summarized generally (although in oversimplified terms) as follows:

The State, counties, cities and other subdivisions of government were deemed immune from liability for the torts committed by public employees in the performance of governmental functions, except to the extent that the immunity had been waived or judicially found to be inapplicable.¹ In effect, this meant that tort actions could be successfully prosecuted against governmental entities only if (a) the injury complained of arose out of the performance of a "proprietary" activity as distinguished from a "governmental" one;² or (b) the injury was the result of a nuisance created by the public entity;³ or (c) a statute could be found which waived immunity and imposed liability on the public entity;⁴ or (d) the claim related to "taking or damaging" of property under circumstances permitting the action to be formulated as one for "inverse condemnation."⁵ The range of tort claims which conceivably could be brought within one or another of these four exceptional situations was broad, but not coextensive with the law governing tort liability of private persons.

The foregoing rules, however, were significantly and materially affected by the handing down, on January 27, 1961, of the Supreme Court's far-reaching decision in the case of *Muskopf v. Corning Hos-*

¹ See, e.g., *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953); *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1, 40 A.L.R.2d 919 (1947). For good general surveys of the subject, see 2 HARPER & JAMES, *THE LAW OF TORTS* 1607-32 (1956) [hereinafter cited as HARPER & JAMES]; David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1 (1959); *Governmental Tort Liability*, 9 LAW & CONTEMP. PROB. 179 (1942).

² The "governmental-proprietary" distinction was recognized as applicable not only to municipal corporations, *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670, Ann. Cas. 1918D 106, L.R.A. 1917E 635 (1917), but also to the State, *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 458 (1956), and various forms of local entities. See *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953) (counties); *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958) (district agricultural associations); *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948) (municipal housing authorities); *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 293 Pac. 53 (1930) (municipal utility districts).

³ The cases recognized that a public entity could be held liable for creating a nuisance even though involved in a "governmental" activity. See *Phillips v. City of Pasadena*, 27 Cal.2d 104, 162 P.2d 625 (1945); *Ambrosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

⁴ The number of such statutes is larger than is generally realized. See compilation at 35-101 *infra*.

⁵ "Inverse condemnation" is the term generally used to refer to actions brought to recover the just compensation required to be paid by CAL. CONST., Art. I, § 14, where private property is "taken or damaged for public use." See, e.g., *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957); *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955). The constitutional provision is deemed to be self-executing and hence requires no enabling legislation. *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943); *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942). For further discussion of the employment of this remedy in situations otherwise indistinguishable from ordinary negligence torts, see pp. 102-108 *infra*.

pital District.⁶ The Court in this case, by a 5-2 decision, declared that "the doctrine of governmental immunity for torts for which its agents are liable has no place in our law"⁷ Plaintiff's complaint for damages for personal injuries allegedly sustained by reason of negligence of the employees of defendant Corning Hospital District⁸ was thus held to state a cause of action.

Abrogation of the common law doctrine of governmental immunity,⁹ however, does not necessarily mean that public entities are now to be treated in the law as subject to the same rules governing tort liability as are private persons. The *Muskopf* opinion intimates, on the contrary, that the issue of liability in a given case (and hence in tort actions against public entities generally) may be resolved only by a careful analysis in at least three different areas of legal development:

(1) The Court in *Muskopf* refused to disturb the previously recognized distinction between the State's consent to be sued and its substantive liability.¹⁰ Quoting Section 32121, subdivision (b), of the Health and Safety Code (which authorizes hospital districts to "be sued in all courts and places and in all actions and proceedings whatever"), the opinion points out that logically it would seem from the quoted language that judgment was authorized to be entered against the hospital district in any such suit. Similarly, the opinion observes, the wording of Article XX, Section 6 of the California Constitution ("Suits may be brought against the State in such manner and in such courts as shall be directed by law") seems on its face "to say that the state may be held liable when suits are brought against it in accordance with a legislatively prescribed procedure."¹¹ Previous cases,¹² however, had construed language of this type as only giving consent to suit, and *not* as a waiver of sovereign immunity. Despite the Court's intimations that such holdings were at variance with the apparent meaning of the legislative language, they were not overruled. Instead, Mr. Justice Traynor states: "Consistent, however, with our previous construction of essentially identical statutory language, we hold that article XX, section 6, provides merely for a legislative consent to suit."¹³ Section 32121(b) of the Health and Safety Code was thus treated as merely the statutory embodiment of the consent of the Legislature to suit against a hospital district, enacted pursuant to Article XX, Section 6. In light of the precedents which the Court refused to disturb, such legislative consent to suit against the defendant hospital

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

⁷ *Id.* at 221, 11 Cal. Rptr. at 95, 359 P.2d at 463. Earlier in its opinion, the Court states: "After a reevaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust." *Id.* at 213, 11 Cal. Rptr. at 90, 359 P.2d at 458.

⁸ The defendant hospital district was created pursuant to the provisions of The Local Hospital District Law, CAL. H. & S. CODE §§ 32000-32492.

⁹ As is pointed out at 17 *infra*, the doctrine of immunity from tort liability, as developed in the California cases, had two separate elements: (1) procedural immunity to suit, and (2) substantive immunity from liability. The *Muskopf* case clearly abrogates the second aspect of the doctrine, but, taken literally, seems to recognize the continued validity of the first except to the extent it has been modified by legislation.

¹⁰ See *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1, 40 A.L.R.2d 919 (1947).

¹¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (1961).

¹² The court cites, *inter alia*, *Denning v. State*, 123 Cal. 316, 55 Pac. 1000 (1899); *Melvin v. State*, 121 Cal. 16, 53 Pac. 416 (1898); and *Chapman v. State*, 104 Cal. 690, 38 Pac. 457 (1894). For a discussion of these cases, see pp. 19-20 *infra*.

¹³ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (1961).

district was thus an essential element in the ultimate holding of liability.¹⁴ Accordingly, it would seem that a preliminary issue to be investigated, in seeking to ascertain the present California law of governmental tort liability, is the extent to which the Legislature has given its consent to suit against various types of public entities.¹⁵

(2) The Supreme Court recognized in *Muskopf* that the Legislature had made substantial inroads upon the governmental immunity doctrine. Citing four statutory provisions¹⁶ as illustrative, the Court pointed out that the legislative approach to the matter had been sporadic. Specific legislation had been adopted from time to time in particular areas of governmental immunity where the need was felt to be most pressing, but there had been no comprehensive legislative treatment of the problem. The Legislature, however, had been sufficiently active that Mr. Justice Traynor could say: "For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion."¹⁷ A second avenue of consideration, then, in appraising the present law of governmental liability requires investigation into the extent to which the statutory law has modified the common law rules.¹⁸

(3) Finally, the *Muskopf* case, viewed in light of its facts, simply held that a hospital district could not assert governmental immunity as a defense against an action for personal injuries sustained by a patient in a district hospital as a result of the negligence of district employees. Its implications in other situations and with respect to other public entities in the light of the previously established nonstatutory law of governmental immunity are admittedly very broad. Yet, as the Court itself specifically recognized, abrogation of the immunity doctrine "does not mean that the state is liable for all harms that result from its activities. Both the state and individuals are free to engage in many activities that result in harm to others so long as such activities are not tortious."¹⁹ Moreover, in a companion case, the court held a school district not liable in tort for certain discretionary acts of its officers; but in reaching this conclusion, the court strongly intimated that public entities may in some circumstances be liable for injuries resulting from conduct of their officers for which the officers themselves are immune.²⁰

Each of these three problem areas, as posed by the *Muskopf* decision, will be independently examined for such light as they may cast upon the present law as well as the most desirable directions for its future development through legislative enactment.

¹⁴ See *Hensley v. Reclamation Dist. No. 556*, 121 Cal. 96, 53 Pac. 401 (1898).

¹⁵ See pp. 17-33 *infra*.

¹⁶ CAL. EDUC. CODE § 903; CAL. GOVT. CODE §§ 50140, 53051; CAL. VEH. CODE § 17001.

¹⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

¹⁸ See pp. 35-218 *infra*.

¹⁹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 220, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

²⁰ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

STATUTORY CONSENT TO SUIT

If the doctrine of sovereign immunity were deemed to be based solely on the absence of a remedy against the state, statutory consent to suit would appear to connote a waiver of immunity. The issue of liability, however, is readily distinguishable from that of the remedial devices available to the injured person; and the conceptual distinction is authenticated by experience. Prior to 1893, the only remedy available to an individual injured by negligence of state employees was administrative adjudication followed by an appropriation bill enacted by the Legislature.¹ Even today, under the claims procedure which is the lineal descendant of the 1893 legislation first permitting suit against the State, the primary remedy is audit by the State Board of Control or the State Controller and, where the claim is allowed, payment pursuant to legislative appropriation.² Suit is authorized only on such claims as are administratively disallowed.³ Similar procedures obtain with respect to claims against local public entities.⁴ Manifestly, in the administrative auditing of claims, liability conceivably might be voluntarily assumed (absent statutory or constitutional restrictions⁵) in cases

¹ See *Welsbach v. State*, 206 Cal. 556, 558, 275 Pac. 436, 437 (1929):

"Prior . . . to 1893 persons having causes of action against the state for injuries arising by reason of the negligence of its officials or employees were not permitted a recovery against the state in the courts, but were relegated to the uncertain mercies of the legislature for relief. It was doubtless for the purpose of a definite departure from the long-held rule of law that the sovereign could not be made a party to actions of any sort against it without its consent, that the legislature of California, in its wisdom, saw fit to adopt the act of 1893 [Cal. Stat. 1893, ch. 45, p. 57] . . ." *Cf. Chapman v. State*, 104 Cal. 690, 696, 38 Pac. 457, 458-59 (1894). Similar reliance upon legislative adjudication and allowance of claims by private appropriation bills has been not uncommon in other states. See 2 HARPER & JAMES 1613; Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942); Nutting, *Legislative Practice Regarding Tort Claims Against the State*, 4 MO. L. REV. 1 (1939). It has been suggested that "the legislative allowance of claims was and continues to be the common-law method. The press of business in the legislatures, the delay in passing upon claims, and the political interplay concerning them have had more to do with creation of procedures delegating auditing functions to administrative bodies, and the law courts, than have any conceptual concerns about justice." David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 4 (1959).

² CAL. GOVT. CODE §§ 600-624. See, generally, *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943).

³ CAL. GOVT. CODE §§ 640-655.

⁴ CAL. GOVT. CODE §§ 700-720. As to the status of local entity claims procedures prior to 1959, see 2 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, Recommendation and Study at A-1 (1959); Van Alstyne, *Claims Against Public Entities: Chaos in California Law*, 6 U.C.L.A. L. REV. 205 (1959).

⁵ Although statutory restrictions against payment of claims not recognized in law may restrict the power of some entities to voluntarily assume liability, see, e.g., CAL. GOVT. CODE § 23006 (applicable to counties), the most pervasive limitation would seem to be the constitutional prohibition against gifts of public funds. CAL. CONST., Art. IV, § 31. See *Chapman v. State*, 104 Cal. 690, 38 Pac. 457 (1894). Early cases strongly declared that "moral" or "equitable" considerations were an insufficient basis for authorizing payment of claims and that payment on such basis would be an illegal gift. *Conlin v. Board of Supervisors*, 99 Cal. 17, 33 Pac. 753 (1893); *Powell v. Phelan*, 138 Cal. 271, 71 Pac. 335 (1903). The severity of this view, however, has been greatly relaxed in recent years due to three important developments: (a) the expansion of the doctrine which restricts judicial scrutiny to the face of the legislative appropriation measure, thereby making the presumption of validity well-nigh conclusive, *Dittus v. Cranston*, 186 Cal. App.2d 837, 9 Cal. Rptr. 314 (1960); cf. *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L.R.A. 459 (1891); (b) expansion of the doctrine that expenditures of public funds for the benefit of private persons are not prohibited gifts if the Legislature could reasonably conclude that such expenditure was for a public purpose, *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959); *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455

thought to be deserving; but once the claim has been rejected and thereafter referred to the court for adjudication, the issue of liability is necessarily determinable solely by reference to substantive legal principles.

Viewed in this light, it is not difficult to understand how the granting of consent to the bringing of an action against the State (or its subdivisions) might logically be regarded not as a waiver of substantive immunity but simply as a choice of one among several alternative remedial techniques for administering such liability as might exist under the law. If the entity is legally liable, such consent, of course, implies that judgment may be entered against it; but if it is not, the implication is equally clear that judgment will be entered in its favor. Permission to sue simply constitutes a procedural remedy; it does not predetermine the substantive result.⁶

The logical implications of the foregoing analysis—that liability may exist without a judicial remedy, and that a judicial remedy may exist without liability—were early accepted by the California courts. The ensuing principle that governmental immunity was founded on absence of both a right and a remedy was originally introduced by what almost appears to have been judicial inadvertence; but once announced, was perpetuated through invocation of *stare decisis*.⁷

The case of *Green v. State of California*⁸ involved a statute enacted in 1885⁹ which authorized named individuals “to institute an action against the State of California in any Court of competent jurisdiction in such State, for damages which may be alleged to have been caused” by the construction of a canal pursuant to a previous legislative enactment. The action of the trial court in dismissing a complaint predicated upon this statute was sustained on appeal. The court rejected the contention that the State’s immunity was based solely upon the rule that the sovereign may not be sued in its own courts without its consent. Instead, said the court, “when the state permits itself to be sued, the matter is simply referred to the courts to determine whether the claim does or does not constitute a lawful demand against the state”¹⁰

This broad generalization, however, was not necessary to the decision. The statute in question expressly authorized judgment to be entered against the State only “if it appears upon the trial of any of said actions that damage has been done to the plaintiff by any act for which the state is legally liable.” As the Supreme Court quite properly pointed out, this language “industriously excludes the idea that the liability was admitted, or that any legal defense was waived except that

(1930); and (c) the principle that charter cities, being vested with autonomy in the area of “municipal affairs,” are not limited by the gift clause of the Constitution, *Tevis v. City & County of San Francisco*, 43 Cal.2d 190, 272 P.2d 757 (1954); *Los Angeles Gas & Elec. Corp. v. City of Los Angeles*, 188 Cal. 307, 205 Pac. 125 (1922). Despite this doctrinal relaxation, however, there seems to have been little tendency upon the part of public officers auditing claims to approve them where the defense of governmental immunity would be available in a court action thereon.

⁶ Compare Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMP. PROB. 181, 188 (1942) and Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214, 219 (1942), both of which are cited in *People v. Superior Court*, 29 Cal.2d 754, 760, 178 P.2d 1, 5 (1947). See also James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955).

⁷ See *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947) and cases therein cited. *Cf. Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 132 P.2d 804 (1942).

⁸ 73 Cal. 29, 14 Pac. 610 (1887).

⁹ Cal. Stat. 1885, ch. 123, p. 107.

¹⁰ 73 Cal. 29, 32, 14 Pac. 610, 611 (1887).

of immunity from suit."¹¹ On the merits, the court found no basis for holding the State liable under applicable legal principles.

The *Green* case thus may properly be regarded as one in which the statutory consent to suit was accompanied by an express retention of the benefits of the governmental immunity doctrine, to the extent that that doctrine might be applicable. This interpretation does not mean that the statutory consent provision merely authorized the plaintiff to make a fruitless trip to the courthouse. A basic substantive issue still remained to be determined, namely, whether the State was liable under the circumstances on the theory of inverse condemnation. On this reasonably debatable issue the court held for the defendant.

In 1893 the Legislature enacted another consent to suit statute¹² which, *inter alia*, authorized persons having claims on contract or for negligence against the State, which were not allowed by the State Board of Examiners, "to bring suit thereon against the State in any of the Courts of this State of competent jurisdiction, and prosecute the same to final judgment." The case of *Chapman v. State of California*,¹³ decided in 1894, related to facts which occurred prior to the enactment of the 1893 statute. The court held that the statute was not intended to have any retroactive effect, and, indeed, that it could not be construed as creating any liability for past acts of negligence without violating the prohibition in Section 31 of Article IV of the Constitution against the Legislature making any gift of public money or other thing of value. On the facts, however, the court held that plaintiffs' loss was based on a contract right for which liability did exist prior to the 1893 Act, and that the consent statute had simply provided an additional remedy for the enforcement of that contractual liability. The court in *Chapman* obviously did not find it necessary to, and in fact did not, pass on the question whether the 1893 statute was intended to waive prospectively the State's substantive immunity from tort liability.

A somewhat similar problem was presented in *Melvin v. State*,¹⁴ in which an alleged tort cause of action against the State had also occurred prior to the enactment of the 1893 statute. The court merely followed the *Chapman* case, pointing out that the State was not liable for the tort at the time the cause of action arose, and that "the passage of the act of 1893, after the commission of the tort, did not have the effect of giving a right of action for a wrong where none before existed."¹⁵ Other cases dealing with alleged causes of action which occurred prior to the passage of the 1893 statute are to the same effect,¹⁶ although in one of them, *Davis v. State*,¹⁷ there is an unnecessary dictum to the effect that the 1893 statute ". . . is a mere waiver, within certain bounds, of the state's sovereign prerogative not to be

¹¹ *Id.* at 33, 14 Pac. at 612.

¹² Cal. Stat. 1893, ch. 45, p. 57. This statute is the predecessor of CAL. POL. CODE § 688 (enacted by Cal. Stat. 1929, ch. 516, p. 891), later recodified as CAL. GOVT. CODE § 16041 *et seq.* (enacted by Cal. Stat. 1945, ch. 119, p. 511), and presently found as CAL. GOVT. CODE § 600 *et seq.* (enacted by Cal. Stat. 1959, ch. 1715, p. 4116).

¹³ 104 Cal. 690, 38 Pac. 457 (1894).

¹⁴ 121 Cal. 16, 53 Pac. 416 (1898).

¹⁵ *Id.* at 23, 53 Pac. at 418.

¹⁶ See *Davis v. State*, 121 Cal. 210, 53 Pac. 555 (1898); *Molineux v. State*, 109 Cal. 378, 42 Pac. 34 (1895).

¹⁷ 121 Cal. 210, 53 Pac. 555 (1898).

sued. . . . It clearly was not the intent of the act . . . to give any new right, other than the right to sue, to any claimant whomsoever."¹⁸

The issue whether the 1893 statute was intended to constitute a prospective consent to liability in tort was apparently squarely raised for the first time in the case of *Denning v. State*, decided in 1899.¹⁹ The alleged acts of negligence in that case occurred subsequent to the enactment of the 1893 statute. In reply to the State's contention that it was immune from liability for negligence in the conduct of a governmental function, the plaintiff argued that the Legislature intended by the Act of 1893 to make the State liable for the negligence of its officers and employees to the same extent that other corporations are liable. Without observing that the *Chapman* and *Melvin* cases had dealt solely with the problem of retroactive assumption of liability, the court paraphrased language taken out of context from those decisions, stating that in both cases ". . . it was held that said statute did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted."²⁰ Thus, through an erroneous interpretation of the *Chapman* and *Melvin* cases, the California rule was finally settled in *Denning* that statutory consent to be sued does not constitute a waiver of immunity from liability for tort.²¹

This narrow interpretation of consent to suit statutes has been reaffirmed in later cases dealing with the lineal descendants of the 1893 statute, namely Section 688 of the Political Code²² and Section 16041 *et seq.* of the Government Code.²³ Similarly, the California courts have consistently refused to infer a waiver of substantive immunity from statutory provisions expressly consenting to suit against other forms of public entities, including irrigation districts,²⁴ hospital districts,²⁵ municipal utility districts,²⁶ housing authorities,²⁷ the Los Angeles County Flood Control District,²⁸ the State Compensation Insurance Fund,²⁹ and the Sacramento and San Joaquin Drainage District.³⁰

The significance of the foregoing historical survey, of course, lies in the fact that the Supreme Court in *Muskopf* declined to overrule the cited cases (except insofar as they accepted the doctrine of substantive immunity) or to discard the accepted interpretation of the consent to suit statutes as simply procedural in effect. Indeed, the Court care-

¹⁸ *Id.* at 212, 53 Pac. at 556.

¹⁹ 123 Cal. 316, 55 Pac. 1000 (1899).

²⁰ *Id.* at 319, 55 Pac. at 1001.

²¹ *Accord*, *Walker v. Department of Public Works*, 108 Cal. App. 508, 291 Pac. 907 (1930); *County of Alameda v. Chambers*, 35 Cal. App. 537, 170 Pac. 650 (1917). See also cases cited, notes 22-30 *infra*.

²² *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947).

²³ *Gillespie v. City of Los Angeles*, 114 Cal. App.2d 513, 250 P.2d 717 (1952).

²⁴ See *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 Pac. 171 (1928); *Jackson & Perkins Co. v. Byron-Bethany Irr. Dist.*, 136 Cal. App. 375, 29 P.2d 217, 30 P.2d 516 (1934); *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 Pac. 706 (1922). *But cf.* *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717 (1941).

²⁵ *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953).

²⁶ *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 293 Pac. 53 (1930).

²⁷ *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

²⁸ *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

²⁹ *Rauschan v. State Compensation Ins. Fund*, 80 Cal. App. 754, 253 Pac. 173 (1927), disapproved on other grounds in *People v. Superior Court*, *supra* note 22.

³⁰ *Western Assur. Co. v. Sacramento & San Joaquin Drainage Dist.*, 72 Cal. App. 68, 237 Pac. 59 (1925).

fully points out that hospital districts had expressly been declared by the Legislature to be subject to suit. The fair implication seems to be that in the absence of such statutory consent to suit, no action could have been maintained. In the words of Mr. Justice Traynor,³¹ such statutes "have been construed as providing only a waiver [of immunity] from suit" and hence "their continuous reenactment indicates a clear legislative purpose to remove all procedural obstacles" when substantive liability exists. Absence of legislative consent to suit would, it seems, constitute a "procedural obstacle" to recovery.

It may well be that the Supreme Court, having taken the major step of discarding the rule of substantive governmental immunity, would not hesitate to discard the procedural half of the doctrine as well, if the need to do so arises. Taking the *Muskopf* case on its face, however, it would seem that an injured person seeking redress against a public entity by means of a civil tort action must be prepared to establish that consent to suit against the entity has been granted. We thus turn to an examination of the extent to which this has been done.

Statutes Granting Unqualified Consent to Suit

Legislative consent to suit has been enacted in several forms, which for convenience may be classified as follows:

General Consent Statutes

Many statutes relating to governmental entities contain a simple general statement to the effect that the entity "may sue and be sued," without further elaboration. Absent any qualification upon the consent thus expressed, such provisions are clearly broad enough to authorize an action in tort founded upon negligence.³² Included among these provisions are the following general statutes:³³

Counties	GOVT. CODE § 23004 (a)
Cities ³⁴	GOVT. CODE § 34501
Boulevard districts	STS. & HWYS. CODE § 26113 (a)

³¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (1961).

³² See *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958); *Ambrosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957); *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

³³ Omitted from the listing in the text are the following statutory enabling acts with "sue and be sued" clauses, which acts have been repealed (but as to which the repealing measure expressly preserved the continued applicability of the act to any existing districts formed thereunder): CAL. PUB. RES. CODE § 5662, repealed with savings clause by Cal. Stat. 1957, ch. 2165, § 1, p. 3819 (park, recreation and parkway districts); Sanitary District Law of 1891, Cal. Stat. 1891, ch. 161, § 5, p. 224, CAL. GEN. LAWS ANN. Act 7102, § 5 (Deering 1954), repealed by Cal. Stat. 1939, ch. 1124, p. 3072, with savings clause codified by repealing statute as CAL. H. & S. CODE § 6406, subsequently reenacted as CAL. H. & S. CODE § 6935 (sanitary districts); Sanitary District Act of 1919, Cal. Stat. 1919, ch. 480, § 6, p. 943, CAL. GEN. LAWS ANN. Act 7103, § 5 (Deering 1954), repealed by Cal. Stat. 1939, ch. 1124, p. 3072, with savings clause codified by repealing statute as CAL. H. & S. CODE § 6406, subsequently reenacted as CAL. H. & S. CODE § 6935 (sanitary districts).

³⁴ CAL. GOVT. CODE § 34501, cited in text, applies only to general law cities. However, charter cities ordinarily have similar provisions in their charters, see, e.g., Los Angeles Charter, § 2(2), Cal. Stat. 1925, ch. 5, p. 1023; cf. Modesto Charter, § 200, Cal. Stat. 1951, ch. 46, p. 4314, incorporating CAL. GOVT. CODE § 34501 by reference, although the language used is often in the broader and more comprehensive form employed in the provisions cited in the text at 24-27 *infra*. See, e.g., San Francisco Charter, § 2, Cal. Stat. 1931, ch. 56, p. 2978; San Diego Charter, § 1, Cal. Stat. 1931, ch. 47, p. 2840. The cases intimate that municipal corporations are in any event amenable to suit, even in the absence of statute, to the same extent as private corporations or persons. *Spring Valley Water Works v. San Francisco*, 32 Cal. 286, 22 Pac. 910 (1890).

Cemetery districts	H. & S. CODE § 8960
Community redevelopment agencies	H. & S. CODE § 33262(a)
County drainage districts	WATER CODE § 56041(a)
County sanitation districts	H. & S. CODE § 4738
District agricultural associations	AGRIC. CODE § 86(a)
Fire protection districts	H. & S. CODE § 13852(a)
Flood control and water conservation districts	Flood Control and Water Conservation District Law, Cal. Stat. 1931, ch. 641, § 7(2), p. 1371, CAL. GEN. LAWS ANN. Act 9178, § 7(2) (Deering 1954), CAL. WATER CODE APP. § 38-7(2) (West 1956)
Harbor districts	HARB. & NAV. CODE § 6072
Harbor improvement districts	HARB. & NAV. CODE § 5900.1
Highway lighting districts	STS. & HWYS. CODE § 19131
Housing authorities	H. & S. CODE § 34311(a)
Joint highway districts	STS. & HWYS. CODE § 25050(h)
Joint powers contract agencies	GOVT. CODE § 6508
Library districts	EDUC. CODE § 27872
Library districts in unincorporated territory	EDUC. CODE § 27575
Local fire districts	H. & S. CODE § 14092(a)
Parking authorities	STS. & HWYS. CODE § 32301(a)
Pest abatement districts	H. & S. CODE § 2853(f)
Police protection districts	H. & S. CODE § 20077
Port districts	HARB. & NAV. CODE § 6292
Reclamation districts	WATER CODE § 50603
Recreation and park districts	PUB. RES. CODE § 5782.5(a)
River port districts	HARB. & NAV. CODE § 6892
Sanitary districts	H. & S. CODE § 6511
Separation of grade districts	STS. & HWYS. CODE § 8145(a)
Soil conservation districts	PUB. RES. CODE § 9255
Storm water districts	Storm Water District Act of 1909, Cal. Stat. 1909, ch. 222, § 8, as amended by Cal. Stat. 1957, ch. 357, § 221, p. 1062, CAL. GEN. LAWS ANN. Act 6176, § 8 (Deering Supp. 1961), CAL. WATER CODE APP. § 13-8 (West Supp. 1961)
Unified school district public libraries	EDUC. CODE § 28111

Similar unqualified language granting consent to "sue and be sued" is found in the following special acts governing particular public entities:

Alameda County Flood Control and Water Conservation District Act	Cal. Stat. 1949, ch. 1275, § 5(2), as amended by Cal. Stat. 1961, ch. 1565, § 1, p. 3384, CAL. GEN. LAWS ANN. Act. 205, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 55-5(2) (West Supp. 1961)
--	---

Bethel Island Municipal Improvement District Act	Cal. Stat. (1st Ex. Sess.) 1960, ch. 22, § 76, p. 333
California Toll Bridge Authority	Srs. & Hwys. Code § 30058
Contra Costa County Flood Control and Water Conservation District Act	Cal. Stat. 1951, ch. 1617, § 5(2), as amended by Cal. Stat. 1959, ch. 1886, § 1, p. 4447, CAL. GEN. LAWS ANN. Act 1656, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 63-5(2) (West Supp. 1961)
Embarcadero Municipal Improvement District Act	Cal. Stat. (1st Ex. Sess.) 1960, ch. 81, § 76, p. 447
Estero Municipal Improvement District Act	Cal. Stat. (1st Ex. Sess.) 1960, ch. 82, § 76, p. 463
Fairfield-Suisun Sewer District Act	Cal. Stat. 1951, ch. 303, § 41, p. 555, CAL. GEN. LAWS ANN. Act 7551a, § 41 (Deering 1954)
Guadalupe Valley Municipal Improvement District Act	Cal. Stat. 1959, ch. 2037, § 76, p. 4710, CAL. GEN. LAWS ANN. Act 5239b, § 76 (Deering Supp. 1961)
Knight's Landing Ridge Drainage District Act	Cal. Stat. 1913, ch. 99, § 5, p. 117, CAL. GEN. LAWS ANN. Act 2191, § 5 (Deering 1954), CAL. WATER CODE APP. § 21-5 (West 1956)
Lake County Flood Control and Water Conservation District Act	Cal. Stat. 1951, ch. 1544, § 5(2), as amended by Cal. Stat. 1959, ch. 1532, § 3, p. 3836, CAL. GEN. LAWS ANN. Act 4145, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 62-5(2) (West Supp. 1961)
Los Angeles Metropolitan Transit Authority Act of 1957	Cal. Stat. 1957, ch. 547, § 4.2, p. 1617, CAL. GEN. LAWS ANN. Act 4481, § 4.2 (Deering Supp. 1961), CAL. PUB. UTIL. CODE APP. 1, § 4.2 (West Supp. 1961)
Marin County Flood Control and Water Conservation District Act	Cal. Stat. 1953, ch. 666, § 5(2), p. 1916, CAL. GEN. LAWS ANN. Act 4599, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 68-5(2) (West 1956)
Montalvo Municipal Improvement District Act	Cal. Stat. 1955, ch. 549, § 42, p. 1018, CAL. GEN. LAWS ANN. Act 5239a, § 42 (Deering Supp. 1961)
Mt. San Jacinto Winter Park Authority Act	Cal. Stat. 1945, ch. 1040, § 4.2, p. 2011, CAL. GEN. LAWS ANN. Act 6385, § 4.2 (Deering 1954)
Sacramento & San Joaquin Drainage District Act	WATER CODE § 8503
Sacramento River West Side Levee District Act	Cal. Stat. 1915, ch. 361, § 5, p. 523, CAL. GEN. LAWS ANN. Act 4296, § 5 (Deering 1954), CAL. WATER CODE APP. § 26-5 (West 1956)
San Diego Unified Port District Act	Cal. Stat. (1st Ex. Sess.) 1962, ch. 67, § 23, p. --, CAL. GEN. LAWS ANN. Act 3207, § 23 (Deering Supp. 1962), CAL. HARB. & NAV. CODE APP. § 1-23 (West Supp. 1962)
San Joaquin County Flood Control and Water Conservation District Act	Cal. Stat. (1st Ex. Sess.) 1956, ch. 46, § 5(2), as amended by Cal. Stat. 1961, ch. 933, § 4, p. 2559, CAL. GEN. LAWS ANN. Act 7150, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 79-5(2) (West Supp. 1961)
Santa Barbara County Flood Control and Water Conservation District Act	Cal. Stat. 1955, ch. 1057, § 5(2), p. 2007, CAL. GEN. LAWS ANN. Act. 7304, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 74-5(2) (West 1956)
Shasta County Water Agency Act	Cal. Stat. 1957, ch. 1512, § 41, p. 2847, CAL. GEN. LAWS ANN. Act 7580, § 41 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-41 (West 1959)
Solvang Municipal Improvement District Act	Cal. Stat. 1951, ch. 1635, § 42, p. 3680, CAL. GEN. LAWS ANN. Act 5239, § 42 (Deering 1954)

Comprehensive Consent Statutes

A number of statutory provisions granting consent to suit against public agencies do so in such broad and comprehensive terms as to suggest a legislative intent not only to consent to suit but also to waive immunity from liability. Typical language of this sort was involved in the *Muskopf* case, where Mr. Justice Traynor quoted the applicable provisions of the Local Hospital District Act,³⁵ authorizing hospital districts to "sue and be sued in all courts and places and in all actions and proceedings whatever." Consistent with holdings in previous cases, however, this unequivocal declaration was held to be "similar" to a simple "sue and be sued" provision and hence to merely constitute "a waiver [of immunity] from suit and not a waiver of substantive immunity."³⁶ Equally broad statutory language, with occasional immaterial variations of wording, is found in general enabling statutes relating to the following types of local public entities:³⁷

Air pollution control districts	H. & S CODE § 24212 (b)
Bridge and highway districts	STS. & HWYS. CODE § 27161
Citrous pest control districts	Citrous Pest District Control Act, Cal. Stat. 1939, ch. 89, § 45(a), as amended by Cal. Stat. 1961, ch. 10, § 6, p. 536, CAL. GEN. LAWS ANN. Act 130, § 45(a) (Deering Supp. 1961)
Community services districts	GOVT. CODE § 61612
County water authorities	County Water Authority Act, Cal. Stat. 1943, ch. 545, § 5(2), as amended by Cal. Stat. 1945, ch. 670, § 1, p. 1337, CAL. GEN. LAWS ANN. Act 9100, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 45-5(2) (West 1956)
Hospital districts	H. & S. CODE § 32121(b)
Memorial districts	MIL. & VET. CODE § 1190(a)
Metropolitan water districts	Metropolitan Water District Act, Cal. Stat. 1927, ch. 429, § 5(2), as amended by Cal. Stat. 1937, ch. 140, § 2, p. 383, CAL. GEN. LAWS ANN. Act 9129, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 35-5(2) (West 1956)
Recreational harbor districts	HARB. & NAV. CODE § 6612
Small craft harbor districts	HARB. & NAV. CODE § 7142
Student transportation districts	EDUC. CODE § 16959 (b)

Comprehensive statutory language consenting to suit against the entity "in all actions and proceedings" is also found in the following special acts governing particular local public entities:

³⁵ CAL. H. & S. CODE § 32121(b).

³⁶ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 218, 11 Cal. Rptr. 89, 93, 359 P.2d 457, 461 (1961). Prior cases construing similar statutory language as only giving consent to suit include *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953); *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

³⁷ Omitted from the listing are the following statutory provisions which have been repealed, but with respect to which the repealing measure expressly preserved the continued applicability of the repealed act to any existing districts formed thereunder: Conservancy Act of California, Cal. Stat. 1919, ch. 332, § 6(2), p. 567, CAL. GEN. LAWS ANN. Act 1585, § 6(2) (Deering 1954), repealed with savings clause by Cal. Stat. 1953, ch. 1023, § 1, p. 2493 (conservancy districts); Drainage District Act of 1923, Cal. Stat. 1923, ch. 102, § 15, p. 204, CAL. GEN. LAWS ANN. Act 2204, § 15 (Deering 1954), repealed with savings clause by Cal. Stat. 1953, ch. 1019, § 1, p. 2492 (drainage districts); CAL. H. & S. CODE § 936(b), repealed with savings clause by Cal. Stat. 1959, ch. 380, § 3, p. 2305 (local health districts).

American River Flood Control District Act	Cal. Stat. 1927, ch. 808, § 2(b), as amended by Cal. Stat. 1931, ch. 491, § 1, p. 1065, CAL. GEN. LAWS ANN. Act 320, § 2(b) (Deering 1954), CAL. WATER CODE APP. § 37-2(b) (West 1956)
Bay Area Pollution Control Law	H. & S. CODE § 24354(b)
Contra Costa County Storm Drainage District Act	Cal. Stat. 1953, ch. 1532, § 5(2), p. 3192, CAL. GEN. LAWS ANN. Act 1657, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 69-5(2) (West 1956)
Contra Costa County Water Agency Act	Cal. Stat. 1957, ch. 518, § 9(1), p. 1555, CAL. GEN. LAWS ANN. Act 1658, § 9(1) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-9(1) (West 1959)
Del Norte County Flood Control District Act	Cal. Stat. 1955, ch. 166, § 6(2), as amended by Cal. Stat. 1959, ch. 388, § 1, p. 2313, CAL. GEN. LAWS ANN. Act 2040, § 6(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 72-6(2) (West Supp. 1961)
Fresno Metropolitan Flood Control Act	Cal. Stat. 1955, ch. 503, § 8(2), p. 976, CAL. GEN. LAWS ANN. Act 2791, § 8(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 73-8(2) (West 1956)
Humboldt County Flood Control District Act	Cal. Stat. 1945, ch. 939, § 6(2), as amended by Cal. Stat. 1955, ch. 1102, § 2, p. 2085, CAL. GEN. LAWS ANN. Act 3515, § 6(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 47-6(2) (West 1956)
Los Angeles County Flood Control Act	Cal. Stat. 1915, ch. 755, § 2(2), as amended by Cal. Stat. 1951, ch. 1251, § 1, p. 3102, CAL. GEN. LAWS ANN. Act 4463, § 2(2) (Deering 1954), CAL. WATER CODE APP. § 28-2(2) (West 1956)
Lassen-Modoc County Flood Control and Water Conservation District Act	Cal. Stat. 1959, ch. 2127, § 3(b), p. 5010, CAL. GEN. LAWS ANN. Act 4200, § 3(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-3(b) (West 1959)
Mendocino County Flood Control and Water Conservation District Act	Cal. Stat. 1949, ch. 995, § 3(b), p. 1811, CAL. GEN. LAWS ANN. Act 4830, § 3(b) (Deering 1954), CAL. WATER CODE APP. § 54-3(b) (West 1956)
Mojave Water Agency Law	Cal. Stat. 1959, ch. 2146, § 13(1), p. 5132, CAL. GEN. LAWS ANN. Act 9095, § 13(1) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-13(1) (West 1959)
Monterey County Flood Control and Water Conservation District Act	Cal. Stat. 1947, ch. 699, § 5(2), p. 1740, CAL. GEN. LAWS ANN. Act 5064, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 52-5(2) (West 1956)
Monterey Peninsula Airport District Act	Cal. Stat. 1941, ch. 52, § 3(2), p. 685, CAL. GEN. LAWS ANN. Act 153, § 3(2) (Deering 1954)
Morrison Creek Flood Control District Act	Cal. Stat. 1953, ch. 1771, § 3(b), p. 3531, CAL. GEN. LAWS ANN. Act 6749, § 3(b) (Deering 1954), CAL. WATER CODE APP. § 71-3(b) (West 1956)
Napa County Flood Control and Water Conservation District Act	Cal. Stat. 1951, ch. 1449, § 5(2), p. 3412, CAL. GEN. LAWS ANN. Act 5275, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 61-5(2) (West 1956)
Orange County Flood Control Act	Cal. Stat. 1927, ch. 723, § 2(2), as amended by Cal. Stat. 1957, ch. 1036, § 2, p. 2269, CAL. GEN. LAWS ANN. Act 5682, § 2(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 36-2(2) (West Supp. 1961)
Palo Verde Irrigation District Act	Cal. Stat. 1923, ch. 452, § 9(2), p. 1082, CAL. GEN. LAWS ANN. Act. 3880, § 9(2) (Deering 1954), CAL. WATER CODE APP. § 33-9(2) (West 1956)

Plumas County Flood Control and Water Conservation District Act	Cal. Stat. 1959, ch. 2114, § 3(b), p. 4913, CAL. GEN. LAWS ANN. Act 5964, § 3(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-3(b) (West 1959)
Riverside County Flood Control and Water Conservation District Act	Cal. Stat. 1945, ch. 1122, § 9(3), as amended by Cal. Stat. 1955, ch. 1259, § 1, p. 2291, CAL. GEN. LAWS ANN. Act 6642, § 9(3) (Deering Supp. 1961), CAL. WATER CODE APP. § 48-9(3) (West 1956)
San Benito County Water Conservation and Flood Control District Act	Cal. Stat. 1953, ch. 1598, § 6(2), p. 3283, CAL. GEN. LAWS ANN. Act 6808, § 6(2) (Deering 1954), CAL. WATER CODE APP. § 70-6(2) (West 1956)
San Bernardino County Flood Control Act	Cal. Stat. 1939, ch. 73, § 2(2), p. 1025, CAL. GEN. LAWS ANN. Act 6850, § 2(2) (Deering 1954), CAL. WATER CODE APP. § 43-2(2) (West 1956)
San Luis Obispo County Flood Control and Water Conservation District Act	Cal. Stat. 1945, ch. 1294, § 5(2), p. 2427, CAL. GEN. LAWS ANN. Act 7205, § 5(2) (Deering 1954), CAL. WATER CODE APP. § 49-5(2) (West 1956)
San Mateo County Flood Control District Act	Cal. Stat. 1959, ch. 2108, § 3(3), p. 4886, CAL. GEN. LAWS ANN. Act 7261, § 3(3) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 87-3(3) (West 1959)
Santa Clara-Alameda-San Benito Water Authority Act	Cal. Stat. 1955, ch. 1289, § 21(2), p. 2352, CAL. GEN. LAWS ANN. Act 9102, § 21(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 76-21(2) (West 1956)
Santa Clara County Flood Control and Water Conservation District Act	Cal. Stat. 1951, ch. 1405, § 5(2), as amended by Cal. Stat. 1st Ex. Sess. 1956, ch. 32, § 1, p. 352, CAL. GEN. LAWS ANN. Act 7335, § 5(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 60-5(2) (West 1956)
Santa Cruz County Flood Control and Water Conservation District Act	Cal. Stat. 1955, ch. 1489 § 22, p. 2703, CAL. GEN. LAWS ANN. Act 7390, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-22 (West 1956)
Sierra County Flood Control and Water Conservation District Act	Cal. Stat. 1959, ch. 2123, § 3(b), p. 4980, CAL. GEN. LAWS ANN. Act 7661, § 3(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-3(b) (West 1959)
Siskiyou County Flood Control and Water Conservation District Act	Cal. Stat. 1959, ch. 2121, § 3(b), p. 4947, CAL. GEN. LAWS ANN. Act 7688, § 3(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-3(b) (West 1959)
Sonoma County Flood Control and Water Conservation District Act	Cal. Stat. 1949, ch. 994, § 3(b), as amended by Cal. Stat. 1953, ch. 524, § 1, p. 1766, CAL. GEN. LAWS ANN. Act 7757, § 3(b) (Deering 1954), CAL. WATER CODE APP. § 53-3(b) (West 1956)
Tehama County Flood Control and Water Conservation District Act	Cal. Stat. 1957, ch. 1280, § 3(b), as amended by Cal. Stat. 1961, ch. 631, § 1, p. 1802, CAL. GEN. LAWS ANN. Act 8510, § 3(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-3(b) (West Supp. 1961)
Vallejo Sanitation and Flood Control District Act	Cal. Stat. (1st Ex. Sess.) 1952, ch. 17 § 2(b), as amended by Cal. Stat. 1953, ch. 1439, § 1, p. 3028, CAL. GEN. LAWS ANN. Act 8934, § 2(b) (Deering 1954), CAL. WATER CODE APP. § 67-2(b) (West 1956)
Ventura County Flood Control Act	Cal. Stat. (4th Ex. Sess.) 1944, ch. 44, § 7(2), as amended by Cal. Stat. 1953, ch. 1058, § 1, p. 2533, CAL. GEN. LAWS ANN. Act 8955, § 7(2) (Deering 1954), CAL. WATER CODE APP. § 46-7(2) (West 1956)

Yolo County Flood Control
and Water Conservation
District Act

Cal. Stat. 1951, ch. 1657, § 3(b), as amended by Cal.
Stat. 1961, ch. 895, § 1.5, p. 2502, CAL. GEN. LAWS
ANN. Act 9307, § 3(b) (Deering Supp. 1961), CAL.
WATER CODE APP. § 65-3(b) (West Supp. 1961)

Implied Consent Statutes

In seven statutes, there is no provision specifically giving consent to suit against the public entity; but provisions may be found therein relating to actions against the respective entities which clearly imply that such consent is given.³⁸ Such provisions do not evidence any particular pattern of legislative development. Public entities governed by this type of consent statute include:

The State of California	See GOVT. CODE §§ 641-654, authorizing suit against State on claims rejected by State Board of Control
School districts	See EDUC. CODE § 903, providing that governing board shall be liable in name of school district "for any judgment against the district" founded on negligence of the district or its personnel
Irrigation districts	See WATER CODE §§ 22650-22651, authorizing district to defend "in any action or proceeding brought against it."
California water districts	See WATER CODE § 35407, authorizing a district to "defend any action or proceeding brought against it."
California water storage districts	See WATER CODE § 43700, authorizing a district to "defend in any action or proceeding brought against it."
Levee districts	See WATER CODE § 70093, authorizing district to employ counsel to "defend actions brought by or against the district."
Resort districts	See PUB. RES. CODE § 11301, providing that district governing board may defend in the name of the district "in all actions, suits, or proceedings."

Statutes Granting Qualified or Limited Consent to Suit

Despite the length of the list of statutory provisions set forth above granting unqualified consent to suit against public entities, it does not exhaust the varieties of local public agencies known to California law. In certain other statutes relating to such entities, the Legislature has consented to suit, but has expressly limited or qualified the consent. The limitation is typically expressed in the form of an exception which is appended to the usual permission for the entity to "sue and be sued" and which reads "except as otherwise provided by law."

It is surely a permissible, although perhaps not a necessary, inference from such language that the Legislature intended to incorporate by reference the then settled body of case law declaring the existence and various ramifications of the doctrine of governmental immunity. It could be argued, for example, that such exceptions may have been inserted into the statutes in question out of an abundance of caution, to forestall any possible contention that permission to be sued was

³⁸ Consent has been implied from such language in numerous cases. See, e.g., *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947); *Ahern v. Livermore Union High School Dist.*, 208 Cal. 770, 284 Pac. 1105 (1930); *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 Pac. 171 (1928). It should be noted that inverse condemnation actions, being founded directly upon the provisions of CAL. CONST., Art. I, § 14, are an exception to the rule requiring consent to suit, since said constitutional provision is deemed to be self-executing. *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942).

intended to alter the accepted doctrine of tort immunity as it existed when such statutes were being enacted by the Legislature. If this argument were accepted, it might provide the basis for holding that the general abrogation of the immunity doctrine in the *Muskopf* decision has no application to public entities governed by statutes thus qualifying a grant of consent to suit, and that the legislative intent to preserve immunity prevails instead.

Although no direct authority supporting the suggested conclusion has been found, analogous cases have tended to accord full effect to indications of legislative intent to disclaim liability.³⁹ The *Muskopf* opinion, on the other hand, affords no basis for believing that mere differences in statutory language would substantially alter the result there reached. However, the possibility that such statutory exceptions may pose somewhat more subtle interpretative issues justifies their separate classification for the purposes of the present study.

Statutes expressing a consent to be sued "except as otherwise provided by law" (or words of comparable import) include the following general enabling provisions and special laws:⁴⁰

Airport districts	PUB. UTIL. CODE § 22553 (a)
County water districts	WATER CODE § 31080
Municipal utility districts	PUB. UTIL. CODE § 12702
Municipal water districts	Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 12(2), as amended by Cal. Stat. 1961, ch. 669, § 1, p. 1887, CAL. GEN. LAWS ANN. Act 5243, § 12(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 20-12(2) (West Supp. 1961)
Public utility districts	PUB. UTIL. CODE § 16402
Regional park districts	PUB. RES. CODE § 5539 (b)
Regional shoreline park and recreational districts	PUB. RES. CODE § 5718 (b)
Transit districts	PUB. UTIL. CODE § 25702
Water conservation districts	Water Conservation Act of 1927, Cal. Stat. 1927, ch. 91, § 2(B), as amended by Cal. Stat. 1955, ch. 1641, § 1, p. 2957, CAL. GEN. LAWS ANN. Act 9127a, § 2(B) (Deering Supp. 1961), CAL. WATER CODE APP. § 34-2(B) (West 1956)
Water conservation districts	Water Conservation Act of 1931, Cal. Stat. 1931, ch. 1020, § 2(2), as amended by Cal. Stat. 1957, ch. 531, § 1, p. 1579, CAL. GEN. LAWS ANN. Act. 9127c, § 2(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 39-2(2) (West Supp. 1961)
Water replenishment districts	WATER CODE § 60230 (2)
Amador County Water Agency Act	Cal. Stat. 1959, ch. 2137, § 3.3, p. 5062, CAL. GEN. LAWS ANN. Act 276, § 3.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-3.3 (West 1959)

³⁹ See, e.g., *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717 (1941). See also *Stang v. City of Mill Valley*, 38 Cal.2d 486, 240 P.2d 980 (1952); *Greenberg v. County of Los Angeles*, 113 Cal. App.2d 389, 248 P.2d 74 (1952).

⁴⁰ Omitted from the listing is CAL. H. & S. CODE § 5990 (b), relating to regional sewage disposal districts, which was repealed by Cal. Stat. 1959, ch. 1309, § 1, p. 3581. The repealing measure, however, expressly preserved the applicability of the act being repealed to any existing districts formed under its provisions.

Alpine County Water Agency Act	Cal. Stat. 1961, ch. 1896, § 6, p. 3994, CAL. GEN. LAWS ANN. Act 270, § 6 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-6 (West Supp. 1961)
Antelope Valley-East Kern Water Agency Law	Cal. Stat. 1959, ch. 2146, § 61(2), p. 5153, CAL. GEN. LAWS ANN. Act 9095, § 61(2) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-61(2) (West 1959)
Crestline-Lake Arrowhead Water Agency Act	Cal. Stat. (1st Ex. Sess.) 1962, ch. 40 § 11(2), p. ---, CAL. GEN. LAWS ANN. Act 9099a, § 11(2) (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 104-11(2) (West Supp. 1962)
Desert Water Agency Law	Cal. Stat. 1961, ch. 1069, § 15(2), p. 2762, CAL. GEN. LAWS ANN. Act 9097, § 15(2) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-15(2) (West Supp. 1961)
El Dorado County Water Agency Act	Cal. Stat. 1959, ch. 2139, § 7, p. 5086, CAL. GEN. LAWS ANN. ACT 2245, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-7 (West 1959).
Fresno Metropolitan Transit District Act of 1961	Cal. Stat. 1961, ch. 1932, § 6.2, p. 4061, CAL. GEN. LAWS ANN. Act 2792, § 6.2 (Deering Supp. 1961), CAL. PUB. UTIL. CODE APP. 2, § 6.2 (West Supp. 1961)
Kern County Water Agency Act	Cal. Stat. 1961, ch. 1003, § 3.3, p. 2653, CAL. GEN. LAWS ANN. Act 9098, § 3.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-3.3 (West Supp. 1961)
Kings River Conservation District Act	Cal. Stat. 1951, ch. 931, § 26(2), p. 2515, CAL. GEN. LAWS ANN. Act 4025, § 26(2) (Deering 1954), CAL. WATER CODE APP. § 59-26(2) (West 1956)
Mariposa County Water Agency Act	Cal. Stat. 1959, ch. 2036, § 3.3, p. 4686, CAL. GEN. LAWS ANN. Act 4613, § 3.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-3.3 (West 1959)
Nevada County Water Agency Act	Cal. Stat. 1959, ch. 2122, § 6, p. 4967, CAL. GEN. LAWS ANN. Act 5449, § 6 (Deering Supp. 1961), CAL. WATER CODE APP. § 90-6 (West 1959)
Orange County Water District Act	Cal. Stat. 1933, ch. 924, § 2(2), as amended by Cal. Stat. 1955, ch. 1230, § 2, p. 2328, CAL. GEN. LAWS ANN. Act 5683, § 2(2) (Deering Supp. 1961), CAL. WATER CODE APP. § 40-2(2) (West 1956)
Placer County Water Agency Act	Cal. Stat. 1957, ch. 1234, § 3.3, p. 2521, CAL. GEN. LAWS ANN. Act 5935, § 3.3 (Deering Supp 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-3.3 (West 1959)
Sacramento County Water Agency Act	Cal. Stat. (1st Ex. Sess.) 1952, ch. 10, § 3.3, p. 317, CAL. GEN. LAWS ANN. Act 6730a, § 3.3 (Deering 1954), CAL. WATER CODE APP. § 66-3.3 (West 1956)
San Francisco Bay Area Rapid Transit District	PUB. UTIL. CODE § 28951
Santa Barbara County Water Agency Act	Cal. Stat. 1945, ch. 1501, § 3.3, p. 2782, CAL. GEN. LAWS ANN. Act 7303, § 3.3 (Deering 1954), CAL. WATER CODE APP. § 51-3.3 (West 1956)
Solano County Flood Control and Water Conservation District Act	Cal. Stat. 1951, ch. 1656, § 3.3, p. 3750, CAL. GEN. LAWS ANN. Act 7733, § 3.3 (Deering 1954), CAL. WATER CODE APP. § 64-3.3 (West 1956)
Sutter County Water Agency Act	Cal. Stat. 1959, ch. 2088, § 3.3, p. 4821, CAL. GEN. LAWS ANN. Act 9096, § 3.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-3.3 (West 1959)

Upper Santa Clara Valley Water Agency Law	Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 15(2), p. ---, CAL. GEN. LAWS ANN. Act 9099b, § 15(2) (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 103-15(2) (West Supp. 1962)
Yuba-Bear River Basin Authority Act	Cal. Stat. 1959, ch. 2131, § 7, p. 5033, CAL. GEN. LAWS ANN. Act 9380, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-7 (West 1959)
Yuba County Water Agency Act	Cal. Stat. 1959, ch. 788, § 3.3, p. 2782, CAL. GEN. LAWS ANN. Act 9407, § 3.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-3.3 (West 1959)

Public Entities For Which Consent to Suit Has Not Been Enacted

As the preceding lists of statutory citations demonstrate, the Legislature has generally consented to suit against public entities in the enabling statute or special act governing the particular entity, although different forms of statutory language have been employed.

Legislation governing local public agencies (and, it will be noted, most of the statutory material cited is of this type) has, however, been characterized on the whole by episodic and haphazard development, particularly as to statutes authorizing the creation of, or directly creating, "districts," "authorities," and "agencies." Legislation of this type generally represents a response to special local needs as they develop, and there is seldom if ever any organized opposition to focus attention on policy considerations. Moreover, since there is normally no political interest in the measure outside the legislative delegation from the affected locality, the language selected by the draftsman is ordinarily accepted without detailed scrutiny and the bill proceeds through the course of enactment as a routine matter.

Such uniformity of legislative policy as appears to be incorporated in these measures thus, when viewed realistically, is attributable chiefly to the tendency of legislative draftsmen to use previous legislation as precedents for new bills. Variations in wording of otherwise similar statutes may thus be attributable as much to the personality and stylistic preferences of the draftsman as to conscious policy choices of the local groups interested in promoting the legislation.

The foregoing considerations are believed to be relevant to appraisal of the fact that in at least seventeen general enabling provisions and three special acts relating to local public entities, no statutory language is found expressly or impliedly consenting to suit against the entities governed thereby. If it is assumed that the courts will continue to recognize that phase of the doctrine of governmental immunity which is founded upon immunity from suit, notwithstanding the demise of substantive immunity from liability, such absence of consent to suit would seem to preclude enforcement of tort liability by civil action against the entities in question.⁴¹

⁴¹ Differences in statutory language in measures relating to the same general subject matter has often been deemed indicative of a difference in legislative intent. See, e.g., *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958), comparing provisions of Los Angeles County Flood Control Act with other special flood control district acts. See also, to the same effect, *People ex rel. Paganini v. Town of Corte Madera*, 97 Cal. App.2d 726, 218 P.2d 810 (1950).

Such a conclusion of nonsuability, however, may not be entirely reliable. The courts have occasionally held public entities subject to suit in tort despite the absence of any statutory consent.⁴² Moreover, there is respectable authority for the view that omissions of this type, when viewed against a background of consistent legislative policy, may be regarded as the product of legislative inadvertence and hence disregarded in favor of applying the general legislative policy.⁴³ In short, if consent to suit against governmental agencies is viewed as a matter of legislative intent, the courts conceivably may find such intent more clearly indicated by the consistent mass of statutes granting such consent than by the apparently inadvertent omission of such language in a few instances.

Attention also should be directed to the general claims statute enacted by the 1959 General Session of the Legislature, which was made applicable to all local public entities, including "any district, local authority or other political subdivision of the State."⁴⁴ Although the purpose of this legislation was to provide a uniform procedure for presentation of claims for money or damages, it contains language⁴⁵ which implies strongly that a civil action may be brought against the entity whenever such a claim is rejected in whole or in part (provided acceptance of partial allowance has not been in settlement of the entire claim). Although the references in the claims statute are generally in negative language (*e.g.*, "no suit for money or damages may be brought"⁴⁶), the entire statute implicitly postulates the claims procedure as simply a preliminary condition precedent to litigation. Since all of the entities governed by the statutes cited below as having no express consent to suit provisions are subject to this claims procedure, the issue of suability may depend in part at least upon the implications to be drawn from the claims statute.

The statutory provisions referred to, in which no legislative consent to suit against the respective public entities is found, include the following general and special laws:⁴⁷

⁴² See *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959). The absence of consent to suit was apparently not argued in this case, however.

⁴³ See, *e.g.*, *State v. Superior Court*, 14 Cal. App.2d 718, 58 P.2d 1322 (1936); *Old Homestead Bakery, Inc. v. Marsh*, 75 Cal. App. 247, 242 Pac. 749 (1925). To the same effect, see the leading case of *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), holding *Regional Agricultural Credit Corporations* (instrumentalities of the federal government) subject to suit notwithstanding absence of express "sue and be sued" provision in governing statute.

⁴⁴ CAL. GOVT. CODE § 700.

⁴⁵ See CAL. GOVT. CODE § 710: "No suit for money or damages may be brought against a local public entity on a cause of action for which this chapter requires a claim to be presented until a written claim therefor has been presented to the entity in conformity with the provisions of this article." See also, CAL. GOVT. CODE § 719: "Except where a different statute of limitations is specifically applicable to a local public entity, any suit brought against a local public entity on a cause of action for which this chapter requires a claim to be presented must be commenced within the period of time prescribed by the statute of limitations which would be applicable thereto if the suit were being brought against a private party."

⁴⁶ CAL. GOVT. CODE § 710.

⁴⁷ Omitted from this list are the following statutory provisions which have been repealed, but with respect to which the repealing measure expressly preserved the applicability of the repealed act to any existing districts created thereunder: CAL. PUB. RES. CODE §§ 5400-5428, repealed with savings clause by Cal. Stat. 1957, ch. 2165, § 1, p. 3819 (recreation, park and parkway districts); CAL. PUB. RES. CODE §§ 5431-5467, repealed with savings clause by Cal. Stat. 1957, ch. 2165, § 1, p. 3819 (county recreation districts); CAL. H. & S. CODE §§ 5500-5656, repealed with savings clause by Cal. Stat. 1959, ch. 1309, § 1, p. 3581 (county sewerage and water districts); CAL. H. & S. CODE §§ 4659-4671, repealed with savings clause by Cal. Stat. 1959, ch. 1309, § 1, p. 3581 (sewer districts in unincorporated territory).

County fire protection districts	H. & S. CODE §§ 14400-14598.5
County waterworks districts	WATER CODE §§ 55000-55991
Drainage districts	Drainage Law of 1885, Cal. Stat. 1885, ch. 158, p. 204, CAL. GEN. LAWS ANN. Act 2200 (Deering 1954), CAL. WATER CODE APP. §§ 5-1 to 5-21 (West 1956)
Drainage districts	Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, p. 291, CAL. GEN. LAWS ANN. Act 2202 (Deering 1954), CAL. WATER CODE APP. §§ 8-1 to 8-106 (West 1956)
Fire protection districts in one or more counties	H. & S. CODE §§ 14600-14791
Garbage and refuse disposal districts	H. & S. CODE §§ 4170-4197
Garbage disposal districts	H. & S. CODE §§ 4100-4163
Levee districts	Levee Districts and Protection Works Act, Cal. Stat. 1905, ch. 310, p. 327, CAL. GEN. LAWS ANN. Act 4284 (Deering 1954), CAL. WATER CODE APP. §§ 9-1 to 9-34 (West 1956)
Metropolitan fire protection districts	H. & S. CODE §§ 14325-14375
Mosquito abatement districts	H. & S. CODE §§ 2200-2398
Parking districts	STS. & HWYS. CODE §§ 35100-35707
Protection districts	Protection District Act of 1880, Cal. Stat. 1880, ch. 63, p. 55, CAL. GEN. LAWS ANN. Act 6172 (Deering 1954), CAL. WATER CODE APP. §§ 4-1 to 4-18 (West 1956)
Protection districts	Protection District Act of 1895, Cal. Stat. 1895, ch. 201, p. 247, CAL. GEN. LAWS ANN. Act 6174 (Deering 1954), CAL. WATER CODE APP. §§ 6-1 to 6-29 (West 1956)
Protection districts	Protection District Act of 1907, Cal. Stat. 1907, ch. 25, p. 16, CAL. GEN. LAWS ANN. Act 6175 (Deering 1954), CAL. WATER CODE APP. §§ 11-1 to 11-93 (West 1956)
Resort improvement districts	PUB. RES. CODE §§ 13000-13233
Sewer districts in two or more municipal corporations and also in unincorporated territory	H. & S. CODE §§ 4614.1-4614.15
Vehicle parking districts	STS. & HWYS. CODE §§ 31500-31933
Levee District No. 1 of Sutter County	Cal. Stat. 1873-74, ch. 349, p. 511, CAL. GEN. LAWS ANN. Act 3368a (Deering 1954), CAL. WATER CODE APP. §§ 1-1 to 1-12 (West 1956)
Lower San Joaquin Levee District Act	Cal. Stat. 1955, ch. 1075, p. 2047, CAL. GEN. LAWS ANN. Act. 4298 (Deering Supp. 1961), CAL. WATER CODE APP. § 75-1 <i>et seq.</i> (West 1956)
San Diego County Flood Control District Act	Cal. Stat. 1945, ch. 1372, p. 2560, CAL. GEN. LAWS ANN. Act 6914 (Deering 1954), CAL. WATER CODE APP. §§ 50-1 to 50-18 (West 1956)

Conclusions

Certain general conclusions may be drawn from the foregoing survey of consent to suit legislation:⁴⁸

(1) Approximately 67 percent of the statutes consulted (*i.e.*, 103 statutes, cited above) contained explicit or clearly implied authorizations for suit. The differences in statutory language in which such consent is granted is deemed to have no material significance so far as the problem of governmental immunity is concerned.

(2) Approximately 20 percent of these statutes (*i.e.*, 32 statutes, cited above) grant consent to suit in qualified terms, which create possible doubts as to the suability of entities in tort actions. It would seem desirable that such doubts be eliminated by appropriate legislation.

(3) Approximately 13 percent of the statutes (*i.e.*, 20 statutes, cited above) contain no legislative provisions consenting to suit against the entities governed thereby. Although possible bases exist upon which a court might find such consent to be implied, the matter is sufficiently doubtful to suggest the advisability of clarification by appropriate legislation.

⁴⁸In selecting the statutes listed in the text, an effort was made to exclude provisions relating to districts which are not truly independent corporate entities but are instead mere agencies or instrumentalities of the city or county in which they exist, and hence are not separately subject to suit or imposition of liability. See, *e.g.*, *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), holding storm drain maintenance district not be suable independently from its parent county. Cf. *Marr v. Southern Cal. Gas Co.*, 198 Cal. 278, 245 Pac. 178 (1926); *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809 (1919); *Pasadena Park Improvement Co. v. Lelande*, 175 Cal. 511, 166 Pac. 341 (1917); *Mortimer v. Acquisition & Improvement Dist. No. 36*, 105 Cal. App.2d 298, 233 P.2d 113 (1951).

STATUTORY PROVISIONS GOVERNING SUBSTANTIVE TORT LIABILITY OF GOVERNMENTAL ENTITIES

The Supreme Court in the *Muskopf* decision referred to the fact that the California Legislature has "contributed mightily" to the process of erosion of the doctrine of governmental immunity.¹ Indeed, as the survey of legislation which immediately follows indicates, the actions of the Legislature with respect to problems of governmental tort liability have been much more extensive than is generally realized. The legislation relating to this problem, moreover, has not been entirely in the direction of relaxation of the immunity doctrine, but upon occasion has actually written a measure of immunity from liability into the form of positive statute law.

In order to provide a firm basis for appraisal of the impact of *Muskopf* upon the liability of governmental entities, the extent of the statutory acceptance of tort liability should first be evaluated. It must be kept in mind that legislation making public entities liable for their employees' tortious acts may not always lead to results identical to those which might be reached under judicial abrogation of the doctrine of governmental immunity. Such legislation is often a response to empirically felt needs in recurring but somewhat narrow circumstances, and almost always evinces an eclectic legislative approach to the problem. As a result, statutes which authorize governmental liability are likely to incorporate their own limitations or enlargements upon common law rules which would otherwise be applicable. Whether *Muskopf* has materially altered the scope of liability for conduct which falls within the general ambit of such statutes is thus an issue which may involve subtle and debatable interpretative problems. In the course of the survey, an effort will be made to identify these problems in relevant context.

The extent to which the Legislature may have expressed a clear intent to immunize governmental entities from liability in particular circumstances must also, of course, be evaluated. *Muskopf* implicitly acknowledges the right of the Legislature to prescribe the substantive principles applicable; and nothing in the opinion suggests any purpose on the part of the Court to do anything but implement (within the bounds of acceptable statutory interpretation) the legislative will in the matter. Manifestly, the abolition of the common law doctrine of governmental immunity has no direct effect upon such statutory immunities as already exist or may hereafter be enacted. Indirectly, of course, *Muskopf* may fortify the Court in giving such statutory immunities a narrow interpretation in light of its basic premise therein to the effect that "when there is negligence, the rule is liability, immunity is the exception."² Again, however, the precise interrelation-

¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

² *Id.* at 219, 11 Cal. Rptr. at 94, 359 P.2d at 462.

ship between *Muskopf* and the statutes in question may involve interpretative problems of considerable complexity.

We thus turn first to an examination of the statutes which authorize governmental liability, together with a brief summary of their judicial interpretation (if any). Secondly, we shall investigate other provisions which apparently confer immunity from such liability.

Statutes Authorizing Governmental Liability

1. Vehicle Code Section 17001

Section 17001 of the Vehicle Code, originally enacted in 1929,³ imposes liability upon any "public agency" for death, personal injury or property damage caused by a motor vehicle negligently operated by one of its officers or employees acting within the scope of his office or employment. It has been held immaterial whether the vehicle was engaged in a governmental or proprietary capacity, for liability attaches under the statute in either situation.⁴ This appears to be the only statute in California law which waives sovereign immunity with respect to public entities of all types.⁵ It has survived repeated attacks on the ground of unconstitutionality.⁶

Being in derogation of common law, the courts have declared that a rule of strict construction must be applied to the motor vehicle liability statute.⁷ The scope of the liability thereby imposed has thus assumed rather clearly defined limits:

(a) Liability is restricted to injuries resulting from the operation of a "motor vehicle." Section 415 of the Vehicle Code defines a motor vehicle as "a vehicle which is self-propelled," while Section 670 defines the term "vehicle" as "a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved by human power or used exclusively upon stationary rails or tracks." In the light of these definitions, Section 17001 seems to be broad enough to include such equipment as a bulldozer,⁸ a street sweeper,⁹ or a mechanical spraying machine mounted on a trailer and

³ CAL. VEH. CODE § 17001 is a recodification of former CAL. VEH. CODE § 400, which was based upon CAL. CIV. CODE § 1714½, enacted by Cal. Stat. 1929, ch. 260, § 1, p. 565.

⁴ See *Arthur v. City of Los Angeles*, 130 Cal. App.2d 595, 279 P.2d 68 (1955); *Hopping v. City of Redwood City*, 14 Cal. App.2d 360, 58 P.2d 379 (1936); *Willoughby v. Zylstra*, 5 Cal. App.2d 297, 42 P.2d 685 (1935).

⁵ The term "public agency" is defined to mean "the State, any county, municipal corporation, district and political subdivision of the State, or the State Compensation Insurance Fund." CAL. VEH. CODE § 17000. In view of this broad definition, the section (or its predecessor) has been held applicable to county fire protection districts, *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940); harbor districts, *Shields v. Oxnard Harbor Dist.*, 46 Cal. App.2d 477, 116 P.2d 121 (1941); and "home-rule" charter cities, *Lossman v. City of Stockton*, 6 Cal. App.2d 324, 44 P.2d 397 (1935).

⁶ *Heron v. Riley*, 209 Cal. 507, 289 Pac. 160 (1930); *Von Arx v. City of Burlingame*, 16 Cal. App.2d 29, 60 P.2d 305 (1936). Cf. *Brindamour v. Murray*, 7 Cal.2d 73, 59 P.2d 1009 (1936).

⁷ *Raynor v. City of Arcata*, 11 Cal.2d 113, 77 P.2d 1054 (1938); *Sheldon v. City of Burlingame*, 146 Cal. App.2d 30, 303 P.2d 344 (1956); *Eddy v. City of Los Angeles*, 28 Cal. App.2d 89, 82 P.2d 25 (1938); *State v. Superior Court*, 14 Cal. App.2d 718, 58 P.2d 1322 (1936).

⁸ *Yarrow v. State*, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); *Behling v. County of Los Angeles*, 139 Cal. App.2d 684, 294 P.2d 534 (1956).

⁹ Cf. *Continental Insurance Co. v. Pacific Greyhound Lines*, 43 Cal. App.2d Supp. 377, 111 P.2d 37 (1941).

being pulled by a jeep,¹⁰ but would not include a bicycle,¹¹ airplane,¹² streetcar operated on rails,¹³ or an unconnected semitrailer.¹⁴

(b) The injury must result from the negligent "operation" of a motor vehicle. This means that the vehicle "must be in a 'state of being at work' or 'in the act of exercise of some specific function' by performing work or producing effects at the time and place the injury is inflicted."¹⁵ Thus, liability of a public entity cannot be predicated upon negligent deposit of oil from its vehicles upon the roadway,¹⁶ or upon negligent employment of an unlicensed driver.¹⁷ By the same token, the alleged negligence of a county ambulance driver in delaying arrival at the hospital so long that a patient being transported in the ambulance died before arrival, is not negligent "operation" within the meaning of the statute.¹⁸ However, a vehicle may be in "operation" so as to make the statute applicable even when it is not actually moving, such as when it has been negligently parked,¹⁹ or is in the process of being unloaded,²⁰ or when equipment on the vehicle is being negligently operated.²¹ There is no requirement in the statute, however, that the negligent operation of the vehicle or the injury take place upon a public street or highway.²²

(c) Although liability under the statute is not limited to cases in which injury was caused by a vehicle *owned* by the public entity but extends to "any other motor vehicle" as well,²³ it is requisite that the officer or employee be operating it in the course and scope of his employment at the time of the injury.²⁴ Thus, determination of the right to recover under the statute is complicated by the same difficult factual questions entailed in the "scope-of-agency" issue where the doctrine of *respondet superior* is invoked against a private employer.²⁵ How-

¹⁰ *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959).

¹¹ See *Tomson v. Kischassey*, 144 Cal. App.2d 363, 301 P.2d 55 (1956).

¹² See *Di Guillo v. Rice*, 27 Cal. App.2d Supp. 775, 70 P.2d 717 (1937); 12 OFS. CAL. ATRX. GEN. 23 (1948), citing *McBoyle v. United States*, 233 U.S. 25 (1931).

¹³ See *Reilly v. California Street Cable R.R.*, 76 Cal. App.2d 620, 173 P.2d 872 (1946). Although the definition of "vehicle" in CAL. VEH. CODE § 670 expressly excludes devices "used exclusively upon stationary rails or tracks," trolley coaches deriving motive power from overhead wires but running on pneumatic tires rather than rails are governed in part by the Vehicle Code. See CAL. VEH. CODE §§ 650, 21051.

¹⁴ See *Miller v. Berman*, 55 Cal. App.2d 569, 131 P.2d 18 (1942).

¹⁵ *Chilcote v. San Bernardino County*, 218 Cal. 444, 445, 23 P.2d 748, 749 (1933).

¹⁶ *Ibid.*

¹⁷ *Head v. Wilson*, 36 Cal. App.2d 244, 97 P.2d 509 (1939).

¹⁸ *Greenberg v. County of Los Angeles*, 113 Cal. App.2d 389, 248 P.2d 74 (1952).

¹⁹ *Reed v. City of San Diego*, 77 Cal. App.2d 860, 177 P.2d 21 (1947). See also *Yarrow v. State*, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960).

²⁰ *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955).

²¹ *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959); *Behling v. County of Los Angeles*, 139 Cal. App.2d 634, 294 P.2d 534 (1956).

²² See *Bright v. East Side Mosquito Abatement Dist.* 168 Cal. App.2d 7, 335 P.2d 527 (1959), operation on private property 200 feet off roadway.

²³ See *Heron v. Riley*, 209 Cal. 507, 289 Pac. 160 (1930).

²⁴ *Brindamour v. Murray*, 7 Cal.2d 73, 59 P.2d 1009 (1936).

²⁵ See, e.g., *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 66 P.2d 651 (1937) (not in scope of employment while returning to work after lunch); *Megowan v. City of Los Angeles*, 7 Cal.2d 80, 59 P.2d 1012 (1936) (fireman is within scope of employment while driving to commissioner's home to take latter on official errands); *Brindamour v. Murray*, 7 Cal.2d 73, 59 P.2d 1009 (1936) (not in scope of employment while returning home after dinner); *Sheldon v. City of Burlingame*, 146 Cal. App.2d 30, 303 P.2d 344 (1956) (police officer is within scope of employment in driving citizen home late at night); *Garcia v. City of Santa Monica*, 92 Cal. App.2d 53, 206 P.2d 37 (1949) (police officer not within scope of employment when pushing stalled vehicle with police car in effort to start motor); *Kadow v. City of Los Angeles*, 31 Cal. App.2d 324, 87 P.2d 906 (1939) (police officer not within scope of employment in driving superior officer to police station as a courtesy).

ever, it has been held not necessary to invoke Vehicle Code Section 17001 in order to establish liability where a publicly owned vehicle is being operated in a proprietary capacity, for then the public entity may be held liable on the same basis as any other private owner under the provisions of Sections 17150-17153 of the Vehicle Code.²⁶ In such cases, even if the employee was not operating the vehicle within the scope of his employment at the time of the accident, the entity is still liable as owner under Vehicle Code Section 17150 (the "owner's liability" statute) if the employee's operation of the vehicle was with the permission of the employing entity.²⁷ The "owner's liability" statute, however, may not be applicable to publicly owned vehicles which are generally authorized to be used only in governmental activities,²⁸ and to this extent public entities may still enjoy governmental immunity.

(d) Liability under Section 17001 is restricted to injuries caused by negligent operation of a motor vehicle by an "officer, agent, or employee" of the defendant entity. This requirement has created litigation not only as to the question whether a particular operator was, in contemplation of law, within the class of officers, agents or employees,²⁹ but also as to what entity constitutes the responsible employer.³⁰

(e) Liability under Section 17001 is restricted to injuries resulting from negligence, thereby apparently precluding recovery against the employing entity where the injury resulted from an intentional tort.³¹

²⁶ *Bertiz v. City of Los Angeles*, 74 Cal. App. 792, 241 Pac. 921 (1925). See also *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 66 P.2d 651 (1937). Vehicle Code Sections 17150-53 are a recodification of former CAL. VEH. CODE § 402, which was based upon CAL. CIV. CODE § 1714, enacted by Cal. Stat. 1929, ch. 261, § 1, p. 566. Under these provisions, a private owner is liable to persons injured as a result of the negligent operation of the vehicle with the consent of the owner. It should be noted that the principle of ownership liability is not limited to motor vehicles. See, e.g., CAL. HARB. & NAV. CODE § 661, imposing liability upon "every owner of an undocumented vessel" for injury resulting from the negligent operation of the vessel with the consent of the owner thereof. Public entities apparently are not liable under this provision. See definitions in CAL. HARB. & NAV. CODE § 651 (f), (j).

²⁷ CAL. VEH. CODE § 17150; *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 66 P.2d 651 (1937). The holding in this case, being inconsistent with dictum in *Brindamour v. Murray*, 7 Cal.2d 73, 59 P.2d 1009 (1936), suggesting that municipal liability based on permission rather than agency would be unconstitutional, must be deemed to have disapproved such dictum sub silentio.

²⁸ As enacted in 1935, the owner's liability statute was expressly limited to "private owners." See Cal. Stat. 1935, ch. 27, § 402, p. 153. The *Peccolo* case, *supra* note 27, merely analogizes public entities acting in a proprietary capacity with private owners. However, even where it is said that a "governmental" public entity lacks authority to consent to the use of its own vehicle outside the scope of employment, and thus is immune from direct liability based on its ownership of the vehicle, an employee using the publicly owned vehicle with permission may nevertheless be an additional insured under the entity's standard liability insurance policy. *Jurd v. Pacific Indem. Co.*, 57 Cal.2d 699, 21 Cal. Rptr. 793, 371 P.2d 569 (1962).

²⁹ *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955) (operation by prisoner at county honor farm pursuant to orders by county employees held to be within statute); *Woodman v. Hemet Union High School Dist.*, 136 Cal. App. 544, 29 P.2d 257 (1934) (operation of vehicle by Boy Scouts does not make district liable).

³⁰ *Villanazul v. City of Los Angeles*, 37 Cal.2d 718, 235 P.2d 16 (1951), county, and not state or city, is liable for negligent operation of motor vehicle by deputy marshal of municipal court.

³¹ Compare the distinctions recognized between negligence and wilful misconduct under the so-called "guest statute," CAL. VEH. CODE § 17158. See *Meek v. Fowler*, 3 Cal.2d 420, 45 P.2d 194 (1935); Note, 22 CALIF. L. REV. 119 (1933). *But cf. West v. City of San Diego*, 54 Cal.2d 469, 474, 6 Cal. Rptr. 289, 292, 353 P.2d 929, 932 (1960); and *Raynor v. City of Arcata*, 11 Cal.2d 113, 121, 77 P.2d 1054, 1059 (1938), suggesting that employer liability exists where the "negligent operation" of an authorized emergency vehicle consists of such arbitrary conduct as "can be said to be wilful misconduct." See also *Isaacs v. City & County of San Francisco*, 73 Cal. App.2d 621, 167 P.2d 221 (1946).

To this extent, it would seem that Section 17001 does not incorporate the full sweep of the doctrine of *respondeat superior*, for under that doctrine private employers may be held liable for intentional and wilful torts of their employees acting within the scope of their employment.³²

(f) Liability under Section 17001 appears to be subject to two statutory limitations which are applicable when the injury occurs under circumstances exempting the driver of the publicly owned vehicle from compliance with ordinary speed laws, rules of the road and other traffic regulations. Such exemption applies to (1) operation (with siren and red lamp on) of an authorized emergency vehicle in response to fire and emergency calls or in immediate pursuit of a suspected law violator,³³ and (2) operation of publicly owned vehicles and equipment "while actually engaged in work upon the surface of a highway, or work of installation, removal, repairing, or maintaining official traffic control devices."³⁴ In these cases, the entity cannot be held liable for violations of the exempted regulations, *i.e.*, for *per se* negligence;³⁵ but it may still be liable for common law negligence,³⁶ and in the case of emergency vehicles, for "arbitrary exercise" of the emergency privilege.³⁷

In summary, it appears that the liability imposed upon public entities by Section 17001 of the California Vehicle Code is substantially narrower than the liability of private employers and owners of motor vehicles. In the light of the abrogation of the immunity doctrine by the *Muskopf* decision, the following tentative conclusions may be advanced:

The general principal of liability for negligent operation of motor vehicles, as expressed in Section 17001, is consistent with *Muskopf*, although the discarding of the immunity doctrine has undoubtedly enlarged the area of liability beyond what was granted by Section 17001.³⁸ To that extent, Section 17001 may no longer be necessary.

³² *Monty v. Orlandi*, 169 Cal. App.2d 620, 337 P.2d 861 (1959); *Carr v. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5 (1946).

³³ CAL. VEH. CODE § 21055.

³⁴ CAL. VEH. CODE § 21053. This limitation does not apply to protect against liability where the road work is being performed in an area from which general traffic is excluded. *Behling v. County of Los Angeles*, 139 Cal. App.2d 684, 294 P.2d 534 (1956).

³⁵ *Yarrow v. State*, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); *Raynor v. City of Arcata*, 11 Cal.2d 113, 77 P.2d 1054 (1938); *Lucas v. City of Los Angeles*, 10 Cal.2d 476, 75 P.2d 599 (1938). See *Torres v. City of Los Angeles*, 58 Cal.2d —, 22 Cal. Rptr. 866, 372 P.2d 906 (1962).

³⁶ *Torres v. City of Los Angeles*, 58 Cal.2d —, 22 Cal. Rptr. 866, 372 P.2d 906 (1962) (city liable for common law negligence in operation of emergency vehicles); *Peerless Laundry Services, Ltd. v. City of Los Angeles*, 109 Cal. App.2d 703, 241 P.2d 269 (1952) (city held liable for negligent operation of authorized emergency vehicle, where negligence existed on common law principles outside scope of exempt traffic regulations); *Yarrow v. State*, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960) (holding that State may be liable for common law negligence in operation of road construction vehicles at site of road work, but not for *per se* negligence consisting of violation of exempted traffic regulations); *Gibson v. State*, 184 Cal. App.2d 6, 7 Cal. Rptr. 315 (1960) (*semble*). It may be noted that although the operator of an authorized emergency vehicle is immune from personal liability even where the employer is liable, see CAL. VEH. CODE § 17004, the operator of a highway repair or construction vehicle is not thus civilly immune. *Yarrow v. State*, *supra*.

³⁷ CAL. VEH. CODE § 21056. See *West v. City of San Diego*, 54 Cal.2d 469, 6 Cal. Rptr. 289, 353 P.2d 929 (1960); *Davidson v. County of Marin*, 147 Cal. App.2d 54, 304 P.2d 743 (1956).

³⁸ Technical limitations restricting Section 17001 to cases involving "motor vehicles" and the "operation" thereof (see notes 12-18 *supra*) presumably will no longer be of importance, for liability may be postulated on common law principles outside the statute.

However, if (as is suggested above³⁹) nonliability of public entities for the intentionally tortious operation of motor vehicles in the course of public employment may be derived by implication from the express limitation of Section 17001 to negligence (*expressio unius est exclusio alterius*), then it could be argued that such nonliability will continue to exist notwithstanding *Muskopf*. Similarly, if the liability of public entities, as owners, for negligent operation of vehicles with their permission has heretofore been limited to "proprietary" activities because of the implications of the explicit wording of Section 17001, such limitation would seem not to be disturbed by *Muskopf*.⁴⁰ In short, to the extent that public nonliability is founded on legislative intent, it is apparently not altered by the general abolition of governmental immunity. However, it is distinctly possible that these two rules of nonliability owe their existence more to the governmental immunity doctrine itself than to the negative implications of Section 17001. Legislation to clarify the future status of the two rules would seem to be desirable. In this regard, it would not seem unreasonable to treat public entities the same as private persons similarly situated. Thus, an employing public entity should be responsible to the same extent as a private employer for vehicle torts committed by officers and employees acting within the scope of employment; and the same rules of law applicable to owners of private vehicles ought to apply to public entities as owners of motor vehicles.

On the other hand, the immunity of public entities from liability founded on *per se* negligence where their vehicles are exempted from compliance with speed and traffic regulations, although a court-made rule, would seem to be a logical corollary to the statutes which grant such exemptions. Presumably, therefore, this immunity would continue to be recognized notwithstanding the *Muskopf* decision.⁴¹

2. Education Code Section 903

Section 903 of the Education Code provides:

The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees.

This provision is derived from Section 1623 of the Political Code,¹ which later became Section 2.801 of the School Code,² and was ulti-

³⁹ See notes 31-32 *supra*.

⁴⁰ See note 28 *supra*.

⁴¹ This conclusion is fortified by the language of the Supreme Court in *Yarrow v. State*, 53 Cal.2d 427, 442, 2 Cal. Rptr. 137, 145, 348 P.2d 687, 695 (1960), stating, "To the extent that the public employee is relieved from the *per se* consequences of violation of Vehicle Code regulations, it would seem that the public employer, either under the doctrine of *respondet superior*, or under imputed liability as the owner of the vehicles involved, should also be relieved from liability for *per se* negligence." This unanimous decision, it will be noted, was approved by four of the five justices who concurred in the majority opinion in *Muskopf*, together with both of the dissenters in the latter case. See also *Torres v. City of Los Angeles*, 58 Cal.2d —, 22 Cal. Rptr. 866, 372 P.2d 906 (1962).

¹ The language imposing tort liability was introduced into CAL. POL. CODE § 1623 by amendment in 1923. See Cal. Stat. 1923, ch. 145, p. 298. Prior to that date, Section 1623 provided only for district liability for teachers' salary and for contract debts. In its original form as enacted by the amendment of 1923, liability for negligence was imposed only with respect to injuries "to any pupil."

² The School Code was enacted as a separate code by the 1929 Legislature, and is not contained in the official session laws of that year. Section 2.801 was amended in 1931 so that the liability thereby imposed was expanded in scope to

mately recodified as Section 1007 of the Education Code of 1943.³ Its present number was adopted in the course of the revision of the Education Code by the 1959 Legislature.⁴

Section 903 and its predecessors have been uniformly construed as a general waiver of immunity of school districts from both suit and liability for negligence.⁵ Although in its original form, the liability imposed by the section was restricted to injuries sustained by "a pupil,"⁶ the reenactment of 1931 enlarged the statutory language to refer to injury "to person or property."⁷ This change of language was deemed to have extended the liability of school districts "to all damages to persons or property caused by the ordinary negligence of the district, its officers or employees acting within the scope of their office or employment."⁸

Under Section 903, school districts are clearly not insurers of the safety of pupils or others having dealings with the district.⁹ Liability thereunder is limited to ordinary negligence. "The standard of care required of the governing board is that which a person of ordinary prudence, charged with its duties, would exercise under the same circumstances."¹⁰

Liability under this provision has been asserted successfully against school districts in a large variety of circumstances, including cases of alleged lack of supervision or improper supervision,¹¹ failure to utilize safety devices required by law,¹² failure to warn or protect pupils against known hidden dangers,¹³ the furnishing of improper or unsafe equipment,¹⁴ and failure to properly regulate vehicular traffic on school grounds.¹⁵ Section 903, it should be noted, overlaps to some extent the provisions of Section 17001 of the Vehicle Code (under which school districts are liable for negligent operation of motor vehicles by their personnel in the course of employment)¹⁶ as well as Section 53051 of the Government Code (under which school districts are liable in stated circumstances for injuries resulting from dangerous and defective conditions of school district property).¹⁷

include not only school pupils, but "injury to person or property" generally. Cal. Stat. 1931, ch. 1178, p. 2487. A claims presentation requirement was subsequently added by amendment in 1937. Cal. Stat. 1937, ch. 149, p. 414.

³ Cal. Stat. 1943, ch. 71, p. 323.

⁴ Cal. Stat. 1959, ch. 2, p. 622, as amended by Cal. Stat. 1959, ch. 1727, p. 4144.

⁵ *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal.2d 544, 2 Cal. Rptr. 279, 348 P.2d 887 (1960); *Ahern v. Livermore Union High School Dist.*, 208 Cal. 770, 284 Pac. 1105 (1930).

⁶ See note 1 *supra*.

⁷ See note 2 *supra*.

⁸ *Bates v. Escondido Union High School Dist.*, 133 Cal. App. 725, 730, 24 P.2d 884, 886 (1933), cited approvingly in *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal.2d 544, 2 Cal. Rptr. 279, 348 P.2d 887 (1960), n. 4.

⁹ *Taylor v. Oakland Scavenger Co.*, 12 Cal.2d 310, 83 P.2d 948 (1938); *Weldy v. Oakland High School Dist.*, 19 Cal. App.2d 429, 65 P.2d 851 (1937); *Goodman v. Pasadena City High School Dist.*, 4 Cal. App.2d 65, 40 P.2d 854 (1935).

¹⁰ *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal.2d 544, 552, 2 Cal. Rptr. 279, 284, 384 P.2d 887, 892 (1960), citing *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal.2d 207, 253 P.2d 1 (1953).

¹¹ *Woodsmall v. Mt. Diablo Unified School Dist.*, 188 Cal. App.2d 262, 10 Cal. Rptr. 447 (1961); *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App.2d 277, 335 P.2d 709 (1959).

¹² *Lehmuth v. Long Beach Unified School Dist.*, 53 Cal.2d 544, 2 Cal. Rptr. 279, 348 P.2d 887 (1960); *Lehmann v. Los Angeles City Bd. of Educ.*, 154 Cal. App.2d 256, 316 P.2d 55 (1957).

¹³ *Lillenthal v. San Leandro Unified School Dist.*, 139 Cal. App.2d 453, 293 P.2d 889 (1956).

¹⁴ *Maede v. Oakland High School Dist.*, 212 Cal. 419, 298 Pac. 987 (1931).

¹⁵ *Taylor v. Oakland Scavenger Co.*, 12 Cal.2d 310, 83 P.2d 948 (1938).

¹⁶ See discussion at 36-40 *supra*.

¹⁷ See discussion at 42-59 *infra*.

In view of the comprehensive nature of the statutory provisions waiving the governmental immunity of school districts, it may be concluded that the abrogation of the immunity doctrine by the *Muskopf* case will have little effect on the tort liability of such districts. Two qualifications, however, should be appended to this conclusion.

First, as indicated below, the range of potential liability of an owner or possessor of premises under common law principles is in some respects broader than that which is imposed by Section 53051 of the Government Code.¹⁸ It is doubtful that the general liability for negligence imposed by Section 903 of the Education Code embraces all aspects of the occupier's liability.¹⁹ Hence the *Muskopf* decision may possibly expose school districts to some additional tort liability in cases where the specific requirements of Section 53051 cannot be established, and the applicability of Section 903 is questionable.

Second, each of the statutory provisions waiving immunity of school districts is restricted to negligent torts. No case has been found in which liability of a school district has been adjudicated thereunder for intentional torts of district personnel. However, in *Lipman v. Brisbane Elementary School District*,²⁰ a companion case to *Muskopf*, the Court holds that the rule of governmental immunity may no longer be invoked to shield public bodies from liability for intentional torts of their agents and employees, except in certain (but not necessarily all) cases where the agents themselves are immune from personal liability because the alleged tortious acts were committed while acting in a discretionary capacity.²¹ It appears, therefore, that under the doctrine of *Lipman*, the liability of school districts now embraces intentional torts not previously covered by the statutory waivers.²²

3. Public Liability Act of 1923

A prolific source of litigation seeking damages for injuries resulting from negligence of public personnel has been Section 2 of the Public

¹⁸ See pp. 51-54 *infra*.

¹⁹ For example, the owner or possessor of premises is ordinarily not liable to an unknown trespasser except for intentional harms or willful or wanton injury. See 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1444 (1960), and cases cited. A similar limitation on liability is generally recognized as to licensees in the absence of "active" or "overt" negligence. *Id.* at 1149. These rules, however, are modified in the case of children by the "attractive nuisance" doctrine. See RESTATEMENT, TORTS § 339 (1934), which was adopted as the law of California in *King v. Lennen*, 53 Cal.2d 340, 1 Cal. Rptr. 665, 348 P.2d 98 (1959). In view of the fact that Section 903 of the Education Code is expressly limited to liability resulting from "negligence," it would seem unlikely, in the absence of case authority clarifying the matter, that either the "intentional harms" or "willful or wanton" injury bases for a possessor's liability would be assimilated therein, although liability for attractive nuisance might plausibly be regarded as covered by the section.

²⁰ 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

²¹ The alleged tort in the *Lipman* case was the intentional tort of malicious defamation; and the opinion intimates that the district would have been held liable for such tortious conduct of its officers had it not been for the fact that the officers themselves were immune from personal liability (since the alleged acts occurred in the course of discretionary authority, see *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957), and cases therein cited), and as a matter of policy the circumstances were such as to preclude imposing such liability on the district.

²² Another situation in which the district may be liable, although its officers are immune, is presented by Education Code Sections 15511-15516, immunizing school district officers from personal liability in specified situations when defective buildings are employed for school purposes, but expressly providing that such personal immunity shall not relieve the district of liability.

Liability Act of 1923,¹ now codified² as Section 53051 of the California Government Code. This section provides:

A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

It has frequently been stated that this statute does not make public entities insurers of the safety of their property, but merely imposes upon them a duty of reasonable care.³ It is, in short, a legislative waiver of immunity from liability when the statutory conditions exist.⁴ The scope of liability under Section 53051, as delineated in the cases interpreting it, may be briefly outlined as follows:

(a) **Local agency.** Section 53051 constitutes a waiver of immunity from liability only of the public entities which are expressly within its terms, that is, cities, counties and school districts.⁵ Being a matter of state-wide concern, it applies to home-rule charter cities as well as to general law cities.⁶ The limitation to cities, counties and school districts, however, impliedly excludes from its scope such other entities as water conservation districts,⁷ flood control districts,⁸ housing authorities,⁹ district agricultural associations,¹⁰ and the State itself.¹¹ Prior to *Muskopf*, it was recognized that the excluded types of public enti-

¹ Cal Stat. 1923, ch. 328, § 2, p. 675. Sections 1 and 3 of the original 1923 Act related to liability of appointing officers for the negligence of their appointees, and to free defense for such officers when sued, and are presently codified as CAL. GOVT. CODE §§ 1950, 1951, 1954 and 2000.

² Cal Stat. 1949, ch. 81, § 1, p. 285.

³ *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937); *Rodkey v. City of Escondido*, 8 Cal.2d 685, 67 P.2d 1053 (1937); *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936).

⁴ Since the Public Liability Act constitutes a modification of the general principle of nonliability of governmental entities, it has frequently been said that the Act must be "strictly construed" in favor of the public agency, see *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937); *Van Dorn v. City & County of San Francisco*, 103 Cal. App.2d 714, 230 P.2d 393 (1951), and that liability thereunder exists only when all of the statutory requirements conditioning such liability are supplied. *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936); *Meyer v. City of San Rafael*, 22 Cal. App.2d 46, 70 P.2d 533 (1937).

⁵ The term "local agency" as used in CAL. GOVT. CODE § 53051 is defined to mean "city, county, or school district." CAL. GOVT. CODE § 53050(c).

⁶ *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353 (1935); *Rafferty v. City of Marysville*, 207 Cal. 657, 280 Pac. 118 (1929); *Taylor v. City of Los Angeles*, 180 Cal. App.2d 255, 4 Cal. Rptr. 209 (1960).

⁷ *Kambish v. Santa Clara Valley Water Conservation Dist.*, 185 Cal. App.2d 107, 8 Cal. Rptr. 215 (1960).

⁸ *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950).

⁹ *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951).

¹⁰ *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958).

¹¹ In *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 225 P.2d 522 (1950), the defendant city was held not liable under CAL. GOVT. CODE § 53051 for a dangerous and defective condition of a highway under the jurisdiction of the State Division of Highways. Following this decision, plaintiff was unsuccessful in asserting liability of the State for the same injury. *Gillespie v. City of Los Angeles*, 114 Cal. App.2d 513, 250 P.2d 717 (1952). In *Bosqui v. City of San Bernardino*, 2 Cal. 2d 747, 43 P.2d 547 (1935), the Public Liability Act was held to be constitutional as against the contention that by excluding liability of the State thereunder, a discriminatory classification had been created.

ties were still liable under common law rules for injuries resulting from defective public property where the defense of governmental immunity was not otherwise available, as, for example, where the property in question was being employed in a "proprietary" capacity.¹² Moreover, if the public body or agency exercising jurisdiction over the allegedly defective public property was not an independent public entity but merely a subdivision or instrumentality of the county or city, an action could be brought under Section 53051 directly against the "parent" entity and the inapplicability of the statute to its instrumentality was deemed immaterial.¹³

(b) **Public property.** The statute requires the dangerous or defective condition to be a condition of "public property." This term is defined to mean "public street, highway, building, park, grounds, works, or property."¹⁴ Although this statutory enumeration seems to contemplate real property only, the courts have experienced no difficulty in applying the Act to personal property of various kinds,¹⁵ as well as to types of structures not readily analogized to those designated by the statutory definition.¹⁶ Its principal application, however, has been to streets and sidewalks.¹⁷ The requirement that the property be "public" (i.e., under the control of the local public agency) has created only occasional grounds for dispute.¹⁸

(c) **Dangerous or defective condition.** The injury must result from a "dangerous or defective" condition of the public property. It has been held that such a condition is one which exposes those coming in contact

¹² See *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958); *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951).

¹³ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), holding a county storm drain maintenance district to be a mere instrumentality of the county.

¹⁴ CAL. GOVT. CODE § 53050(b).

¹⁵ See, e.g., *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 334 P.2d 968 (1959) (boulevard stop sign); *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940) (cast iron pipe); *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 Pac. 59 (1930) (motor truck); *Dawson v. Tulare Union High School*, 98 Cal. App. 138, 276 Pac. 424 (1929) (piano).

¹⁶ See, e.g., *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955) (drainage ditch); *Selby v. County of Sacramento*, 139 Cal. App.2d 94, 294 P.2d 508 (1956) (sewer line and ditch); *Bady v. Detwiler*, 127 Cal. App.2d 321, 273 P.2d 941 (1954) (traffic control device); *Bacigalupi v. Bagshaw*, 87 Cal. App.2d 48, 196 P.2d 66 (1948) (culvert). A structure under the control of the public entity may be "public property" even though not owned in fee, but instead constructed on private property or on an easement therein. See *Young v. County of Ventura*, 39 Cal. App.2d 732, 104 P.2d 102 (1940).

¹⁷ *David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 40 (1959), "By far the greatest municipal liability arises from sidewalk and street conditions." See cases cited below, *passim*. Note should be taken of CAL. STS. & HWYS. CODE § 5640 (adopted as part of the Improvement Act of 1911 by Cal. Stat., 1911, ch. 397, § 39, p. 750) which purports to provide that when persons suffer injuries resulting from defective streets or sidewalks, "no recourse for damages thus suffered shall be had against the city." (The term "city" is elsewhere defined to include counties, resort districts, and corporations organized and existing for municipal purposes. CAL. STS. & HWYS. CODE § 5005.) Although this statutory exemption has been held to have been superseded, to the extent of any inconsistency, by the later enacted provisions of the Public Liability Act of 1923, see *Jones v. City of South San Francisco*, 96 Cal. App.2d 427, 216 P.2d 25 (1950); *Ackers v. City of Los Angeles*, 40 Cal. App.2d 50, 104 P.2d 399 (1940), it is potentially still operative to preclude tort liability in certain street and sidewalk cases not falling within the scope of the 1923 Act. See discussion in the text at 125-26, 181-83 *infra*.

¹⁸ *Union Transp. Co. v. Sacramento County*, 42 Cal.2d 235, 267 P.2d 10 (1954) (issue whether bridge had been dedicated to public use and dedication accepted by county). See also *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Gillespie v. City of Los Angeles*, 36 Cal.2d 553, 225 P.2d 522 (1950).

with it to a reasonably foreseeable risk of injury.¹⁹ In general, the cases appear to recognize that such dangerous and defective conditions may exist in either of two general types of situations:²⁰

First, the public property may be in such a condition as to endanger members of the public who are using it in its ordinary, customary and intended manner, such as pedestrians on a sidewalk,²¹ motorists in the street,²² campers in a public park,²³ bathers on a public beach,²⁴ or school children playing in a schoolyard.²⁵

Actionable defects, under this view, are not limited to structural or mechanical imperfections, but may include dangers created by the normal use of the property or its general plan of operation.²⁶ For example, a slide, located in a public swimming pool, which was properly constructed and generally safe for use, was held to constitute a dangerous and defective condition when located close to an area in which swimmers were likely to congregate and be struck by persons using the slide.²⁷ A structurally sound sandbox in a playground was deemed dangerous and defective when located in such proximity to a baseball diamond as to expose its users to the risk of being struck by batted or thrown baseballs.²⁸ A well-built sidewalk has been classified as dangerous and defective where it abutted a sharp declivity and no fence or other barrier was provided to prevent users from falling or being jostled over the edge.²⁹ Other examples abound in the cases.³⁰

Moreover, the defect need not be man-made, but may be one caused by natural conditions.³¹ For example, a county was held liable for injuries resulting from the falling of a decayed tree in one of its parks;³² a city was liable for injuries resulting from slippery banks

¹⁹ See *Jones v. City of Los Angeles*, 104 Cal. App.2d 212, 215, 231 P.2d 167, 169 (1951): "A dangerous or defective condition, as a basis of liability, is one from which it would reasonably be anticipated injury would occur to those coming in contact with the condition. Stated otherwise, the question is whether the condition created an unreasonable hazard." *Accord*: *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959); *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958).

²⁰ The classification here employed was adopted by the Supreme Court in *Stang v. City of Mill Valley*, 38 Cal.2d 436, 240 P.2d 980 (1952), citing numerous cases in each category.

²¹ See, e.g., *Johnson v. City of San Leandro*, 179 Cal. App.2d 794, 4 Cal. Rptr. 404 (1960); *Reinach v. City & County of San Francisco*, 164 Cal. App.2d 763, 331 P.2d 1006 (1958); *Aitkenhead v. City & County of San Francisco*, 150 Cal. App.2d 49, 309 P.2d 57 (1957).

²² See, e.g., *Reel v. City of South Gate*, 171 Cal. App.2d 49, 340 P.2d 276 (1959); *Hoel v. City of Los Angeles*, 136 Cal. App.2d 295, 288 P.2d 989 (1955).

²³ See, e.g., *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943).

²⁴ See, e.g., *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868 (1952).

²⁵ See, e.g., *Huff v. Compton City Grammar School Dist.*, 92 Cal. App. 44, 267 Pac. 918 (1928).

²⁶ To this effect, see *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 334 P.2d 968 (1959); *Collenburg v. County of Los Angeles*, 150 Cal. App.2d 795, 310 P.2d 989 (1957); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940).

²⁷ *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958).

²⁸ *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940).

²⁹ *Marsh v. City of Sacramento*, 127 Cal. App.2d 721, 274 P.2d 434 (1954).

³⁰ See, e.g., *Sale v. County of San Diego*, 184 Cal. App.2d 785, 7 Cal. Rptr. 756 (1960) (plank set up as crossing over water-filled dip in street, which became wet and slippery due to splashing by passing vehicles); *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 334 P.2d 968 (1959) (boulevard stop sign permitted to become obscured by overhanging branches); *Irvin v. Padelford*, 127 Cal. App.2d 135, 273 P.2d 539 (1954) (boulevard stop sign temporarily removed at intersection with through highway); *Huff v. Compton City Grammar School Dist.*, 92 Cal. App. 44, 267 Pac. 918 (1928) (burning of trash in unguarded incinerator located in school yard).

³¹ *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943).

³² *Ibid.*

around the edges of a public lake;³³ and another city was liable for underwater rocks which constituted a hazard to bathers on its public beach.³⁴

It should be noted, however, that the concept of foreseeability of risk (as an inherent element in the statutory words, "dangerous or defective") restricts liability to situations in which the defect threatens harm to a person using the public property in its ordinary and usual fashion.³⁵ A concrete spillway may be perfectly safe as long as it is used as a spillway; hence it would be unreasonable to hold the entity liable for injuries sustained by one who goes on to the spillway to obtain a drink of water therefrom.³⁶ Similarly, a railing along a staircase is safe when used as intended, but may become dangerous when used as a place to sit; such use, however, is not an ordinary or customary use of a railing and hence injury resulting therefrom is not actionable.³⁷ In short, the duty to maintain public property in a reasonably safe condition does not require the entity to foresee risks which might arise in connection with unusual, unexpected, and unauthorized uses.

On the other hand, the duty to maintain public property in a reasonably safe condition is not limited to maintaining the property only for its "intended" use. In *Torkelson v. City of Redlands*,³⁸ a 10-year-old child drowned in a storm drain. The defendant city contended that the drain was not dangerous for the purpose for which it had been constructed; that its use as a playground for children cannot be made a basis for liability; and that the trial court properly granted its motion for a directed verdict. In reversing the trial court's determination, the appellate court stated:

When the property of a public agency is in that condition which involves an unreasonable risk of injury to the general public, it is in a dangerous condition within the meaning of the Public Liability Act. [Citations omitted.]³⁹

* * *

One of the factors pertinent to a determination of the question whether the condition of public property is dangerous to the general public, is the use to which that property is put. The respondent has cited a number of cases which indicate that liability is limited to injuries sustained in the ordinary, usual and customary use of the public property in which the alleged dangerous condition exists [citations omitted]. The opinions in some of these cases contain language referring to

³³ *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.2d 30 (1931).

³⁴ *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956).

³⁵ *Loewen v. City of Burbank*, 124 Cal. App.2d 551, 269 P.2d 121 (1954); *Ford v. Riverside City School Dist.*, 121 Cal. App.2d 554, 263 P.2d 626 (1953); *Demmer v. City of Eureka*, 78 Cal. App.2d 708, 178 P.2d 472 (1947); *Howard v. City of Fresno*, 22 Cal. App.2d 41, 70 P.2d 502 (1937); *Woodman v. Hemet Union High School Dist.*, 136 Cal. App. 544, 29 P.2d 257 (1934); *Beeson v. City of Los Angeles*, 115 Cal. App. 122, 300 Pac. 993 (1931). Note, however, that even if the use is unauthorized and unintended by the public entity, it may be deemed within the Public Liability Act if such unauthorized use is so frequent and customary that actual or constructive notice of such use and the dangers attendant upon it may reasonably be imputed to the entity. See *Gallipo v. City of Long Beach*, 146 Cal. App.2d 520, 304 P.2d 106 (1956), frequent and customary use of pipeline suspended from city bridge as walkway for children.

³⁶ *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952).

³⁷ *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App.2d 277, 335 P.2d 709 (1959).

³⁸ 198 Cal. App.2d 354, 17 Cal. Rptr. 899 (1961).

³⁹ *Id.* at 358, 17 Cal. Rptr. at 901.

the use of such property "for the purpose intended" [citation omitted], its "intended lawful use" [citation omitted], and its use for purposes inconsistent with those for which it was intended. [Citation omitted.] Respondent relies upon these statements and contends, in substance, that the ordinary, usual and customary use of property is that use for which it was designed or originally intended; claims that Linda was using the ditch as a playground; that this was not its designed or intended use; that her death resulted from a use inconsistent with that for which the ditch was designed or intended; and, for this reason, the city is not liable therefor. This concept is a limitation upon the scope of the stated rule not justified either by reason or precedent. In many cases the liability of a public agency for injuries caused by the dangerous condition of its property has been affirmed even though such injury arose out of a use thereof other than that for which it was designed or originally intended. [Citations omitted.] An ordinary usual and customary use, for the purpose at hand, includes that which reasonably should be anticipated, even though without the bounds of the designed or originally intended use [citations omitted], and any established actual use which, being known to and acquiesced in by the public agency owner, has converted or enlarged the designed or originally intended use. [Citations omitted.] It should be noted that the actual use thus considered must be an established or customary use as distinguished from a casual or unusual use. [Citation omitted.]⁴⁰

* * *

We hold that in determining whether public property constitutes a dangerous condition the use factor to be considered in making such determination includes not only its designed or originally intended use, but every other reasonably anticipated use and also any use actually being made of it, conditioned always upon the fact that the owning agency has knowledge of its actual use, and conditioned further upon the fact that such use is not a mere casual one but a customary use.⁴¹

And in *Acosta v. County of Los Angeles*,⁴² a child riding a bicycle on a sidewalk in violation of an ordinance forbidding such conduct was held to be within the protection of the Public Liability Act.

Second, the danger may arise not from the inherent physical characteristics, plan of operation or use of the property by the public, but from the manner in which it is used by public employees. For example, if weeds are burned near a public street, the smoke may so obscure the street as to make it hazardous,⁴³ and if the fire is allowed to burn without suitable precautions, it may constitute a threat to nearby

⁴⁰ *Id.* at 358-60, 17 Cal. Rptr. at 901-2.

⁴¹ *Id.* at 361, 17 Cal. Rptr. at 903.

⁴² 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961).

⁴³ *Teihet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957).

private property.⁴⁴ Sewage permitted to escape from a sewer line,⁴⁵ obstructions permitted to block the flow in a drainage ditch,⁴⁶ water permitted to collect in a pool at the end of a storm drain,⁴⁷ or water sprayed on a street by a street cleaner,⁴⁸ may create foreseeable risks of harm to members of the public, and hence be deemed actionable under the Act.

In construing the Public Liability Act, the courts have recognized the practical impossibility of maintaining streets and sidewalks in perfect condition, and readily concede that minor defects are bound to exist.⁴⁹ To hold a city or county civilly liable for injuries resulting from such defects, moreover, would in effect make the entity an insurer of the safety of its premises. Thus, the so-called "minor defect" rule has developed, under which no liability may be predicated upon minor or trivial defects under the Public Liability Act.⁵⁰ Such defects cannot be regarded reasonably as "dangerous or defective" conditions.

Whether a given defect is "minor" under this rule is not simply a question of size, although measurements undoubtedly are significant;⁵¹ the ultimate test is whether, under all the circumstances, the defect is obviously dangerous and likely to expose users to an unreasonable risk of injury.⁵² Ordinarily this issue is a question of fact for the jury,⁵³ but when the court feels that reasonable minds could not differ as to the result, it may be treated as a question of law to be determined by the court.⁵⁴

⁴⁴ *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).

⁴⁵ *Selby v. County of Sacramento*, 139 Cal. App.2d 94, 294 P.2d 508 (1956).

⁴⁶ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Knight v. City of Los Angeles*, 26 Cal.2d 764, 160 P.2d 779 (1945).

⁴⁷ *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868 (1952).

⁴⁸ *Duran v. Gibson*, 180 Cal. App.2d 753, 4 Cal. Rptr. 803 (1960).

⁴⁹ *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953); *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937).

⁵⁰ Cases cited note 49 *supra*. *Accord*: *Adams v. City of San Jose*, 164 Cal. App.2d 665, 330 P.2d 840 (1958); *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957); *Ness v. City of San Diego*, 144 Cal. App.2d 668, 301 P.2d 410 (1956); *Clark v. City of Berkeley*, 143 Cal. App.2d 11, 299 P.2d 296 (1956).

⁵¹ Cases holding that particular defects are "minor" and hence not actionable ordinarily stress the negligible size of the defect. See, e.g., *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937) (difference of $\frac{1}{8}$ inch in elevation of sidewalk slabs); *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957) (difference of about $\frac{1}{8}$ inches); *Ness v. City of San Diego*, 144 Cal. App.2d 668, 301 P.2d 410 (1956) (difference of $\frac{1}{8}$ inch); *Dunn v. Wagner* 22 Cal. App.2d 51, 70 P.2d 498 (1937) (difference of 1 inch).

⁵² See *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 697, 698, 329 P.2d 943, 948, 949 (1958), "a city is not liable for minor defects that could not reasonably be anticipated to result in accidents . . . but the public is entitled to be protected from even small defects if injury is likely to result from them. . . . It is obvious that a tape measure cannot be used to determine these questions. The question is not solely one of height or depth."; *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 43, 309 P.2d 125, 127 (1957), "The size of the defect is only one circumstances [sic] to be considered, as no court has fixed an arbitrary measurement in inches below which a defect is trivial as a matter of law and above which it becomes a question of fact whether or not the defect is dangerous. All the circumstances surrounding the condition must be considered in the light of the facts of the particular case." *Accord*: *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Johnson v. City of Palo Alto*, 199 Cal. App.2d 148, 18 Cal. Rptr. 484 (1962); *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959).

⁵³ *Palmer v. City of Long Beach*, 33 Cal.2d 134, 199 P.2d 952 (1948); *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723 (1938); *Rodriguez v. City of Los Angeles*, 171 Cal. App.2d 761, 341 P.2d 410 (1959); *Adams v. City of San Jose*, 164 Cal. App.2d 665, 330 P.2d 840 (1958); *Aitkenhead v. City & County of San Francisco*, 150 Cal. App.2d 49, 309 P.2d 57 (1957); *Clark v. City of Berkeley*, 143 Cal. App.2d 11, 299 P.2d 296 (1956); *Newman v. County of San Mateo*, 121 Cal. App.2d 825, 264 P.2d 594 (1953).

⁵⁴ *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953); *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937); *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957); *Ness v. City of San Diego*, 144 Cal. App.2d 668, 301 P.2d 410 (1956); *Dunn v. Wagner*, 22 Cal. App.2d 51, 70 P.2d 498 (1937).

(d) **Knowledge or notice of defect.** Section 53051 requires as a condition of liability that "the legislative body, board, or person authorized to remedy the condition" must have had "knowledge or notice of the defective or dangerous condition." In view of this statutory language, the knowledge or notice must embrace both the fact that a defective condition exists, and the fact that the condition is dangerous (*i.e.*, likely to cause harm).¹ In addition, such notice or knowledge must be possessed not by any public employee, but by a responsible board or officer with authority to remedy the defect.²

This notice requirement should be contrasted with that applicable to private occupiers of land. They are charged with the knowledge of their employees concerning dangerous conditions under the ordinary common law rules relating to imputed notice. Under these rules, notice of a dangerous condition need not come to an employee with authority to remedy the condition. On the other hand, all knowledge of employees is not necessarily imputed to the employer. Civil Code Section 2332 provides:

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

Under this principle, "notice to an agent is not notice to the principal unless such knowledge is of a matter concerning which the agent has authority."³ An employee's actual knowledge of the existence of a dangerous condition may be imputed, though, even in the absence of showing a specific duty of the employee to act in relation to the condition. Such knowledge may be imputed where such knowledge could reasonably be said to give rise to an employee's duty with respect to the condition to act as the employer's representative. Thus, in *Hollander v. Wilson Estate Co.*,⁴ complaints to an elevator operator concerning a grinding noise in an elevator (which later fell four stories) were held to impute notice to the owner.

The common law principle is not so broad, however, that notice will be imputed to the private occupier of land through employees who have no reasonable connection with the defect. No tort cases have been found, but analogous cases in other fields may be found in which the doctrine of imputed notice is limited. For instance, in *Lorenz v. Rousseau*,⁵ the knowledge of a real estate agent—whose only duty was to collect the rent—that the lessee was constructing an improvement on the property was not imputed to the owner so as to require the posting and recording of a notice of nonresponsibility under the mechanic's lien law. In

¹ *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959); *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958). See also *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936); *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App.2d 277, 335 P.2d 709 (1959).

² See *Watson v. City of Alameda*, 219 Cal. 331, 26 P.2d 286 (1933); *Hoel v. City of Los Angeles*, 136 Cal. App.2d 295, 288 P.2d 989 (1955); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940); and *Sinclair v. City of Pasadena*, 21 Cal. App.2d 720, 70 P.2d 241 (1937), holding that notice to a mere employee is not sufficient. The restrictive significance of these cases, however, has been largely dissipated by later decisions affirming a liberal application of the doctrine of constructive notice. See cases cited in notes 9 and 10 *infra*.

³ *Lorenz v. Rousseau*, 35 Cal. App. 1, 6, 258 Pac. 690, 692 (1927).

⁴ 214 Cal. 582, 7 P.2d 177 (1932).

⁵ 85 Cal. App. 1, 258 Pac. 690 (1927).

Primm v. Joyce,⁶ the knowledge of a rental collection agent that a lessee had sublet the premises was not imputed to the owner so as to charge him with knowledge that a condition of the lease against subletting had been breached.

The Public Liability Act requirement that a responsible board or "person authorized to remedy the condition" have notice of the defect might be a formidable barrier to recovery under the Act if actual notice were required, as had been the case under an earlier but abortive statute.⁷ However, the courts have consistently held that either actual or constructive notice satisfies the purpose of the Act.⁸ Constructive notice has been found to exist in two general types of cases, first, in cases where the condition was created by employees of the entity under circumstances likely to result in hazard to the public, where such likelihood was known or should have been known by responsible public officials;⁹ and second, in cases where the condition had existed for a sufficient length of time and was of such a conspicuous character that reasonable inspection would have disclosed its existence.¹⁰

Whether the defect is sufficiently conspicuous to support constructive notice is generally a question of fact;¹¹ but where it would be unreasonable to reach any other conclusion, the courts may hold it to be so

⁶ 83 Cal. App.2d 288, 188 P.2d 301 (1948).

⁷ See Cal. Stat. 1911, ch. 593, § 1, p. 1115, providing that if any person suffers injury to person or property "in consequence of the dangerous or defective condition of any street, highway, public building, public work or property," no officer of the entity could be held liable unless he had received "actual notice" of the defect and had failed for a reasonable time thereafter to repair it, having authority to do so plus funds available for the purpose. To this provision was attached a proviso declaring, "but in all such cases damage may be recovered against the county, city, or city and county as in ordinary actions for damages." This 1911 Public Liability Act, however, was declared unconstitutional insofar as it purported to impose liability on public entities, since the title of the Act referred only to "liability of public officers" and hence failed to conform to the requirements of CAL. CONST., Art. IV, § 24. *Brunson v. City of Santa Monica*, 27 Cal. App. 89, 148 Pac. 950 (1915).

⁸ *Palmer v. City of Long Beach*, 33 Cal.2d 134, 199 P.2d 952 (1948); *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945); *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950). Cases involving evidence tending to show actual notice are somewhat rare in the appellate reports. See, e.g., *Gibson v. County of Mendocino*, 16 Cal.2d 80, 105 P.2d 105 (1940); *Rubell v. County of Santa Clara*, 27 Cal. App.2d 377, 80 P.2d 1023 (1938).

⁹ See, e.g., *Duran v. Gibson*, 180 Cal. App.2d 753, 4 Cal. Rptr. 803 (1960) (slippery condition of street caused by use of city water truck to flush debris held within constructive notice doctrine where city employees were doing the work under orders from and with knowledge of a responsible city official); *Reel v. City of South Gate*, 171 Cal. App.2d 49, 340 P.2d 276 (1959) (unlighted barricades placed in street by city painters held within constructive notice doctrine where done under orders of city engineer); *Teilhert v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957) (dangerous condition of highway due to dense smoke from weed burning operations of county employees held within constructive notice doctrine where such work was being done under orders of responsible road commissioner in customary manner which was known to create possibility of such danger); *Wood v. County of Santa Cruz*, 133 Cal. App.2d 713, 284 P.2d 923 (1955) (defective condition of highway consisting of brush cuttings left thereon by road crew held within constructive notice doctrine where such work was conducted under supervision of county officials in charge of highway maintenance). See also *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940) (*semble*). Some cases have held that when the entity deliberately creates an inherently dangerous and defective condition, the statutory requirement of notice is dispensed with. See *Fritchard v. Sully-Miller Contracting Co.*, 178 Cal. App.2d 246, 2 Cal. Rptr. 330 (1960). The traditional analysis would have treated these cases as examples of constructive notice. Cf. *DAVID, CALIFORNIA MUNICIPAL TORT LIABILITY 233-235 (1936)*.

¹⁰ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945); *Reinach v. City & County of San Francisco*, 164 Cal. App.2d 763, 331 P.2d 1006 (1958); *Clark v. City of Berkeley*, 143 Cal. App.2d 11, 299 P.2d 296 (1956).

¹¹ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958); *Gallipo v. City of Long Beach*, 146 Cal. App.2d 520, 304 P.2d 106 (1956); *Van Dorn v. City & County of San Francisco*, 103 Cal. App.2d 714, 230 P.2d 393 (1951).

trivial or minor, as a matter of law, as to preclude the operation of the constructive notice doctrine.¹²

It should be noted that the city's duty to make reasonable inspections of its streets and sidewalks¹³ is a more stringent one than the duty of ordinary prudence imposed on the citizen using these facilities; and hence the same defect may be sufficiently conspicuous to give constructive notice to the entity, and yet sufficiently inconspicuous that the plaintiff was not contributorily negligent as a matter of law in failing to notice it.¹⁴

The duty to make reasonable inspections to see that the property is safe is similar to the duty of inspection that is imposed upon private owners and occupiers of land by the common law. However, in contrast with public landowners,¹⁵ private owners and occupiers are usually held to owe this duty only to invitees.

The main difference between the duty owed a licensee and that owed the person referred to in California as an invitee . . . is that in addition to using ordinary care not to harm the invitee or business visitor the landowner must use reasonable care to discover conditions which might cause harm.¹⁶

An employer, too, owes to his employees the duty of inspecting the premises to learn of hidden hazards.¹⁷ The private occupier's duty to inspect, as a general rule, does not extend beyond the "area of invitation." Thus, in *Powell v. Jones*,¹⁸ the defendant was held not liable to a babysitter who was injured by a dangerous condition because the injury occurred while the sitter was returning from a personal errand next door and was entering the house by an entrance that she would not have been expected to use for her babysitting activities. When the sitter was outside the area where she was employed to be, the property owner's duty—the court said—was merely to refrain from active negligence or wanton or wilful injury.

From the foregoing, it appears that a private occupier's general inspection duty is to see that the property is safe for people who have been invited to use it, whether as employees or as patrons. In some instances, however, the duty of inspection has been extended further. Where electric power lines are maintained, the private occupier must inspect them to see whether they create a hazard to licensees as well as

¹² *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953); *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936); *Adams v. City of San Jose*, 164 Cal. App.2d 665, 330 P.2d 840 (1958); *Balmer v. City of Beverly Hills*, 22 Cal. App.2d 529, 71 P.2d 854 (1937).

¹³ See *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945), holding that city may not await reports of defective conditions by members of the public, but must make reasonable inspections for existence of such conditions both on improved and unimproved streets and sidewalks open to the public. Cf. *Aguirre v. City of Los Angeles*, 46 Cal.2d 841, 299 P.2d 862 (1956); *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Perry v. City of San Diego*, 80 Cal. App.2d 166, 181 P.2d 98 (1947).

¹⁴ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Reinach v. City & County of San Francisco*, 164 Cal. App.2d 763, 331 P.2d 1006 (1958). See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 39, 40 (1959).

¹⁵ See note 61 *infra*.

¹⁶ *Boucher v. American Bridge Co.*, 95 Cal. App.2d 659, 668, 213 P.2d 537, 543-544 (1950).

¹⁷ *Devens v. Goldberg*, 33 Cal.2d 173, 199 P.2d 943 (1948).

¹⁸ 133 Cal. App.2d 601, 284 P.2d 856 (1955).

invitees. In a recent case the California Supreme Court said, quoting in part from prior cases involving power lines:

[W]ires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom. Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein. . . .

In *Lozano v. Pacific Gas & Elec. Co.* (1945), 70 Cal. App.2d 415, 420, 422, . . . it is declared that the defendant company's duty "to use care so as to avoid injury to persons or property was established by a clear showing that the company owned, maintained and operated the power line in question. Such duty extended to every person rightfully on the premises and was obviated only as to trespassers and individuals unlawfully there at the time of injury. . . ." ¹⁹

So far as trespassers are concerned, no California case has been found clearly indicating that there is ever a duty to inspect property to see that it does not create a hazard to the trespassers. There are a few cases, however, from which such a duty might be implied. It is clear that a private occupier does have some duties to foreseeable trespassers. He may not wantonly and wilfully create conditions intended to inflict serious injury upon a trespasser.²⁰ He may not create conditions that are extremely hazardous to immature persons who are likely to trespass and who will not appreciate the hazard that exists.²¹ Moreover, under the holding in *Blaylock v. Jensen*,²² he may not negligently create "traps" into which foreseeable trespassers may fall without any appreciation of danger. Apparently, under the rationale of *Langazo v. San Joaquin Light & Power Co.*,²³ if there is a statutory standard of safety to be observed which has been imposed for the protection of the general public, a violation of the standard will result in liability even to a trespasser.

In none of the cases cited in the preceding paragraph is there any specific indication that the private landowner owes a duty to look for the conditions that will result in injury to the trespasser. However, the facts of some of the cases indicate that there may in fact be such a duty. In the *Blaylock* case, the plaintiff went into an oil sump covered with dirt to rescue her dog and became imbedded in tar. The court held that the evidence of defendant's negligence was sufficient but reversed for a finding upon the question of plaintiff's contributory negligence. One may surmise that the hazard of the sump became concealed and the sump became a "trap" because of the defendant's failure to inspect regularly and take precautions. The unreported case of *Malloy v. Hibernia Sav. & Loan Soc.*²⁴ is similar. There a small child fell into

¹⁹ *Dunn v. Pacific Gas & Elec. Co.*, 43 Cal.2d 265, 273, 272 P.2d 745, 749 (1954).

²⁰ RESTATEMENT, TORTS § 85 (1934). See also 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1444 (7th ed. 1960).

²¹ *King v. Lennen*, 53 Cal.2d 340, 1 Cal. Rptr. 665, 348 P.2d 98 (1959).

²² 44 Cal. App.2d 850, 113 P.2d 256 (1941).

²³ 32 Cal. App.2d 678, 90 P.2d 825 (1939).

²⁴ 3 Cal. Unrep. 76, 78 Cal. XIX, 21 Pac. 525 (1889).

an open cesspool that was covered with dirt so that it appeared the same as the surrounding ground. The defendant was held liable. In a subsequent case, the Supreme Court explained that the defendant in the *Malloy* case would have been liable "had an adult been killed under the same circumstances, for the complaint showed a veritable trap—a cesspool, open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land. Into such a trap anyone, adult or child, might have walked."²⁵ Again, one may surmise that the negligence involved may have been the failure to inspect to see that the obvious hazard did not become concealed. Nevertheless, the *Malloy* case seems to predicate liability on the removal of the surrounding fence. The *Langazo* case might be read to require power companies to inspect their lines to see that they comply with the Public Utility Commission's safety orders and failure to do so may result in liability to trespassers; however, such a duty is nowhere stated.

However, the public entity's duty of inspection runs to licensees and trespassers as well as invitees, for the Public Liability Act draws no distinctions based upon the plaintiff's status on the property.²⁶

(e) **Failure to remedy defect or protect public.** The Public Liability Act postulates liability upon negligence.²⁷ Under the terms of the Act, it is not the existence of the defective condition which renders the public entity liable, but its negligence after notice, in failing within a reasonable time to take action necessary to remedy the condition or protect the public from the danger.²⁸ This duty is not satisfied by the mere giving of notice to an adjoining landowner to take the necessary precautions, even where such duty may rest on the landowner.²⁹ It may, however, be satisfied by the entity either by making suitable repairs,³⁰ by erecting warning signs, barricades or other protections,³¹ or by taking such other steps as may be appropriate to the circum-

²⁵ *Loftus v. Dehail*, 133 Cal. 214, 218, 65 Pac. 379, 380 (1901).

²⁶ *Gibson v. County of Mendocino*, 16 Cal.2d 80, 84, 105 P.2d 105, 107 (1940); *Gallipo v. City of Long Beach*, 146 Cal. App.2d 520, 304 P.2d 106 (1956). See also *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961).

²⁷ *George v. City of Los Angeles*, 11 Cal.2d 303, 79 P.2d 723 (1938); *Sandstoe v. Atchison, T. & S.F. Ry.*, 28 Cal. App.2d 215, 82 P.2d 216 (1938). The title to the original Act, Cal. Stat. 1923, ch. 328, p. 675, described it, in part, as an Act "making counties, municipalities and school districts liable for the negligence of their respective officers in certain instances . . ." (Emphasis added.) It seems to be settled that the Act does not create any liability for intentional or wilful misconduct. See *Whiteford v. Yuba City Union High School Dist.*, 117 Cal. App. 462, 4 P.2d 266 (1931). Cf. *Pittam v. City of Riverside*, 128 Cal. App. 57, 16 P.2d 768 (1932).

²⁸ *Watson v. City of Alameda*, 219 Cal. 331, 26 P.2d 286 (1933); *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); *Telhet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957); *Gallipo v. City of Long Beach*, 146 Cal. App.2d 520, 304 P.2d 106 (1956).

²⁹ *Marsh v. City of Sacramento*, 127 Cal. App.2d 721, 274 P.2d 434 (1954). The city or county, however, may in such cases obtain full indemnity from such landowner, since the latter is primarily liable. See *City & County of San Francisco v. Ho Sing*, 51 Cal.2d 127, 330 P.2d 802 (1958).

³⁰ See *Aguirre v. City of Los Angeles*, 46 Cal.2d 841, 299 P.2d 862 (1956) (duty to inspect and repair sidewalks); *Kirack v. City of Eureka*, 69 Cal. App.2d 134, 158 P.2d 270 (1945).

³¹ *Gallipo v. City of Long Beach*, 146 Cal. App.2d 520, 304 P.2d 106 (1956) (suitable barriers); *Marsh v. City of Sacramento*, 127 Cal. App.2d 721, 274 P.2d 434 (1954) (fence); *Electrical Prods. Corp. v. County of Tulare*, 116 Cal. App.2d 147, 253 P.2d 111 (1953) (warning signs and flares). See also *Rose v. County of Orange*, 94 Cal. App.2d 688, 211 P.2d 45 (1949); *Gove v. Lakeshore Homes Ass'n*, 54 Cal. App.2d 155, 128 P.2d 716 (1942).

stances.³² Whether the steps taken are sufficiently prompt and adequate to meet the danger are generally regarded as questions of fact.³³

Like the public entity's duty of inspection under the Public Liability Act, the public entity's duty of repair is not limited by the fact that the person injured is a licensee or trespasser.³⁴ On the other hand, except insofar as invitees who are in the "area of invitation" are concerned, the private occupier has neither the duty of inspection nor the duty of repair. The private occupier's usual duty is merely to refrain from wanton or wilful injury.³⁵ In particular situations, an additional duty has been imposed. He must protect trespassers against "traps."³⁶ He must protect trespassing children against "attractive nuisances."³⁷ And he must protect licensees³⁸—and perhaps trespassers,³⁹ too—against the hazards of electric power lines. But these extensions of the duty to take precautions are exceptions to the private occupier's normal duties in regard to his property.

Although the terms of the Public Liability Act seem to predicate liability upon negligent failure to take necessary precautions after notice, the courts have held that a public entity may be held liable under the Act for injuries caused by defects that the entity has negligently created even though the entity has had no opportunity to take necessary precautions.⁴⁰ The basis for this liability was stated in *Pritchard v. Sully-Miller Contracting Co.*,⁴¹ a case in which the City of Long Beach was urging that it had no authority to enter State highway property to change the timing of a traffic signal that a city employee had negligently set, causing the signal to work as a trap:

The action sanctioned by section 53051, Government Code, is based on negligence . . . , and the provision for notice to "the legislative body, board or person authorized to remedy the con-

³² See e.g., *Shea v. City of San Bernardino*, 7 Cal.2d 688, 62 P.2d 365 (1936) (city under duty to apply to Railroad Commission for action to correct defect in grade crossing); *Telhet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957) (county engaged in weed burning operations under duty to provide positive two-way traffic control on highway obscured by smoke).

³³ *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 43 (1956) (adequacy of precautions to prevent swimmers from injuring themselves on underwater rocks); *Aitkenhead v. City & County of San Francisco*, 150 Cal. App.2d 49, 309 P.2d 57 (1957) (adequacy of repairs to sidewalk); *Rose v. County of Orange*, 94 Cal. App.2d 688, 211 P.2d 45 (1949) (promptness in taking precautions after notice of defect); *Bigelow v. City of Ontario*, 37 Cal. App.2d 198, 99 P.2d 298 (1940) (adequacy of warning sign). Occasionally, the issue has been regarded as a matter of law where the evidence showed without conflict that the entity had done all that could reasonably be expected to protect the public. See *Electrical Prods. Corp. v. County of Tulare*, 116 Cal. App.2d 147, 253 P.2d 111 (1953).

³⁴ *Gibson v. County of Mendocino*, 16 Cal.2d 80, 84, 105 P.2d 105, 107 (1940).

³⁵ In *Palmquist v. Mercer*, 43 Cal.2d 92, 272 P.2d 26 (1954), the Union Oil Company was held to be under no duty to warn horseback riders of a low clearance created by a pipeline trestle because such riders were licensees and Union's only duty was to refrain from "wanton or wilful injury." That Union knew of the condition and the hazard created is indicated by the fact that it had posted warning signs which were not maintained.

³⁶ *Blaylock v. Jensen*, 44 Cal. App.2d 850, 113 P.2d 256 (1941).

³⁷ *King v. Lennen*, 53 Cal.2d 340, 1 Cal. Rptr. 665, 343 P.2d 98 (1959).

³⁸ *Dunn v. Pacific Gas & Elec. Co.*, 43 Cal. 2d 265, 272 P.2d 745 (1954).

³⁹ *Langazo v. San Joaquin Light & Power Co.*, 32 Cal. App.2d 678, 90 P.2d 825 (1939).

⁴⁰ *Fackrell v. City of San Diego*, 26 Cal.2d 196, 206, 157 P.2d 625, 630 (1945) ("where the dangerous condition is due to the negligent act or omission of the officers doing or directing the work it is unnecessary to prove as a condition to liability that they had notice of the condition, and the authority . . . to correct it"); *Duran v. Gibson*, 180 Cal. App.2d 753, 4 Cal. Rptr. 803 (1960) (slippery condition caused by city truck washing debris from street; a following semitrailer skidded and caused injuries involved).

⁴¹ 178 Cal. App.2d 246, 2 Cal. Rptr. 830 (1960).

dition" is intended for the protection of the city, not to assist it in inflicting a wrong. The elements of notice and failure to exercise diligence ordinarily are essential to show culpability on the part of the city but where it has itself created the dangerous condition it is *per se* culpable and notice, knowledge and time for correction have become false quantities in the problem of liability.⁴²

Thus, under the Act, there are actually two bases for liability: (1) negligent failure after notice to take action necessary to remedy the condition or to protect the public from danger or (2) negligent creation of the dangerous or defective condition. At least as to invitees, the liability of private landowners for dangerous conditions of their property rests on the same bases.⁴³

(f) **Proximate cause.** Under Section 53051, the injuries in question must "result" from the dangerous or defective condition. This requirement is regarded as the equivalent of the common law requirement of proximate cause, and like it, is ordinarily treated as an issue of fact.⁴⁴

The courts have uniformly held that the public entity remains liable under the statute even though the defective condition was created or maintained by a private person who is jointly liable therefor.⁴⁵ Likewise, the concurrent or intervening negligent act of a third party does not cut off the chain of causation provided all of the statutory conditions of liability are satisfied.⁴⁶ However, the injury must be shown to have been proximately caused by some dangerous defect in the property itself or in its ordinary and customary use, and not solely by the tortious conduct of third persons.⁴⁷ By the same token, the mere failure of the public entity to make and enforce safety regula-

⁴² *Id.* at 256, 2 Cal. Rptr. at 336.

⁴³ Compare the following statement from *Hatfield v. Levy Bros.*, 18 Cal.2d 798, 806, 117 P.2d 841, 845 (1941): "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of his employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. . . . Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it."

⁴⁴ *Osborn v. City of Whittier*, 103 Cal. App.2d 609, 230 P.2d 132 (1951); *Rippe v. City of Los Angeles*, 50 Cal. App.2d 189, 123 P.2d 47 (1942); *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940); *Pittam v. City of Riverside*, 128 Cal. App. 57, 16 P.2d 768 (1932).

⁴⁵ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953) (defective condition of sidewalk created by abutting property owner for his own benefit); *Sale v. County of San Diego*, 184 Cal. App.2d 785, 7 Cal. Rptr. 756 (1960) (hazardous plank laid across water-filled dip in road by unknown third person); *White v. Cox Bros. Constr. Co.*, 162 Cal. App.2d 491, 329 P.2d 14 (1958) (chuck hole created by road contractor working on street).

⁴⁶ *Bady v. Detwiler*, 127 Cal. App.2d 321, 273 P.2d 941 (1954) (negligent operation by driver of vehicle); *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954) (negligent play by golfer); *Jones v. City of Los Angeles*, 104 Cal. App.2d 212, 231 P.2d 167 (1951) (negligent driving of truck too close to curb); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940) (negligent playing of baseball near child's sandbox).

⁴⁷ *Shiple v. City of Arroyo Grande*, 92 Cal. App.2d 748, 208 P.2d 51 (1949); *Campbell v. City of Santa Monica*, 51 Cal. App.2d 626, 125 P.2d 561 (1942).

tions⁴⁸ or to carefully supervise activities of its employees⁴⁹ is not actionable under the statute, absent some dangerous or defective condition of public property itself. In the important case of *Stang v. City of Mill Valley*,⁵⁰ for example, the Supreme Court held that the Public Liability Act did not impose liability for loss of a house due to the failure of the city to maintain its water mains and hydrants in sufficiently workable condition to permit the fire department to control a fire therein. The court pointed out that the city had not created the condition which caused the loss (*i.e.*, the fire) and that the defective condition of the water system had merely failed to provide a remedy for such condition. When the statutory conditions of liability are met, however, the courts recognize that the usual defenses to a negligence action, such as contributory negligence⁵¹ and assumption of risk⁵² are available to the defendant city, county or school district.

The impact of the *Muskopf* decision abolishing governmental immunity upon the statutory liability provided in Section 53051 of the Government Code is somewhat difficult to assess. Certain significant possibilities, however, may readily be suggested.

First, public entities other than cities, counties and school districts (which are the only ones subject to the statutory liability of Section 53051⁵³) are now exposed to the possibility of being held liable for injuries sustained as the result of dangerous or defective conditions of public property under their control. However, such liability will not be circumscribed by the statutory limitations prescribed by Section 53051; instead, it apparently will be governed by the common-law rules which determine the liability of owners and occupiers of land to invitees, licensees and trespassers.⁵⁴ In a recent county water district case, the Supreme Court squarely held that, under the *Muskopf* decision, Section 53051 will no longer, as before, be construed as impliedly absolving from liability all entities other than those named.⁵⁵

⁴⁸ *Seybert v. County of Imperial*, 162 Cal. App.2d 209, 327 P.2d 560 (1958) (absence of safety regulations governing use of public lake by speedboats); *Perry v. City of Santa Monica*, 130 Cal. App.2d 370, 279 P.2d 92 (1955) (absence of boulevard stop sign). See also *Mercado v. City of Pasadena*, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959) (choice of location of stop sign).

⁴⁹ *Jones v. Czapkay*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960) (no liability for negligent enforcement of quarantine laws); *Durst v. County of Colusa*, 166 Cal. App.2d 623, 333 P.2d 789 (1958) (no liability for negligent administration of blood transfusion by incompetent employee); *Grove v. County of San Joaquin*, 156 Cal. App.2d 308, 320 P.2d 161 (1958) (no liability for inadequate control maintained over prisoners in county jail).

⁵⁰ 38 Cal.2d 486, 240 P.2d 980 (1952). See also *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962) (no liability for fire arises under Public Liability Act where fire hose is too short to be usable in firefighting).

⁵¹ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947); *Gibson v. Mendocino County*, 16 Cal.2d 80, 105 P.2d 105 (1940); *Paxton v. County of Alameda*, 119 Cal. App.2d 393, 259 P.2d 934 (1953).

⁵² *Nagle v. City of Long Beach*, 113 App.2d 669, 248 P.2d 799 (1952); *Parcher v. City of Los Angeles*, 106 Cal. App.2d 421, 235 P.2d 220 (1951); *Owen v. City of Los Angeles*, 82 Cal. App.2d 933, 187 P.2d 860 (1947).

⁵³ CAL. GOV'T. CODE § 53050 (c) defines "local agency" as used in Section 53051 to mean "city, county, or school district."

⁵⁴ The common law liability of owners and possessors of land is in some respects more extensive, see note 60 *infra*, and in some respects narrower, see note 61 *infra*, than the statutory liability defined in CAL. GOV'T. CODE § 53051.

⁵⁵ *Lattin v. Coachella Valley County Water District*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962). Previously the courts had held Section 53051 inapplicable to such other types of public entities as a flood control district, *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950); a housing authority, *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951); and a district agricultural association, *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958).

In effect, the court which found the doctrine of governmental immunity to be "mistaken" and "unjust" in *Muskopf* refused to attribute to the Legislature an intent impliedly to perpetuate the immunity of all other public entities in the guise of a Public Liability Act waiving the immunity of three named ones.

Second, it has been held that cities may be held liable to the same extent as private owners for injuries resulting from defective property being used in a "proprietary" capacity, irrespective of the provisions of the Public Liability Act.⁵⁶ (Since counties and school districts may also be deemed to act in a proprietary capacity under some circumstances,⁵⁷ it would seem that the same rule would apply to them.) In light of this rule, the possible effect of *Muskopf* upon the liability of cities, counties and school districts for dangerous and defective property may be analyzed along at least four different lines:

(1) It could be argued that since liability exists without Section 53051 for defective property employed in "proprietary" activities, and since *Muskopf* has removed the governmental immunity barrier to common law liability for "governmental" activities, Section 53051 has, in effect, been rendered a nullity which may hereafter be ignored by injured claimants. This argument, however, would seem to be contrary to the manifest legislative intent to specify in Section 53051 what the conditions of liability are.

(2) It could be argued, in order to carry out the legislative intent expressed in Section 53051, that the rules governing liability of cities, counties and school districts (so far as dangerous and defective property is concerned) have not been affected by the *Muskopf* decision, and that the previously recognized distinction between property employed in a "proprietary" as distinguished from a "governmental" capacity still exists. In short, this argument would be that *Muskopf* has not changed the prior law. This view, however, would perpetuate the very distinction which *Muskopf* abolished as being both "illogical" and "inequitable."⁵⁸ In two recent opinions, the first division of the District Court of Appeal for the First Appellate District has nevertheless taken this view.⁵⁹ Neither opinion explores the full implications of the conclusion there reached that notwithstanding *Muskopf*, there can be no tort liability of a city, county or school district arising out of a dangerous or defective condition of public property being employed for a "governmental" purpose unless all of the statutory conditions of the Public Liability Act are satisfied. Moreover, although the court explicitly admits that the applicability of the Public Liability Act in defective property cases will hereafter, in its view, re-

⁵⁶ *Sanders v. City of Long Beach*, 54 Cal. App.2d 651, 129 P.2d 511 (1942), citing *Peccolo v. City of Los Angeles*, 8 Cal.2d 532, 66 P.2d 651 (1937). See also, in accord, *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954); *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950). Cf. *Boothby v. Town of Yreka City*, 117 Cal. App. 643, 4 P.2d 589 (1931).

⁵⁷ See *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 453 (1956); *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953).

⁵⁸ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 217, 11 Cal. Rptr. 89, 92, 359 P.2d 457, 460 (1961).

⁵⁹ *Ngim v. City & County of San Francisco*, 193 Cal. App.2d 138, 13 Cal. Rptr. 849 (1961); *Kotronakis v. City & County of San Francisco*, 192 Cal. App.2d 624, 13 Cal. Rptr. 709 (1961). See also, to the same effect, *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962) (dictum); *Akers v. City of Palo Alto*, 194 Cal. App.2d 109, 14 Cal. Rptr. 767 (1961) (dictum).

quire a continued application of the "governmental"- "proprietary" distinction, neither opinion attempts to justify this result or to reconcile it with the Supreme Court's condemnation of that distinction in *Muskopf*. Both opinions, in professing to be adhering to the legislative intent expressed in the Public Liability Act, avoid any attempt to explain why common law liability may exist as an exception to that Act when the entity is acting in a proprietary capacity, while common law liability may not exist under the *Muskopf* case when the entity is acting in a governmental capacity. In view of the unsatisfactory nature of these decisions, they should not be regarded as necessarily conclusive on the point in the absence of approval by the Supreme Court.

(3) It could be argued that Section 53051 remains effective as the legislative standard of liability, but that the old distinction between "proprietary" and "governmental" uses of property should be deemed to have been abolished by *Muskopf*. This view, however, would tend to restrict the scope of tort liability of cities, counties and school districts, for in certain cases the statutory conditions laid down by Section 53051 are stricter and liability thereunder is correspondingly narrower than at common law.⁶⁰ Under this view, liability for property defects would hereafter exist only when all of the requirements of Section 53051 are met, even though proprietary liability would have been recognized prior to *Muskopf*. Such a narrowing of tort liability seems clearly contrary to the general tenor of the *Muskopf* and *Lipman* opinions and seems unlikely to prevail.

(4) It could be argued that an injured plaintiff may now seek relief either under Section 53051 or under the common law. To recognize these two bases for liability as alternatives would not do unnecessary violence to either the legislative intent underlying Section 53051 nor the judicial attitude exemplified in *Muskopf*, for under some circumstances liability under Section 53051 is broader than under the common law.⁶¹ If this view is accepted, the plaintiff could proceed

⁶⁰ Under Section 53051, for example, liability exists only when responsible officials authorized to remedy the defect have received actual or constructive notice of the dangerous and defective condition. See text at 49 *supra*. At common-law, however, the knowledge of a mere employee may be imputed to the landowner in some circumstances. See, e.g., *Hatfield v. Levy Bros.*, 18 Cal.2d 798, 117 P.2d 841 (1941); *Gilbert v. Pessin Grocery Co.*, 132 Cal. App.2d 212, 282 P.2d 148 (1955). In addition, no liability can be had under Section 53051 for willful or intentional injury or for active negligent conduct, whereas a private landowner is liable to licensees and trespassers for such injuries. See *Knight v. Kaiser Co.*, 48 Cal. 2d 778, 312 P.2d 1089 (1957) and cases there cited; *Oettinger v. Stewart*, 24 Cal.2d 133, 148 P.2d 19 (1944); *Simpson v. Richmond*, 154 Cal. App.2d 27, 315 P.2d 435 (1957).

⁶¹ It has been intimated by the courts that liability exists under Section 53051 for injuries to trespassers and licensees under circumstances where a private owner would not be liable at common law. See *Gibson v. County of Mendocino*, 16 Cal.2d 30, 105 P.2d 105 (1940); *Gallipo v. City of Long Beach*, 164 Cal. App.2d 70, 330 P.2d 91 (1958); *Castro v. Sutter Creek Union High School Dist.*, 25 Cal. App.2d 372, 77 P.2d 509 (1938). See also *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943) (county held liable for injury resulting from natural condition (i.e., decayed tree) although court concedes that no such liability would attach to a private owner at common law). Moreover, it must be remembered that most users of sidewalks and streets are probably there for purposes of their own, unconnected with any business purpose or invitation of the city or county, and hence under accepted definitions would probably be classified as "licensees" rather than "invitees." See, e.g., *O'Brien v. Fong Wan*, 185 Cal. App.2d 112, 8 Cal. Rptr. 124 (1960) (pedestrian on sidewalk); *Flick v. Ducey & Attwood Rock Co.*, 70 Cal. App.2d 70, 160 P.2d 569 (1945) (motorist on private street). Cf. *Van Winkle v. City of King*, 149 Cal. App.2d 500, 308 P.2d 512 (1957); *Free v. Furr*, 140 Cal. App.2d 378, 295 P.2d 134 (1956); *Robbins v. Yellow Cab Co.*, 100 Cal. App.2d 174, 223 P.2d 80 (1950). Liability under Section 53051, however, is predicated on breach of a duty to maintain the streets and sidewalks in a reasonably safe condition, which duty is closely analogous to the duty owed by private persons toward "invitees" but not toward "licensees." See *Knight v. Kaiser Co.*, 48

under whichever theory is most hospitable to his claim. Section 53051 would still be given full effect insofar as it expands upon common law liability, and the common law liability would be given full effect insofar as it is more liberal than Section 53051.⁶² However, under this view, if it be correct, the tort liability of cities, counties and school districts based on defective public property would be substantially greater than that of both private owners of premises and public entities other than the three types named in Section 53051; and the principal application of Section 53051 would be in situations where no liability can be established under common law rules—that is, in the area where Section 53051 expands upon and imposes liability beyond the outer limits recognized by the common law rules. Not only does the inherent inconsistency and nonuniformity of application of Section 53051 appear to be in need of legislative treatment, but the basic policy determination to impose a statutory liability of this magnitude where none would otherwise exist would seem to deserve careful reconsideration.

4. Negligence of officers and employees of reclamation and flood control districts.

Prior to 1923, it was apparently settled law that a reclamation district, being a public agency created to perform the "governmental" function of draining and reclaiming overflowed and swamp lands, was not liable for damages resulting from the negligent conduct of its officers or employees.¹ The Supreme Court, in a leading case in point,² postulated this result not only on the doctrine of substantive immunity, but also in part on absence of statutory authorization for such districts to be sued and in part on the unenforceability of the judgment in view of the fact that such districts possessed no leviable property and had no power to levy assessments to satisfy such a judgment.

In 1923, the California Legislature brought into being a drastic change in the law relating to liability of reclamation districts by adding Section 3464 to the Political Code.³ This new section provided that the negligence of "a trustee or trustees" of a reclamation district was to be imputed to the district; and, in order that the waiver of substantive immunity would be enforceable, it proceeded to authorize the district to levy assessments to pay any damages so incurred. Since authorization for suit against such districts had been conferred many years previously,⁴ all of the grounds for district nonliability as declared in the cases had now been eliminated so far as negligence of reclamation district trustees was involved.

In 1951, the provisions of the Political Code governing reclamation districts were codified as part of the Water Code;⁵ but at the same time an amendment was adopted to the liability provision in question

Cal. 2d 773, 312 P.2d 1089 (1957); *Palmquist v. Mercer*, 43 Cal.2d 92, 272 P.2d 26 (1954). Insofar as Section 53051 appears to assimilate all users of streets and sidewalks to the approximate status of invitees, Section 53051 thus may be deemed to impose tort liability beyond what would obtain at common law as to a private corporation similarly situated.

⁶² See note 60 *supra*.

¹ *Hensley v. Reclamation Dist. No. 556*, 121 Cal. 96, 53 Pac. 401 (1898); *Sels v. Greene*, 88 Fed. 129 (N.D. Cal. 1898).

² *Hensley v. Reclamation Dist. No. 556*, *supra* note 1.

³ Cal. Stat. 1923, ch. 259, § 1, p. 513.

⁴ Shortly after the *Hensley* case, *supra* note 1, had adverted to the want of authority for reclamation districts to sue and be sued, such authority was supplied by amendment to § 3453 of the CAL. POL. CODE, Cal. Stat. 1899, ch. 10, § 1, p. 9. This authority is today found in CAL. WATER CODE § 50603.

⁵ Cal. Stat. 1951, ch. 336, p. 693.

expanding its scope to impute to the district not only the negligence of trustees but also that of "any employee or servant" of a reclamation district.⁶ In its present form, the provision is Section 50152 of the Water Code, and reads:

The negligence of a trustee in his official capacity or any employee or servant of a district shall be imputed to the district to the same extent as if the district were a private corporation.

A similar section was inserted into the Flood Control and Water Conservation District Act (a general authorizing measure) adopted in 1931.⁷ This section, however, has not been enlarged by later amendment and its liability provisions⁸ still read as they did when originally enacted:

The negligence of a trustee or trustees of a flood control and water conservation district shall be imputed to the district to the same extent as if the water conservation and flood control district were a private corporation

These two waivers of immunity are unique in California statutory law. Other public entities performing similar functions, such as drainage and irrigation districts, have not been subjected to liability along the lines set by the reclamation district pattern.⁹

The Flood Control and Water Conservation District Act is a *general* enabling law, and districts created thereunder must be distinguished from flood control districts created by *special* law (of which there are many in California).¹⁰ Such special law flood control districts are not governed by the general act, and hence have been held entitled to the benefits of governmental tort immunity.¹¹ On the other hand, although there also have been many reclamation districts created by special legislative act,¹² all such special reclamation acts appear to incorporate by

⁶ Cal. Stat. 1951, ch. 681, § 5, p. 1889. The statutory authorization to levy assessments to pay for damages, which had been codified as CAL. WATER CODE § 51480, was concurrently given an equivalent enlargement of scope. Cal. Stat. 1951, ch. 681, § 43, p. 1894.

⁷ Flood Control and Water Conservation District Act, Cal. Stat. 1931, ch. 641, § 10, p. 1371. CAL. GEN. LAWS ANN. Act 9178, § 10 (Deering 1954), CAL. WATER CODE APP. § 38-10 (West 1956).

⁸ Authority is also expressly conferred upon districts created under the Flood Control and Water Conservation District Act to be sued, and to levy assessments to pay damages for which the district may be found liable thereunder. See Flood Control and Water Conservation District Act, *supra* note 7, §§ 7(2), 10.

⁹ As to the tort immunity of drainage and irrigation districts, prior to the *Muskopf* case, see *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 Pac. 171 (1928); *Western Assur. Co. v. Sacramento and San Joaquin Drainage Dist.*, 72 Cal. App. 68, 237 Pac. 59 (1925). See also, *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 Pac. 706 (1922).

¹⁰ More than 30 special law flood control districts have been created by legislative act in California. See CAL. WATER CODE, "Uncodified Acts" (Deering 1962); CAL. WATER CODE APP. (West 1956). The constitutionality of such special legislation, notwithstanding the provisions of CAL. CONST., Art. IV, § 25, has been repeatedly affirmed by the courts. See, e.g., *Alameda County Flood Control and Water Conservation Dist. v. Stanley*, 121 Cal. App.2d 308, 263 P.2d 632 (1953), and cases therein cited.

¹¹ *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941). See also, *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950); *Janssen v. County of Los Angeles*, 50 Cal. App.2d 45, 123 P.2d 122 (1942). *But cf. Hayashi v. Alameda County Flood Control and Water Conservation Dist.*, 167 Cal. App.2d 584, 334 P.2d 1048 (1959), construing the claims filing provisions of a special flood control district statute as constituting a waiver of governmental immunity. However, this result appears to be contrary to the earlier decision (neither cited nor discussed in the *Hayashi* case) of the Supreme Court in *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958), where nearly identical language of CAL. WATER CODE § 22727 was held not to amount to a waiver of immunity.

¹² Numerous subsisting special act reclamation district statutes are collected in CAL. WATER CODE, "Uncodified Acts" (Deering 1962) and CAL. WATER CODE APP. (West 1956).

reference the general provisions of the Water Code relating to reclamation districts, thereby presumably including Section 50152, quoted above.¹³

In view of the broad waiver of immunity enacted in the two statutory provisions here under discussion, one might be tempted to conclude that *Muskopf* will have little effect on the tort liability of reclamation and general law flood control districts. The actual possibilities, however, are not that simple.

First, the language of the statutory waivers refers only to imputing the *negligence of district personnel* to the district as if the district were a private corporation. (The two statutes, it will be noted, do not simply declare the respective districts liable for negligence to the same extent as private corporations.) In the absence of controlling judicial interpretation, this language conceivably might be construed to require the injured plaintiff to prove that an *identified* officer or employee was negligent in the course and scope of his employment. Such an interpretation would as a practical matter tend to narrow the scope of district liability, for the plaintiff may not always be able to trace the claimed negligent act to a *particular* officer or employee. Private corporations, however, frequently are held liable under common law rules of negligence without identification of the negligent employee, where plaintiff proves negligence by *someone* which, under the circumstances, is imputable to defendant (*e.g.*, in actions founded on the doctrines of *res ipsa loquitur* or attractive nuisance).

It is thus conceivable that, to the extent it now makes the common law rules of tort liability applicable, *Muskopf* may have enlarged the negligence liability of reclamation and general law flood control districts somewhat beyond the limits implied by the wording of the respective statutory waivers. This conclusion, however, presupposes the answer to another imponderable: Will the courts construe the statutory waivers in question as not constituting implied limitations on district liability? Stated differently, in prescribing by statute the conditions of district tort liability, did the Legislature impliedly intend such conditions to be exclusive of any other possible grounds of such liability? The answer to these questions cannot be predicted with confidence. A legislative clarification of the problem would seem to be desirable.

Second, it will be recalled that while reclamation districts are made liable by statute for negligence of their trustees, employees and serv-

¹³ Each of the statutes referred to in note 12 *supra* has been checked and found to contain language of incorporation by reference. In some instances, the language of incorporation clearly is broad enough to include not only the general law provisions relating to reclamation districts as of the date of enactment of the special act but also subsequent amendments thereto, such as the 1951 amendment cited note 6 *supra*. See, *e.g.*, Reclamation Dist. No. 1001, Cal. Stat. 1911, ch. 411, § 2, as amended by Cal. Stat. 1917, ch. 617, § 1, p. 969, CAL. WATER CODE APP. § 18-2 (West 1956), incorporating by reference all laws relating to reclamation districts, as well as parts of laws "now existing, or that may hereafter be enacted." In other instances, the referential language is not explicit with respect to future amendments but purports to incorporate generally the provisions of the "Political Code" relating to reclamation districts. See, *e.g.*, Reclamation District No. 1600, Cal. Stat. 1913, ch. 195, § 2, as amended by Cal. Stat. 1919, ch. 312, § 1, p. 515, CAL. WATER CODE APP. § 25-2 (West 1956). It is well settled, however, that such a general reference normally incorporates subsequent amendments in the absence of expressed intention to the contrary. See *Palermo v. Stockton Theatres, Inc.*, 32 Cal.2d 53, 195 P.2d 1 (1948). The reference to the "Political Code," moreover, is clearly a sufficient identification of the present Water Code sections which are the successors and continuations of the former reclamation district provisions of the Political Code. See CAL. GOVT. CODE § 9604.

ants, general law flood control districts are only statutorily liable for the negligence of their trustees. If it be assumed that the latter statute is not to be regarded as an implied exclusion of any other bases for district liability, it would seem that *Muskopf* has now made such districts liable for employee negligence to the same extent as private corporations.

On the other hand, an intermediate interpretation is also possible. The courts might treat the statutory waivers as prescribing the exclusive conditions of liability to the extent that the statutory language is applicable, but as not precluding common law liability in cases to which it is not applicable. Thus, Section 50152 of the Water Code might be deemed applicable to all cases of alleged negligence of reclamation district trustees, employees or servants. However, Section 10 of the Flood Control and Water Conservation District Act would be applicable only to cases of trustee negligence, but not to cases of employee negligence. The employee cases would be governed, under *Muskopf*, by common law rules. But, as suggested in the preceding paragraph, the common law rules may be easier for an injured plaintiff to satisfy as a practical matter than the statutory rule of imputed negligence. If this be so, the anomalous result of the suggested intermediate interpretation would seem to be that the common law liability of general law flood control districts for employee negligence is now (*i.e.*, post-*Muskopf*) somewhat broader than the statutory liability, in such cases, of reclamation districts; and is likewise broader than the statutory liability of both types of districts for trustee negligence.

Third, it must be recalled that *Muskopf* and *Lipman* appear to recognize that public entities, being now precluded from reliance on the immunity doctrine, are liable under appropriate circumstances for *intentional* as well as negligent tortious conduct of their officers and employees.¹⁴ The statutory waivers here being discussed, however, are limited in terms to *negligence*. The possibility is thus suggested that under *Muskopf* reclamation and general law flood control districts may now be exposed to liability for intentional torts.¹⁵ (Here again, of course, one must assume that the statutory waivers will not be deemed to be implied limitations on other forms of liability.)

In evaluating this possibility, one must recall the language of the Supreme Court in *Hensley v. Reclamation District No. 556*,¹⁶ in which a reclamation district was held to be immune from tort liability prior to the enactment of the statutory waiver. Mr. Justice McFarland there pointed out that a reclamation district "could obtain means to satisfy a [tort] judgment only by levying assessments upon the lands of the district. But it has no power to levy assessments for that purpose."¹⁷ Bearing in mind the Court's earlier statement in the same opinion that reclamation districts "have only such powers and have only such liabilities as are prescribed by the law which creates them,"¹⁸ it would seem to follow that the tort liability of such entities cannot be greater than their lawful authority to satisfy tort judgments.

¹⁴ See p. 42, note 21 *supra*.

¹⁵ See the analogous discussion in the text at 42, notes 18-22 *supra*, with respect to the possible intentional tort liability of school districts in the light of the *Muskopf* and *Lipman* cases.

¹⁶ 121 Cal. 96, 53 Pac. 401 (1898). See text accompanying note 2 *supra*.

¹⁷ *Id.* at 98, 53 Pac. at 402.

¹⁸ *Id.* at 97, 53 Pac. at 401-402.

A reflection of this same thought is found in *Muskopf*, where Mr. Justice Traynor remarks that to the extent that governmental tort immunity ever had support in the theory that there was no fund out of which a tort judgment could be paid, that reason was wholly inapplicable to the case before the court. "Public convenience does not outweigh individual compensation," said Mr. Justice Traynor, "and a suit against a county hospital or hospital district is against an entity *legally and financially capable of satisfying a judgment.*"¹⁹ (Emphasis added.)

In the light of these judicial intimations, it may be significant that the statutory provisions authorizing reclamation and general law flood control districts to levy assessments to pay tort damages are restricted to damages incurred through personnel negligence which is imputed to the district.²⁰ Having statutory power to satisfy damages for negligence only, it would seem to be arguable that reclamation and general law flood control districts may still, notwithstanding *Muskopf*, claim immunity from intentional and other forms of nonnegligent tort liability.

The conclusion just expressed, however, is subject to some reservations, since it is based on the dubious assumption of the continued vitality of the language in the *Hensley* case as to the want of power in such districts to satisfy a tort judgment in the absence of statute. Modern cases have recognized that even the most explicit statutory and constitutional prohibitions against the exceeding of budget and debt limitations do not preclude the payment of liabilities (such as tort damages) imposed by operation of law.²¹ In view of these authorities, the mere absence of express authority to levy assessments to satisfy damages for intentional torts would not appear to be an insurmountable obstacle. If liability exists by operation of law, the power to satisfy the liability may reasonably be implied as a corollary thereto. Until a judicial decision so holds, however, the full impact of *Muskopf* upon the intentional tort liability of reclamation and general law flood control districts will necessarily remain uncertain. Here again legislative treatment seems to be indicated.

5. Negligence of weed abatement crews

Weed abatement is regarded in California as a "governmental" function; and hence damages resulting from negligence in the performance of such work have been held not to be a liability of the public entity doing the work,¹ absent some statutory waiver of immunity.² In 1941, however, the Legislature added a liability clause to the Municipi-

¹⁹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 216, 11 Cal. Rptr. 89, 91, 359 P.2d 457, 459 (1961).

²⁰ CAL. WATER CODE § 51480 (reclamation districts); Flood Control and Water Conservation District Act, Cal. Stat. 1931, ch. 641, § 10, p. 1371, CAL. GEN. LAWS ANN. Act 9178, § 10 (Deering 1954); CAL. WATER CODE APP. § 38-10 (West 1956).

²¹ *County of Los Angeles v. Byram*, 36 Cal.2d 694, 227 P.2d 4 (1951); *County of Los Angeles v. Payne*, 8 Cal.2d 563, 66 P.2d 658 (1937); *Mills v. Houck*, 124 Cal. App. 1, 12 P.2d 101 (1932); *Metropolitan Life Ins. Co. v. Deasy*, 41 Cal. App. 667, 183 Pac. 243 (1919).

¹ *Hanson v. City of Los Angeles*, 63 Cal. App.2d 426, 147 P.2d 109 (1944).

² Liability for fires negligently allowed to spread to adjoining property has been sustained under the theory that such fire constitutes a dangerous and defective condition of public property under CAL. GOV'T. CODE § 53051. See *Osborn v. City of Whittier*, 103 Cal. App.2d 609, 230 P.2d 132 (1951). Also, when smoke from a weed abatement fire was permitted to obscure a nearby highway to such an extent as to make it dangerous to motorists, liability was sustained under the same rationale. *Teilhet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957).

pal Weed Abatement Act,³ which, in its present codified form as Section 39586 of the Government Code⁴ reads in part:

If the legislative body finds that property damage was caused by the negligence of a city officer or employee in connection with the abatement of a [weed] nuisance pursuant to this article, a claim for such damages may be paid from the city general fund.

This section does not appear to have been construed in any reported decision. Although it appears to contemplate payment of the damages solely on the basis of an administrative procedure, the section also (in a sentence not quoted above) expressly makes claims for such damages subject to the general claims procedures enacted in 1959,⁵ and thus would seem to impliedly authorize a civil action to be brought to enforce a claim rejected by the city council.⁶

It will be noted that Section 39586 is limited to "property damage," and then only when "negligence" of a city officer or employee is established. If these restrictions are construed as indicative of a legislative intent to preclude other types of injuries and other grounds of liability, the *Muskopf* decision will presumably have little or no effect upon municipal weed abatement activities; although *Muskopf* will, of course, mean that *other* public entities engaged in weed abatement work will henceforth be liable under common law rules.

On the other hand, if Section 39586 is not construed as an implied legislative limitation, it would seem that municipal liability arising from weed abatement work will, as a consequence of the abrogation by *Muskopf* of governmental immunity, be substantially expanded and will now extend to personal injuries and intentional torts as well.

Insofar as negligent injuries are concerned, the Legislature has effectively resolved some of the interpretative problems here suggested. In 1961, a new section was added to the Government Code, numbered Section 53057, and providing in part:

A local agency which authorizes its employees to burn weeds and rubbish on vacant property shall be liable for injuries to persons and damage to other property caused by negligence of the employees in burning the weeds and rubbish. . . . The cost of insuring the liability imposed by this section may be added to any assessment authorized to be levied by a local agency to defray the costs of burning weeds and rubbish on vacant property.

For the purposes of this section, "local agency" shall include all other districts in addition to school districts.⁷

Since cities and counties, as well as school districts, are clearly within the relevant definition of "local agency" as set forth in Section 53050 of the Government Code, it appears to follow that this new Section 53057 completely overlaps the older Section 39586, and contemplates

³ Cal. Stat. 1941, ch. 215, § 4, p. 1288, amending the original weed abatement act established by Cal. Stat. 1915, ch. 511, p. 841.

⁴ The weed abatement act was made a part of the Government Code by Cal. Stat. 1949, ch. 79, p. 205. Section 39586 originally contained its own claim presentation procedures, but these were deleted and a cross-reference made to the new general claims procedure enacted in 1959, by an amendment of the same year. Cal. Stat. 1959, ch. 1726, § 2, p. 4142.

⁵ Following the language quoted in the text, *supra*, Section 39586 provides: "Claims therefor are governed by Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of this code."

⁶ See text at 31, notes 44-46 *supra*.

⁷ Cal. Stat. 1961, ch. 986, p. 2528.

enforcement of the liability by civil action following presentation and rejection of a claim. Furthermore, Section 53057 expands the scope of liability well beyond that of Section 39586 by covering *personal* injuries (not merely property damage) and burning operations of *counties* and all types of *districts* (not merely of municipal weed abatement crews).

Two significant interpretative problems not resolved by Section 53057, however, remain open. One is whether these two sections were intended to impliedly preclude entity liability for intentional torts, a possibility explored above. Another stems from the statutory phrase, "negligence of the employees." Here, as was suggested in the immediately preceding discussion of the statutory waivers of immunity in cases of negligence of reclamation and general law flood control district employees,⁸ a rather subtle problem arises. That is whether the common law rules of negligence, which may in some cases provide an easier framework for proving a *prima facie* case than under the statute, will be held applicable; or whether the plaintiff will be compelled to prove negligence on the part of an identified employee in every case. Legislative clarification of these problems would seem to be desirable.

6. Statutory assumption by public entity of tort liability of its officers and employees

An interesting compromise between liability and a waiver of immunity has been achieved in some 25 statutes. These provisions generally consist of a legislatively imposed duty on the public entity to pay tort judgments rendered against its officers or employees; but they do not constitute a waiver of the entity's immunity from liability. Furthermore, such provisions generally explicitly negate any obligation on the part of the officer or employee to repay the entity which has satisfied his personal judgment debt.¹

The statutes in question contain certain substantive differences which provide a basis on which they may be conveniently classified into five separate groups:

First, two special statutes creating water agencies contain a provision to the effect that:

When a director, officer, agent or employee is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the agency shall pay the judgment without obligation for repayment by the director, officer, agent or employee.

It will be noted that the quoted language appears to include all types of agency personnel, and that the liability referred to is not limited in

⁸ See text at 61 *supra*.

¹ Such negation suggests a possible constitutional problem in that use of public funds in satisfaction of a personal obligation of the employee might be deemed a gift within the prohibition of CAL. CONST., Art. IV, § 31. In all likelihood, however, such payments would be sustained under the public benefit theory employed to validate other statutory impositions of public liability where the loss would ordinarily be borne by private persons. See, e.g., *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959) (reimbursement of fishermen for nets and other fishing equipment rendered valueless by anti-netting legislation); *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930) (compensation to ranchers for destruction of tubercular cattle). See also *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958) (compensation to utility company for cost of relocating facilities made necessary by construction of sewer line).

terms to cases of negligence but would seem to include intentional torts as well.² Provisions of this broad, unqualified type are found in:

Contra Costa County Water Agency Act, Cal. Stat. 1957, ch. 518, § 23, p. 1560, CAL. GEN. LAWS ANN. Act 1658, § 23 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-23 (West 1959).

Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 27, p. 5139, CAL. GEN. LAWS ANN. Act 9095, § 27 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-27 (West 1959).

Second, in 19 statutes, there are provisions which read, in substance:

If an officer, agent, or employee of the district is held liable for any act or omission in his official capacity, except in case of actual fraud or actual malice, and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer, agent or employee.

By way of comparison with the first group of provisions, this language it will be observed, again includes all types of personnel and both negligent and intentional torts. But, unlike the first group, it makes an express exception for judgments founded upon "actual fraud" and "actual malice." (Query: does the term "actual" connote a legislative intention to require payment of the judgment if it is founded upon "constructive" fraud or "implied" malice, on the theory that in such cases the fraud or malice is not "actual"?) Provisions of this broad but partially qualified type are found in four general authorizing statutes and in 15 special statutes governing particular entities:

GOVT. CODE § 61633 (community services districts).

WATER CODE § 31090 (county water districts).

WATER CODE § 60202 (water replenishment districts).

Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 21, added by Cal. Stat. 1951, ch. 62, § 22, p. 200, CAL. GEN. LAWS ANN. Act 5243, § 21 (Deering 1954), CAL. WATER CODE APP. § 20-21 (West 1956).

Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 38, p. 4001, CAL. GEN. LAWS ANN. Act 270, § 38 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-38 (West Supp. 1961).

Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 9.4, p. 5073, CAL. GEN. LAWS ANN. Act 276, § 9.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-9.4 (West 1959).

Antelope Valley-East Kern Water Agency Law, Cal. Stat. 1959, ch. 2146, § 76, p. 5173, CAL. GEN. LAWS ANN. Act 9095, § 76 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-76 (West 1959).

Crestline-Lake Arrowhead Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 40, § 26, p. ---, CAL. GEN. LAWS ANN. Act 9099a, § 26 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 104-26 (West Supp. 1962).

Desert Water Agency Law, Cal. Stat. 1961, ch. 1069, § 24, p. 2767, CAL. GEN. LAWS ANN. Act 9097, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-24 (West Supp. 1961).

El Dorado County Water Agency, Cal. Stat. 1959, ch. 2139, § 37, p. 5094, CAL. GEN. LAWS ANN. Act 2245, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-37 (West 1959).

² Intent to include intentional torts is also evidenced by provisions, found in some of the statutes here under discussion, to the effect that no officer or employee shall be liable except for damage "proximately caused by his own negligence, *misconduct* or *wilful violation of duty*." (Emphasis added.) See, e.g., CAL. WATER CODE § 22726 (irrigation districts); Contra Costa County Water Agency Act, Cal. Stat. 1957, ch. 518, § 23, p. 1560, CAL. GEN. LAWS ANN. Act 1658, § 23 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-23 (West 1959).

Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 9.3, p. 2669, CAL. GEN. LAWS ANN. Act 9098, § 9.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-9.3 (West Supp. 1961).

Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 17, p. 2508, CAL. GEN. LAWS ANN. Act 4025, § 17 (Deering 1954), CAL. WATER CODE APP. § 59-17 (West 1956).

Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 7.4, p. 4693, CAL. GEN. LAWS ANN. Act 4613, § 7.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-7.4 (West 1959).

Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 38, p. 4974, CAL. GEN. LAWS ANN. Act 5449, § 38 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-38 (West 1959).

Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 7.4, p. 2529, CAL. GEN. LAWS ANN. Act 5935, § 7.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-7.4 (West 1959).

Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 7.4, p. 4829, CAL. GEN. LAWS ANN. Act 9096, § 7.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-7.4 (West 1959).

Upper Santa Clara Valley Water Agency Law, Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 24, p. —, CAL. GEN. LAWS ANN. Act 9099b, § 24 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP., § 103-24 (West Supp. 1962).

Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 37, p. 5040, CAL. GEN. LAWS ANN. Act 9380, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-37 (West 1959).

Yuba County Water Agency Act, Cal. Stat. 1959, ch. 788, § 7.4, p. 2790, CAL. GEN. LAWS ANN. Act 9407, § 7.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-7.4 (West 1959).

Third, two general water district enabling acts contain still another variation on the same theme:

When an officer of a district is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer.

This form of language, while basically similar to the first two classes, is distinguishable in that (a) it is limited to judgments against officers and does not extend to judgments against other types of district personnel,³ and (b) like the first group but unlike the second, it makes no exception for cases of malice or fraud. Provisions of this type, which are narrow as to personnel protected but broad as to the type of liability covered, are found in the following statutes:

WATER CODE § 22730 (irrigation districts).

WATER CODE § 35755 (California water districts).

Fourth, Section 1095 of the Code of Civil Procedure contains a general provision of rather narrow application but of generally similar policy. This section provides that when a plaintiff prevails in a mandamus action,

he may recover the damages which he has sustained . . . together with costs; . . . *provided, however*, that in all cases where

³The distinction between "officers" and "employees" has been well-marked in the cases, as in statutory language, see, *e.g.*, *Davis v. Kendrick*, 52 Cal.2d 517, 341 P.2d 673 (1959); *Hernandez v. Barton*, 176 Cal. App.2d 535, 1 Cal. Rptr. 572 (1959). *Cf.* 40 CAL. JUR.2d *Public Officers* § 13, p. 651. However, in a particular statutory context the term "officer" may be construed as broad enough to include a person ordinarily deemed an "employee," see *Estrada v. Indemnity Ins. Co.*, 153 Cal. App.2d 129, 322 P.2d 294 (1958), and vice versa, see *Singleton v. Bonnesen*, 181 Cal. App.2d 327, 280 P.2d 481 (1955).

the respondent is a state, county or municipal officer, all damages and costs, or either, which may be recovered or awarded, shall be recovered and awarded against the state, county or municipal corporation represented by such officer and not against such officer so appearing in said proceeding . . . ; but in all such cases the court shall first determine that the officer appeared and made defense in such proceeding in good faith.

This section, it will be noted, is also restricted in terms to "officers" and would appear not applicable where other types of personnel are respondents in mandamus actions; and, furthermore, it applies in terms only to officers of the State, a county, or a municipal corporation. Thus, Section 1095 would seem not to be applicable to districts, authorities, agencies, and other special forms of local governmental entities, except where the particular entity could be reasonably considered to be a "municipal corporation."⁴

Fifth, Section 2002.5 of the Government Code provides a special rule of payment of malpractice judgments against state-employed medical personnel. This section, in pertinent part, provides:

Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts . . . for malpractice alleged to have arisen out of the performance of his duties as a state employee . . . [and] there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.

This provision, which in terms applies only to state (*i.e.*, not to city, county or district) personnel,⁵ and relates solely to malpractice actions

⁴The only type of district which has been held to be a "municipal corporation" within the meaning of Section 1095 is a county sanitation district. *Mitchell v. County Sanitation Dist.*, 164 Cal. App.2d 133, 330 P.2d 411 (1958). However, other types of districts have, for a variety of purposes, been deemed "municipal corporations" or "municipalities." See, *e.g.*, *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863 (1946) (county water district); *Metropolitan Water Dist. v. County of Riverside*, 21 Cal.2d 640, 134 P.2d 249 (1943) (metropolitan water district); *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 293 Pac. 53 (1930) (municipal water district); *Imperial Irr. Dist. v. County of Riverside*, 96 Cal. App.2d 402, 215 P.2d 518 (1950) (irrigation district). Whether a particular entity will be so classified, however, is generally deemed a matter of legislative intent in the context of the particular legal problem before the court. See *Clements v. T. R. Bechtel Co.*, 43 Cal.2d 227, 273 P.2d 5 (1954); *Siler v. Industrial Acc. Comm'n*, 150 Cal. App.2d 157, 309 P.2d 910 (1957). *Cf. Santa Barbara County Water Agency v. All Persons*, 47 Cal.2d 699, 306 P.2d 875 (1957). It would thus be somewhat hazardous to rely on *Mitchell v. County Sanitation Dist.*, *supra*, as indicating that *all* districts will be deemed within the scope of Section 1095.

⁵Personnel "licensed in one of the healing arts," within the meaning of Section 2002.5, means only persons licensed "under Division 2 of the Business and Professions Code" (these words are omitted from the text of the section as quoted in the text above). Thus, the section apparently extends its protection to clinical laboratory technicians (Bus. & Prof. Code §§ 1200 *et seq.*), dentists (Bus. & Prof. Code §§ 1600 *et seq.*), physicians and surgeons (Bus. & Prof. Code §§ 2000 *et seq.*), physical therapists (Bus. & Prof. Code §§ 2650 *et seq.*), professional nurses (Bus. & Prof. Code §§ 2700 *et seq.*), vocational nurses (Bus. & Prof. Code §§ 2840 *et seq.*), optometrists (Bus. & Prof. Code §§ 3000 *et seq.*), pharmacists (Bus. & Prof. Code §§ 4000 *et seq.*), and veterinarians (Bus. & Prof. Code §§ 4800 *et seq.*). It may be doubtful, however, whether § 2002.5 would cover malpractice by a State dispensing optician (Bus. & Prof. Code §§ 2550 *et seq.*), registered physical therapist (Bus. & Prof. Code §§ 2600 *et seq.*), psychologist

arising in performance of official duty, is unique not only in its lesser scope as contrasted to the other statutes here collected, but also in its provision for payment of settlements as well as judgments. In addition, it studiously refrains from declaring, as do the other provisions, that payment by the State shall be without obligation for repayment by the officer or employee in question.

In appraising the 25 statutes here collected, it should be kept in mind that there are more than a hundred statutes relating to other types of public entities which contain no such assumption of liability. The policy considerations which prompted the Legislature to select these entities, but to exclude others which are generally quite similar in form and function, are obscure. The almost inadvertent way in which such inexplicable discrepancies in legislative policy occur is exemplified in one 1959 statute which created two separate and distinct special districts, but enacted different forms of assumption-of-liability clauses applicable to the respective entities.⁶ In 1959, also, although several entities were created by special acts containing an assumption-of-liability provision, others performing similar functions were created by the same Legislature without one.⁷ The lack of uniformity of legislative policy is apparent.

Although statutory provisions of this type are not identical to waivers of immunity, they do have a similar effect, in that the public employer is ultimately liable for the damages incurred by the injured person.⁸ Certain practical differences in their operation as compared to a waiver of immunity should, however, be noted.

All but the last of these statutes expressly contemplate that the entity shall pay only after a judgment has been rendered against one of

(Bus. & Prof. Code §§ 2900 *et seq.*), or psychiatric technician (Bus. & Prof. Code §§ 4500 *et seq.*), since these occupations, although within the "healing arts" division of the code, are not required to be "licensed" but only to be certificated. In addition, State employed chiropractors and osteopaths would seem not to be protected, since these professions are governed by initiative measures and not by the Business and Professions Code. See CAL. BUS. & PROF. CODE §§ 1000, 3600.

⁶ Cal Stat. 1959, ch. 2146, p. 5114 consists of two special district statutes enacted as one legislative bill. Sections 1 through 35 of this measure bear the short title, "Mojave Water Agency Law," and include an assumption-of-liability provision (*i.e.*, § 27) of the first type classified in the text. (See text, *supra*, for full citation.) Sections 49 through 96 comprise the "Antelope Valley-East Kern Water Agency Law," and include a provision (*i.e.*, § 76) of the second type listed in the text. (See text for full citation.)

⁷ Of the twenty-five statutes listed in the text, *supra*, nine were enacted by the 1959 Legislature. However, five other special water district statutes were passed in the 1959 General Session which did not contain an assumption-of-liability provision. See San Mateo County Flood Control District Act, Cal. Stat. 1959, ch. 2103, p. 4885, CAL. GEN. LAWS ANN. Act 7261 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 37-1 *et seq.* (West 1959); Plumas County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2114, p. 4912, CAL. GEN. LAWS ANN. Act 5964, (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 88-1 *et seq.* (West 1959); Siskiyou County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2121, p. 4946, CAL. GEN. LAWS ANN. Act 7688 (Deering Supp. 1961) CAL. WATER CODE APP. 1959 SUPP. §§ 89-1 *et seq.* (West 1959); Sierra County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2123, p. 4979, CAL. GEN. LAWS ANN. Act 7661 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 91-1 *et seq.* (West 1959); Lassen-Modoc County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2127, p. 5009, CAL. GEN. LAWS ANN. Act 4200 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 92-1 *et seq.* (West 1959).

⁸ It is assumed that the expression "act or omission done or omitted in his official capacity," as contained in the cited statutes, is intended to be substantially synonymous with "act or omission done or omitted in the course and scope of his office or employment." The statutory language does not seem to be restricted to judgments rendered against the public officer or employee only when sued in his official capacity, see *Reed v. Molony*, 38 Cal. App.2d 405, 101 P.2d 175 (1940); *cf. Holman v. County of Santa Cruz*, 91 Cal. App.2d 502, 205 P.2d 767 (1949), but would seem to include judgments against him when sued in a personal capacity based on his official acts or omissions. Ordinarily, the action may be brought in either form. See *Bettencourt v. State*, 139 Cal. App.2d 255, 293 P.2d 472 (1956).

its officers or employees. This language would appear to preclude a negotiated settlement without litigation. To the extent that a commitment to litigation may tend to increase the plaintiff's minimum settlement price, the statutory insistence upon a judgment (which, of course, could be a stipulated judgment pursuant to settlement agreement) may tend to increase the entity's ultimate financial outlay. It may also tend to reduce incentives which might otherwise exist for the entity to negotiate for a settlement since the practical problems facing the plaintiff are often greater when suing an employee than when suing his employer. Under some circumstances, for example, the plaintiff may experience greater difficulty in proving a basis for personal liability in an action against a specific employee than would be true if the public entity employer could be sued directly as a defendant.⁹ The public entity may also feel justified in assuming that a jury will be less liberal in assessing damages when a lone employee is the nominal defendant, than when the larger, impersonal and more affluent public entity is named as a party.

Moreover, it seems evident that these provisions are not merely a codification of the doctrine of *respondet superior*. They seem to contemplate that the employing entity must satisfy the judgment against its employee even where the entity could not itself have been held directly liable for the plaintiff's damages. Prior to *Muskopf*, of course, this would have been the case whenever the entity was entitled to assert a defense of governmental immunity, for no such defense was ordinarily available to the employee. A similar possibility still exists, even subsequent to abrogation of the immunity doctrine by *Muskopf*. Today, for example, the employing entity may have a complete defense of non-compliance by plaintiff with the applicable entity claims statute; but no such defense may be available to the employee.¹⁰ Moreover, 23 of the cited statutes expressly provide that the entity not only must satisfy the judgment, but must do so "without obligation for repayment" from the culpable employee, thereby abolishing the employer's common law right to seek such reimbursement.¹¹

⁹ Statutory provisions often protect public personnel from liability except under specified conditions. See, e.g., the limitations on personal liability of officers for injuries resulting from dangerous or defective conditions of public property, as set forth in CAL. GOVT. CODE § 1953. See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), holding that complaint stated good cause of action against county but did not state cause of action to impose personal liability on county officers for same injuries; *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940) (*semble*). See also CAL. GOVT. CODE §§ 1953.5 (applicable to officers of "any district"), 1954 (applicable to members of "any board"), and 1955 (applicable to officers and employees of any "district" or "political subdivision"). In several of the statutes containing assumption-of-liability provisions, there are also express limitations on personal liability. See, e.g., CAL. GOVT. CODE § 61627, providing that personnel of community services districts shall not be liable for acts or omissions of their appointees or employees in the absence of actual notice of inefficiency or incompetency of the person appointed or employed; CAL. WATER CODE § 22725, providing that irrigation district officer shall not be held liable unless the injury resulted from his own negligence, misconduct or wilful violation of official duty. It should also be recognized that in some cases (e.g., cases tried on the theory of *res ipsa loquitur*, nuisance, or inverse condemnation) it may be extremely difficult as a practical matter to identify and prove that any particular public officer or employee was a tortfeasor, although a *prima facie* case may be proven without difficulty against the public entity itself.

¹⁰ The existing claims statutes requiring presentation of a claim as a condition to suit against public personnel, see CAL. GOVT. CODE §§ 801, 803, are not as comprehensive in their coverage as are the general claims statutes relating to claims against local public entities. See 3 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, Recommendation and Study at H-1, H-14 to H-17 (1961).

¹¹ See *Tyree v. City of Los Angeles*, 92 Cal. App.2d 182, 206 P.2d 912 (1949); *Von Arx v. City of Burlingame*, 16 Cal. App.2d 29, 60 P.2d 305 (1936).

In view of these differences between entity liability under the statutory provisions cited, and the common law liability which would obtain under *respondeat superior*, it is arguable that *Muskopf* may not have altered the liability of the entities governed by these statutes. Indeed, the Supreme Court has expressly construed one of the above cited assumption-of-liability provisions as evidencing a legislative intention *not* to abrogate the doctrine of governmental immunity.¹² Such a conclusion, if warranted before *Muskopf*, would seem to be equally justified afterwards, for the statutory language remains the same. The interpretation referred to, however, was based in part upon the fact that a companion provision expressly declared a legislative intent not to impose any new liability except as provided in the assumption-of-liability section in question.¹³ Although similar expressions of legislative intent are found in two others of the 25 statutes above cited,¹⁴ there is no such language in most of them.¹⁵ A recent (post-*Muskopf*) decision by the Supreme Court, however, appears to ignore such implications of statutory language and holds that assumption-of-liability statutes do not preclude common law liability under *Muskopf*.¹⁶

¹² *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958). See also *Powers Farms, Inc. v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717 (1941). The provision in question was Water Code Section 22730, relating to irrigation districts.

¹³ The court in *Vater v. County of Glenn*, *supra* note 12, quoted the language of Water Code Section 22731 ("Nothing in the preceding portion of this article shall be construed as creating any liability except as provided in Section 22730 unless it would have existed regardless of this article") and concluded that "There is no doubt that . . . section 22731 of the code show[s] a legislative intent not to abrogate the rule of governmental immunity for irrigation districts except with respect to the payment of such judgments [pursuant to § 22730]." *Id.* at 820, 323 P.2d at 88.

¹⁴ In addition to the provision found in the Irrigation District Act (CAL. WATER CODE § 22731) construed in the *Vater* case, *supra* note 12, similar language is found in CAL. WATER CODE § 31039 (county water districts) and CAL. WATER CODE § 35756 (California water districts).

¹⁵ Of the twenty-five statutes cited in the text, only three (Water Code Sections 22730, 21090 and 35755) contain language qualifying the assumption-of-liability clause. However, ten of the remaining twenty-two laws contain a provision exonerating district personnel from personal liability for acts or omissions of their employees or appointees in the absence of actual notice of the inefficiency or incompetence of the latter (see note 9 *supra*), together with a legislative declaration to the effect that such exoneration provision is not intended to impose any additional liability that would not otherwise have existed. See *Amador County Water Agency Act*, Cal. Stat. 1959, ch. 2137, § 9.3, p. 5073, CAL. GEN. LAWS ANN. Act 276, § 9.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-9.3 (West 1959); *El Dorado County Water Agency Act*, Cal. Stat. 1959, ch. 2139, § 36, p. 5094, CAL. GEN. LAWS ANN. Act 2245, § 36 (Deering Supp. 1961); CAL. WATER CODE APP. 1959 SUPP. § 96-36 (West 1959); *Kern County Water Agency Act*, Cal. Stat. 1961, ch. 1003, § 9.2, p. 2669; *Kings River Conservation District Act*, Cal. Stat. 1951, ch. 931, § 16, p. 2508, CAL. GEN. LAWS ANN. Act 4025, § 16 (Deering 1954), CAL. WATER CODE APP. § 59-16 (West 1956); *Mariposa County Water Agency Act*, Cal. Stat. 1959, ch. 2036, § 7.3, p. 4693, CAL. GEN. LAWS ANN. Act 4613, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-7.3 (West 1959); *Nevada County Water Agency Act*, Cal. Stat. 1959, ch. 2122, § 37, p. 4974, CAL. GEN. LAWS ANN. Act 5449, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-37 (West 1959); *Placer County Water Agency Act*, Cal. Stat. 1957, ch. 1234, § 7.3, p. 2529, CAL. GEN. LAWS ANN. Act 5935, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-7.3 (West 1959); *Sutter County Water Agency Act*, Cal. Stat. 1959, ch. 2088, § 7.3, p. 4328, CAL. GEN. LAWS ANN. Act 9096, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-7.3 (West 1959); *Yuba-Bear River Basin Authority Act*, Cal. Stat. 1959, ch. 2131, § 36, p. 5040, CAL. GEN. LAWS ANN. Act 9380, § 36 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-36 (West 1959); *Yuba County Water Agency Act*, Cal. Stat. 1959, ch. 788, § 7.3, p. 2790, CAL. GEN. LAWS ANN. Act 9407, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-7.3 (West 1959). Since these declarations of intent not to impose any new liability are expressly directed to the liability of officers and employees, and not to the liability of the employing entity, the interpretation and rationale of *Vater v. County of Glenn*, *supra* note 12, may possibly be inapplicable. But see text at pp. 194-95 *infra*. The liability of these ten entities thus may be on a parity with that of the remaining twelve with respect to which the legislation is entirely silent.

¹⁶ *Latin v. Coachella Valley County Water District*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 322 (1962).

A final problem of interpretation relates to issues suggested in the *Lipman* case. There, it will be recalled, the Supreme Court reaffirmed the doctrine of official immunity for discretionary conduct, but concluded that "immunity of the agency from liability for discretionary conduct of its officials, however, is not coextensive with the immunity of the officials in all instances."¹⁷ In short, the employing entity may on common law grounds be held liable for tortious conduct of its officers even though the officers themselves are wholly immune from personal liability. In so holding, of course, the Court contemplated an action directly against the public entity to enforce its liability. The statutes here being discussed, however, expressly contemplate that entity liability arises only when a judgment has been rendered against the officer personally. If the officer has a complete defense of immunity, no liability under the statute will ever arise for no judgment will be rendered against him. The question is thus presented whether the principle of the *Lipman* case will be invoked to sustain liability of entities governed by such statutes; or whether, on the contrary, the immunity of the officer will in effect exonerate the employing entity because of the statutory insistence upon a judgment against the officer as a prerequisite to employer liability. These, and the other problems discussed above relating to the interpretation and application of these statutes in the light of the abrogation of governmental immunity, invite careful legislative consideration and solution.

7. Damage from mob or riot

The earliest statutory waiver of sovereign immunity in California appears to be the mob violence act passed in 1868,¹ which was later codified as part of the Political Code.² In its present form, the same statutory policy is declared in Section 50140 of the Government Code:

A local agency is responsible for damage by mobs or riots to property within its boundaries.

The term "local agency" is elsewhere defined to mean "county, city, or city and county."³

This provision appears to be based upon the famous English Riot Act of 1714, which declared that the inhabitants of any "Hundred" or of any city or town in which property is damaged by three or more persons "unlawfully, riotously and tumultuously assembled" shall be "liable to yield damages to the Person or Persons injured."⁴ Though as few as three persons was sufficient to impose civil liability for damage to property,⁵ the Act also made it a capital offense for riotous "persons to the Number of twelve or more" to fail to disperse within one hour after "reading the Riot Act."⁶ The California statutes are silent regarding the requisite number of persons necessary to constitute a mob or riot for purposes of civil damages, although a minimum of two

¹⁷ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

¹ Cal. Stat. 1867-68, ch. 344, p. 418.

² CAL. POL. CODE §§ 4452-4457, codified as CAL. GOVT. CODE §§ 50140-50145 by Cal. Stat. 1949, ch. 81, p. 259.

³ CAL. GOVT. CODE § 50001.

⁴ English Riot Act, 1 Geo. I, ch. 5 (1714).

⁵ *Pritchit v. Waldron*, 5 Term. Rep. 14, 101 Eng. Rep. 8 (1792).

⁶ That portion of the Riot Act that was required to be read to disperse rioters is as follows: "Our sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to

persons is sufficient for penal purposes.⁷ Whether this penal standard would be applied to the provisions regarding civil liability is a matter of conjecture.

Without regard to the penal aspects of riotous conduct, the policy implicit in these mob violence statutes appears to be predicated on the view that it is not unfair to spread the risk of loss from criminal disorders upon the inhabitants of the public entity vested with responsibility and legal authority to prevent and suppress them.⁸ This liability is a form of indemnification not founded on fault, for it exists without the necessity for plaintiff to establish any negligence or nonfeasance on the part of law enforcement authorities.⁹ Recovery, however, is denied if the damage was aided, permitted or sanctioned by the plaintiff's negligence,¹⁰ as when plaintiff, with notice of impending danger, failed to use reasonable diligence to notify the responsible authorities.¹¹ The recoverable damages extend only to plaintiff's loss of or injury to property—meaning, in all likelihood, only tangible, corporeal property.¹² Such recovery is deemed to be compensatory in nature and not punitive.¹³

Since liability exists solely by virtue of the statute,¹⁴ it would seem that the abrogation of governmental immunity by *Muskopf* would have no direct effect upon the recoverability of property damage caused by mob violence. In the absence of governmental immunity, however, public entities may now be liable for *personal* injuries sustained as a result of a negligent or other tortious failure on the part of law enforcement personnel to control or suppress a mob or riot. The policy considerations relevant to such possibility will be discussed at a later point in this study.¹⁵

8. Livestock killed by dogs

Section 439.55 of the Agricultural Code provides that fees for the issuance of dog license tags and fines for violations of the dog license law shall be paid into the county treasury and shall be used "to pay damages to owners of livestock killed by dogs." Through this provision, the Legislature has created a form of insurance whereby the risk of loss to livestock (defined by statute to include domestic fowl and

their habitations or to their lawful business upon the pains contained in the Act made in the first year of King George for preventing tumults and riotous assemblies. God save the King."

In *Rex v. Child*, 4 C. & P. 442, 172 Eng. Rep. 774 (1830), the magistrate forgot to read "God save the King" and, as a result, the court directed an acquittal.

New Jersey has a similar statement to be read in case of riot that ends with "God save the state." N.J. STAT. ANN. § 2A:126-4 (1953).

⁷ CAL. PEN. CODE § 404 defines a riot as "Any use of force or violence, disturbing of the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law . . ."

⁸ *Agudo v. County of Monterey*, 13 Cal.2d 285, 89 P.2d 400 (1939). See also DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS 126 n.574 (1936), suggesting also that such statutes tend to stimulate citizens and officers to greater vigilance, place the moral support of the community behind officers dealing with mob and riot, and promote law and order.

⁹ *Agudo v. County of Monterey*, 13 Cal.2d 285, 89 P.2d 400 (1939). See *Clear Lake Water Works Co. v. Lake County*, 45 Cal. 90 (1872).

¹⁰ CAL. GOVT. CODE § 50142.

¹¹ *Wing Chung v. City of Los Angeles*, 47 Cal. 531 (1874).

¹² *Chamon v. City & County of San Francisco*, 1 Cal. Unrep. 509 (1869).

¹³ *Agudo v. County of Monterey*, 13 Cal.2d 285, 89 P.2d 400 (1939).

¹⁴ *Clear Lake Water Works Co. v. Lake County*, 45 Cal. 90 (1872).

¹⁵ See p. 451 *infra*.

rabbits¹⁶) from the predatory actions of dogs is distributed generally among all dog owners.¹⁷

It appears from the statutory language that the fact of death to livestock by action of a dog is alone enough to establish the owner's right to indemnity, irrespective of the dog's ownership or identity, and without proof of any negligence or want of care by county law enforcement officers or dog catchers.¹⁸ The plaintiff's recovery is limited to the value of the livestock as fixed by two disinterested witnesses;¹⁹ and if a claim therefor is denied by the county board of supervisors, a civil action to enforce it may be prosecuted against the county.²⁰

Since liability under this statute is not founded on fault and appears to be purely statutory in nature, the discarding of the governmental immunity doctrine would seem not to have any direct effect thereon. The extent to which, under *Muskopf*, public entities may now be liable for negligent or other tortious failure to adopt or enforce precautions designed to protect against *nonfatal* injuries to livestock caused by dogs, however, involves the broader problem of tort liability for failure of law enforcement and police protection which is discussed below.²¹

9. Erroneous conviction of felony

Sections 4900-4906 of the Penal Code provide for the payment by the State of an indemnity to persons erroneously convicted and imprisoned on a felony charge. An administrative procedure is prescribed, requiring a claim to be presented to the State Board of Control²² and determined by the Board upon the basis of evidence presented at a hearing.²³ The claimant is required to prove (a) that he was convicted of a felony and imprisoned in a State prison therefor, (b) that the crime with which he was charged was either not committed at all, or if committed, was not committed by him, (c) that he did not either negligently or intentionally contribute to the bringing about of his arrest or conviction, and (d) the amount of the pecuniary injury sustained because of said erroneous conviction and imprisonment.²⁴ Recovery is based upon

¹⁶ CAL. AGRIC. CODE § 439.56, last sentence.

¹⁷ Personal liability of the dog owner for both death and injury to livestock, in the form of a double damages provision, is contained in Agricultural Code Section 439.80. It is not clear whether the county liability imposed by Section 439.55 is cumulative to the owner's personal liability, or whether the two remedies are mutually exclusive.

¹⁸ CAL. AGRIC. CODE § 439.56. See *Adams v. County of San Joaquin*, 162 Cal. App.2d 271, 328 P.2d 250 (1958).

¹⁹ CAL. AGRIC. CODE § 439.56 provides that a claim for indemnity under the statute shall be accompanied by "the affidavits of two disinterested witnesses" which shall "fix the value of the livestock." Although it has not squarely been decided whether the value so fixed is conclusive, a possible implication to that effect may be derived from the case of *Adams v. County of San Joaquin*, 162 Cal. App.2d 271, 328 P.2d 250 (1958), holding that plaintiff stated a good cause of action to recover the amount stated in the affidavits, upon the theory of a common count for money due and owing.

²⁰ *Adams v. County of San Joaquin*, *supra* note 18.

²¹ See pp. 438-47 *infra*.

²² CAL. PEN. CODE §§ 4900-4901.

²³ CAL. PEN. CODE §§ 4902-4904.

²⁴ These requirements are set forth in part in Penal Code Section 4900, and in part in Penal Code Sections 4903 and 4904. In the former section, the persons eligible to claim the indemnity are defined in two different ways: *first*, any person who, after conviction of a felony, "and having been imprisoned therefor in a State prison of this State shall hereafter be granted a pardon by the Governor of this State for the reason that the crime with which he was charged was either not committed at all or, if committed, was not committed by him"; and *second*, any person who, after conviction of a felony, "being innocent of the crime with which he was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he was imprisoned." These two definitions seem to be redundant, for any person meeting the first definition would seem to also satisfy the second. The reason for the redundancy lies in the fact that the statute originally included in the second category only persons who had served the full

the pecuniary injury sustained but may not exceed \$5,000;²⁵ and the amount fixed by the Legislature on recommendation of the State Board of Control is conclusive upon the courts.²⁶ In general, the statutory indemnity permits at least a portion of the personal loss incurred in the conviction of an innocent person to be borne by the taxpayers whose public servants brought about the loss.

Since indemnity for erroneous conviction is purely statutory in nature, *Muskopf* apparently has no direct effect thereon. However, the absence of governmental immunity suggests the possibility that a person wrongfully convicted may now recover damages for negligent or intentional acts or omissions by the prosecutor, law enforcement officers, judge or other public officials which bring about an erroneous conviction. In general, the public officers themselves would ordinarily be immune from personal liability for such tortious conduct;²⁷ but in *Lipman*, it will be recalled, the Supreme Court ruled that the employing entity may under some circumstances be liable for damages even where its culpable officers are wholly immune from personal liability. The policy considerations relating to this phase of governmental tort liability since *Muskopf* are examined below.²⁸

10. Destruction of diseased animals and plants

The Agricultural Code contains several sections authorizing payment of indemnities to owners of livestock or plants which are required to be destroyed to prevent the spread of disease. Provisions of this type exist with respect to the destruction of tubercular cattle,¹ cattle in brucellosis control areas where necessary to prevent the spread of that disease,² animals and poultry in an animal quarantine district which are infected with or have been exposed to various infectious diseases,³ and host plants of the Oriental fruit fly.⁴ The legislative policy toward such indemnity payments has been selective, and numerous provisions authorizing the destruction of animals, plants and other property deemed to be public nuisances have been enacted without provision for any compensation being paid.⁵

Injury to or loss of private property in the exercise of the State's police powers, for the promotion of public health, safety and welfare, is regarded in law as *damnum absque injuria* for which the governmental agency is not liable, either under common law principles or in

term for which they had been imprisoned. Cal. Stat. 1913, ch. 165, § 1, p. 245. The words "or any part thereof," in the second definition, were inserted by amendment in 1931. Cal. Stat. 1931, ch. 775, § 1, p. 1615. This amendment also eliminated a third category of claimants defined in the original 1913 statute, namely, persons convicted of a felony and imprisoned therefor who "shall hereafter, on a retrial of the case, or on reversal on appeal of the final judgment of conviction, be acquitted or discharged" for either of the two reasons specified.

²⁵ CAL. PEN. CODE § 4904. This amount was set in the original 1913 Act, cited note 24 *supra*, and has never been increased.

²⁶ See *Plum v. State Bd. of Control*, 51 Cal. App.2d 382, 124 P.2d 891 (1942).

²⁷ See *Oppenheimer v. Ashburn*, 173 Cal. App.2d 624, 343 P.2d 931 (1959) (immunity of judges); *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48 (1880) (grand jurors); *White v. Brinkman*, 23 Cal. App.2d 307, 73 P.2d 254 (1937) (public prosecutor); *Coverstone v. Davies*, 38 Cal.2d 315, 239 P.2d 876 (1952); *White v. Towers*, 37 Cal.2d 727, 235 P.2d 209 (1951) (law enforcement officers).

²⁸ See pp. 411-15 *infra*.

¹ CAL. AGRIC. CODE § 239.

² CAL. AGRIC. CODE § 264.

³ CAL. AGRIC. CODE § 207.

⁴ CAL. AGRIC. CODE § 153.2.

⁵ See, e.g., CAL. AGRIC. CODE § 115 (pest-infected shipments of plants); § 153 (host plants of citrus white fly); § 160 (host plants of white pine blister rust); § 207.7 (horses, mules and other animals infected with dourine); §§ 276.4, 276.5 (diseased behives); § 311.1 (uninspected meat).

inverse condemnation.⁶ Voluntary payment of indemnity in such cases, however, is deemed a constitutional exercise of legislative discretion and not a prohibited gift of public funds, on the theory that it will encourage cooperation of persons affected, reduce costs of enforcement of the health measures in question, and thereby promote the public purpose objective of the statute.⁷

The indemnity authorized to be paid, however, is not always governed by a uniform rule, nor is it necessarily the full market value of the property destroyed.⁸ In addition, detailed and sometimes onerous conditions and exceptions are prescribed.⁹ Since the loss is otherwise non-compensable, the conditions on which such indemnity is made payable are, of course, simply matters for legislative discretion.¹⁰

The indemnity statutes here cited create a liability which is purely statutory; and it follows that the abrogation of governmental immunity by *Muskopf* will not alter the situation. However, when a public officer destroys private property under the claimed authority of one of the many statutes so providing, he may expose himself to personal liability if the destruction is later found by a court to be wrongful and not in conformity with the statutory authorization.¹¹ When this is the case, it would seem plausible that the employing entity should also be liable upon the basis of *respondeat superior*, now that governmental immunity does not preclude such a result. On the other hand, the trend toward expansion of the rule that officers are immune from suit for discretionary acts in the course of their duties¹² betokens the likelihood that livestock and agricultural inspectors engaged in destroying diseased property may be entitled to immunity.¹³ Under *Lipman*, however, such personal immunity would not necessarily exonerate the employing public entity from liability, and the injured farmer would not thus be wholly devoid of a remedy for unauthorized destruction of his plants or animals.¹⁴

⁶ *Miller v. Schoene*, 276 U.S. 272 (1928); *Afonso Bros. v. Brock*, 29 Cal. App.2d 26, 84 P.2d 515 (1938). See also, *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930).

⁷ See *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Repr. 327, 347 P.2d 671 (1959); *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930).

⁸ CAL. AGRIC. CODE §§ 239 and 264, for example, authorize the owner of destroyed cattle to be paid the proceeds (if any) of the salvage of the animal plus "one-third of the difference between the appraised value and the proceeds of the sale of the salvage, but in no instance to exceed fifty dollars (\$50) for any grade animal or seventy-five dollars (\$75) for any purebred animal." CAL. AGRIC. CODE § 153.2, on the other hand, authorizes payment to owners of destroyed Oriental fruit fly host plants of their value as fixed by the director of agriculture to "reimburse the owner of the plant which is destroyed for the loss which he would have sustained if the plant had not been infested and had not [sic] been destroyed."

⁹ See CAL. AGRIC. CODE §§ 240, 264.1, prescribing conditions under which no indemnity is payable (e.g., where the owner has violated quarantine regulations, has failed to clean and disinfect the premises as required, etc.).

¹⁰ *Afonso Bros. v. Brock*, 29 Cal. App.2d 26, 84 P.2d 515 (1938).

¹¹ See *Lertora v. Riley*, 6 Cal.2d 171, 57 P.2d 140 (1936); *Afonso Bros. v. Brock*, 29 Cal. App.2d 26, 84 P.2d 515 (1938).

¹² For discussion of the doctrine of official immunity, see pp. 246-60, *infra*; 2 HARPER & JAMES 1638-46.

¹³ The rule that the enforcing officer must proceed at the risk of personal liability has been widely and persuasively condemned, with most authorities recommending as a more realistic and salutary substitute therefor a rule of personal immunity of the officer coupled with liability of the governmental employer. 3 DAVIS, ADMINISTRATIVE LAW 531-36 (1958); 2 HARPER & JAMES 1632-46. See also FROSSER, TORTS 780-84 (2d ed. 1955); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

¹⁴ In *Afonso Bros. v. Brock*, *supra* note 10, the court appears to have deemed the existence of a right of action against the officer, in which the owner may litigate the alleged wrongfulness of the destruction of his property and recover damages if such destruction was in fact not authorized by the facts upon which the officer acted, as essential to the constitutionality of the statute permitting such destruction. To the extent that this is true, it should be noted that the elimina-

11. Private property commandeered during emergency

In times of great emergency or disaster, public officials may find it necessary to commandeer or even destroy private property in order to protect the public safety and welfare. When this is done in good faith and under reasonably apparent necessity, the courts have recognized that the officer is personally immune from tort liability for the damage or loss suffered by the owner of the property.¹⁵

On the other hand, the decisional law (absent statutory provisions for payment of compensation) is somewhat inconclusive as to whether the public entity is required to compensate the owner in such cases.¹⁶ In passing upon a claim for destruction by American military forces of an oil refinery in the Philippines, the Supreme Court of the United States conceded that just compensation must be paid under the Fifth Amendment when private property is taken by the United States for public use.¹⁷ On the facts of the case before it, however, the Court drew a distinction between instances of seizure of property by the military for "use" in future operations, and destruction of property to promote a military objective, holding the latter to be a noncompensable loss. The rather obvious difficulties likely to arise in applying this distinction led the Court, in all likelihood, to add the following precautionary statement to its opinion: "No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts."¹⁸

Many of the problems of ascertaining whether liability exists for emergency uses of private property have been resolved by legislation in California. Under the California Disaster Act,¹⁹ the Governor, during a state of extreme emergency or a state of disaster, has been given broad emergency powers. Section 1585 of the Military and Veterans Code provides that in the exercise of these powers, the Governor

is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibility . . . vested in him as Chief Executive of the State *and the State shall pay the reasonable value thereof.* [Emphasis added.]

In addition the Governor has power to order the employees of any city, county or district to perform emergency services outside the boundaries of their respective entities. Section 1587 of the Military and Veterans Code provides, in connection therewith, that:

During a state of extreme emergency or a state of disaster in the event that any equipment owned, leased or operated by any county,

tion of the doctrine of sovereign immunity, and hence the responsibility of the governmental employer for such damages, removes whatever necessity may have existed for the rule of personal liability in the past.

¹⁵ *Surocco v. Geary*, 3 Cal. 69 (1853). See generally 1 HARPER & JAMES 202-203, and cases there cited.

¹⁶ *Dictum in Surocco v. Geary*, *supra* note 15, intimates that the city would not be liable either on the theory of inverse condemnation or of tort. The California Legislative Counsel has concurred in this view so far as actions taken by the Governor under the California Disaster Act are concerned. See Opinion of Legislative Counsel, 2 SEN. J. 1770 (Reg. Sess. 1951). The weight of the case law in other states, however, is to the contrary. See Annot., 137 A.L.R. 1290 (1942); 18 AM. JUR. *Eminent Domain* § 16, pp. 642-643 (1938); 56 AM. JUR. *War* § 33 (1947). Recent cases have, however, introduced into the subject a distinction between a commandeering of property for future use (which is compensable in inverse condemnation) and immediate destruction of property to serve military objectives (deemed noncompensable). See Annot., 97 L. ED. 164 (1953).

¹⁷ *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952).

¹⁸ *Id.* at 156, per Mr. Chief Justice Vinson.

¹⁹ CAL. MIL. & VET. CODE §§ 1500-1600.

city and county, city or district, is damaged or destroyed while being used outside of the territorial limits of the public agency owning such equipment, the public agency suffering loss shall be entitled to file a claim for the amount thereof against the State of California

The same section goes on to expressly declare that the claim shall not include compensation for the services of the claimant agency's personnel, nor for rental, use or ordinary wear and tear of such equipment. In short, Section 1587 appears to contemplate State liability only for damage or destruction of equipment.²⁰

The liability established by Sections 1585 and 1587, quoted above, appears to be strictly statutory, and hence would not seem to be affected by *Muskopf* or *Lipman*. To the extent that emergency conditions arise which are not embraced within these sections, however, common law principles of liability would obtain. In such cases, the nonavailability of governmental immunity as a defense would seem to open the way to a judicial approval of the liberal rules of liability which obtain in certain other jurisdictions.²¹ Indeed, a somewhat veiled intimation that the California Supreme Court is prepared to make such an enlargement where deemed appropriate is found in the *Lipman* opinion.²² A legislative rule governing the subject would seem to be appropriate.

12. Damages resulting from public improvement projects

The proliferation of governmental services to meet the needs of a growing population and an increasingly industrialized economy inevitably requires many forms of public improvements to be built. Often such improvements seem to fall into the conceptual "twilight zone"¹ between eminent domain and police power where the liability of the governmental agency for damages is somewhat uncertain.² If the project

²⁰ Read literally, Section 1587 might appear to be simply a claims presentation provision. However, it expressly incorporates Section 1586 of the Military and Veterans Code as prescribing the manner of presentation of a damage claim; and Section 1586 in turn incorporates by reference the provisions of the Government Code (i.e., CAL. GOVT. CODE §§ 600-655) relating to inverse condemnation claims against the State, which provisions "shall govern the presentment, allowance or rejection of such claims and the conditions upon which suit may be brought against the State. Payment for such property . . . shall be made from any funds appropriated by the State for such purpose." The quoted language seems to clearly indicate a legislative intent to make the State substantively liable. Far less clear language was held to constitute a waiver of sovereign immunity in *Hayashi v. Alameda County Flood Control & Water Conservation Dist.*, 167 Cal. App.2d 584, 334 P.2d 1048 (1959).

²¹ See discussion at pp. 480-82, *infra*. Cf. Annot., 137 A.L.R. 1290 (1942); 18 AM. JUR. *Eminent Domain* § 16 (1938); 56 AM. JUR. *War* § 33 (1947).

²² See *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961). In holding that a public employer may, in some circumstances, be liable even though its employee is immune from liability resulting from discretionary conduct, Mr. Chief Justice Gibson cites, *inter alia*, Hall & Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 514 (1907). The cited article urges that although the responsible officers are properly held to be immune from personal liability when, acting reasonably, they destroy private property to prevent the spread of fire, the entity which benefits from their act should be required to assume the liability for the loss. This citation is particularly significant in view of the fact that one of the leading cases affirming the officer's immunity in such a case, but at least obliquely intimating that the entity is also immune, is the early California case of *Surocco v. Geary*, 3 Cal. 69 (1853), cited in notes 15 and 16 *supra*.

¹ The phrase is one coined by the late Mr. Justice Carter. See *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 344, 333 P.2d 1, 9 (1958).

² See *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944); *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960). Cf. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 721, 329 P.2d 289, 293 (1958) (Carter, J., concurring).

is classified as an exercise of police power, injuries suffered by private interests may be noncompensable as *damnum absque injuria*.³ Even where the power of eminent domain is being exercised, however, there are limits to the injuries for which just compensation is required to be paid.⁴ On the other hand, police power, too, has its limits and under some circumstances may result in public liability for damages in inverse condemnation.⁵

The Legislature has been active in attempting to resolve problems arising in this area. Many statutory provisions attempt to settle the potential controversies which might arise by expressly imposing liability upon the public entity making the improvement. The statutes may conveniently be classified in three groups for the purpose of analysis and discussion: (a) statutes relating to relocation of utility facilities; (b) statutes requiring restoration of intersections when improvements are installed in public streets; and (c) other miscellaneous provisions imposing liability for damages resulting from public improvements.

(a) **Relocation of utility facilities.** In urban areas, the subsurface area beneath street pavements often is occupied by a variety of conduits, sewer pipes, storm drains, water mains, gas lines, telephone and telegraph cables, and like facilities. These structures may be owned and operated by public agencies or by private enterprises, and may be situated in the street by virtue of proprietary property rights,⁶ under statutory authorization,⁷ or pursuant to a franchise granted by the city or county exercising jurisdiction over the street.⁸

As new underground facilities are needed from time to time, acute problems often arise with respect to the relocation, reconstruction or alteration of existing subsurface structures to make room for the new ones. If the facility to be added demands little in the way of space requirements and its subsurface location may be determined with considerable flexibility, the relocation and alteration problem is seldom serious. But when the new structure requires a very large proportion of the subsurface space, or engineering requirements dictate that its location be restricted to a particular portion of the area beneath the street, the economic implications of the problem may be of substantial size. Installation of storm drains, sewers and water mains, for example, often require substantial structural alterations to utility facilities beneath the surface, such as gas mains, telephone lines, or water pipes. Which agency is liable for the cost of such alterations and relocations? Should the cost be borne by the public entity installing the new sub-

³ *People ex rel. Dep't of Pub. Works v. Russell*, 48 Cal.2d 189, 309 P.2d 10 (1957); *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1 (1941); *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960). See also, *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955).

⁴ See *People ex rel. Dep't of Pub. Works v. Symons*, 54 Cal.2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960); *People ex rel. Dep't of Pub. Works v. Ayon*, 54 Cal.2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960), *cert. denied*, 364 U.S. 827 (1960).

⁵ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944). See *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1935).

⁶ *County of Contra Costa v. Central Contra Costa Sanitary District*, 182 Cal. App.2d 176, 5 Cal. Rptr. 783 (1960); see also *Airways Water Co. v. County of Los Angeles*, 106 Cal. App.2d 787, 236 P.2d 199 (1951); *Colegrove Water Co. v. City of Hollywood*, 151 Cal. 425, 90 Pac. 1053 (1907).

⁷ See *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal.2d 766, 336 P.2d 514 (1959); *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941).

⁸ See *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958); CAL. PUB. UTIL. CODE §§ 6201-6302.

structure for whose benefit the relocation or alteration is required? Or should it be a liability of the utility whose facilities impede the path of the public improvement? Should liability in such cases be allocated upon the same basis where the facilities being altered are owned by another public agency as where they are owned by a private corporation? Should allocation of costs be determined in terms of temporal priority of installation, or in terms of relative social importance of the function or service being rendered?

Questions of this sort have occupied the attention of the Legislature on many occasions. As a result, numerous statutes expressly impose liability for such utility relocations upon the public entity engaged in the installation of the new structure. The statutory treatment, however, is not uniform in either scope or coverage, and contains inexplicable subsidiary variations of policy which can be attributed only to the *ad hoc* and episodic way in which the problem has been considered. It seems reasonably clear, however, that the determination to impose such liability on the entity making the improvement is entirely a matter of policy, and that no constitutional impediments preclude the Legislature from doing so,⁹ even though in the absence of such legislation the public entity might not be liable.¹⁰

The statutory provisions relating to liability for relocating utility structures generally are of five distinguishable types:

First, there are 35 special district statutes which, in substance, provide that:

The district, in exercising such power [of eminent domain], shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cables or poles of any public utility which is required to be moved to a new location.

Language substantially like this is found in the following statutes:

GOVT. CODE § 61610 (community services districts).

H. & S. CODE § 5998 (regional sewage disposal districts).¹¹

PUB. UTIL. CODE § 25703 (transit districts).

PUB. UTIL. CODE § 28953 (San Francisco Bay Area Rapid Transit District).

WATER CODE § 60230(8) (water replenishment districts).

Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671 §§ 12(7), 12(7a), as amended by Cal. Stat. 1961, ch. 669, § 1, p. 1387, CAL. GEN. LAWS ANN. Act 5243 (Deering Supp. 1961), CAL. WATER CODE APP. §§ 20-12(7), 12(7a) (West Supp. 1961).

⁹ See *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 719, 329 P.2d 289, 292 (1958). "... there would appear to be no basic principle that would prohibit granting a utility a right to compensation for relocating its lines as part of its franchise although such right would not otherwise pass. This view finds support in cases holding that the Legislature may provide for such compensation. [Citing cases from New York, Maryland, Pennsylvania, Maine, New Hampshire and Ohio.] See also *Dittus v. Cranston*, 53 Cal.2d 284, 9 Cal. Rptr. 314, 347 P.2d 671 (1959); *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930).

¹⁰ See cases cited note 13 *infra*. The entity, however, is ordinarily liable in inverse condemnation if the utility facilities are maintained under private easement or other proprietary rights rather than a mere franchise privilege. *Southern Cal. Gas Co. v. Los Angeles County Flood Control Dist.*, 169 Cal. App.2d 840, 338 P.2d 29 (1959). See *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n*, *supra* note 5.

¹¹ The Regional Sewage Disposal District Act was repealed by Cal. Stat. 1959, ch. 1309, § 1, p. 3531. The repealing provision, however, contained a savings clause to the effect that existing districts "shall remain unaffected by such repeal."

- Alameda County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 1275, § 5(13), as amended by Cal. Stat. 1961, ch. 1565, § 1, p. 3384, CAL. GEN. LAWS ANN. Act 205, § 5(13) (Deering Supp. 1961), CAL. WATER CODE APP. § 55-5(13) (West Supp. 1961).
- Antelope Valley-East Kern Water Agency Law, Cal. Stat. 1959, ch. 2146, § 61(7), p. 5153 CAL. GEN. LAWS ANN. Act 9095, § 61(7) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-61(7) (West 1959).
- Contra Costa County Flood Control and Water Conservation District Law, Cal. Stat. 1951, ch. 1617, § 5(13), as amended by Cal. Stat. 1959, ch. 1886, § 1, p. 4447, CAL. GEN. LAWS ANN. Act 1656 § 5(13) (Deering Supp. 1961), CAL. WATER CODE APP. § 63-5(13) (West Supp. 1961).
- Contra Costa County Water Agency Act, Cal. Stat. 1957, ch. 518, § 10, p. 1556, CAL. GEN. LAWS ANN. Act 1658, § 10 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-10 (West 1959).
- Crestline-Lake Arrowhead Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 40, § 11(9), p. —, CAL. GEN. LAWS ANN. Act 9099a, § 11(9) (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 104-11(9) (West Supp. 1962).
- Del Norte County Flood Control District Act, Cal. Stat. 1955, ch. 166, § 7, p. 620, CAL. GEN. LAWS ANN. Act 2040, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. § 72-7 (West 1956).
- Desert Water Agency Act, Cal. Stat. 1961, ch. 1069, § 9, p. 2761, CAL. GEN. LAWS ANN. Act 9097, § 9 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-9 (West Supp. 1961).
- El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 8, p. 5086, CAL. GEN. LAWS ANN. Act 2245, § 8 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-8 (West 1959).
- Fresno Metropolitan Flood Control Act, Cal. Stat. 1955, ch. 503, § 26, p. 983, CAL. GEN. LAWS ANN. Act 2791, § 26 (Deering Supp. 1961), CAL. WATER CODE APP. § 73-26 (West 1956).
- Fresno Metropolitan Transit District Act, Cal. Stat. 1961, ch. 1932, § 6.3, p. 4061, CAL. GEN. LAWS ANN. Act 2792, § 6.3 (Deering Supp. 1961), CAL. PUB. UTIL. CODE APP. 2, § 6.3 (West Supp. 1961).
- Humboldt County Flood Control District Act, Cal. Stat. 1945, ch. 939, § 7, p. 1761, CAL. GEN. LAWS ANN. Act 3515, § 7 (Deering 1954), CAL. WATER CODE APP. § 47-7 (West 1956).
- Lake County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1544, § 5(12), as amended by Cal. Stat. 1959, ch. 1532, § 3, p. 3836, CAL. GEN. LAWS ANN. Act 4145, § 5(12) (Deering Supp. 1961), CAL. WATER CODE APP. § 62-5(12) (West Supp. 1961).
- Marin County Flood Control and Water Conservation District Act, Cal. Stat. 1953, ch. 666, § 5(13), p. 1916, CAL. GEN. LAWS ANN. Act 4599, § 5(13) (Deering 1954), CAL. WATER CODE APP. § 68-5(13) (West 1956).
- Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 14, p. 5133, CAL. GEN. LAWS ANN. Act 9095, § 14 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-14 (West 1959).
- Monterey County Flood Control and Water Conservation District Act, Cal. Stat. 1947, ch. 699, § 6, p. 1743, CAL. GEN. LAWS ANN. Act 5064, § 6 (Deering 1954), CAL. WATER CODE APP. § 52-6 (West 1956).
- Napa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1449, § 6, p. 3415, CAL. GEN. LAWS ANN. Act 5275, § 6 (Deering 1954), CAL. WATER CODE APP. § 61-6 (West 1956).
- Sacramento County Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1952, ch. 10, § 3.4, p. 317, CAL. GEN. LAWS ANN. Act 6730a, § 3.4 (Deering 1954), CAL. WATER CODE APP. § 66-3.4 (West 1956).
- San Geronio Pass Water Agency Law, Cal. Stat. 1961, ch. 1435, § 9, p. 3245, CAL. GEN. LAWS ANN. Act 9099, § 9 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 101-9 (West Supp. 1961).

San Joaquin County Flood Control and Water Conservation District Act, Cal. Stat. (1st Ex. Sess.) 1956, ch. 46, § 5(13), as amended by Cal. Stat. 1961, ch. 933, § 4, p. 2559, CAL. GEN. LAWS ANN. Act 7150, § 5(13) (Deering Supp. 1961), CAL. WATER CODE APP. § 79-5(13) (West Supp. 1961).

San Luis Obispo County Flood Control and Water Conservation District Act, Cal. Stat. 1945, ch. 1294, § 6, p. 2430, CAL. GEN. LAWS ANN. Act 7205, § 6 (Deering 1954), CAL. WATER CODE APP. § 49-6 (West 1956).

San Mateo County Flood Control District Act, Cal. Stat. 1959, ch. 2108, § 3(8), p. 4886, CAL. GEN. LAWS ANN. Act 7261, § 3(8) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 87-3(8) (West 1959).

Santa Barbara County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1057, § 5(12), p. 2007, CAL. GEN. LAWS ANN. Act 7304 (Deering Supp. 1961), CAL. WATER CODE APP. § 74-5(12) (West 1956).

Santa Barbara County Water Agency Act, Cal. Stat. 1945, ch. 1501, § 3.4, p. 2782, CAL. GEN. LAWS ANN. Act 7303, § 3.4 (Deering 1954), CAL. WATER CODE APP. § 51-3.4 (West 1956).

Santa Clara-Alameda-San Benito Water Authority Act, Cal. Stat. 1955, ch. 1289, § 21(5), p. 2352, CAL. GEN. LAWS ANN. Act 9102, § 21(5) (Deering Supp. 1961), CAL. WATER CODE APP. § 76-21(5) (West 1956).

Santa Clara County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1405, § 6, as amended by Cal. Stat. (1st Ex. Sess.) 1952, ch. 20, § 3, p. 373, CAL. GEN. LAWS ANN. Act 7335, § 6 (Deering 1954), CAL. WATER CODE APP. § 60-6 (West 1956).

Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 49, p. 2705, CAL. GEN. LAWS ANN. Act 7390, § 49 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-49 (West 1956).

Shasta County Water Agency Act, Cal. Stat. 1957, ch. 1512, § 66, p. 2851, CAL. GEN. LAWS ANN. Act 7580, § 66 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-66 (West 1959).

Solano County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1656, § 3.4, as amended by Cal. Stat. 1957, ch. 1502, § 1, p. 2830, CAL. GEN. LAWS ANN. Act 7733, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. § 64-3.4 (West Supp. 1961).

Upper Santa Clara Valley Water Agency Law, Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 15(7), p. —, CAL. GEN. LAWS ANN. Act 9099b, § 15(7) (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 103-15(7) (West Supp. 1962).

Of the 35 provisions just cited, all but one¹² incorporate the liability clause in question within general provisions conferring upon the district the power of eminent domain. Liability for removal, reconstruction and relocation costs, according to the *literal* wording of these provisions, obtains only when the district is exercising "such power" of *eminent domain*. In the absence of statute, however, it has been held that a governmental entity is not liable to a franchise occupier of the public streets for such relocation costs where it is exercising the *police power*.¹³ There is at least a possibility, therefore, that the cited provisions (subject to the lone exception noted) may only impose liability where the improvement in question cannot be assimilated to the police

¹² Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 49, p. 2705, CAL. GEN. LAWS ANN. Act 7390, § 49 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-49 (West 1956).

¹³ Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal.2d 331, 333 P.2d 1 (1958); Southern Cal. Gas Co. v. City of Los Angeles, 50 Cal.2d 713, 329 P.2d 289 (1958). Where the utility facilities are in the street by virtue of private property rights prior in time to the street use, however, compensation for relocation costs must be paid by later improver. County of Contra Costa v. Central Contra Costa Sanitary Dist., 182 Cal. App.2d 176, 5 Cal. Rptr. 733 (1960).

power and hence must seek justification solely as an exercise of eminent domain.¹⁴

Four deviations from the general pattern of statutory language are also worth noting.

The typical provision quoted above as the prototype of all 35 cited sections, it will be observed, expressly imposes liability for the cost of "removal, reconstruction, or relocation" of structures. (Emphasis added.) In nine of the cited provisions, however, there appears to be a studious attempt to limit the liability to the cost of removal or relocation,¹⁵ thereby impliedly precluding any liability for reconstruction expense. This difference in statutory language may indicate a legislative policy determination not to impose upon the nine districts in question the cost of newly constructed improvements which, by replacing older, largely depreciated structures, may increase the total capital assets of, and thus unduly enrich, the public utility owner. The reason why this policy has been applied in such a selective manner (*i.e.*, in only nine of the cited statutes), however, is not apparent.

¹⁴ The placing of the relocation-cost clause in the context of eminent domain provisions is consistent with the general legislative policy reflected in Code of Civil Procedure Sections 1248(6) and 1248a, which sections include removal and relocation costs as part of the damages recoverable in condemnation proceedings. See, *e.g.*, *City of Long Beach v. Pacific Elec. Ry.*, 44 Cal.2d 599, 283 P.2d 1036 (1955); *Southern Cal. Gas Co. v. Los Angeles County Flood Control Dist.*, 169 Cal. App.2d 840, 338 P.2d 29 (1959). Moreover, some special district statutes expressly contemplate that a judgment in condemnation proceedings may require such relocations to be made by the district. See, *e.g.*, *Humboldt County Flood Control Act*, Cal. Stat. 1945, ch. 939, § 30, p. 1773, CAL. GEN. LAWS ANN. Act 3515, § 30 (Deering 1954), CAL. WATER CODE APP. § 47-30 (West 1956); *Marin County Flood Control and Water Conservation District Act*, Cal. Stat. 1953, ch. 666, § 28, p. 1933, CAL. GEN. LAWS ANN. Act 4599, § 28 (Deering 1954), CAL. WATER CODE APP. § 68-28 (West 1956); *Santa Barbara County Flood Control and Water Conservation District Act*, Cal. Stat. 1955, ch. 1057, § 30, p. 2023, CAL. GEN. LAWS ANN. Act 7304, § 30 (Deering Supp. 1961), CAL. WATER CODE APP. § 74-30 (West 1956). On the other hand, the Supreme Court, in *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, *supra* note 13, at 337, 333 P.2d at 4, quoted Section 5(13) from the *Marin County Flood Control and Water Conservation District Act*, *supra*, as indicating a legislative intent to authorize payment of such costs by the district where it was exercising the police power. The precise problem of interpretation here raised, however, does not appear to have been argued in the *Edison Co.* case, and hence any implications drawn from the opinion on this score should be viewed with reservations.

¹⁵ The *El Dorado County Water Agency Act*, Cal. Stat. 1959, ch. 2139, § 8, p. 5086, CAL. GEN. LAWS ANN. Act 2245, § 8 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-8 (West 1959), contains the following language: "The agency in exercising such power [of eminent domain] shall, in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal and relocation of any structure, railways, mains, pipes, conduits, wires, cables or poles of any public utility which require removal only, or removal and reinstallation in a new location." (Emphasis added.) Similar language, seemingly excluding any reconstruction costs, is found in the *Mojave Water Agency Law*, Cal. Stat. 1959, ch. 2146, § 14, p. 5133, CAL. GEN. LAWS ANN. Act 9095, § 14 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-14 (West 1959); *Monterey County Flood Control and Water Conservation District Act*, Cal. Stat. 1947, ch. 699, § 6, p. 1743, CAL. GEN. LAWS ANN. Act 5064, § 6 (Deering 1954), CAL. WATER CODE APP. § 52-6 (West 1956); *Napa County Flood Control and Water Conservation District*, Cal. Stat. 1951, ch. 1449, § 6, p. 3415, CAL. GEN. LAWS ANN. Act 5275, § 6 (Deering 1954), CAL. WATER CODE APP. § 61-6 (West 1956); *San Luis Obispo County Flood Control and Water Conservation District Act*, Cal. Stat. 1945, ch. 1294, § 6, p. 2430, CAL. GEN. LAWS ANN. Act 7205, § 6 (Deering 1954), CAL. WATER CODE APP. § 49-6 (West 1956); *Santa Barbara County Water Agency Act*, Cal. Stat. 1945, ch. 1501, § 3.4, p. 2782, CAL. GEN. LAWS ANN. Act 7303, § 3.4 (Deering 1954), CAL. WATER CODE APP. § 51-3.4 (West 1956); *Santa Clara County Flood Control and Water Conservation District Act*, Cal. Stat. 1951, ch. 1405, § 6, as amended by Cal. Stat. (1st Ex. Sess.) 1952, ch. 20, § 3, p. 373, CAL. GEN. LAWS ANN. Act 7335, § 6 (Deering 1954), CAL. WATER CODE APP. § 60-6 (West 1956); *Shasta County Water Agency Act*, Cal. Stat. 1957, ch. 1512, § 66, p. 2851, CAL. GEN. LAWS ANN. Act 7580, § 66 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP., § 83-66 (West 1959); *Solano County Flood Control and Water Conservation District Act*, Cal. Stat. 1951, ch. 1656, § 3.4, as amended by Cal. Stat. 1957, ch. 1502, § 1, p. 2830, CAL. GEN. LAWS ANN. Act 7733, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. § 64-3.4 (West Supp. 1961).

An alternative method for solving the "betterments" problem, in cases where reconstruction of old utility facilities is required, is not to deny all compensation (as in the nine provisions discussed in the preceding paragraph) but instead to allow a credit to the entity making the improvement. Thus, in the San Francisco Bay Area Rapid Transit District Act, typical provision is made for payment of costs of "removal, reconstruction, or relocation" of public utility facilities, but the district is only required to pay the "cost, exclusive of betterment and with credit for salvage value." Of the 35 statutes cited above, this is the only one adopting this alternative.

A third deviation from the dominant legislative pattern should also be observed. The concluding words of the typical provision quoted above, it will be noted, limit the application of the liability clause to instances in which public utility structures are "required to be moved to a new location." This language would appear to preclude liability for alterations or reconstructions not involving an actual moving to a new location, as where, for example, it is necessary to cut, remove, and ultimately restore an existing pipe, conduit, or pole, without changing its location, in order that the district may install its new facility underneath or in close proximity thereto. It thus may be significant to observe that in one¹⁶ of the cited statutes (but not in any of the other 34) the district's liability is not limited to public utility facilities which require removal to a new location, but extends to all such facilities which are "required to be reconstructed or relocated."

A final (and unique) deviation from the usual pattern of language is found in the Fresno Metropolitan Transit District Act of 1961. Section 6.3 of this act employs the general language of the provision quoted above, thereby imposing on the district the duty to pay the costs of removal, reconstruction or relocation of public utility facilities; but this duty is then qualified by a proviso in these words: "provided such facilities are being maintained pursuant to a franchise from a city or county." The policy underlying the language of the proviso is difficult to discern. By limiting the duty of the district to pay for removal and reconstruction costs to cases of facilities maintained under city or county franchise, an obvious inference arises that the Legislature thereby intended to immunize the district from any such liability in other cases. A telephone company, for example, would appear to have no right to recover for reconstruction or relocation costs incurred by reason of an improvement or installation by the district, for telephone facilities are maintained in public streets under *statutory* franchise rights independent of city or county control.¹⁷ Indeed, if taken to its logical extreme, the proviso impliedly immunizes the district from such liability even when the utility facilities required to be relocated are situated in a privately owned right-of-way and hence are not maintained under franchise from any public entity. In this latter situation (and possibly even in the former) the implication of immunity from liability poses substantial problems of constitutionality in view of the

¹⁶ San Mateo County Flood Control District Act, Cal. Stat. 1959, ch. 2108, § 3(8), p. 4886, CAL. GEN. LAWS ANN. Act 7261, § 3(8) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 87-3(8) (West 1959).

¹⁷ See CAL. PUB. UTIL. CODE § 7901, as construed in *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal.2d 766, 336 P.2d 514 (1959). Other examples of statutory franchises are collected in *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941).

prohibition on the taking of private property for public use without payment of just compensation.¹⁸ In view of the difficulties which it creates, it is perhaps fortunate that this proviso is found only in the one statute cited.

Second, there are two statutory provisions which require the district making the improvement to bear the cost of alteration or relocation of "any facilities devoted to a public use":¹⁹

STS. & HWYS. CODE § 32950.5 (parking authorities).

WATER CODE §§ 56041(d), 56060 (county drainage districts).

In the absence of a statutory definition of the phrase, "devoted to a public use," it would seem probable that it includes any uses for which the power of eminent domain may be exercised.²⁰ Under this interpretation, it will be noted, the liability created by these two statutes includes the alteration and relocation costs of *publicly* as well as *privately* owned utility structures; and it is not limited to "utilities" but extends to property devoted to any kind of "public use." The 35 provisions discussed immediately above, however, are in terms limited to structures owned by "any public utility," a term which is not only substantially narrower than "public use" but also lends itself to possible interpretation as referring only to *privately* owned facilities.²¹ Finally, the two provisions here cited appear in terms to impose liability where the required alteration does not require any change of location, as well as where such change is necessary.

Third, there are ten statutes which impose liability on the public agency for alteration and relocation costs of designated types of structures, without limiting them to those owned by "public utilities" (as in the first category, above) or to those which are "devoted to a public use" (as in the second group). Statutes of this type include:

PUB. UTIL. CODE § 21634 (California Division of Aeronautics).

Contra Costa County Storm Drainage District Act, Cal. Stat. 1953, ch. 1532, § 7, p. 3194, CAL. GEN. LAWS ANN. Act 1657, § 7 (Deering 1954), CAL. WATER CODE APP. § 69-7 (West 1956).

Lassen-Modoc County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2127, § 3(g), p. 5010, CAL. GEN. LAWS ANN. Act 4200, § 3(g) Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-3(g) (West 1959).

Morrison Creek Flood Control District Act, Cal. Stat. 1953, ch. 1771, § 3, p. 3531, CAL. GEN. LAWS ANN. Act 6749, § 3 (Deering 1954), CAL. WATER CODE APP. § 71-3 (West 1956).

Plumas County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2114, § 3(g), p. 4913, CAL. GEN. LAWS ANN. Act 5964, § 3(g) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-3(g) (West 1959).

¹⁸ See discussion in text at 90-91 *infra*; cases cited note 33 *infra*.

¹⁹ There are minor differences in the wording of the two statutes. CAL. STS. & HWYS. CODE § 32950.5 refers to cost of removal, alteration and relocation of "any property devoted to a public use"; CAL. WATER CODE §§ 56041, 56060 refer to cost of alteration or relocation of "any facilities devoted to a public use."

²⁰ See CAL. CODE CIV. PROC. §§ 1238-1238.5. The statutory enumeration of "public uses," however, is not conclusive upon the courts, and the ultimate determination whether a given use is a "public" one is a judicial question. See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955); *City of Menlo Park v. Artino*, 151 Cal. App.2d 261, 311 P.2d 135 (1957).

²¹ See CAL. CONST., Art. XII, §§ 23, 23a; *City of National City v. Fritz*, 33 Cal.2d 635, 204 P.2d 7 (1949) (municipal sewer system not a "public utility"); *City of Pasadena v. Railroad Comm'n*, 183 Cal. 526, 192 Pac. 25 (1920) (municipal electric system not a "public utility"). *But cf.* CAL. PUB. UTIL. CODE §§ 10001-10060, providing for municipal acquisition of public utility systems.

San Benito County Water Conservation and Flood Control District Act, Cal. Stat. 1953, ch. 1598, § 8, p. 3286, CAL. GEN. LAWS ANN. Act 6808, § 8 (Deering 1954), CAL. WATER CODE APP. § 70-8 (West 1956).

Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 25, p. 2703, CAL. GEN. LAWS ANN. Act 7390, § 25 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-25 (West 1956).

Sierra County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2123, § 3(g), p. 4980, CAL. GEN. LAWS ANN. Act 7661, § 3(g) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-3(g) (West 1959).

Siskiyou County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2121, § 3(g), p. 4947, CAL. GEN. LAWS ANN. Act 7688, § 3(g) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-3(g) (West 1959).

Tehama County Flood Control and Water Conservation District Act, Cal. Stat. 1957, ch. 1280, § 3(g), as amended by Cal. Stat. 1961, ch. 631, § 1, p. 1802, CAL. GEN. LAWS ANN. Act 8510, § 3(g) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-3(g) (West Supp. 1961).

The cited statutes typically provide that the subject entity shall pay for the cost of alterations or relocations of "any bridge, trestle, wire line, pole, conduit line, cable, viaduct, embankment or other structure" whose alteration or relocation is necessary to accomplish the purposes of the statute. The enumeration of facilities varies somewhat among the ten provisions,²² but in only one²³ of them is there any indication of intent to limit such structures to those owned by private persons. In the other nine, the language is clearly broad enough to cover both public and private property, and in several there is an additional clause expressly imposing liability on the local entity for the cost of changing or relocating any portion of a state highway.²⁴ Finally, it should be noted that of the ten statutes here cited, three²⁵ appear in terms to be limited to costs incurred where the affected facility or structure is required to be moved to a new location, while the other seven appear to include alteration expenses not involving any change of situs.

²² The words quoted in the text are from the Morrison Creek Flood Control District Act, Cal. Stat. 1953, ch. 1771, § 3(g), p. 3531, CAL. GEN. LAWS ANN. Act 6749, § 3(g) (Deering 1954), CAL. WATER CODE APP. § 71-3(g) (West 1956). The Contra Costa County Storm Drainage District Act, Cal. Stat. 1953, ch. 1532, § 7, p. 3194, CAL. GEN. LAWS ANN. Act 1657, § 7 (Deering 1954), CAL. WATER CODE APP. § 69-7 (West 1956), and the San Benito Water Conservation and Flood District Act, Cal. Stat. 1953, ch. 1598, § 8, p. 3286, CAL. GEN. LAWS ANN. Act 6808, § 8 (Deering 1954), CAL. WATER CODE APP. § 70-8 (West 1956), however, omit the words "bridge, trestle, . . . viaduct, embankment" but add the words "railways, mains, pipes" to the list as quoted in the text. The Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 25, p. 2703, CAL. GEN. LAWS ANN. Act 7390, § 25 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-25 (West 1956), omits the words "pole, conduit line, cable" but includes the balance. The five Flood Control and Water Conservation District Acts in which the provision is found in section 3(g)—that is, the acts for the counties of Lassen-Modoc, Plumas, Sierra, Siskiyou and Tehama—all contain an enumeration like that in the Santa Cruz act, but supplement this by the broad comprehensive phrase, "existing works or structures."

²³ The liability of the California Division of Aeronautics, in cases of removals and relocations made necessary to eliminate airport hazards or to permit improvement and expansion of airports or air navigation facilities is limited to "private structures, railways, mains, pipes, conduits, wires, cables, poles, or any other structure or equipment required to be moved to a new location." (Emphasis added.) CAL. PUB. UTIL. CODE § 21634.

²⁴ Language to this effect is found in the provisions cited in the text as Lassen-Modoc County Flood Control and Water Conservation District Act, Morrison Creek Flood Control District Act, Plumas County Flood Control and Water Conservation District Act, Sierra County Flood Control and Water Conservation District Act, Siskiyou County Flood Control and Water Conservation District Act, and Tehama County Flood Control and Water Conservation District Act *supra*.

²⁵ Such limiting language is found in the provisions cited in the text as California Division of Aeronautics, Contra Costa County Storm Drainage District Act, and San Benito County Water Conservation and Flood Control District Act *supra*.

Fourth, there are nine provisions, all found in recently enacted special water agency statutes, which adopt a different approach to the general problem, and provide:

In lieu of compensation and damages for the taking or damaging of any public utility facility which must be replaced by the public utility to provide service to the public equivalent to that provided by the facility taken or damaged, the agency shall pay to the public utility owning such facility its actual cost incurred to replace in kind the facility so taken or damaged, less proper deductions for depreciation, together with its actual cost incurred to rearrange or rehabilitate the facilities of such public utility not taken or damaged but required to be rearranged or rehabilitated by reason of such taking or damaging.

The statutes containing language of this type include:

- Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 7, p. 3994, CAL. GEN. LAWS ANN. Act 270, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-7 (West Supp. 1961).
- Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 3.4, p. 5062, CAL. GEN. LAWS ANN. Act 276, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-3.4 (West 1959).
- Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 3.4, p. 2653, CAL. GEN. LAWS ANN. Act 9098, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-3.4 (West Supp. 1961).
- Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 3.4, p. 4686, CAL. GEN. LAWS ANN. Act 4613, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-3.4 (West 1959).
- Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 7, p. 4967, CAL. GEN. LAWS ANN. Act 5449, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-7 (West 1959).
- Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 3.4, as amended by Cal. Stat. 1959, ch. 815, § 4, p. 2823, CAL. GEN. LAWS ANN. Act 5935, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-3.4 (West 1959).
- Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 3.4, p. 4821, CAL. GEN. LAWS ANN. Act 9096, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-3.4 (West 1959).
- Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 8, p. 5033, CAL. GEN. LAWS ANN. Act 9380, § 8 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-8 (West 1959).
- Yuba County Water Agency Act, Cal. Stat. 1959, ch. 738, § 3.4, p. 2782, CAL. GEN. LAWS ANN. Act 9407, § 3.4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-3.4 (West 1959).

The Legislature, in these provisions, seems to have adopted a policy that when water agency improvements make it necessary that (a) "public utility" facilities (b) be replaced (*i.e.*, not merely altered or relocated) in order to provide the equivalent of prior utility service, the agency shall pay (c) the actual cost of replacement in kind, less depreciation (thereby substantially eliminating the "betterments" problem), together with (d) the cost of rearranging or rehabilitating other related facilities. Liability under these provisions has been carefully limited both as to fact situations in which the statute is operative, and as to the extent of liability, and thus appears to be narrower in scope than any of the previously cited provisions.

Fifth, there are a few scattered statutes relating to cost of utility relocations which do not lend themselves to the foregoing classification. They may be briefly summarized as follows:

STRS. & HWYS. CODE §§ 700-707.5²⁶—an elaborate series of provisions imposing liability upon the State under specified conditions for relocation of utility facilities in connection with planning and construction of the California freeway system. In general, the State's liability extends to both publicly and privately owned structures (*ibid.* § 700(b)), and express provision is made for crediting the State with the value of betterments, salvage, and depreciation. (*Ibid.* § 705.) If the utility owner occupied the freeway subsurface under express contractual obligation to relocate the facility (other than a facility used solely to supply water) at its own expense, however, the State is not liable. (*Ibid.* § 703.)

WATER CODE § 8617.5—applicable to the State Reclamation Board in administering the affairs of the Sacramento & San Joaquin Drainage District, and providing that the Board may pay the cost of relocation, reconstruction, or replacement of "improvements, structures, or utilities which have actually existed and been in use for over 20 years," where such relocation, reconstruction or replacement has been rendered necessary in connection with repair or reconstruction of levees or flood control works completed prior to June 30, 1957, and not financed either in whole or in part with funds under the Flood Relief Law of 1956 (CAL. GOVT. CODE §§ 54150-54161) or PUBLIC LAW 375, Eighty-first Congress, Second Session.

WATER CODE § 11590—applicable to the Department of Water Resources in administering and carrying out the Central Valley Project, and providing that no part of any common carrier railroad line, public utility facility, or facility of any state agency, may be taken or destroyed in the course of the Project, in the absence of agreement therefor, unless the department "has provided and substituted for the facilities to be taken or destroyed new facilities of like character and at least equal in usefulness with suitable adjustment for any increase or decrease in the cost of operating and maintenance thereof."

The statutory pattern revealed by the 59 statutory provisions just cited is characterized by wide discrepancies of policy, both as to the situations in which the statutory liability arises, and as to the extent of liability. The net effect would appear to be both arbitrary and potentially discriminatory.

The nonuniform and haphazard pattern of the statutes, moreover, is sharply emphasized by comparison of the 59 statutes cited with others which confer power upon local entities to require utility relocations and alterations, but fail to impose any liability upon the public entity for the cost of the work. At least six flood control district acts,²⁷ for example, authorize the district to compel the owner of existing utility structures to remove or alter them so as to eliminate obstructions to free flow of water along any watercourse, conduit or canal,

²⁶ These statutes appear to be limited to freeway development. Where utility relocations become necessary on other state highways, the cost is generally required to be borne by the utility. See CAL. STS. & HWYS. CODE § 680; State v. Marin Municipal Water Dist., 17 Cal.2d 699, 111 P.2d 651 (1941).

²⁷ American River Flood Control District Act, Cal. Stat. 1927, ch. 808, § 22, p. 1608, CAL. GEN. LAWS ANN. Act 320, § 22 (Deering 1954), CAL. WATER CODE APP. § 37-22 (West 1956); Los Angeles County Flood Control Act, Cal. Stat. 1915, ch. 755, § 16, as amended by Cal. Stat. 1953, ch. 1139, § 1, p. 2635, CAL. GEN. LAWS ANN. Act 4463, § 16 (Deering 1954), CAL. WATER CODE APP. § 28-16 (West 1956); Mendocino County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 995, § 3(g), p. 1811, CAL. GEN. LAWS ANN. Act 4830, § 3(g) (Deering 1954), CAL. WATER CODE APP. § 54-3(g) (West 1956); Orange County Flood Control Act, Cal. Stat. 1927, ch. 723, § 16, as amended by Cal. Stat. 1961, ch. 305, § 2, p. 1347, CAL. GEN. LAWS ANN. Act 5682, § 16 (Deering Supp. 1961), CAL. WATER CODE APP. § 36-16 (West Supp. 1961); Sonoma County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 994, § 3(g), as amended by Cal. Stat. 1953, ch. 524, § 1, p. 1766, CAL. GEN. LAWS ANN. Act 7757, § 3(g) (Deering 1954), CAL. WATER CODE APP. § 53-3(g) (West 1956); Yolo County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1657, § 3(g), as amended by Cal. Stat. 1961, ch. 895, § 1.5, p. 2502, CAL. GEN. LAWS ANN. Act 9307, § 3(g) (Deering Supp. 1961), CAL. WATER CODE APP. § 65-3(g) (West Supp. 1961). Three of these statutes (*i.e.*, those applicable to Mendocino, Sonoma and Yolo counties) contain a proviso, however, requiring the district to pay for the cost of changing or relocating any portion of a state highway. The other three statutes are silent on this point.

but are silent with respect to liability for the cost of such alteration or relocation work. The Supreme Court, in reliance upon this difference in statutory language, has held that a district governed by one of these six acts is not liable to a franchise holder for utility relocation or alteration costs.²⁸ Had the Legislature intended to impose such liability, said the Court, "it is reasonable to assume that it would have adopted language similar to that found in many other flood control acts. . . ."²⁹

In addition, there are many statutes governing public entities whose duties are likely to give rise to a utility relocation situation, where the statute is totally silent as to both power to require such relocation or alteration, and as to liability for the cost of the work.³⁰ In these cases, too, legislative silence appears to mean the burden must be borne by the franchise owner rather than the public entity.³¹

Looking solely to the statutory pattern, the need for a more uniform and rationally consistent policy with respect to relocation and alteration costs is manifest. Under the statutes cited, it is possible for a public utility company in one community to receive full reimbursement for the cost of reconstructing and relocating some of its franchise lines beneath the street to make way for a storm drain project. In another area a few miles away, however, the same company must bear the entire cost itself, while in still a third area it may be reimbursed for only part of the total outlay (*i.e.*, cost less depreciation and betterments; or for relocation of certain types of facilities but not of others; or for relocation costs but not for alterations requiring no change of location).

These differences are not merely academic. Utility systems and their rate structures often overlap geographical boundaries of public entities. Moreover, some large taxpayers may consume relatively small amounts of utility services, while many large consumers of utility services may be wholly or partially exempt from taxes or special assessments. The consumers of utility services, who ordinarily will pay the ultimate cost of relocations as part of their utility bills where the public entity is not liable, are thus not necessarily the same persons as the taxpayers who would bear the burden if the entity was liable; and the burden will not necessarily be distributed in the same proportions over the two different groups.

²⁸ *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958). Reliance on such variations of legislative language in similar statutes as indicating a difference of legislative intent is, of course, a standard technique of statutory interpretation. See, *e.g.*, *Pacific Gas & Elec. Co. v. Shasta Dam Pub. Util. Dist.*, 135 Cal. App.2d 463, 287 P.2d 841 (1955).

²⁹ *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 337, 333 P.2d 1, 4 (1958).

³⁰ See, *e.g.*, CAL. H. & S. CODE §§ 4700 *et seq.* (county sanitation districts); CAL. H. & S. CODE §§ 6400 *et seq.* (sanitary districts); CAL. WATER CODE §§ 55000 *et seq.* (county waterworks districts); CAL. WATER CODE §§ 70000 *et seq.* (levee districts); Flood Control and Flood Water Conservation District Act of 1931; Metropolitan Water District Act; San Diego Unified Port District Act; Vallejo County Sanitation and Flood Control District Act; Water Conservation Act of 1931.

³¹ See *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958). In addition, at least one statute expressly imposes the liability for relocation costs upon the franchise owner occupying the subsurface of state highways. See CAL. STRS. & HWYS. CODE § 680; *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941). On the other hand, where the utility facilities being relocated are situated in a private easement or right of way, rather than under mere franchise privileges, the public entity will ordinarily be liable for relocations costs even in the absence of statute, upon the theory of inverse condemnation under CAL. CONST., Art. I, § 14. See *Southern Cal. Gas Co. v. Los Angeles County Flood Control Dist.*, 169 Cal. App.2d 840, 338 P.2d 29 (1959). *Cf. Panhandle Eastern Pipe Line Co. v. State Highway Comm'n.*, 294 U.S. 613 (1935).

Have the *Muskopf* and *Lipman* decisions had any observable effect upon the existing confusion of rules governing liability for utility relocations? The cases holding the public entity not liable for alteration and relocation of franchise facilities, absent a statute imposing such liability,³² were decided upon the underlying foundation of the governmental immunity doctrine so that the only possible nonstatutory basis for liability was the untenable theory that such relocation constituted a taking or damaging of private property for public use, for which just compensation was constitutionally required to be paid. Now that *Muskopf* and *Lipman* have removed the doctrinal underpinning of these cases, a second possibility must be considered, namely whether compulsory relocation or alteration of such facilities in the exercise of the police power is tortious, and hence gives rise to liability entirely apart from either inverse condemnation or statute.

As already noted, a public agency exercising the police power ordinarily cannot require private structures located in private rights of way to be relocated or altered, unless the just compensation required by constitutional mandate is paid.³³ The common law immunity of the public entity from such liability where utility facilities are installed in streets under franchise rights is not founded on the theory that a franchise is not a valuable property interest within the meaning of the constitutional protection,³⁴ but on the theory that "a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets."³⁵ In short, the immunity of the public entity is fundamentally contractual in nature. The demise of governmental immunity, therefore, would not appear to alter the situation. *Muskopf* and *Lipman* did not purport to create new substantive liabilities, but only to remove the previous artificial barrier (*i.e.*, the immunity doctrine) to enforcement of *existing* liabilities. In the franchise-relocation cases, the barrier to liability was not immunity (for public entities are not immune from actions to enforce liability in inverse condemnation)³⁶ but the implied contractual obligation accepted as part of the franchise. That obligation would seem not to be impaired by the end of the unrelated immunity doctrine.³⁷

³² Cases cited in note 13 *supra*.

³³ *Southern Cal. Gas Co. v. Los Angeles County Flood Control Dist.*, 169 Cal. App.2d 840, 338 P.2d 29 (1959) (applying CAL. CONST., Art. I, § 14); *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n.*, 294 U.S. 613 (1935) (applying the due process clause of the 14th amendment).

³⁴ Franchises have often been classified as a form of property interest for various purposes. See, *e.g.*, *Stockton Gas & Elec. Co. v. County of San Joaquin*, 143 Cal. 313, 83 Pac. 54 (1905); *American States Water Serv. Co. v. Johnson*, 31 Cal. App.2d 606, 88 P.2d 770 (1939). See also *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897); *County of Tulare v. City of Dinuba*, 188 Cal. 664, 206 Pac. 983 (1922).

³⁵ *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 716, 329 P.2d 289, 290 (1958), citing numerous cases.

³⁶ See *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943), and *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942), holding that CAL. CONST., Art. I, § 14 is self-executing and provides a remedy in inverse condemnation even in the absence of statutory procedural provisions.

³⁷ This seems to be the view which obtains in New York, subsequent to the judicial announcement in that state in 1945 that the defense of governmental immunity had been waived by statute. See, *e.g.*, *New York City Tunnel Authority v. Consolidated Edison Co.*, 235 N.Y. 467, 68 N.E.2d 445 (1946), followed in *Jamaica Water Supply Co. v. City of New York*, 280 App. Div. 834, 114 N.Y.S.2d 79 (1952), *aff'd*, 304 N.Y. 917, 110 N.E.2d 739 (1953), *cert. denied*, 346 U.S. 821 (1953).

The only doubt as to the correctness of this conclusion stems from the Court's use of the word "governmental" in the passage just quoted—a term which the Court then immediately contrasts with "proprietary,"³⁸ thereby suggesting that there is no implied condition requiring assumption by the franchise owner of relocation costs where proprietary functions are concerned.³⁹ *Muskopf*, of course, rejected any such distinction between "governmental" and "proprietary" functions as an irrational and inequitable criterion of tort liability. It is, however, neither necessary nor plausible to assume that the implied condition attached to the utility franchise has now disappeared along with the adjective "governmental." In the present context, that adjective appears to have been used merely to identify those normal uses of the public street by public bodies which were clearly to be anticipated by the utility company at the time it accepted its franchise.⁴⁰ As to such uses, at least, it would seem fairly clear that the rule of governmental nonliability (absent statutory modification) would still obtain notwithstanding *Muskopf*. As to other situations, including relocations of facilities located in private rights-of-way, the rule of governmental liability in inverse condemnation would likewise seem to continue unimpaired. Where statutes impose liability for relocations, however, the existing confusion and inconsistencies of legislative policy also remain, insistently suggesting the need for legislative modification.

(b) Restoration of crossings and intersections. Closely related to statutes requiring public entities to pay for alteration and relocation costs of utility structures beneath street surfaces are a series of statutes authorizing public entities to construct improvements in or across public ways, streams, railroads, and the like, but explicitly requiring that the entity restore the intersection or crossing to its former state. These statutes generally are not worded in terms of payment of costs or of damages, but it seems clear that the net financial effect of the statutory duty of restoration is not substantially different than one of liability for cost. Whether the restoration work is undertaken directly by the public entity which is constructing the intersecting facilities, or is performed by the owner of the property being intersected under agreement for reimbursement by the former, is a matter which the law has apparently left to private arrangement between the parties.⁴¹

The numerous statutes of the type here discussed, although characterized by a common theme and similar verbal drafting, are marked by some diversity of legislative policy. Minor variations in wording

³⁸ *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 717, 329 P.2d 289, 290 (1958), stating, immediately following the statement quoted in the text accompanying note 35 *supra*: "The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule."

³⁹ See, to the same effect, *Postal Telegraph-Cable Co. v. City & County of San Francisco*, 53 Cal. App. 188, 199 Pac. 1108 (1921). *Cf. Los Angeles Gas & Elec. Co. v. City of Los Angeles*, 251 U.S. 32 (1919).

⁴⁰ In *Southern Cal. Gas Co. v. City of Los Angeles*, *supra* note 35, the court expressly distinguished a Louisiana case as not applicable because there "the competing public use was so highly unusual that it could not have been contemplated at the time the franchise was accepted. In the present case, on the contrary, the use of the streets for sewers was clearly to be anticipated, the utility's common-law obligation to relocate its pipes to accommodate that use has at all times been clearly recognized by the law, and there is no provision in the company's franchise abrogating that obligation by giving it the right to recover the costs of such relocation." *Id.* at 721, 329 P.2d at 293.

⁴¹ See *County of Calaveras v. Calaveras County Water Dist.*, 184 Cal. App.2d 276, 7 Cal. Rptr. 396 (1960).

have apparently introduced possible differences in scope and extent of liability. At least six different types of such provisions are observable.

First, a number of statutes contain language authorizing the entity to construct and maintain its facilities

across, along, in, under, over, or upon any road, street, alley, avenue, or highway, and across, under, or over any railway, canal, ditch, or flume which the route of such works intersects, crosses, or runs along, in such manner as to afford security for life and property,

but attach to the authorization an express condition to the effect that in exercising the rights thus conferred, the entity

shall *restore the road, street, alley, avenue, highway, canal, ditch, or flume* so used to its former state of usefulness as nearly as may be. [Emphasis added.]

It is characteristic of this form of statute that the duty of restoration generally is defined with reference to the specific places interfered with. The authority to lay facilities in or across a "street or highway," for example, is accompanied by a precisely equivalent duty to restore said "street or highway."⁴² The significance of this pattern of words relates to the utility relocation and alteration problem discussed previously. When the entity, acting under its statutory authorization, is installing structures (*e.g.*, sewers) in a street in the exercise of the police power, its duty of restoration manifestly requires it to assume the cost of repairing and resurfacing the pavement;⁴³ but, since the duty relates only to restoration of the "street," it apparently has no duty to pay for the cost of relocation or alteration of private utility facilities located in the street under franchise rights.⁴⁴

Statutes substantially of the type above quoted include:

H. & S. CODE § 6518 (sanitary districts).

PUB. UTIL. CODE §§ 10101 and 10102 (municipal corporations).

PUB. UTIL. CODE § 12808 (municipal utility districts).

PUB. UTIL. CODE § 16466 (public utility districts).

PUB. UTIL. CODE § 25805 (transit districts).

American River Flood Control District Act, Cal. Stat. 1927, ch. 808, § 20, as amended by Cal. Stat. 1961, ch. 241, § 1, p. 1259, CAL. GEN. LAWS ANN. Act 320, § 20 (Deering Supp. 1961), CAL. WATER CODE APP. § 37-20 (West Supp. 1961).

Drainage District Improvement Act of 1919, Cal. Stat. 1919, ch. 354, § 24c, added by Cal. Stat. 1929, ch. 725, § 6, p. 1329, CAL. GEN. LAWS ANN. Act 2203, § 24c (Deering 1954), CAL. WATER CODE APP. § 31-24c (West 1956).

Los Angeles County Flood Control Act, Cal. Stat. 1915, ch. 755, § 15, as amended by Cal. Stat. 1957, ch. 1106, § 1, p. 2409, CAL. GEN. LAWS ANN. Act 4463, § 15 (Deering Supp. 1961), CAL. WATER CODE APP. § 28-15 (West Supp. 1961).

⁴² The language quoted in the text as illustrative of the class of provisions here discussed is taken from CAL. PUB. UTIL. CODE §§ 10101 and 10102, which apply to all municipal corporations. Most of the other cited provisions have a more limited list of places which may be intersected or used for laying public facilities, generally restricting such places to public streets and highways.

⁴³ See *County of Calaveras v. Calaveras County Water Dist.*, 184 Cal. App.2d 276, 7 Cal. Rptr. 396 (1960).

⁴⁴ *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 337, 333 P.2d 1, 5 (1958) (rejecting contention that district was liable under Section 15 of Los Angeles County Flood Control Act, cited in text *infra*); *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 717, 329 P.2d 289, 291 (1958) (rejecting contention that city was liable under CAL. PUB. UTIL. CODE § 10101, cited *infra*).

Metropolitan Water District Act, Cal. Stat. 1927, ch. 429, § 5(6), as amended by Cal. Stat. 1937, ch. 140, § 2, p. 383, CAL. GEN. LAWS ANN. Act 9129, § 5(6) (Deering 1954), CAL. WATER CODE APP. § 35-5(6) (West 1956).

Second, a group of statutes confer authority to cross, intersect or use streets, highways, railroads, watercourses and similar places in the construction of public facilities, providing that

the agency shall *restore at its own expense any such crossings and intersections* to their former state as nearly as may be, or to an extent which does not unnecessarily impair their usefulness. [Emphasis added.]

The statutory duty to restore is here not confined merely to the "street or highway" as in the first group of statutes, but embraces the entire "crossing" or "intersection." It is somewhat doubtful whether this difference indicates a sufficient change in legislative intent to justify a holding that the agency or district is liable for relocation of utility structures as well as restoration of the surface pavement of the street. It might, however, support a holding that alteration of utility lines, where necessary to make the crossing, must be paid by the public entity. Statutes employing this broader form of language include:

Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 17, p. 3997, CAL. GEN. LAWS ANN. Act 270, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-17 (West Supp. 1961).

Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 4.7, p. 5065, CAL. GEN. LAWS ANN. Act 276, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-4.7 (West 1959).

Antelope Valley-East Kern Water Agency Law, Cal. Stat. 1959, ch. 2146, § 74, p. 5172, CAL. GEN. LAWS ANN. Act 9095, § 74 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-74 (West 1959).

Crestline-Lake Arrowhead Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 40, § 24, p. —, CAL. GEN. LAWS ANN. Act 9099a, § 24, CAL. WATER CODE APP. 1959 SUPP. § 104-24 (West Supp. 1962).

Desert Water Agency Act, Cal. Stat. 1961, ch. 1069, § 22, p. 2772, CAL. GEN. LAWS ANN. Act 9097, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-22 (West Supp. 1961).

El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 18, p. 5088, CAL. GEN. LAWS ANN. Act 2245, § 18 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-18 (West 1959).

Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 27, p. 2519, CAL. GEN. LAWS ANN. Act 4025, § 27 (Deering 1954), CAL. WATER CODE APP. § 59-27 (West 1956).

Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 4.7, p. 4688, CAL. GEN. LAWS ANN. Act 4613, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-4.7 (West 1959).

Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 19, as amended by Cal. Stat. 1951, ch. 62, § 19, p. 198, CAL. GEN. LAWS ANN. Act 5243, § 19 (Deering 1954), CAL. WATER CODE APP. § 20-19 (West 1956).

Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 17, p. 4970, CAL. GEN. LAWS ANN. Act 5449, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-17 (West 1959).

Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 4.7, p. 2523, CAL. GEN. LAWS ANN. Act 5935, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-4.7 (West 1959).

San Geronio Pass Water Agency Law, Cal. Stat. 1961, ch. 1435, § 22, p. 3255, CAL. GEN. LAWS ANN. Act 9099, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 101-22 (West Supp. 1961).

- Santa Barbara County Water Agency Act, Cal. Stat. 1945, ch. 1501, § 4.7, p. 2784, CAL. GEN. LAWS ANN. Act 7303, § 4.7 (Deering 1954), CAL. WATER CODE APP. § 51-4.7 (West 1956).
- Shasta County Water Agency Act, Cal. Stat. 1957, ch. 1512, § 56, p. 2849, CAL. GEN. LAWS ANN. Act 7580, § 56 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-56 (West 1959).
- Solano County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1656, § 4.6, p. 3752, CAL. GEN. LAWS ANN. Act 7733, § 4.6 (Deering 1954), CAL. WATER CODE APP. § 64-4.6 (West 1956).
- Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 4.7, p. 4823, CAL. GEN. LAWS ANN. Act 9096, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-4.7 (West 1959).
- Upper Santa Clara Valley Water Agency Law, Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 22, p. ---, CAL. GEN. LAWS ANN. Act 9099b, § 22, CAL. WATER CODE APP. 1959 SUPP. § 104-24 (West Supp. 1962).
- Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 17, p. 5035, CAL. GEN. LAWS ANN. Act 9380, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-17 (West 1959).
- Yuba County Water Agency Act, Cal. Stat. 1959, ch. 788, § 4.7, p. 2784, CAL. GEN. LAWS ANN. Act 9407, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-4.7 (West 1959).

Third, a few provisions go a slight step further, suggesting a legislative intent to include liability for both utility relocations and alterations. In these statutes, after authorizing the crossing of streets, highways, watercourses, and the like, the Legislature has provided that: "The district shall *restore the property crossed* as near as may be to its former state or so as not to have impaired unnecessarily its usefulness." [Emphasis added.] The reference here to "property crossed" is possibly more inclusive than the reference in the second group of provisions, above, to "crossings and intersections," although the difference in meaning, if any, is admittedly subtle. Statutes of this type include:

- WATER CODE § 22431 (irrigation districts).
- WATER CODE § 31060 (county water districts).
- WATER CODE § 35603 (California water districts).

Fourth, a small number of statutes employ language which appears designed to extend the frontiers of liability for intersections on public streets well beyond the boundaries defined (although somewhat vaguely) in the preceding groups. These provisions typically require that the public entity

shall *restore any property altered or damaged* when so crossed or intersected to its former state as nearly as may be, or in a manner so as not to have impaired unnecessarily its usefulness. [Emphasis added.]

The words "any property altered or damaged" would seem to include, without doubt, utility facilities as well as the road itself. The explicitness of the legislative intent here, of course, may cast doubt upon whether such liability was included in the somewhat less explicit language employed in the statutes collected in the preceding three groups. Statutes of the type just quoted include:

- PUB. RES. CODE §§ 11270-11271 (resort districts).
- WATER CODE § 43154 (water storage districts).

WATER CODE § 55377 (county waterworks districts).

California Water Storage and Conservation District Act, Cal. Stat. 1941, ch. 1253, § 30, p. 3151, CAL. GEN. LAWS ANN. Act 9126a, § 30 (Deering 1954), CAL. WATER CODE APP. § 44-30 (West 1956).

Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, § 52, p. 306, CAL. GEN. LAWS ANN. Act 2202, § 52 (Deering 1954), CAL. WATER CODE APP. § 8-52 (West 1956).

Orange County Water District Act, Cal. Stat. 1933, ch. 924, § 39, p. 2430, CAL. GEN. LAWS ANN. Act 5683, § 39 (Deering 1954), CAL. WATER CODE APP. § 40-39 (West 1956).

Fifth, at least one statutory provision is even more explicit than those cited immediately above. This provision, in addition to requiring the district to "restore the crossings and intersections," then goes on to provide that

The district shall *pay the necessary expenses of any intersection and damages* to any public corporation, city or county or abutting property owner for expenses caused by the construction of the works of the district. [Emphasis added.]

The statute in question is:

STRS. & HWYS. CODE §§ 27260-27261 (bridge and highway districts).

This provision, however, is distinguishable in that it limits the duty to pay expenses and damages to "public" corporations and "abutting property owners," thereby presumably excluding privately owned public utility companies whose facilities in the street are required to be moved or altered. Such utility structures, however, in all likelihood will have been installed in the streets over which the district exercises its powers under express statutory or contractual conditions requiring alterations and relocations to be made at the expense of the utility when the road is being altered or improved.⁴⁵

Sixth, there is one recently enacted special water agency act which combines an express mandate to the agency to

restore at its own expense any such crossings and intersections to their former state as nearly as may be, or to an extent which does not unnecessarily impair their usefulness

with an express reservation, for the benefit of any "owner whose right-of-way shall be intersected or crossed" by the agency's facilities, to recover compensation for damage or loss sustained thereby. This reservation is contained in a proviso which states:

provided, that nothing herein contained shall be construed to preclude or limit the right of such owner to recover just compensation for any damage or loss sustained by reason of any intersection or crossing that occurs as aforesaid.

⁴⁵ Statutory conditions for such relocations at utility company expense are found in CAL. STRS. & HWYS. CODE § 680, see *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 851 (1941); CAL. PUB. UTIL. CODE §§ 6294, 6297. In the *Marin Municipal Water District* case, *supra*, the Court held that the district was liable for relocating its lines located in a state highway, in view of the statutory command of CAL. STRS. & HWYS. CODE § 680. *Query*: Where would the liability rest if the utility company (public or private) was under a duty, appended as a condition to acceptance of its franchise, to relocate its lines at its own expense; and where, at the same time, the entity (*e.g.*, a bridge and highway district) whose improvement project made such relocation necessary was under a statutory duty to pay for all such relocation expenses as part of the cost of the project?

The statute quoted from is:

Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 4.7, p. 2656, CAL. GEN. LAWS ANN. Act 9098, § 4.7 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-4.7 (West Supp. 1961).

The use of the term, "just compensation," suggests that the proviso was intended to merely constitute a reaffirmation of the agency's constitutional duty to pay just compensation whenever private property is taken or damaged for public use by the agency; and, as so construed, might well be considered as an implied negation of any other liabilities not expressly declared by statute.⁴⁶ Had the Legislature desired to make certain the duty of the agency to pay for *all* damage sustained by private owners arising out of crossings and intersections, it could have done so very easily by affirmatively imposing such a duty on the agency. The quoted proviso fails to create or impose any duty. It merely preserves whatever duty may already exist (if any) to pay compensation for such damage against impairment or limitation through interpretation of the statute. In short, this proviso does not enlarge the liability of the agency but merely reinforces whatever liabilities already exist, and then only with reference to owners of rights-of-way. The agency's constitutional duty to pay just compensation for relocation and construction costs when crossing private rights-of-way is already established,⁴⁷ and could in any event not be impaired by a mere statute; hence, as to such cases, the proviso adds nothing. The more extensive and financially significant problem of payment of costs of relocation and reconstruction of franchise facilities in public streets, on the other hand, is not affected by the proviso for such franchise rights are not "owned" by the utility company as a "right-of-way."⁴⁸ As to such cases, the proviso is inapplicable according to its own terms. The purpose of its enactment thus is difficult to comprehend, and possibly must be attributed chiefly to an overabundance of caution on the part of the draftsman. Its inherent ambiguity, however, suggests that it may prove to be an invitation to unnecessary litigation.

The impact of *Muskopf* and *Lipman* upon the liabilities governed by the 39 "restoration" statutes here collected, it is believed, will be substantially the same as in the case of provisions expressly referring in terms to the costs of alteration and relocation of utility lines.⁴⁹ In short, it is unlikely that the demise of governmental immunity will effect the result previously obtainable under these statutes. The discrepancies of legislative language and the uncertainties as to who is liable, and as to the extent of liability, however, warrant legislative clarification of these statutes in the interest of uniformity of policy.

(c) **Miscellaneous provisions relating to damages arising from public improvement projects.** Five additional statutory provisions, not subject to being classified under the preceding headings, should be identified. Each

⁴⁶ See the similar interpretation given analogous language inserted by amendment into the Los Angeles County Flood Control Act in 1953. *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958).

⁴⁷ See cases cited note 33 *supra*.

⁴⁸ A franchise right is in actuality a special privilege to employ a public right of way for private purposes in which the public is interested and from which public benefits accrue. See *City of Oakland v. Hogan*, 41 Cal. App.2d 333, 106 P.2d 987 (1940). Cf. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958) (distinguishing between franchise rights and private rights-of-way).

⁴⁹ See pp. 90-91 *supra*.

of these provisions appears to be *sui generis*. Their essential features are briefly summarized in the following list:

GOVT. CODE §§ 33409-33414 provide a procedure for abandonment of municipal parks, and require the city to pay to abutting property owners such damages as will result to abutting property as a result of the abandonment, as determined by a board of appraisers. This procedure, and liability thereunder, apply only to general law cities, and not to freeholder charter cities, since the matter of disposition of park lands is deemed to be a "municipal affair" over which charter cities are independent of general law.⁵⁰

PUB. UTIL. CODE §§ 1202, 1202.5 and 1203 confer jurisdiction upon the Public Utilities Commission to require alteration or separation of railroad grade crossings, and to allocate the costs of such improvements in part to the railroads involved and in part to the State, county, city or other political subdivision affected. Although in most cases it would not be unconstitutional to require the railroad to assume the entire burden of the expense,⁵¹ specific standards for determining the proportions of the cost allocations are prescribed by Section 1202.5.

WATER CODE §§ 1245-1248 provide that municipal corporations which enter any watershed for the purpose of increasing a municipal water supply are liable to persons whose property, business, trade, profession or occupation is within the watershed "for all damage suffered or sustained by them either directly or indirectly because of injury, damage, destruction or decrease in value of any such property, business, trade, profession or occupation resulting from or caused by the taking of any such lands or waters, or by the taking, diverting or transporting of water from such watershed to or for use by or in any such municipal corporation."

WATER CODE §§ 8645-8647 authorize the State Reclamation Board to engage in emergency work for protection and preservation of levees of the Sacramento & San Joaquin Drainage District, and declare that the board "may pay the cost, including any damage that may result from the performance of the work" by means of an assessment to be levied for the purpose.

WATER CODE § 12627.3 declares it to be the policy of the State that "the costs of solution of seepage and erosion problems which arise or will arise by reason of construction and operation of water projects should be borne by the project."

13. Liability assumed by contractual agreement

A number of statutory provisions expressly authorize public agencies to enter into contractual agreements to indemnify or hold harmless the other contracting party from any loss or damages which may be sustained as a consequence of the performance of the contract. Provisions of this type (with a brief indication of the subject matter to which each one relates) include:

FISH & GAME CODE § 1013—authorizes the State to enter into agreements to indemnify and hold harmless any grantor or lessor of property for the purpose of the State constructing or maintaining fish screens, fish ladders, fish weirs and fish traps thereon.

FISH & GAME CODE § 1121—authorizes the State to agree to indemnify and hold harmless any public entity from which it leases real property for use as a fish hatchery.

GOVT. CODE § 6305—authorizes public entity which applies for privilege of operating a foreign trade zone to provide "such indemnity or assurance to the United States or its agencies as they may request."

HARB. & NAV. CODE § 6901.1—authorizes river port districts by resolution to "hold and save harmless" the State, the Reclamation Board and the Sacramento & San Joaquin Drainage District, together with their personnel, from "all claims, damages or liability" resulting from certain improvement projects for which the approval of the Board is required.

⁵⁰ *Wiley v. City of Berkeley*, 136 Cal. App.2d 10, 288 P.2d 123 (1955).

⁵¹ See *Atchison, T. & S.F. Ry., v. Public Util. Comm'n*, 346 U.S. 346, 352 (1953), "this Court has consistently held that in the exercise of the police power, the cost of such improvements may be allocated all to the railroads." (Emphasis by the Court.)

- H. & S. CODE § 2270(e)—authorizes mosquito abatement districts to “make contracts to indemnify or compensate any owner of land or other property for any injury or damage necessarily caused by the use or taking of property for dikes, levees, cuts, canals, or ditches.”
- H. & S. CODE § 2853(e)—authorizes pest abatement districts to “make contracts to indemnify or compensate any owner of land or other property for any injury or damage caused by the exercise of the powers conferred by this chapter or of powers incident thereto.”
- PUB. RES. CODE § 4004—authorizes the State Forester, in establishing a system of firefighting equipment and communications essential thereto, to contract for the use of communications lines and power lines, and in so doing, to make provision “for indemnification and holding harmless of the owners of such facilities so used by reason of such use.”
- STS. & HWYS. CODE § 526.2—authorizes State to hold and save the United States free and harmless from liability for damages to the tubes connecting Oakland and Alameda, in connection with federal dredging for purpose of deepening the Oakland Estuary.
- WATER CODE § 8590(d)—authorizes the State Reclamation Board in the name of the Sacramento & San Joaquin Drainage District to make contracts to indemnify property owners “for any injury or damage” caused by the exercise of its statutory powers.
- WATER CODE §§ 8617, 8618, 12641, 12642, 12712, 12751 and 12828—authorize the State and its subdivisions engaged in construction, maintenance and operation of water projects for which federal funds are available to make agreements to “hold and save the United States free from damage” as a result of such projects.
- WATER CODE §§ 12642, 12712 and 12828—authorize local public entities to agree to save and hold the State free and harmless from damages due to the construction and operation of water projects for which state aid funds are allocated.
- Fresno Metropolitan Flood Control Act, Cal. Stat. 1955, ch. 503, § 9, p. 977, CAL. GEN. LAWS ANN. Act 2791, § 9 (Deering Supp. 1961), CAL. WATER CODE APP. § 73-9 (West 1956)—authorizes the district to enter into cooperation agreements with other public entities, including the United States, and expressly authorizes the district to “agree to indemnify” such entities.
- Fresno Metropolitan Transit District Act, Cal. Stat. 1961, ch. 1932, § 6.5, p. 4062, CAL. GEN. LAWS ANN. Act 2792, § 6.5 (Deering Supp. 1961), CAL. PUB. UTIL. CODE APP. 2, § 6.5 (West Supp. 1961)—general authorization for the district to make contracts and stipulations “to indemnify and save harmless.”
- Los Angeles County Flood Control Act, Cal. Stat. 1935, ch. 285, § 15a, p. 1003, CAL. GEN. LAWS ANN. Act 4463, § 15a (Deering 1954), CAL. WATER CODE APP. § 28-15a (West 1956)—authorizes the district to insert in any contract relating to federal aid for flood control work “such provisions and terms as may be prescribed” by the United States “as a condition upon which such Federal funds are loaned, granted or appropriated.”
- Lower San Joaquin Levee District Act, Cal. Stat. 1955, ch. 1075, § 7, as amended by Cal. Stat. (1st Ex. Sess.) 1958, ch. 32, § 1, p. 225, CAL. GEN. LAWS ANN. Act 4298, § 7 (Deering Supp. 1961), CAL. WATER CODE APP. § 75-7 (West Supp. 1961)—authorizes the district to agree to save the United States and the State harmless from damages in connection with federal or state aid to flood control projects.
- Orange County Flood Control Act, Cal. Stat. 1939, ch. 589, § 15a, p. 2000, CAL. GEN. LAWS ANN. Act 5682, § 15a (Deering 1954), CAL. WATER CODE APP. § 36-15a (West 1956)—authorizes the district to insert in any contract relating to federal aid for flood control work “such provisions or terms as may be prescribed” by the United States “as a condition upon which such Federal funds are loaned, granted or appropriated.”
- Tehama County Flood Control and Water Conservation District Act, Cal. Stat. 1957, ch. 1280, § 3.1, added by Cal. Stat. 1959, ch. 940, as amended by Cal. Stat. 1961, ch. 631, § 1, p. 1802, CAL. GEN. LAWS ANN. Act 8510, § 3.1 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-3.1 (West Supp. 1961)—provides that the power of the district to enter into cooperation agreements with the United States or with the State includes “the power to incur an indebtedness or liability under any such contract.”

In addition to the foregoing provisions,¹ which expressly authorize local entities to assume the tort liability of other entities (particularly the United States) by contractual agreement, there are numerous statutes² which appear to authorize such contractual assumption by clear *implication*. These statutes generally contain express authority for the respective entities to enter into and carry out the terms of contracts of cooperation with other public entities, local and national, for the advancement of the statutory objectives, and thus appear to impliedly authorize the entity to agree to any reasonable conditions (such as assumption of liability) which the other contracting entity imposes as a condition to its participation in the local project.³

¹ Excluded from the listing in the text are a number of express statutory provisions which authorize particular public entities to "give assurances . . . that the local cooperation required by Federal law will be furnished" in connection with specific flood control projects. See, e.g., CAL. WATER CODE §§ 12655 (San Francisco, Modesto Irrigation District, Turlock Irrigation District); 12672 (Ventura County Flood Control District); 12677 (San Bernardino County Flood Control District); 12683 (Los Angeles County Flood Control District); 12686 (Counties of Santa Clara, Santa Cruz, and San Benito, and the Monterey County Flood Control and Water Conservation District); 12695 (City of San Diego); 12705 (City of Santa Cruz). In general, these specific authorizations appear to simply supplement the general authority to provide such assurances given by the Water Code provisions cited in the text, *supra*, or implied in general statutory authorizations for cooperation and joint powers contracts. See CAL. GOVT. CODE §§ 6500-6513; statutes cited in note 2 *infra*.

² See, e.g., CAL. WATER CODE §§ 23195 (irrigation districts), 31150 (county water districts), 35875 (California water districts), 44000 (California water storage districts), 60230 (water replenishment districts); Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, § 97.1, as added by Cal. Stat. 1957, ch. 101, § 1, p. 677, CAL. GEN. LAWS ANN. Act. 2202, § 97.1 (Deering Supp. 1961), CAL. WATER CODE APP. § 8-97.1 (West Supp. 1961); Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 67, § 12(14), as amended by Cal. Stat. 1961, ch. 669, § 1, p. 1887, CAL. GEN. LAWS ANN. Act. 5243, § 12(14) (Deering Supp. 1961), CAL. WATER CODE APP. § 20-12(14) (West Supp. 1961); Metropolitan Water District Act, Cal. Stat. 1927, ch. 429, § 5(9), as amended by Cal. Stat. 1937, ch. 140, § 2, p. 383, CAL. GEN. LAWS ANN. Act. 9129, § 5(9) (Deering 1954), CAL. WATER CODE APP. § 35-5(9) (West 1956); Water Conservation Act of 1927, Cal. Stat. 1927, ch. 91, § 2(e), as amended by Cal. Stat. 1956, ch. 1641, p. 2957, CAL. GEN. LAWS ANN. Act. 9127a, § 2(e) (Deering Supp. 1961), CAL. WATER CODE APP. § 34-2(e) (West 1956); County Water Authority Act, Cal. Stat. 1948, ch. 545, § 5(12), as amended by Cal. Stat. 1945, ch. 670, § 1, p. 1337, CAL. GEN. LAWS ANN. Act. 9100, § 5(12) (Deering 1954), CAL. WATER CODE APP. § 45-5(12) (West 1956); Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, §§ 6-6.2, p. 5069, CAL. GEN. LAWS ANN. Act. 276, §§ 6-6.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 95-6 to 95-6.2 (West 1959); Contra Costa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1617, § 5(9), as amended by Cal. Stat. 1959, ch. 1886, § 1, p. 4447, CAL. GEN. LAWS ANN. Act. 1956, § 5(9) (Deering Supp. 1961), CAL. WATER CODE APP. § 63-5(9) (West Supp. 1961); El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, §§ 30-32, p. 5092, CAL. GEN. LAWS ANN. Act. 2245, §§ 30-32 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 96-30 to 32 (West 1959); Humboldt County Flood Control District Act, Cal. Stat. 1945, ch. 939, § 6(9), as amended by Cal. Stat. 1955, ch. 1102, § 2, p. 2085, CAL. GEN. LAWS ANN. Act. 3515, § 6(9) (Deering Supp. 1961), CAL. WATER CODE APP. § 47-6(9) (West 1956); Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 26(17), p. 2519, CAL. GEN. LAWS ANN. Act. 4025, § 26(17) (Deering 1954), CAL. WATER CODE APP. § 59-26(17) (West 1956); Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 22, p. 5133, CAL. GEN. LAWS ANN. Act. 9095, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-22 (West 1959); Plumas County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2114, § 3(u), p. 4913, CAL. GEN. LAWS ANN. Act. 5964, § 3(u) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-3(u) (West 1959); Shasta County Water Agency Act, Cal. Stat. 1957, ch. 1512, § 75, p. 2862, CAL. GEN. LAWS ANN. Act. 7580, § 75 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-75 (West 1959); Ventura County Flood Control Act, Cal. Stat. (4th Ex. Sess.) 1944, ch. 44, § 7(9), as amended by Cal. Stat. 1953, ch. 1058, § 1, p. 2533, CAL. GEN. LAWS ANN. Act. 8955, § 7(9) (Deering 1954), CAL. WATER CODE APP. § 46-7(9) (West 1956); Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, §§ 27-29, p. 5038, CAL. GEN. LAWS ANN. Act. 9380, §§ 27-29 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 93-27 to 29 (West 1959). General language authorizing such cooperation contracts is found in substantially all of the special water agency and flood control district statutes.

³ Special districts, like other local governmental entities, generally are deemed to possess not only those powers which are expressly set out by statute, but also such additional powers as are reasonably necessary to carry out the purposes of those expressly conferred. See, e.g., *Crawford v. Imperial Irr. Dist.*, 200 Cal. 318, 253 Pac. 726 (1927); *Danley v. Merced Irr. Dist.*, 66 Cal. App. 97, 226 Pac.

The statutes here collected represent in part a considered attempt to comply with requirements of related federal legislation that appropriate assurances be given by responsible local agencies that they will "hold and save the United States free from damages"⁴ as a condition to federal participation in local flood control and water projects. Apart from such federal requirements, they also constitute a reasonable and business-like way to secure the cooperation of both private persons and public bodies, thereby promoting the basic statutory objectives for which the respective entities were created.

The public purpose underlying such contractual assumptions of liability would thus seem to be abundantly clear, and presumably forecloses any doubt as to whether liability thereunder might constitute an invalid gift of public funds.⁵ Likewise, since the liability thus assumed is both contingent and tortious in nature, it would appear not to be within the general inhibitions of either constitutional or statutory debt limitations.⁶

Possible doubt as to the validity and efficacy of such contractual assumption of tort liability, however, stems from an isolated case where the court held that such an agreement entered into between the Los Angeles County Flood Control District and the United States, did not make the district liable in a tort action for wrongful death resulting from alleged negligence of agents of the federal government engaged in flood control district construction work.⁷ This decision, however, appears to be no longer authoritative. It was based primarily on the theory that since the federal government was not then liable for the negligence of its agents, the agreement providing for the district's assumption of liability (and the statute authorizing the district to enter into it) could not have been intended to indemnify the federal government "against a liability that did not exist."⁸ This basis for decision, of course, disappeared with the enactment of the Federal Tort Claims Act under which the federal government is now liable for employee negligence.⁹ A subsidiary basis for the court's decision (that the district was not empowered to assume the role of joint tortfeasor with the federal government) was expressly disapproved in a later decision of the California Supreme Court.¹⁰

847, 854 (1924). As to the broad permissible range of implied powers of agreement, under express authority to enter into cooperation contracts, see *Ivanhoe Irr. Dist. v. All Persons*, 53 Cal.2d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1960).

⁴ See Public Law 738, enacted June 22, 1936, ch. 688, § 3, 49 Stat. 1571, 33 U.S.C. 701c, made applicable to all federal aid flood control projects (except as otherwise specifically provided) by Act of June 28, 1938, ch. 795, § 2, 52 Stat. 1215, 33 U.S.C. 701c note, and Act of Sept. 3, 1954, ch. 1264, § 201, 68 Stat. 1256, 33 U.S.C. 701c note. See also, Flood Control Act of 1948, § 205, 62 Stat. 1182, 33 U.S.C. 701s, expressly incorporated by reference in CAL. WATER CODE § 12751, authorizing local assurances (including assumption of tort liability) to be given as required thereunder.

⁵ See *Dittus v. Cranston*, 53 Cal.2d 284, 9 Cal. Rptr. 314, 347 P.2d 671 (1959), and cases therein cited.

⁶ See *County of Los Angeles v. Byram*, 36 Cal.2d 694, 227 P.2d 4 (1951); *Heyman v. Bath*, 58 Cal. App. 499, 208 Pac. 981 (1922). This conclusion is also supported by a formal opinion of the Attorney General. See 19 Ops. CAL. ATTY. GEN. 21 (1952).

⁷ *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

⁸ *Id.* at 311, 114 P.2d at 16.

⁹ Federal Tort Claims Act of 1946, 60 Stat. 842, 28 U.S.C. §§ 2671-2680, discussed in 2 HARPER & JAMES 1648-1667.

¹⁰ *Clement v. State Reclamation Board*, 35 Cal.2d 628, 645, 220 P.2d 897, 907 (1950), stating that "The Brandenburg case . . . dictum that the state was relieved from liability by the participation of the federal government in the project was unnecessary to the decision therein and is inconsistent with later cases involving the same defendant in which its liability has been recognized."

Accordingly, in view of the abundance of statutory authority for California entities to enter into such save-harmless agreements, there would appear to be little doubt today that such agreements will be given effect by the courts. The *Muskopf* and *Lipman* cases, however, would appear to have no direct relevance to liability pursuant to such agreements, except insofar as the potential extent of liability of another California entity thereby assumed may have been increased as a result of the abolition of governmental immunity.

14. Workmen's compensation

The abrogation by *Muskopf* and *Lipman* of the doctrine of governmental immunity has had no substantial effect upon the liability of public entities for injuries incurred by their officers and employees in the course and scope of employment, where the statutory conditions for workmen's compensation are present. This is true because it appears that substantially all officers and employees of all public entities in California are covered by the Workmen's Compensation Act.

Section 3300 of the Labor Code defines the term "employer," as used in the Workmen's Compensation Act to include "the State and every State agency" as well as "each county, city, district, and all public and quasi public corporations and public agencies therein."¹¹ This comprehensive definition¹² is reinforced by Section 3351, which defines the term "employee" to include not only "every person in the service of an employer . . . whether lawfully or unlawfully employed," but also "all elected and appointed paid public officers" and "all officers and members of boards of directors of quasi-public . . . corporations while rendering actual service for such corporations for pay."

Even the lengthy list of employments excluded from the Act, as set forth in Section 3352 of the Labor Code, do not apply to public entities, in view of the conclusive presumption established by Section 4155 that "the State and each county, city, district, and public agency thereof and all State institutions" have voluntarily elected to come within the compensation law with respect to all employees otherwise excluded from coverage. The only substantial group of public employees not covered by the general compensation scheme are disaster service workers,¹³ and for such persons a special, exclusive, and more limited program of compensation for injuries or death in the performance of duty is expressly provided.¹⁴

¹¹ See, e.g., *Healy v. Industrial Acc. Comm'n*, 41 Cal.2d 118, 258 P.2d 1 (1953) (city officer); *Singleton v. Bonnesen*, 131 Cal. App.2d 327, 280 P.2d 481 (1955) (county deputy sheriff). See 1 CAMPBELL, WORKMEN'S COMPENSATION § 440, p. 397 (1935).

¹² The old case of *Bettencourt v. Industrial Acc. Comm'n*, 175 Cal. 559, 166 Pac. 323 (1917), which held that a reclamation district, being only a quasi-governmental agency of limited powers, was not within the scope of the Workmen's Compensation Act, is clearly not authoritative today in view of the much more comprehensive and inclusive definitions contained in the present law as compared with the law in effect at the time of that decision.

¹³ CAL. LABOR CODE § 3352.94.

¹⁴ CAL. LABOR CODE §§ 4351-4386. Note, however, that a compensated person performing functions for a disaster council is within the general rather than special provisions of the Act. CAL. LABOR CODE § 4354.5. Cf. CAL. MIL. & VET. CODE §§ 340, 520, 562, bringing National Guardsmen and the unorganized militia within the Workmen's Compensation Act as to casualties incurred "in active service and in line of duty."

15. Inverse condemnation

Prior to *Muskopf*, where private property, or some interest therein, had been injured by governmental action, the doctrine of governmental immunity was frequently circumvented by suing for damages in an action known as "inverse condemnation." This remedy is based on Section 14 of Article I of the California Constitution which in part provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner" ¹

Inverse condemnation is, in effect, a form of tort action ² whereby one whose property has been taken or damaged for public use may secure, after the event, the just compensation which ought to have been paid in advance.³ For this purpose, Section 14 of Article I is regarded as self-executing ⁴ and no special enabling legislation is required.

Although a literal interpretation of the constitutional language would seem to require governmental liability for property damage of any kind, early decisions ⁵ tending to support such a result are no longer authoritative. To be sure, the courts have repeatedly acknowledged ⁶ that the phrase "taken or damaged," as introduced in the 1879 Constitution, was intended to enlarge the scope of liability beyond the area embraced by the lone word "taken" as found in the original Constitution of 1849.⁷ Yet at the same time, by a series of interpretative techniques, the courts have limited the applicability of the inverse condemnation principle so that governmental liability thereunder is today substantially narrower than the literal language of the Constitution might suggest. Although the limiting rules are seldom found in isolation and are normally overlapping or intertwined one with another, at least five distinguishable trends of decision can be identified.

Perhaps the most frequently invoked limiting principle may be referred to as the "property interest" requirement, under which a right to compensation exists only if a legally recognized "property interest" has been impaired or otherwise taken or damaged.⁸ Decisions invoking this rationale are seldom informative. Since a right is by definition an

¹ In part, the remedy is also based upon the due process clause of the 14th amendment of the United States Constitution, under which it is recognized that just compensation is required to be paid when private property is "taken" for public use. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897). To this extent, it appears that the state and federal bases for the inverse condemnation action are synonymous; but since the California provision goes further and also guarantees compensation for "damaging," it is desirable for present purposes to disregard the due process background and treat Section 14 of Article I as the primarily relevant constitutional provision.

² See *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 128, 53 P.2d 353, 355 (1935), pointing out that inverse condemnation liability "is in the field of tortious action."

³ See *Podesta v. Linden Irr. Dist.*, 141 Cal. App.2d 88, 296 P.2d 401 (1956); *Smith v. City of Los Angeles*, 66 Cal. App.2d 562, 153 P.2d 69 (1944).

⁴ *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943); *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942).

⁵ See *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240 (1895); *Reardon v. City & County of San Francisco*, 66 Cal. 492, 6 Pac. 317 (1885).

⁶ See *McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.2d 139 (1931); *Gray v. Reclamation District No. 1500*, 174 Cal. 622, 163 Pac. 1024 (1917); *Tyler v. Tehama County*, 109 Cal. 618, 42 Pac. 240 (1895); *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 Pac. 750 (1894); *Steiger v. City of San Diego*, 163 Cal. App.2d 110, 329 P.2d 94 (1958).

⁷ CAL. CONST., Art. I, § 8 (1849).

⁸ *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943); *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943); *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 Pac. 750 (1894); *City of Los Angeles v. Geiger*, 94 Cal. App.2d 180, 210 P.2d 717 (1949). Personal injury, annoyance or discomfort is not compensable. *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941). See also, *Helmann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947).

interest entitled to judicial protection, it is obviously tautological for a court to hold that the plaintiff is entitled to compensation in inverse condemnation *because* he is asserting damage to a legally recognized property interest, or to deny relief *because* the interest in question is not so recognized. This approach, moreover, tends to cast the problem of compensation in inverse condemnation into an artificial mold of *stare decisis*, made up chiefly of precedents declaring the nature and scope of property interests, and thus often begs the real question whether particular damage in the course of a public improvement should be paid for by the public as part of the cost of the improvement, or should be borne by the individual as part of the cost of living in a civilized society.

The published opinions seldom reveal any articulated analysis or appraisal of these underlying issues,⁹ and the process of empirical adjudication has resulted in a somewhat irregular pattern of liability and nonliability. Compensable status has been accorded not only traditional interests such as easements¹⁰ and liens¹¹ but also such interests as freedom of access and egress between real property and the abutting street,¹² an easement of reasonable view of abutting property from a through-traffic highway,¹³ and a right to free ingress and egress to one's property from the nearest cross streets in both directions.¹⁴ Similarly, where the plaintiff's land was subject to an existing easement or servitude, action by a public agency which increased the burden thereon has been held to be compensable injury to a recognized property right.¹⁵

On the other hand, the courts have refused to recognize any compensable interest in direct access to a freeway constructed so as to abut the plaintiff's property, where prior to such construction the plaintiff had no direct access to the former highway;¹⁶ nor in the continuation or maintenance of a two-way flow of traffic past the plaintiff's property;¹⁷ nor in the future construction of a contemplated inexpensive overpass to give access to the plaintiff's property.¹⁸ As noted above, the cost of altering or relocating utility lines to make way for public improvements is not deemed compensable damage to one who maintains such lines in a public street under a mere franchise privilege.¹⁹ It has

⁹ But see *People v. Ricciardi*, 23 Cal.2d 390, 396, 144 P.2d 799, 802 (1943); *Bacich v. Board of Control*, 23 Cal.2d 343, 350-354, 144 P.2d 818, 822-825 (1943), and *id.* at 356-366, 144 P.2d at 826-832 (concurring opinion by Edmonds, J.); *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960).

¹⁰ *Southern Cal. Gas Co. v. Los Angeles County Flood Control Dist.*, 169 Cal. App.2d 840, 338 P.2d 29 (1959).

¹¹ *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 739 (1957).

¹² *Helmann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947); *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942); *McCandless v. City of Los Angeles*, 214 Cal. 67, 4 P.2d 139 (1931); *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 Pac. 750 (1894). See also, *Blumenstein v. City of Long Beach*, 143 Cal. App.2d 264, 299 P.2d 347 (1956).

¹³ *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943).

¹⁴ *Beals v. City of Los Angeles*, 23 Cal.2d 381, 144 P.2d 839 (1943); *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943).

¹⁵ *Podesta v. Linden Irr. Dist.*, 141 Cal. App.2d 38, 296 P.2d 401 (1956); *O'Dea v. County of San Mateo*, 139 Cal. App.2d 659, 294 P.2d 171 (1956).

¹⁶ *Schnider v. State*, 38 Cal.2d 439, 241 P.2d 1 (1952); *People v. Thomas*, 108 Cal. App.2d 832, 239 P.2d 914 (1952).

¹⁷ *People ex rel. Dep't of Pub. Works v. Ayon*, 54 Cal.2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960); *People ex rel. Dep't of Pub. Works v. Russell*, 48 Cal.2d 189, 309 P.2d 10 (1957); *People v. Sayig*, 101 Cal. App.2d 890, 226 P.2d 702 (1951); *Holman v. State*, 97 Cal. App.2d 237, 217 P.2d 443 (1950).

¹⁸ *City of Los Angeles v. Geiger*, 94 Cal. App.2d 180, 210 P.2d 717 (1949).

¹⁹ *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958); *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958).

also been held that an action for personal injuries or wrongful death is not the taking or damaging of a property right and hence not compensable in an action for inverse condemnation.²⁰

The difficulties inherent in the "property interest" requirement are underscored in the case of *Miramar Co. v. City of Santa Barbara*,²¹ where the court was unable to resolve the question whether a littoral owner of land had a property right to the uninterrupted flow of sandy accretions from natural water currents, as against the State's right to improve navigation facilities. Three of the justices flatly declared that no such right existed, while three dissenting judges thought the contrary. The case was resolved only by the seventh justice, who voted in favor of the nonliability solely on the ground that the plaintiff had failed to comply with the applicable claims statute, thereby making it unnecessary to decide the issue upon which the rest of the court was so sharply divided.

A second rule of limitation, which may be invoked to deny compensation even in cases of conceded damage to an undisputed property interest, is the "*damnum absque injuria*" doctrine. The basis of the doctrine is simple. The police power of the State, which is the authority to regulate persons and property in order to promote public health, safety, welfare and morals, necessarily operates in such a way as to cause not only occasional damage to but sometimes even the outright destruction of private property. In order to prevent the intolerable burdens which a contrary rule would place upon the progress of society, in some instances the property owner must, for the sake of the general welfare, yield uncompensated obedience. "Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be, then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is *damnum absque injuria*."²²

It is settled that the constitutional requirement of just compensation for the taking or damaging of private property for public use has not modified or changed in any way the traditional rule of nonliability for *damnum absque injuria*.²³ However, recognizing that the difference between a compensable exercise of the power of eminent domain and a noncompensable exercise of the police power is but a difference of degree,²⁴ the courts in recent years have tended to restrict the *damnum absque injuria* doctrine to cases in which there is a strong showing of necessity for the taking or damaging—*i.e.*, that it was to a large extent an unavoidable consequence of some urgent measure deemed necessary for the public welfare. First announced by way of a casual dictum in

²⁰ *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941). The courts have not as yet attempted to reconcile this decision with *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946), in which a wrongful death action was held to survive the death of the tortfeasor under a statute providing for survival of actions for damages to property.

²¹ 23 Cal.2d 170, 143 P.2d 1 (1943), noted in 32 CALIF. L. REV. 91 (1944).

²² *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 639, 163 Pac. 1024, 1031 (1917).

²³ *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944); *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1 (1941); *Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622, 163 Pac. 1024 (1917).

²⁴ See *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 721-735, 329 P.2d 289, 293-302 (1958) (concurring opinion by Carter, J.); *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944); *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960).

1941,²⁵ which was soon reiterated more forcibly a few months later,²⁶ the strict public necessity rationale of the *damnum absque injuria* doctrine was soon fully accepted.²⁷ As recently and accurately epitomized by the District Court of Appeal, the cases

indicate that, in the absence of any compelling emergency or the pressure of public necessity, the courts will be slow to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance.²⁸

The ultimate determination as to compensability *vel non*, however, requires a careful judicial evaluation of the necessity for the governmental action relative to the risks to which private property is thereby exposed.²⁹

Although the public necessity rationale would seem to limit substantially the potential number of noncompensable property injuries, a third approach has the opposite effect. This approach seeks to define the *damnum absque injuria* doctrine in terms of the cause of action involved rather than the nature of the governmental power exercised. As declared in the recent case of *Bauer v. County of Ventura*,³⁰ Section 14 of Article I does not create any new causes of action, but only gives the plaintiff

a remedy he would not otherwise have against the state for the unlawful dispossession, destruction, or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria*. If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14.³¹

Other cases are to the same effect.³² Under this view, a cause of action in inverse condemnation can be pleaded only by showing not only a taking or damaging for public use, but also that the particular facts would be actionable under general law.

A fourth limitation upon the scope of inverse condemnation flows from the constitutional words "for public use." The courts have construed these words to limit compensable takings or damagings of private property to situations in which some general reciprocal advantage flowed to the governmental agency in the form of use, occupation, or servitude upon the affected property. Thus, for example, ordinary negligence or carelessness by a governmental employee in the routine operations of the governmental agency does not result in compensable

²⁵ *Archer v. City of Los Angeles*, 19 Cal.2d 19, 24, 119 P.2d 1 (1941).

²⁶ *Rose v. State*, 19 Cal.2d 713, 730-31, 123 P.2d 505 (1942).

²⁷ *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944); *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818 (1943); *Podesta v. Linden Irr. Dist.*, 141 Cal. App.2d 38, 296 P.2d 401 (1956); *Smith v. City of Los Angeles*, 66 Cal. App.2d 562, 153 P.2d 69 (1944).

²⁸ *Ward Concrete Prods. Co. v. Los Angeles County Flood Control Dist.*, 149 Cal. App.2d 840, 847-48, 309 P.2d 546, 551 (1957).

²⁹ See *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960).

³⁰ 45 Cal.2d 276, 289 P.2d 1 (1955).

³¹ *Id.* at 282-83, 289 P.2d at 5. (Emphasis in original.)

³² *Clement v. State Reclamation Bd.*, 35 Cal.2d 628, 220 P.2d 897 (1950); *Archer v. City of Los Angeles*, 19 Cal.2d 19, 119 P.2d 1 (1941); *Youngblood v. City of Los Angeles*, 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); *Kambish v. Santa Clara Valley Water Conservation Dist.*, 135 Cal. App.2d 107, 8 Cal. Rptr. 215 (1960). See also *San Gabriel Valley Country Club v. County of Los Angeles*, 182 Cal. 392, 188 Pac. 554 (1920).

damage.³³ But when a plan or program of public improvement is conceived deliberately, for the purpose of fulfilling the basic public purpose of the project as a whole, and the plan either negligently or intentionally incorporates features which expose private property to a risk of harm, the resulting damage is regarded as "for public use" and hence is compensable under Section 14 of Article I.³⁴

The distinction is explained at length in the recent case of *Bauer v. County of Ventura*,³⁵ in which private property was damaged by water overflowing from a drainage ditch as the result of the county's action in raising the bank of the ditch. Although the complaint alleged that the damage resulted from negligent maintenance of the drainage ditch in question, the court pointed out that the consequences of faulty maintenance may assume public importance equivalent to the consequences of the original construction in some instances, and that a taking or damaging of private property for the purpose of maintenance of an existing public improvement may be for public use to the same extent as in the case of faulty original construction. The court then distinguished noncompensable damage resulting from ordinary negligence in routine operations, by pointing out that in the present case,

the raising of a ditch bank appears on its face to be a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole. Here the raising of the bank is not an accident or an act in itself resulting from carelessness. It is deliberate. The damage to property in this instance resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property. Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case.³⁶

By the same token, inconvenience, annoyance or loss of property values as the consequence of an ordinary police regulation, not conceived as part of a general public improvement project, are regarded as noncompensable.³⁷

³³ See, e.g., *Hayashi v. Alameda County Flood Control & Water Conservation Dist.*, 167 Cal. App.2d 854, 334 P.2d 1048 (1959) (negligent failure to repair break in levee); *Neff v. Imperial Irr. Dist.*, 142 Cal. App.2d 755, 299 P.2d 359 (1956) (negligent application of chemical spray); *McNeil v. City of Montague*, 124 Cal. App.2d 326, 268 P.2d 497 (1954) (fire negligently allowed to get out of control); *Miller v. City of Palo Alto*, 208 Cal. 74, 280 Pac. 108 (1929) (*semble*); *Western Assur. Co. v. Sacramento & San Joaquin Drainage Dist.*, 72 Cal. App. 68, 237 Pac. 59 (1925) (*semble*).

³⁴ See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Clement v. State Reclamation Bd.*, 35 Cal.2d 628, 220 P.2d 897 (1950); *House v. Los Angeles County Flood Control Dist.*, 25 Cal.2d 384, 153 P.2d 950 (1944); *Ward Concrete Prods. Co. v. Los Angeles County Flood Control Dist.*, 149 Cal. App.2d 840, 309 P.2d 546 (1957); *Callens v. County of Orange*, 129 Cal. App.2d 255, 276 P.2d 886 (1954). See also, *Ghiozzi v. City of South San Francisco*, 72 Cal. App.2d 472, 164 P.2d 902 (1946); *Annot.*, 2 A.L.R.2d 677 (1948).

³⁵ 45 Cal.2d 276, 289 P.2d 1 (1955).

³⁶ *Id.* at 286, 289 P.2d at 7.

³⁷ See *People v. Sayig*, 101 Cal. App.2d 890, 226 P.2d 702 (1951) (changing street from two-way to one-way traffic); *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943) (diversion of traffic to alternate highway); *Ex parte Young*, 154 Cal. 317, 97 Pac. 822 (1908) (ordinance forbidding sale of intoxicants); *People v. Gianni*, 130 Cal. App. 534, 20 P.2d 87 (1933) (rerouting of traffic); *Eachus v. Los Angeles Consol. Elec. Ry.*, 103 Cal. 614, 37 Pac. 750 (1894) (construction of a rest house) (*dictum*). *But cf.* *Varney & Green v. Williams*, 155 Cal. 318, 100 Pac. 867 (1909) (destruction of billboards under anti-billboard ordinance regarded as compensable) (*dictum*).

A fifth and final rule which limits the operation of the remedy of inverse condemnation is actually a corollary of the "property interest" approach. It restricts the available recovery to those damages which are directly attributable to the particular property interest which the court finds has been taken or injured.³⁸ For example, although a substantial impairment of the property owner's interest in maintaining free access to the abutting highway is compensable, the proper measure of damages is not necessarily the full diminution in property value. "The decline in market value must be tempered by an exclusion of loss of value due to non-compensable injury," and "damages resulting from mere diversion of traffic or inconvenience resulting from circuitry of travel in reaching the subject property are non-compensable."³⁹ In other words, as the Supreme Court pointed out in *Rose v. State*,⁴⁰ although diminution of market value is the normal measure of damages, "evidence relied upon to establish such diminution must be based upon the depreciation flowing from the actionable injury which is the basis for the right to recover," and should exclude depreciation attributable to legally noncompensable factors. A corollary to this restricted view of damages requires special benefits to be considered in determining the net compensable detriment suffered.⁴¹

It is obvious that the apparently simple and commonsense meaning of Section 14 of Article I of the Constitution, insofar as reflected in the remedy of inverse condemnation, has been supplanted by a series of technical and complex rules. However, in the context of the accelerated public improvement programs carried on in California during the last two decades, notably in the fields of flood control and highway improvements, the courts have shown some tendency to enlarge the availability of relief in inverse condemnation. This tendency has been reflected in a willingness on the part of the majority of the Supreme Court to expand the scope of interests which may be classified as "property," and to acknowledge the applicability of inverse condemnation as an appropriate remedy where negligent governmental action may be characterized as falling within the "deliberate act" rationale.

The fact remains that the scope and availability of relief in inverse condemnation is predominantly a matter of judicial creation.⁴² Only in rare instances have the written opinions of the courts attempted to explicate the policy considerations underlying a decision to enlarge or restrict the scope of the remedy.⁴³ Express judicial recognition is seldom found of the fact that the concept of eminent domain serves the function of spreading the cost of public improvements over the public in general rather than imposing it upon the relatively isolated

³⁸ See *People ex rel. Dep't of Pub. Works v. Symons*, 54 Cal.2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947); *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943); *Rose v. State*, 19 Cal.2d 713, 123 P.2d 505 (1942); *Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, 153 Pac. 705 (1915); *Blumenstein v. City of Long Beach*, 143 Cal. App.2d 264, 299 P.2d 347 (1956).

³⁹ *Blumenstein v. City of Long Beach*, 143 Cal. App.2d 264, 270, 299 P.2d 347, 352 (1956).

⁴⁰ 19 Cal.2d 713, 739, 123 P.2d 505, 520 (1942).

⁴¹ *People v. Thomas*, 108 Cal. App.2d 832, 239 P.2d 914 (1952); *People v. Al G. Smith Co.*, 86 Cal. App.2d 308, 194 P.2d 750 (1948).

⁴² But compare the statutory provisions requiring public entities to assume the cost of utility relocations (pp. 79-91, *supra*), highway intersections (pp. 91-96, *supra*), and destruction of diseased livestock and plants (pp. 75-78, *supra*) in situations where, absent such statutory provisions, the loss sustained would often be *damnum absque injuria*.

⁴³ See, e.g., *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799 (1943).

individuals who otherwise would be forced to bear a disproportionate share of that cost. On the other hand, only an occasional reference is made to the fact that an over-liberal extension of the inverse condemnation remedy might well deter the scope and progress of public improvements by unduly enhancing the cost thereof. One may suspect that the courts do weigh these conflicting policies either consciously or intuitively in reaching specific decisions, but for the most part the process of balancing, and the manner of appraising, the competing factors is conjectural since unexpressed in the published opinions.

In view of the foregoing discussion, it seems quite unlikely that the abolition of the doctrine of governmental immunity will have any substantial effect of enlarging public liability in inverse condemnation. The eminent domain concept apparently operates as a fairly effective, although somewhat fortuitous, device for spreading the property losses occasioned by public improvements. In cases where the nature of the loss is such that it is shared widely by many members of the public and is not special to the complaining property owner, as well as in those cases where imposition of liability would expose the public treasury to an intolerable risk of highly speculative damages, the existing doctrines of *damnum absque injuria*, judicial insistence that plaintiff possess a legally recognized property interest, and the requirement that the injury must also be actionable under general law as between private parties, appear to constitute appropriate and flexible techniques for restricting the scope of liability to substantially its present confines. To the extent that these doctrines have created somewhat artificial barriers to relief in the past, the availability of the traditional tort remedy under *Muskopf* would seem to provide a sufficient cure.

STATUTORY IMMUNIZATION FROM TORT LIABILITY

In addition to the large body of statutory law which imposes or authorizes governmental *liability* in a variety of situations, there are also many statutes which, in effect, appear to confer a measure of *immunity* from tort liability.

These immunity provisions can be appraised most effectively against the background of general governmental liability postulated by the *Muskopf* and *Lipman* decisions. Accordingly, for the purpose of this analysis, it will be assumed that the rule of those cases prevails, and that torts of public personnel ordinarily will impose liability on public employers. This assumption, however, creates two difficulties in assessing the legal effect of the statutes to be discussed, many of which relate, in terms, to tort immunities of public officers and employees.

First, it creates problems with regard to statutory interpretation. It must be kept in mind that all of the statutory provisions to be analyzed were enacted at a time when governmental immunity was accepted as the prevailing rule. The extent to which it is appropriate to construe statutory language drafted against this background as indicating a legislative intent to confer (or confirm) an immunity from tort liability upon public entities which already, except to the extent modified by statute, enjoyed such an immunity under common law principles, is a perplexing one.

Second, the end of the doctrine of governmental immunity does not directly affect the statutory immunity (or limitations upon liability) of public officers and employees. Under the *Lipman* case, public entities may be liable in tort on the basis of *respondereat superior* even where the culpable officer or employee is himself personally immune. In such cases, the employing entity's liability is not automatic, but exists only when the court, after a careful judicial appraisal of relevant policy determinants, concludes that such entity liability is not inconsistent with a fair and just accommodation between the private and public interests at stake.¹ Since this appraisal is one which apparently must be based upon the special facts of each individual case, and little guidance is presently available from case law, it seems impossible to make any accurate prediction whether entity liability may exist in the various situations where personnel immunity has been authorized by statute.

In the discussion which follows, it will be assumed, for the reasons just indicated, that if a public officer or employee has been granted a legislative immunity from tort liability, in whole or in part, his governmental employer may also enjoy an equivalent immunity *under*

¹ See *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 230, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961), "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."

some hypothetical circumstances at least. To avoid continuous repetition, this potential entity immunity (which concededly may be very narrow or very broad, depending upon varying circumstances) will be referred to herein as a "derivative immunity." This term should be taken to include the qualifications above-mentioned.

Entry on Private Property to Perform Official Duty

For a great variety of reasons, it frequently is necessary and desirable for public officers and employees to enter upon private property in the performance of their duties. Early California cases adopted the view that in the absence of statutory authorization or voluntary consent by the property owner, such an entry constituted a trespass for which the officer or employee was personally liable.² Where the entry is authorized by statute, either expressly or as an implied incident to the performance of statutory duties, however, it is settled today that the entry, otherwise a trespass, is privileged and nonactionable.³ This recognized immunity, in turn, is subject to two important exceptions. First, if the public officer making the entry abuses the privilege, by exceeding the scope of his authority or committing some tortious injury, negligent or intentional, he is liable *ab initio* for the entry and all injuries incurred as a result.⁴ Second, the privilege of entry on private property for official purposes only extends to "such innocuous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property," for beyond this limit the trespass would constitute a taking or damaging of the property, giving rise to liability in inverse condemnation.⁵

A number of California statutory provisions appear to have granted immunity from liability for trespass by expressly authorizing entries upon private property for designated public purposes; but accompanying such statutory authorization is an express declaration that the immunity does not preclude liability for abuse of the privilege. Typical

² *Brownell v. Fisher*, 57 Cal. 150, 151 (1880), entry by agents of Swamp Land District held to be a trespass in the absence of statutory authority or consent of owner of land, for under such circumstances "neither the corporation [i.e., District] nor its trustees, nor any of its employees, had a legal right to commit a trespass." To the same effect, see *Pico v. Colimas*, 32 Cal. 578 (1867).

³ *Onick v. Long*, 154 Cal. App.2d 381, 316 P.2d 427 (1957) (entry by liquor control officers to investigate for possible violations of alcoholic beverage control act); *People v. Wright*, 153 Cal. App.2d 35, 313 P.2d 868 (1957) (police officer investigating suspicious conduct on private property). To the same effect, see *Giacona v. United States*, 257 F.2d 450 (5th Cir. 1953); *Johnson v. Steele County*, 240 Minn. 154, 60 N.W.2d 32 (1953); *Commonwealth v. Carr*, 312 Ky. 393, 227 S.W.2d 904 (1950); *Heinze v. Murphy*, 180 Md. 423, 24 A.2d 917 (1942); RESTATEMENT, TORTS § 211 (1934); 1 HARPER & JAMES 56-57.

⁴ RESTATEMENT, TORTS § 214 (1934), apparently accepted as the California rule in *Riechhold v. Sommarstrom Inv. Co.*, 83 Cal. App. 173, 256 Pac. 592 (1927), and *Onick v. Long*, 154 Cal. App.2d 381, 316 P.2d 427 (1957). See also 1 HARPER & JAMES 58-59; *Heinze v. Murphy*, 180 Md. 423, 24 A.2d 917 (1942).

⁵ *Jacobsen v. Superior Court*, 192 Cal. 319, 329, 219 Pac. 986, 991 (1923), cited with approval on this point in *People ex rel. Dep't of Pub. Works v. Ayon*, 54 Cal.2d 217, 5 Cal. Rptr. 151, 352 P.2d 519 (1960), and *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947). Subject to this limitation, however, statutory provisions granting immunity for such entries upon private property are constitutional. See *Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County*, 62 Cal. App.2d 378, 144 P.2d 857 (1944); *Contra Costa County v. Cowell Portland Cement Co.*, 126 Cal. App. 267, 14 P.2d 606 (1932). In the case of surveys and tests to determine the suitability of lands for reservoir purposes, the restrictive influence of the *Jacobsen* case, *supra*, has been eliminated by a special statutory procedure established in CAL. CODE CIV. PROC. § 1242.5, enacted in 1959.

statutory language along these lines provides that for the purpose of executing its statutory powers and duties, the public agency

shall have the right of access through its authorized representatives to all properties within said [entity] . . . may enter upon such lands and make examinations, surveys and maps thereof and such entry shall constitute no cause of action in favor of the owners of such land, except for injuries resulting from negligence, wantonness or malice.

Statutory language substantially like that quoted is found in Code of Civil Procedure Section 1242 and in the following special district acts:

- Alameda County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 1275, § 5(8), as amended by Cal. Stat. 1961, ch. 1565, § 1, p. 3384, CAL. GEN. LAWS ANN. Act 205, § 5(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 55-5(8) (West Supp. 1961).
- Contra Costa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1617, § 5(8), as amended by Cal. Stat. 1959, ch. 1886, § 1, p. 4447, CAL. GEN. LAWS ANN. Act 1656, § 5(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 63-5(8) (West Supp. 1961).
- Contra Costa County Storm Drainage District Act, Cal. Stat. 1953, ch. 1532, § 5(6), p. 3192, CAL. GEN. LAWS ANN. Act 1657, § 5(6) (Deering 1954), CAL. WATER CODE APP. § 69-5(6) (West 1956).
- Del Norte County Flood Control District Act, Cal. Stat. 1955, ch. 166, § 6(8), as amended by Cal. Stat. 1959, ch. 388, § 1, p. 2313, CAL. GEN. LAWS ANN. Act 2040, § 6(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 72-6(8) (West Supp. 1961).
- Humboldt County Flood Control District Act, Cal. Stat. 1945, ch. 939, § 6(8), as amended by Cal. Stat. 1955, ch. 1102, § 2, p. 2085, CAL. GEN. LAWS ANN. Act 3515, § 6(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 47-6(8) (West 1956).
- Lake County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1544, § 5(7), as amended by Cal. Stat. 1959, ch. 1532, § 3, p. 3836, CAL. GEN. LAWS ANN. Act 4145, § 5(7) (Deering Supp. 1961), CAL. WATER CODE APP. § 62-5(7) (West Supp. 1961).
- Marin County Flood Control and Water Conservation District Act, Cal. Stat. 1953, ch. 666, § 5(8), p. 1916, CAL. GEN. LAWS ANN. Act 4599, § 5(8) (Deering 1954), CAL. WATER CODE APP. § 68-5(8) (West 1956).
- Monterey County Flood Control and Water Conservation District Act, Cal. Stat. 1947, ch. 699, § 5(8), p. 1740, CAL. GEN. LAWS ANN. Act 5064, § 5(8) (Deering 1954), CAL. WATER CODE APP. § 52-5(8) (West 1956).
- Napa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1449, § 5(8), p. 3412, CAL. GEN. LAWS ANN. Act 5275, § 5(8) (Deering 1954), CAL. WATER CODE APP. § 61-5(8) (West 1956).
- San Benito County Water Conservation and Flood Control District Act, Cal. Stat. 1953, ch. 1598, § 6(8), p. 3283, CAL. GEN. LAWS ANN. Act 6808, § 6(8) (Deering 1954), CAL. WATER CODE APP. § 70-6(8) (West 1956).
- San Joaquin County Flood Control and Water Conservation District Act, Cal. Stat. (1st Ex. Sess.) 1956, ch. 46, § 5(8), as amended by Cal. Stat. 1961, ch. 933, § 4, p. 2559, CAL. GEN. LAWS ANN. Act 7150, § 5(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 79-5(8) (West Supp. 1961).
- San Luis Obispo County Flood Control and Water Conservation District Act, Cal. Stat. 1945, ch. 1294, § 5(8), p. 2427, CAL. GEN. LAWS ANN. Act. 7205, § 5(8) (Deering 1954), CAL. WATER CODE APP. § 49-5(8) (West 1956).
- Santa Barbara County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1057, § 5(7), p. 2007, CAL. GEN. LAWS ANN. Act 7304, § 5(7) (Deering Supp. 1961), CAL. WATER CODE APP. § 74-5(7) (West 1956).
- Santa Clara County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1405, § 5(8), as amended by Cal. Stat. (1st Ex. Sess.) 1956, ch. 32, § 1, p. 352, CAL. GEN. LAWS ANN. Act 7335, § 5(8) (Deering Supp. 1961), CAL. WATER CODE APP. § 60-5(8) (West 1956).

Two important problems as to the effect of the statutes just cited should be noted.

One problem relates to the scope of the exception contained in the last few words of these provisions, which exclude from the immunity any "injuries resulting from negligence, wantonness or malice." This statutory exception appears on its face to be narrower than the common law exception, under which an officer engaged in making an authorized official entry upon private lands was liable *ab initio* for all injuries sustained by the landowner whenever he abused or exceeded his authority.⁶ Thus, at common law the officer's liability included damage sustained by reason of the original entry as well as from intentional torts committed on the premises and was not restricted to injuries attributable to negligence, wantonness or malice. This apparent departure from the common law rule, however, may be due to legislative inadvertence and inartistic choice of wording; hence a liberal judicial interpretation could conceivably construe the exception as an attempt to merely codify the common law.

The second problem involves the scope which should be accorded the words, "shall constitute no cause of action," as contained in the above-cited statutes. Two alternative constructions appear to be plausible. Taken literally, these words would seem to preclude any right of recovery against anyone, whether the officer or employee who made the entry, or his superior officer or the employing public agency itself.⁷ On the other hand, since at the time of enactment of these statutes, the employing public entity undoubtedly was generally immune from liability for the torts of its employees,⁸ it would not be unreasonable to limit the statutory immunity to officers and employees against whom the injured plaintiff otherwise would have had a cause of action. Under the former interpretation, the employing entity would continue to enjoy the statutory immunity today; while under the latter view, it would only enjoy a derivative immunity dependent, under the *Lipman* decision, upon the particular circumstances of the case.⁹

Although no case has been found which has resolved these interpretation problems, possible support for the view that the cited statutes were intended to immunize the employing entity as well as the trespassing employee may be found in the fact that the Legislature has elsewhere made its intentions crystal clear when granting immunity solely to the officer or employee.¹⁰ A code provision, for example, declares that in performing his statutory duties of maintaining forest and vegetative coverage to protect watersheds and prevent erosion,

⁶ See authorities cited in note 4 *supra*.

⁷ The statutory language, of course, could not effectively immunize the public entity from liability in inverse condemnation, since that liability is of constitutional origin. See *Jacobsen v. Superior Court*, *supra* note 5.

⁸ The governmental immunity doctrine embraced not only negligence in the course of governmental functions, see, e.g., *Hanson v. City of Los Angeles*, 63 Cal. App.2d 426, 147 P.2d 109 (1944) (holding city not liable, absent statute, for property damage resulting from negligence of weed abatement crews burning weeds on private vacant lot), but also intentional torts. See *Oppenheimer v. City of Los Angeles*, 104 Cal. App.2d 545, 232 P.2d 26 (1951) (assault and battery and false arrest); *Norton v. Hoffmann*, 34 Cal. App.2d 189, 93 P.2d 250 (1939) (malicious prosecution).

⁹ See text accompanying note 1 *supra*.

¹⁰ A deviation from a consistent statutory pattern of language, of course, has often been deemed to indicate a difference in legislative intent. See, e.g., *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958); *Pacific Gas & Elec. Co. v. Shasta Dam Pub. Util. Dist.*, 135 Cal. App.2d 463, 287 P.2d 841 (1955); *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955).

"The Director of Natural Resources or his delegated representatives shall not be liable to civil action for trespass committed in performing such work." This language, which explicitly extends immunity solely to the personnel involved and not to the employing entity, is found in Public Resources Code Section 4006.6.

A permissible although admittedly somewhat tenuous inference that the exception contained in the cited statutes (for injuries sustained by reason of negligence, wantonness or malice) was intended to modify the common law may be rested on similar grounds. Numerous other statutes which authorize public personnel to enter private property for a variety of purposes make no mention of the tort liability consequences of the entry, neither granting immunity nor imposing liability. Such legislative silence would seem to imply an intent that the common law rules previously discussed should be applicable *in toto*.¹¹ Where the Legislature has spoken, on the other hand, it would not be unreasonable to treat its expressed policy as supplanting the common law rules. The principal provisions following this pattern (together with an indication of the purpose for which the entry is authorized) include the following acts:

AGRIC. CODE § 129	inspection for plant pests
AGRIC. CODE § 139.5	inspection and destruction of disease carrying rodents
AGRIC. CODE § 200	inspection for animal and poultry diseases
AGRIC. CODE § 276.2	inspection for diseased apiaries
AGRIC. CODE § 324	inspection of foreign cold storage meat
AGRIC. CODE § 442	inspection of milk processing plants
AGRIC. CODE § 762.6	inspection of tomatoes
AGRIC. CODE § 783	inspection of fruits and vegetables and their containers
AGRIC. CODE § 841.1	inspection of honey
AGRIC. CODE § 872 (a)	inspection of canning plants
AGRIC. CODE § 897	inspection of stored field crops
AGRIC. CODE § 994	inspection of Capri figs
AGRIC. CODE § 1012 (a)	inspection of fruits and vegetables for spray residues
AGRIC. CODE § 1098.2	inspection of livestock remedy processing or distributing plants
AGRIC. CODE § 1106 (b)	inspection of egg processing plants
AGRIC. CODE § 1117.1	inspection of poultry processing plants
AGRIC. CODE § 1149	inspection of nurseries and nursery stock
AGRIC. CODE § 1267	investigation of complaints against produce dealers
AGRIC. CODE § 1300.19 (n)	investigation to determine compliance with agricultural marketing orders
AGRIC. CODE § 2091	investigation to determine compliance with agricultural proration programs

¹¹ Such inferences are supported also by the fact that, in at least one statute, the Legislature has expressly stated its intent that the statutory right of access shall not relieve the entity of liability for damages sustained by any property owner by reason of the exercise of the right. Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 4.6, p. 2656, CAL. GEN. LAWS ANN. Act 9098, § 4.6 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-4.6 (West Supp. 1961).

AGRIC. CODE § 4243	inspection of milk distributing plants
BUS. & PROF. CODE § 4012	inspection of pharmacies and dispensaries
BUS. & PROF. CODE § 6509	inspection of barber colleges and barbershops
BUS. & PROF. CODE § 7607	inspection of funeral establishments
BUS. & PROF. CODE § 9533.5	inspection of cleaning and dyeing plants
BUS. & PROF. CODE § 19200	inspection of furniture and bedding
BUS. & PROF. CODE § 19433	investigation of licensees under Horse Racing Act
BUS. & PROF. CODE § 21716	inspection of antifreeze
BUS. & PROF. CODE § 21880	inspection of brake fluid
BUS. & PROF. CODE § 21930	inspection of automatic transmission fluid
FISH & GAME CODE § 6021	examination of conduits and installation of fish screens
FISH & GAME CODE § 7702	investigation of commercial fishing practices
H. & S. CODE § 1662	inspection of premises using animals for experimental purposes
H. & S. CODE § 2270(f)	technical surveys for mosquito abatement district purposes
H. & S. CODE § 2853(g)	technical surveys for pest abatement district purposes
H. & S. CODE § 4008	inspection of ice houses
H. & S. CODE § 6523.2	inspection by sanitary district of sanitary and waste disposal facilities
H. & S. CODE § 13109	inspection for fire hazards
H. & S. CODE § 25820	inspection pursuant to Radiation Control Law
H. & S. CODE § 26327	inspection for existence of drugs and devices suspected of being adulterated, misbranded or falsely advertised
H. & S. CODE § 26548	inspection for foodstuffs suspected of being adulterated or misbranded
H. & S. CODE § 28012	inspection of horse meat processing plants
H. & S. CODE § 28703	inspection of frozen food locker plants
LABOR CODE § 1174(b)	investigation for violations of wage and hour laws
LABOR CODE § 1302	investigation for violations of child labor or compulsory education laws
LABOR CODE § 2422	inspection of labor camps
LABOR CODE § 6314	investigation for violation of industrial safety requirements
PUB. RES. CODE § 2208	inspection of mines and collection of mineralogical information
PUB. RES. CODE § 11206	technical surveys by resort districts

PUB. UTIL. CODE § 771	tests for compliance with utility service measuring standards and other utility regulations
WATER CODE § 5901	technical surveys and enforcement inspections by Klamath River Basin Commission (Art. IX, par. A(11) of Klamath River Basin Compact)
WATER CODE § 22229	technical surveys by irrigation districts
WATER CODE § 35404	to carry out purposes of California water districts
WATER CODE § 43152(d)	technical surveys by water storage districts
WATER CODE § 60230(12)	technical surveys by water replenishment districts
Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 4.6, p. 5065, CAL. GEN. LAWS ANN. Act 276, § 4.6 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-4.6 (West 1959)	technical surveys and investigations
California Water Storage and Conservation District Act, Cal. Stat. 1941, ch. 1253, § 24, p. 3149, CAL. GEN. LAWS ANN. Act 9126a, § 24 (Deering 1954), CAL. WATER CODE APP. § 44-24 (West 1956)	to carry out any purposes of the district
Citrous Pest District Control Act, Cal. Stat. 1939, ch. 89, § 45(g), as amended by Cal. Stat. 1961, ch. 10, § 6, p. 536, CAL. GEN. LAWS ANN. Act 130, § 45(g) (Deering Supp. 1961)	inspection and treatment of citrus trees
Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, § 14, p. 295, CAL. GEN. LAWS ANN. Act 2202, § 14 (Deering 1954), CAL. WATER CODE APP. § 8-14 (West 1956)	technical surveys
Lassen-Modoc County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2127, § 3(t), p. 5013, CAL. GEN. LAWS ANN. Act 4200, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-3(t) (West 1959)	technical surveys
Morrison Creek Flood Control District Act, Cal. Stat. 1953, ch. 1771, § 3(q), p. 3531, CAL. GEN. LAWS ANN. Act 6749, § 3(q) (Deering 1954), CAL. WATER CODE APP. § 71-3(q) (West 1956)	technical surveys

- Plumas County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2114, § 3(t), p. 4917, CAL. GEN. LAWS ANN. Act 5964, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-3(t) (West 1959) technical surveys
- Riverside County Flood Control and Water Conservation District Act, Cal. Stat. 1945, ch. 1122, § 9(12), as amended by Cal. Stat. 1955, ch. 1259, § 1, p. 2291, CAL. GEN. LAWS ANN. Act 6642, § 9(12) (Deering Supp. 1961), CAL. WATER CODE APP. § 48-9(12) (West 1956) technical and other investigations
- Sacramento County Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1952, ch. 10, § 4.6, p. 319, CAL. GEN. LAWS ANN. Act 6730a, § 4.6 (Deering 1954), CAL. WATER CODE APP. § 66-4.6 (West 1956) surveys and technical and other investigations
- San Bernardino County Flood Control District Act, Cal. Stat. 1939, ch. 73, § 2(10), p. 1025, CAL. GEN. LAWS ANN. Act 6850, § 2(10) (Deering 1954), CAL. WATER CODE APP. § 43-2(10) (West 1956) technical and other investigations
- San Mateo County Flood Control District Act, Cal. Stat. 1959, ch. 2108, § 3(11), p. 4889, CAL. GEN. LAWS ANN. Act 7261, § 3(11) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 87-3(11) (West 1959) technical and other investigations
- Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 37, p. 2704, CAL. GEN. LAWS ANN. Act 7390, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-37 (West 1956) technical surveys
- Shasta County Water Agency Act, Cal. Stat. 1957, ch. 1512, § 49, p. 2848, CAL. GEN. LAWS ANN. Act 7580, § 49 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-49 (West 1959) technical and other investigations

- Sierra County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2123, § 3(t), p. 4983, CAL. GEN. LAWS ANN. Act 7661, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-3(t) (West 1959) technical surveys
- Siskiyou County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2121, § 3(t), p. 4951, CAL. GEN. LAWS ANN. Act 7688, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-3(t) (West 1959) technical surveys
- Solano County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1656, § 4.5, p. 3752, CAL. GEN. LAWS ANN. Act 7733, § 4.5 (Deering 1954), CAL. WATER CODE APP. § 64-4.5 (West 1956) surveys and investigations
- Tehama County Flood Control and Water Conservation District Act, Cal. Stat. 1957, ch. 1280, § 3(t), as amended by Cal. Stat. 1961, ch. 631, § 1, p. 1802, CAL. GEN. LAWS ANN. Act 8510, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-3(t) (West Supp. 1961) technical surveys
- Ventura County Flood Control Act, Cal. Stat. (4th Ex. Sess.) 1944, ch. 44, § 7(10), as amended by Cal. Stat. 1953, ch. 1058, § 1, p. 2533, CAL. GEN. LAWS ANN. Act 8955, § 7(10) (Deering 1954), CAL. WATER CODE APP. § 46-7(10) (West 1956) technical and other investigations
- Yolo County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1657, § 3(t), as amended by Cal. Stat. 1961, ch. 895, § 1.5, p. 2502, CAL. GEN. LAWS ANN. Act 9307, § 3(t) (Deering Supp. 1961), CAL. WATER CODE APP. § 65-3(t) (West Supp. 1961) technical surveys

In addition to the foregoing statutes each of which contains express authority for entry upon private property for designated public purposes, there are a number of provisions which impose duties upon public officers that, in the nature of things, ordinarily may be effectively executed only by such entries. Since the courts have recognized implied statutory authority as being just as effective as express author-

ity in immunizing from liability for trespass,¹² provisions of the latter type presumably have the same general legal effect as the former. Included among them are:

BUS. & PROF. CODE § 1226	inspection of clinical laboratories
BUS. & PROF. CODE § 2788	inspection of nursing schools
BUS. & PROF. CODE § 2883	inspection of vocational nursing schools
BUS. & PROF. CODE § 4532	inspection of psychiatric technician schools
BUS. & PROF. CODE § 4809.5	inspection of veterinarian establishments and animal hospitals
BUS. & PROF. CODE § 25753	inspection and investigation of liquor licensees
El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 17, p. 5088, CAL. GEN. LAWS ANN. Act 2245, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-17 (West 1959)	technical studies and inspections relating to water
Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 4.6, p. 4688, CAL. GEN. LAWS ANN. Act 4613, § 4.6 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-4.6 (West 1959)	technical studies and inspections relating to water
Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 15(1), p. 5134, CAL. GEN. LAWS ANN. Act 9095, § 15(1) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-15(1) (West 1959)	surveys and investigations of water supply
Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 16, p. 4970, CAL. GEN. LAWS ANN. Act 5449, § 16 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-16 (West 1959)	technical studies and inspections relating to water
Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 4.6, p. 4823, CAL. GEN. LAWS ANN. Act 9096, § 4.6 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-4.6 (West 1959)	technical studies and inspections relating to water
Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 16, p. 5035, CAL. GEN. LAWS ANN. Act 9380, § 16 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-16 (West 1959)	technical studies and inspections relating to water

¹² See *Onick v. Long*, 154 Cal. App.2d 381, 316 P.2d 427 (1957); *People v. Wright*, 153 Cal. App.2d 35, 313 P.2d 868 (1957). *RESTATEMENT, TORTS* § 211 (1934) states: "A duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority insofar as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled." See also *id.*, comment c.

Yuba County Water Agency technical studies and inspections relating to water
Act, Cal. Stat. 1959, ch.
788, § 4.6, p. 2784, CAL.
GEN. LAWS ANN. Act 9407,
§ 4.6 (Deering Supp. 1961).
CAL. WATER CODE APP. 1959
SUPP. § 84-4.6 (West 1959)

This listing of grants of power which appear to imply authority to enter upon private property in the execution thereof is not intended to be exhaustive, but merely illustrative. It is probable that nearly every public entity, to some degree, has powers sufficient to support such implied authority.

Finally, there is one unusually opaque statute relating to official entries upon private property. This provision, which is found in Public Utilities Code Section 21635, authorizes representatives of the California Division of Aeronautics, for the purpose of making surveys and examinations relative to any condemnation proceedings, "to enter upon any land, *doing no unnecessary damage.*" (Emphasis supplied.) The cited section is otherwise silent on the question of liability for damages arising out of such an entry and inspection. It thus suggests that "unnecessary damage" may be recoverable, but "necessary" damage may not be (unless constitutionally required in inverse condemnation); but it fails to indicate who would be liable for such damage when recoverable, or whether the doctrine of trespass *ab initio* is applicable when unnecessary damage is inflicted, or whether the term "unnecessary" was intended to cover negligently as well as deliberately or maliciously inflicted injury. By contrast with most of the provisions previously cited, this section appears to be a veritable invitation to the presentation of a claim and possible ensuing litigation whenever damage occurs from such an entry, for the vagueness of the statutory term, "unnecessary," suggests that great leeway is afforded to the trier of facts to determine the issue favorably to the property owner.

The foregoing survey of statutes authorizing public officers and employees to enter private property without incurring liability for trespass suggests the need for legislative treatment in two respects.

First, the statutory pattern is neither uniform nor consistent and constitutes an inducement to litigation for the purpose of resolving inherent interpretation difficulties. In the absence of compelling reasons for special treatment in particular cases, a uniform and clearly defined rule of immunity and liability for trespasses in the course of public duty by officers and employees of all types of public entities would seem to be desirable.

Second, the extent to which public agencies may be liable for injuries resulting from an authorized entry upon private property, where the officer or employee is himself immune from such liability, is open to conjecture in view of the somewhat nebulous test indicated in the *Lipman* case. The difficulty is augmented by the fact that some statutes appear to be susceptible of being interpreted to confer immunity upon the employing entity coextensive with that of the employee; but the great majority of the statutory provisions are silent on the subject. The need for clarifying legislative provisions of general application to all public entities would thus seem to be indicated.

Limitations on Personal Liability of Public Officers for Dangerous or Defective Conditions of Public Property

Generally

Prior to the enactment of the Public Liability Act of 1923,¹ public entities generally were not liable for injuries sustained by reason of dangerous or defective conditions of governmental property.² Public officers, however, were held to be personally liable in such cases where they negligently created the condition which caused the injury,³ or where, having a specific duty to do so, they negligently failed to correct such a condition of which they had notice, provided financial resources were available with which to do the work.⁴ In 1911 this common law liability was modified by statute, following the rendition of a large judgment against Supervisor Pridham of Los Angeles County.⁵ The 1911 "Pridham Act"⁶ as later re-enacted in 1919 with minor changes in wording,⁷ is now found in the California Government Code as Section 1953, and provides:

No officer of the State or of any district, county, or city is liable for any damage or injury to any person or property resulting from the defective or dangerous condition of any public property, unless all of the following first appear:

(a) The injury sustained was the direct and proximate result of such defective or dangerous condition.

(b) The officer had notice of such defective or dangerous condition or such defective or dangerous condition was directly attributable to work done by him, or under his direction, in a negligent, careless or unworkmanlike manner.

(c) He had authority and it was his duty to remedy such condition at the expense of the State or of a political subdivision thereof and that funds for that purpose were immediately available to him.

(d) Within a reasonable time after receiving such notice and being able to remedy such condition, he failed so to do, or failed to take reasonable steps to give adequate warning of such condition.

¹ For discussion of this statute, see text at 42-59 *supra*.

² *Brunson v. City of Santa Monica*, 27 Cal. App. 89, 148 Pac. 950 (1915). Immunity, however, was not absolute, for public entities were liable if engaged in "proprietary" functions, see *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917), or if the defective condition of public property resulted in a taking or damaging of private property which was compensable in inverse condemnation proceedings. See *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899 (1920).

³ See *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50 (1912). *Cf.* *Sievers v. City & County of San Francisco*, 115 Cal. 648, 47 Pac. 687 (1897).

⁴ *Wurzburger v. Nellis*, 165 Cal. 48, 130 Pac. 1052 (1913); *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 (1905); *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707 (1899).

⁵ The legislative background of the "Pridham Act," and its motivation in the judgment affirmed on appeal in *Wurzburger v. Nellis*, 165 Cal. 48, 130 Pac. 1052 (1913), is recounted in *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353 (1935). See also, David, *Municipal Tort Liability in California*, 7 So. CAL. L. REV. 372, 412 (1934); David, *The Tort Liability of Municipal Officers*, 13 So. CAL. L. REV. 49, 51-52 (1939).

⁶ Cal. Stat. 1911, ch. 593, p. 1115.

⁷ Cal. Stat. 1919, ch. 360, p. 756. The principal change of wording related to the fact that the original Pridham Act expressly required that the defendant public officer have "actual notice" of the defect as a condition of liability. The 1919 re-enactment omitted the word "actual" and merely required "notice." See David, *The Tort Liability of Municipal Officers*, 13 So. CAL. L. REV. 49, 52-53 (1939). The original Pridham Act purported to impose liability upon cities and counties as well as limit the liability of officers; but since its title referred solely to liability of officers, the statute had been declared unconstitutional *pro tanto* in *Brunson v. City of Santa Monica*, 27 Cal. App. 89, 148 Pac. 950 (1915).

(e) The damage or injury was sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition.

The range of application of this provision is narrower than the scope of the common law rule of liability. Section 1953, for example, accords protection against personal liability only to public "officers," thereby excluding from its scope other classes of public personnel who are subject to the common law rule.⁸ In addition, it relates only to officers of "the State or of any district, county, or city," thereby apparently excluding from its scope the officers of such entities as "authorities" and "agencies."⁹ The reasons for this selective legislative approach are difficult to perceive.

The "Pridham Act" and its successors introduced four limitations upon the common law rule of liability of public officers for defective public property:

(1) Plaintiff must establish not merely that the injury was the proximate result of the defendant's negligence, but that it was also the "direct" result.¹⁰ Although in theory this modification has increased the plaintiff's burden,¹¹ in practice it does not appear to have been applied in such a way as to make much difference in results achieved.¹²

(2) Plaintiff must establish that the defendant officer had actual notice or knowledge of the defect complained of,¹³ whereas at common law constructive notice was sufficient.¹⁴ Although this requirement seems to be settled in the case law, its existence is attributable more

⁸ The distinction between "officers" and "employees" is not only well settled in the cases, see, e.g., *Coulter v. Pool*, 187 Cal. 181, 201 Pac. 120 (1921), but is emphasized by the fact that other closely related code sections *in pari materia* with Section 1953 expressly refer to officers and employees separately. See, e.g., CAL. GOV'T. CODE §§ 1953.6, 1955, 1956.

⁹ In view of the fact that the numerous statutes providing for water agencies, and for transit, housing and water authorities, are a development which postdated the enactment of the predecessor to Section 1953 in 1919, it is conceivable that the courts might construe the statutory term, "district," as indicating a legislative intent to encompass all types of local governmental entities. No case has been found, however, in which this issue has been litigated and decided.

¹⁰ *Hinton v. State*, 124 Cal. App.2d 622, 269 P.2d 154 (1954); *Moore v. Burton*, 75 Cal. App. 395, 242 Pac. 902 (1925); *Azcona v. Tibbs*, 190 Cal. App.2d 425, 12 Cal. Rptr. 232 (1961).

¹¹ See *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935).

¹² See, e.g., *Hinton v. State*, 124 Cal. App.2d 622, 269 P.2d 154 (1954) (state officer's negligent failure to replace missing sign explaining operation of pedestrian pushbutton traffic signal control held to be direct and proximate cause of personal injuries to pedestrian struck by nonnegligent motorist while crossing highway without first actuating pushbutton device); *Churchman v. County of Sonoma*, 59 Cal. App.2d 801, 140 P.2d 81 (1943) (defective condition of highway shoulder held to be direct and proximate cause of personal injuries sustained by motorist whose car went into ditch and who was hurt when he slipped while attempting to disembark from car teetering at steep angle in ditch).

¹³ *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931). In the *Osborne* case, the court states, significantly, that although under the Public Liability Act of 1923 (miscited by the court as "the 1933 act") it had frequently been held that "notice . . . may be implied from dangerous conditions of long standing, and that the knowledge of any one of its responsible officers is sufficient to bind the city or district, the statute here in question (now Government Code Section 1953) relates to the liability of such officers individually, and requires that notice be brought home to a particular defendant before he can be held liable." *Osborne v. Imperial Irr. Dist.*, *supra* at 631, 47 P.2d at 802.

¹⁴ *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 97 Pac. 881 (1908); *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 (1905). See also *Wurzburger v. Nellis*, 165 Cal. 48, 130 Pac. 1052 (1913); *Litch v. White*, 160 Cal. 497, 117 Pac. 515 (1911).

to judicial conceptions of sound public policy than to ordinary standards of statutory interpretation.¹⁵

(3) The plaintiff must establish that the defendant officer had public funds immediately available to him personally with which to repair the defect or establish adequate safeguards against injury.¹⁶ At common law, however, the nonavailability of such funds was treated as an affirmative defense to be pleaded and proved by defendant.¹⁷

(4) The plaintiff must establish that plaintiff was not contributorily negligent,¹⁸ contrary to the common law rule which placed the burden of establishing plaintiff's contributory negligence upon defendant. This change, it should be noted, constitutes a major protection to the defendant officer, particularly where the action is founded upon a claim of wrongful death, for the presumption that decedent was employing due care for his own safety¹⁹ is not available to aid the plaintiff in satisfying his statutory burden of proof.²⁰

It has uniformly been recognized by the courts²¹ that Section 1953, and its predecessors, were intended to be limitations on personal liability and not an enlargement of liability beyond what had been recognized at common law. However, language in the Public Liability Act of 1923 (now California Government Code Section 53051),²² which is closely similar to and presumably modeled after that of the predecessors to Section 1953, has been construed to expand entity liability well beyond common law bounds.²³ Again, Section 1953 has been con-

¹⁵ In view of the explicit requirement of the original 1911 Pridham Act that there be "actual notice" of the defective condition, the courts quite properly refused to impose liability thereunder in absence of both pleading and proof of such notice. See *McCain v. City of Oakland*, 52 Cal. App. 639, 199 Pac. 841 (1921); *Dobbins v. City of Arcadia*, 44 Cal. App. 181, 186 Pac. 190 (1919). This requirement was conceded to be a statutory change from the common law rule. *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 Pac. 462 (1920). But in the process of re-enactment of the statute in 1919, the modifying adjective, "actual," was omitted. See note 7 *supra*. Despite this evidence of apparent legislative intent to return to the common law rule, the courts have continued to construe the 1919 Act (now Government Code Section 1953) as requiring actual notice. As justification for this interpretation, see the statement of Barnard, P. J., in the *Osborne* case, to which is subsequently appended the following thought: "It is the general policy of the law to limit the liability of officers of districts and other governmental agencies, without which limitation responsible persons would hesitate to accept such offices with a danger of liability arising from remote conditions of which they had little or no knowledge and with which they personally had nothing to do. The general good of the public justifies the rather strict regulations which have been enacted for the protection of such officers." *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 633-34, 47 P.2d 798, 803-04 (1935).

¹⁶ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955). See also, *Bartlett v. State*, 145 Cal. App.2d 50, 301 P.2d 985 (1956); *Cantor v. County of Santa Clara*, 139 Cal. App.2d 441, 293 P.2d 894 (1956).

¹⁷ See *Heath v. Manson*, 147 Cal. 694, 82 Pac. 331 (1905); *Taylor v. Manson*, 9 Cal. App. 382, 99 Pac. 410 (1908). *Cf. Uttley v. City of Santa Ana*, 136 Cal. App. 23, 28 P.2d 377 (1933).

¹⁸ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931); *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928).

¹⁹ See *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931); *Weinstock & Chase, The "Presumption of Due Care" in California*, 4 HASTINGS L. J. 124 (1953).

²⁰ *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931); *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 Pac. 462 (1920).

²¹ *Bartlett v. State*, 145 Cal. App.2d 50, 301 P.2d 985 (1956); *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 Pac. 462 (1920). The rule stated in the text is partially statutory. See CAL. GOV. CODE § 1952: "This article [which includes Government Code Section 1953] shall not be construed as enlarging the duty or liability of any public officer."

²² See discussion in text at 42-59 *supra*.

²³ See p. 58, note 61 *supra*.

strued to require plaintiff to establish existence of all of the statutory requirements in order to recover thereunder,²⁴ although early cases had intimated that some of the requirements were inapplicable where the defect was created by direct action of the defendant or persons working under his direction.²⁵ Despite the similar wording of the Public Liability Act, however, the courts have expressed a willingness to relieve the plaintiff of the burden of establishing all of the statutory requirements where plaintiff seeks to hold the entity liable for defective conditions created intentionally by its officers.²⁶ In effect, despite the similarity between the two statutes, there seems to be a judicial disposition to construe Section 1953 strictly in order to maximize the protection it affords to public officers, but concurrently to construe the Public Liability Act liberally in favor of the injured plaintiff and against the public entity.

The effect of the *Muskopf* and *Lipman* cases upon the problem of entity liability in the area embraced by Section 1953 is somewhat difficult to assess. It seems reasonably clear that when an officer is personally liable under Section 1953, the employing entity ordinarily will also be liable, either under the Public Liability Act (if the entity is a city, county or school district),²⁷ or in an action in inverse condemnation (which will often lie for injuries to property resulting from dangerous or defective conditions of public property),²⁸ or simply by operation of the doctrine of *respondet superior* as approved in *Muskopf*. However, it is a considerably more complex question whether, and to what extent, the entity may be liable, when, in practical effect, its officer is immune due to plaintiff's inability to establish all of the conditions required by Section 1953. Two distinguishable aspects of this question may be identified.

First, in a case where Section 1953 protects an officer from personal liability, the employing entity may still be liable under the Public Liability Act (if it is a city, county or school district) or in inverse condemnation.²⁹ The reason for this result is that the conditions of personal liability under Section 1953 are more rigorous and hence more

²⁴ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Bartlett v. State*, 145 Cal. App.2d 50, 301 P.2d 985 (1956).

²⁵ *Moore v. Burton*, 75 Cal. App. 395, 242 Pac. 902 (1925), expressly disapproved on this point, however, in *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955). To the extent that the case of *Black v. Southern Pac. Co.*, 124 Cal. App. 321, 12 P.2d 981 (1932) is in accord with the *Moore* case, it must be assumed that it was also disapproved, *sub silentio*, in the *Bauer* case.

²⁶ See, e.g., *Pritchard v. Sully-Miller Contracting Co.*, 178 Cal. App.2d 246, 254, 2 Cal. Rptr. 830, 834 (1960): "Under the decisions the fact that the city itself deliberately created the dangerous condition dispensed with the notice contemplated by section 53051, Government Code." To the same effect, see *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945).

²⁷ See discussion in text at 122 *supra*.

²⁸ See, e.g., *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), holding that plaintiff's complaint stated a good cause of action either on the theory of inverse condemnation or under the Public Liability Act. On inverse condemnation generally, see text at 102 *et seq. supra*.

²⁹ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955) (county held liable in both inverse condemnation and under Public Liability Act, but county supervisors not liable in absence of showing by plaintiff that all conditions of Government Code Section 1953 were satisfied); *Selby v. County of Sacramento*, 139 Cal. App.2d 94, 294 P.2d 508 (1956) (county held liable under Public Liability Act, but county officers held not liable under Section 1953); *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940).

protective to the officer than are the conditions of entity liability.³⁰ Moreover, the liability of public agencies under the Public Liability Act or in inverse condemnation is independent from that of their officers, being founded not upon *respondeat superior* but upon statutory or constitutional provisions.³¹

Second, in a case where Section 1953 protects an officer from personal liability, there may be no basis for statutory liability of the entity under the Public Liability Act or in inverse condemnation. This would be true, for example, in an action for personal injuries (to which action the theory of inverse condemnation would be inapplicable)³² resulting from the defective condition of State or flood control district property (to which entities the Public Liability Act is inapplicable).³³ The operative facts of the case, however, may be such that the defendant public entity is nonetheless potentially liable for the plaintiff's injuries under common law principles, the defense of sovereign immunity having been eliminated by the *Muskopf* decision. Since a public body, like a private corporation, can only act through its officers and employees and agents, it would seem to follow that the entity's common law liability, if any, must rest ultimately upon the doctrine of *respondeat superior*.³⁴ Yet, by the present hypothesis, the officer whose alleged negligence is the basis for the claim of entity liability is protected against personal liability by Section 1953. When the negligent officer is thus not liable, should the employing entity be held liable, in the absence of statute, for his negligence?

This issue, of course, is not unlike the one presented in *Lipman*, where the officer's "discretionary conduct" immunity from suit was said not to preclude entity liability in every case. Nonliability under Section 1953, however, is not synonymous with official immunity, for under Section 1953 the officer is subject to both suit and possible liability, and is protected only to the extent the statute makes it more difficult for plaintiff to prove his case. Yet the basic objectives of both the statutory and judicially created rules—to encourage vigorous and effective public administration undeterred by fear of litigation and personal liability for official acts—are undoubtedly closely allied with one another.

³⁰ See *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 420, 101 P.2d 743, 746 (1940), "Under the Public Officers Liability Act [i.e., Section 1953] additional allegations of a complaint are required to state a cause of action against the individual defendants than are required to state a cause of action against a city under the Public Liability Act. . . . There is also a difference in the proof required of a plaintiff to make out a *prima facie* case of liability against the individual defendants and against the city." To the same effect, see *Cantor v. County of Santa Clara*, 139 Cal. App.2d 441, 293 P.2d 894 (1956).

³¹ *Barsom v. City of Reedley*, *supra* note 30. See also *Cantor v. County of Santa Clara*, *supra* note 30, holding that although county's liability under the Public Liability Act is independent from any liability under the common law doctrine of *respondeat superior*, a judgment in favor of the county thereunder will also release from personal liability the officer whose alleged negligence was the foundation of the statutory action against the county, for in such a case the plaintiff's failure to prove the statutory elements of county liability necessarily constitutes a failure to establish the narrower statutory elements of personal liability of the officer. A judgment in favor of the officer, however, does not release the employing entity since its liability under the Public Liability Act is broader than that of its officers. See cases cited in note 29 *supra*.

³² *Brandenburg v. Los Angeles County Flood Control Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

³³ *Gillespie v. City of Los Angeles*, 114 Cal. App.2d 513, 250 P.2d 717 (1952); *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951); *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950).

³⁴ *Cantor v. County of Santa Clara*, 139 Cal. App.2d 441, 293 P.2d 894 (1956).

It seems probable, on the whole, that the courts would permit a plaintiff to hold the entity liable notwithstanding the nonliability of its officer under Section 1953. Derivative immunity for public entities may be justified in some cases where discretion in basic policy matters is at stake, for the threat of tort liability of the entity may constitute an inhibiting influence upon officials who, although personally immune, are charged with fiscal responsibilities and may be beset with political pressures seeking to minimize drains upon public funds.³⁵ The situations to which Section 1953 applies, however, are not fundamentally discretionary in nature, but typically involve negligence in the routine construction or maintenance of public property. Section 1953 appears designed to protect against undue personal liability officers who are often charged with vast public duties (often involving maintenance of hundreds of miles of streets and sidewalks, for example) which may expose them to excessive risks. The Legislature has already indicated its willingness to impose liability upon public entities under the Public Liability Act of 1923, notwithstanding the protection afforded the allegedly culpable officers under the earlier-enacted provisions of Section 1953, thereby intimating that there is no basic policy inconsistency between entity liability and official nonliability.³⁶ Moreover, unless recovery against the employing entity were permitted, the injured plaintiff would ordinarily have no remedy whatever to redress his injuries. It would seem to follow, as a general conclusion, that the inability of the plaintiff to establish the personal tort liability of an officer under Section 1953 should not preclude recovery against the employing entity under common law principles.

The foregoing conclusions, which are predicated upon Section 1953 of the Government Code, are subject to possible modification in certain instances where other statutory provisions also impinge upon the problem. Such provisions are found to exist with respect to two general areas: (a) street and sidewalk defects and (b) defective school buildings and structures. We now turn to an examination of these statutes.

Street and Sidewalk Defects

Section 5640 of the Streets and Highways Code, which was originally enacted as part of the Improvement Act of 1911 by the same Legislature which enacted the Pridham Act,³⁷ purports to immunize cities from any liability for damages sustained by reason of defects in streets and sidewalks.³⁸ A companion provision in Section 5641 of the same

³⁵ This rationale appears to be the basis for the ruling in *Lipman* that the Brisbane Elementary School District was not liable for the alleged defamation by its officers in the course of their discretionary responsibilities, although the availability of alternative remedies was also emphasized. See *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 230, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

³⁶ See cases cited in notes 29 and 30 *supra*.

³⁷ CAL. STS. & HWYS. CODE § 5640, as codified by Cal Stat. 1941, ch. 79, § 1, p. 877, derived from the Improvement Act of 1911, Cal. Stat. 1911, ch. 397, § 39, p. 750, which in turn appears to have been patterned after similar provisions in the Vrooman Act, Cal. Stat. 1885, ch. 153, § 23, p. 161. See DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS 168-69 (1936); *Martinovich v. Wooley*, 128 Cal. 141, 60 Pac. 760 (1900). The Pridham Act, now CAL. GOV. CODE § 1953, was enacted by the 1911 Legislature after passage of the Improvement Act. See p. 120, notes 5-7 *supra* and accompanying text.

³⁸ Section 5640 reads: "If, because any graded street or sidewalk is out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using the street or sidewalk and exercising ordinary care to avoid the danger, suffers damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against the city."

code, on the other hand, purports to declare that if the defect existed more than 24 hours after written notice to the superintendent of streets, where such superintendent had authority to make the needed repairs at the expense of the city, "then the person on whom the law may have imposed the obligations to repair such defect in the street or sidewalk, and also the officer through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damage sustained."³⁹ Although these two sections in terms relate only to "cities," a general provision of the Improvement Act of 1911 defines the word "city" to include "counties, cities, cities and counties and all corporations organized and existing for municipal purposes, together with . . . resort districts."⁴⁰

The effect of Sections 5640 and 5641 upon the conclusions reached above (as to the liability of public entities whose officers are protected against liability by Section 1953 of the Government Code) can best be treated by considering the two sections separately.

Taking up Section 5640 first, it has been held that insofar as this 1911 Act provision purports to immunize cities and counties from liability for defective streets and sidewalks, it has been repealed by implication by the subsequent enactment in 1923 of the Public Liability Act.⁴¹ To this extent, its continued existence in the Streets and Highways Code is misleading, and it deserves either to be expressly repealed *pro tanto*, or at least amended to make cross-reference to the Public Liability Act provisions (*e.g.*, "except as provided in Section 53051 of the Government Code," etc.). Section 5640, however, has not been completely superseded, for resort districts and other types of public districts which constitute "corporations organized and existing for municipal purposes"⁴² are not within the provisions of the Public Liability Act. Section 5640 apparently still is effective to confer a statutory immunity upon such districts, which may exist concurrently with nonliability of their officers pursuant to Section 1953 of the Government Code. The general conclusion offered above, that the entity-employer would probably be liable despite Section 1953, must be modified accordingly.

Turning next to Section 5641, it seems, under settled principles of statutory interpretation,⁴³ that to the extent this section is inconsistent

³⁹ Sections 5640 and 5641 were originally enacted as a single provision in 1911, and were divided into separate sections during the 1941 codification. See note 37 *supra*. A similar provision in the Inglewood City Charter, Cal. Stat. 1927, res. ch. 28, art. XXXVI, § 33, p. 2250 presumably has been superseded by the cited code sections. See *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957); *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947).

⁴⁰ CAL. STS. & HWYS. CODE § 5005.

⁴¹ *Jones v. City of South San Francisco*, 96 Cal. App.2d 427, 216 P.2d 25 (1950). See also, *Ackers v. City of Los Angeles*, 40 Cal. App.2d 50, 104 P.2d 399 (1940). Further analysis of the present significance of Section 5640 is set forth at 181-183 *infra*.

⁴² Various types of special districts have been held to be "quasi-municipal" entities, or corporations "organized for municipal purposes," including: (1) *irrigation districts*, see *Mariposa County v. Merced Irr. Dist.*, 32 Cal.2d 467, 196 P.2d 920 (1948) and *Turlock Irr. Dist. v. White*, 186 Cal. 183, 198 Pac. 1060 (1921); (2) *municipal utility districts*, see *Morrison v. Smith Bros., Inc.* 211 Cal. 36, 293 Pac. 53 (1930); (3) *metropolitan water districts*, see *Metropolitan Water Dist. v. County of Riverside*, 21 Cal.2d 640, 134 P.2d 249 (1943); (4) *California water districts*, see *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863 (1946); (5) *municipal water districts*, see *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941).

⁴³ As between two inconsistent statutory provisions relating to the same subject matter, the latest expression of the legislative will is deemed to control. *County of Ventura v. Barry*, 202 Cal. 550, 262 Pac. 1081 (1927); *Estate of McGee*, 154 Cal. 204, 97 Pac. 299 (1908). See also cases cited in note 41 *supra*.

with Section 1953 of the Government Code or its predecessors (all of which were enacted *after* the predecessor to Section 5641),⁴⁴ the latest expression of the legislative will (*i.e.*, Section 1953) would prevail. No cases holding squarely to that effect, however, have been found, and a weak dictum in one decision⁴⁵ points to the opposite result. If it be assumed that Section 1953 repeals Section 5641 to the extent there is inconsistency, Section 5641 would still be applicable in cases outside the scope of Section 1953, for it is settled that repeals by implication only extend to areas of actual inconsistency.⁴⁶ As pointed out above,⁴⁷ Section 1953 extends protection to officers of "the State or of any district, county, or city," thereby impliedly withholding its benefits from officers of "authorities" or "agencies." There is reason to believe that the statutory phrase, "corporations organized and existing for municipal purposes,"⁴⁸ as used to define the "cities" to which Section 5641 applies, may include such types of entities as transit authorities,⁴⁹ local housing authorities,⁵⁰ and water authorities or agencies,⁵¹ and accordingly, Section 5641 may be applicable to the officers of such entities. Section 5641, it will be noted, constitutes a more effective protection against personal liability⁵² than do the provisions of Section 1953, since *written* notice of the defect is required. Moreover, "authorities" and "agencies" which are "organized and existing for municipal purposes" (other than entities covered by the Public Liability Act of 1923) would appear to be immune from liability for street and sidewalk defects by virtue of Section 5640.

⁴⁴ Although the Pridham Act (*i.e.*, the predecessor to CAL. GOVT. CODE § 1953) was enacted at the same 1911 session of the Legislature as the Improvement Act of 1911 (*i.e.*, the predecessor to Streets & Highways Code Section 5641), the former measure followed the latter in the legislative process as shown by its higher chapter number. See notes 6 and 37 *supra*. The rule that the latest expression of the legislative will prevails is applicable to inconsistent bills enacted at the same legislative session. See Note, 3 U.C.L.A. L. Rev. 417 (1956), and cases there cited.

⁴⁵ See *Jones v. City of South San Francisco*, 96 Cal. App.2d 427, 432, 216 P.2d 25, 28 (1950), holding that the Public Liability Act of 1923 prevailed over that portion of Section 39 of the Improvement Act of 1911 which immunized public entities, but that "It did not entirely repeal, by implication, section 39, because that section still contained [in what is now CAL. STRS. & HWYS. CODE § 5641] the liability imposed on public officials . . ." This dictum is deemed to be weak and unpersuasive, however, for the court's attention had not been drawn to the provisions of CAL. GOVT. CODE § 1953, and its relevancy to the liability of public officials was thus not considered.

⁴⁶ *Estate of Muntz*, 69 Cal. App. 404, 231 Pac. 371 (1924); *Jones v. City of South San Francisco*, *supra* note 45.

⁴⁷ See note 9 *supra*.

⁴⁸ CAL. STRS. & HWYS. CODE § 5005.

⁴⁹ See *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 293 Pac. 53 (1930), classifying a municipal utility district as a municipal corporation for tort liability purposes. Such districts have statutory powers to provide transportation facilities, somewhat comparable to those possessed by transit authorities. Compare CAL. PUB. UTIL. CODE § 12801 (municipal utility districts) with Los Angeles Metropolitan Transit Authority Act, Cal. Stat. 1957, ch. 547, § 4.4, p. 1617; CAL. GEN. LAWS ANN. Act 4481, § 4.4 (Deering Supp. 1961); CAL. PUB. UTIL. CODE APP. 1 § 4.4 (West Supp. 1961).

⁵⁰ See *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948); *Willmon v. Powell*, 91 Cal. App. 1, 266 Pac. 1029 (1928).

⁵¹ See *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal.2d 7, 172 P.2d 863 (1946); *Metropolitan Water Dist. v. County of Riverside*, 21 Cal.2d 640, 134 P.2d 249 (1943). *But cf.* *Santa Barbara County Water Agency v. All Persons*, 47 Cal.2d 699, 306 P.2d 875 (1957), holding a county water agency not to be organized for municipal purposes within limited meaning of CAL. CONST., Art. XI, § 6 (1959).

⁵² It is here assumed, in the absence of cases to the contrary, that the courts would construe Section 5641 as requiring plaintiff to establish all of the conditions set out in Section 5641 in order to recover judgment thereunder. This is the accepted interpretation of the comparable language in Government Code Section 1953, see notes 10-24 *supra* and accompanying text, and is consistent with the similar view taken of the provisions of the Vrooman Act which, as indicated in note 37 *supra*, were the predecessors of Section 5641. See *Stockton Automobile Co. v. Confer*, 154 Cal. 402, 97 Pac. 881 (1908); *Merritt v. McFarland*, 4 Cal. App. 390, 88 Pac. 369 (1906).

The interrelationship between the three statutory enactments just discussed—the Pridham Act and its descendants (Government Code Section 1953); the Public Liability Act of 1923 (Government Code Section 53051); and the liability provisions of the Improvement Act of 1911 (Streets and Highways Code Sections 5640 and 5641)—may be briefly summarized for convenience as follows:

First: Officers of cities, counties and school districts receive protection against personal liability for street and sidewalk defects from Government Code Section 1953, but their respective employer-entities are liable pursuant to Government Code Section 53051, and probably also under common law principles in view of the decisions in *Muskopf* and *Lipman*.

Second: Officers of resort districts, and all other public districts which may be classified as “corporations organized and existing for municipal purposes,” receive protection against personal liability for street and sidewalk defects from Government Code Section 1953, while their respective employer-entities are immune from liability pursuant to Streets and Highways Code Section 5640. Since this immunity is statutory in nature, the abolition of governmental immunity in *Muskopf* and *Lipman* would appear to have no effect thereon.

Third: Officers of “agencies” and “authorities” which may be properly classified as “corporations organized and existing for municipal purposes” receive protection against personal liability for street and sidewalk defects from Streets and Highways Code Section 5641 (a somewhat more effective protection than that afforded by Government Code Section 1953), while their respective employer-entities are immune from liability pursuant to Streets and Highways Code Section 5640.

Fourth: Officers of districts *other than* resort districts and *other than* districts which are classifiable as “corporations organized and existing for municipal purposes” receive protection against personal liability for street and sidewalk defects from Government Code Section 1953, but the respective employer-entities are probably liable under common law principles (no statutory immunity under Streets and Highways Code Section 5640 being available) in view of *Muskopf* and *Lipman*.

Fifth: Officers of “agencies” and “authorities” which cannot be properly classified as “corporations organized and existing for municipal purposes” enjoy no protection against personal liability for street and sidewalk defects, either under Government Code Section 1953 or under Streets and Highways Code Section 5641, and their respective employer-entities are liable under common law principles in view of *Muskopf* and *Lipman*.

This complex and confusing pattern of immunity and liability for street and sidewalk defects illustrates the difficulties which have inadvertently crept into California law as a consequence of sporadic and piecemeal legislative treatment of the problem and emphasize how such difficulties have now been intensified by superimposition thereon of the general principle of tort liability as a corollary to the demise of governmental tort immunity. The internal inconsistencies and contradictions suggested in the foregoing summation obviously demand legisla-

tive treatment pursuant to a more consistent and uniform legislative policy.

Defective School Buildings and Structures

A series of sections in the Education Code also deserve consideration to determine whether they modify the general conclusions already reached.

Section 15512 of this code immunizes any member of a school district governing board from personal liability resulting from "the use of tents or other temporary structures, except in case of his own personal negligence or misconduct." Section 15513 immunizes members of school district governing boards from personal liability "as a result of the continued use of any building or buildings" referred to in the notice calling an election in which the electorate refuses to approve issuance of bonds or an increase in the tax rate to provide funds with which to repair, reconstruct or replace such defective school buildings. Section 15514 simply grants a blanket immunity, by providing, without more, that "No member of the governing board of the district shall be held personally liable for injury to person or damage to property by reason of the use of any building."

In the absence of cases construing these provisions, the kinds of injuries which were envisaged as resulting from the "use" of buildings, within the contemplation of the Legislature, are not entirely clear, but apparently would include at least such injuries as resulted from dangerous or defective physical conditions therein. The immunity, however, is extended solely to school board members (not to all officers); and, in any event, Section 15515 declares that "Nothing in Sections 15512, 15513, or 15514 shall be construed as relieving any school district of any liability for injury to person or damage to property imposed by law."

One additional Education Code provision is relevant to the present problem. Section 15516 provides, in what is apparently a somewhat special situation, that school board members (as well as school district employees) shall not be personally liable for damages sustained by "any pupil above the compulsory school age," caused by the dangerous or defective condition of premises or buildings in which such student is voluntarily in attendance for class or field trip purposes, where the building is not under the management or control of the governing board and is not owned, rented or leased by the school district.

There is no provision (as there is accompanying Sections 15512, 15513 and 15514) declaring that Section 15516 does not absolve the district from liability. However, it is manifest that district liability in cases falling within Section 15516 could not be asserted under the Public Liability Act of 1923 (which is restricted to defective conditions of public property under the control of the school district), and hence would ordinarily be founded upon simple negligence (such as negligence of the school board in authorizing, or of other school employees in conducting or supervising, the classes or field trips in defective or unsafe physical surroundings). Although the negligence involved in a particular case of this type might conceivably be within the scope of official discretionary conduct, for which the school officers would be

personally immune under common law principles as well as by virtue of Section 15516, it is probable that the policy-balancing test approved in *Lipman* would be deemed irrelevant to the issue of district liability. Whether such negligence occurs in the course of discretionary or ministerial action, school district liability for the resulting damages is of statutory origin, being affirmed positively in Section 903 of the Education Code. The policy-balancing approach appears appropriate only where, as in *Lipman*, there is official immunity but no statutory provision imposing liability upon the employing entity. In negligence cases where official immunity would obtain under Section 15516, it is thus probable that the employing school district would still be liable.

Although the Education Code provisions just discussed do not appear to alter our general conclusion that entity liability probably obtains despite official immunity under Section 1953, it should be noted that these sections expand official immunity substantially beyond the limits of Section 1953. Why such enlarged protection should be accorded to school board members but not to their counterparts in other districts, or in city and county governing boards, is not readily apparent. The inconsistency of existing legislation, and need for greater uniformity of policy, is thus once again underscored.

Statutory Immunity of Public Officials for Acts of Subordinates

Generally

There is a twofold common law rule, long recognized by the California courts, which rejects the principle of *respondeat superior* as being inapplicable and holds a public official personally liable for the tortious acts of his subordinates in the public service only when he (1) directed, participated in, cooperated in, or ratified such acts,¹ or (2) having the power of appointment and removal, negligently failed to use due care in making the appointment of, or negligently failed to discharge, a subordinate whose incompetence or unfitness for the position was known, or should have been known, to the officer.² An anachronistic exception, under which at one time a sheriff was deemed fully liable for the torts of his deputies to the same extent as the employer of a private agent,³ appears to have been largely discarded in recent

¹ *Michel v. Smith*, 188 Cal. 199, 205 Pac. 113 (1922); *Payne v. Bennion*, 178 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960). See also *Wolfson v. Wheeler*, 130 Cal. App. 475, 19 P.2d 1004 (1933) and cases cited in note 5 *infra*.

² *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943); *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955); *Baisley v. Henry*, 55 Cal. App. 760, 204 Pac. 399 (1921).

³ *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842 (1904); *Hirsch v. Rand*, 39 Cal. 315 (1870); *Van Pelt v. Littler*, 14 Cal. 194 (1859). This exception for sheriffs and their deputies was apparently founded upon an ancient fiction at common law, which regarded the deputy and sheriff as "one person in law," see *Whitney v. Butterfield*, 13 Cal. 335, 342 (1859), and thus held the sheriff liable for the acts of his deputy as if they had been done by himself. See generally *Michel v. Smith*, 188 Cal. 199, 205 Pac. 113 (1922); *Van Vorce v. Thomas*, 18 Cal. App.2d 723, 64 P.2d 772 (1937). As a well-considered opinion recently pointed out, under this fiction "it is held that the deputy is acting in the private service of the sheriff and in his name and stead." *Payne v. Bennion*, 178 Cal. App.2d 595, 600, 3 Cal. Rptr. 14, 17 (1960). Under modern conditions of county administration, where sheriff's deputies are treated substantially in the same fashion as other county employees, enjoying a fixed compensation, and comparable civil service and retirement benefits, the old fiction is obviously not in accord with reality.

years,⁴ and the rules just stated now appear to be regarded as generally applicable to public employees of every conceivable type.⁵

There are several statutory provisions in the California codes and uncodified laws which appear to adopt the common law rules, in whole or in part, and occasionally to modify them in certain particulars. Such statutes are deemed relevant to the present study of tort liability of public entities for at least three reasons.

First, these statutes, like the common law rules on which they are based, generally establish limitations on the personal liability of public officers.⁶ They are thus germane to the issues suggested by the *Lipman* case: to what extent are public entities liable where the culpable officers of the entity are not personally liable for an injury sustained by the plaintiff? It may be safely assumed that the nonliability of a public officer for the actionable tort of a subordinate employee would not diminish the liability of the employing entity for the latter employee's act, either under relevant statutes imposing such liability (e.g., Vehicle Code Section 17001) or under the doctrine of *respondet superior* as approved in *Muskopf*.⁷ However, the practical impact of official nonliability in such cases may be of considerable significance. Where the superior officer is personally liable, plaintiff may elect to proceed solely against him and the sureties on his official bond, and consequently there may be no actual drain upon public funds in satisfying

⁴ In part, the old common law exception has been eliminated by the enactment in 1951 of Government Code Section 1953.6, quoted in the text *infra*. However, apart from legislative action on the matter, the courts have indicated repeatedly that the exception is no longer regarded as having any validity as applied to modern conditions of county law enforcement. The general rule that *respondet superior* does not apply as between an officer and his subordinates was applied to a city police chief in *Michel v. Smith*, 138 Cal. 199, 205 Pac. 113 (1922), and was extended to a county sheriff in *Lorah v. Biscailuz*, 12 Cal. App.2d 100, 54 P.2d 1125 (1936). Although the latter case was later overruled on a different point in *Union Bank & Trust Co. v. County of Los Angeles*, 11 Cal. 2d 675, 81 P.2d 919 (1938), its holding and rationale for rejecting the old exception for sheriff's deputies was approved in later cases. See *Payne v. Bennion*, 173 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960); *Van Vorce v. Thomas*, 18 Cal. App.2d 723, 64 P.2d 772 (1937); *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955). In the *Marshall* case, Mr. Justice Drapeau, applying the general rule (and rejecting the exception) to hold the sheriff of Los Angeles County not liable, states that if the general rule of nonliability were not the law, "no one in his right mind would undertake the responsibility of sheriff. . . . To permit legal actions to recover damages from sheriffs . . . for every tort of a deputy . . . lacks the leaven of realistic thinking under increasing complexities of public service." *Marshall v. County of Los Angeles*, *supra* at 815, 281 P.2d at 546. An off-hand statement to the contrary in *Reynolds v. Lerman*, 138 Cal. App.2d 586, 292 P.2d 559 (1956), was dictum clearly not necessary to the decision, was made without reference to the cases cited above, and failed to consider the persuasive reasons which have been given for discarding the exception.

⁵ *Payne v. Bennion*, 173 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960) (supervisor working under superintendent of schools); *County of Placer v. Aetna Cas. & Sur. Co.*, 50 Cal.2d 182, 323 P.2d 753 (1958) (clerk appointed by justice of the peace); *Sarafini v. City & County of San Francisco*, 143 Cal. App.2d 570, 300 P.2d 44 (1956) (police officer acting under supervision of police lieutenant); *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949) (police officer appointed by chief of police); *Reed v. Molony*, 38 Cal. App.2d 405, 101 P.2d 175 (1940) (investigator working under State Medical Board); *Van Vorce v. Thomas*, 18 Cal. App.2d 723, 64 P.2d 772 (1937) (deputy marshal of municipal court appointed by marshal).

⁶ See *Payne v. Bennion*, 173 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960). *Cf.* *County of Placer v. Aetna Cas. & Sur. Co.*, 50 Cal.2d 182, 323 P.2d 753 (1958).

⁷ *E.g.*, in *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955), the court held the county sheriff to be not liable under the common law and statutory rules for the torts of his subordinates, but held the county liable therefor under the statutory waiver of immunity for automobile accident injuries now found in Vehicle Code Section 17001. See also, *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949), holding city officials not liable for torts of subordinate employee, but intimating that city would be liable therefor were it not for the doctrine of sovereign immunity then recognized to exist. Some of the statutory provisions to be discussed expressly provide that the limitation upon the liability of public officers thereby enacted does not limit or curtail any liability of the employing entity which otherwise would exist. See, e.g., CAL. GOVT. CODE § 1953.6.

the plaintiff's claim.⁸ If the superior officer is not liable for the tort of his subordinate, however, the action in all likelihood will be brought directly against the employing entity and a judgment for plaintiff therein, founded on the subordinate employee's tort, will be payable from public funds (or from insurance purchased with public funds). To the extent that the statutes to be discussed confer immunity upon, or limit the liability of, superior officers for the acts of their subordinates, there may thus be a concomitant increase in financial risk to the employing entity.

Second, the statutory provisions in question derive relevancy from the fact that the common law liability of superior officers for the torts of their subordinates, under the twofold rules outlined above, is not founded upon *respondeat superior*, but is an independent tort liability founded upon the superior officer's personal negligence or wrongful conduct.⁹ It is thus possible that under some circumstances the injured plaintiff may be unable to establish personal tort liability of the employee whose conduct caused the injury, but may be able to establish liability of the employee's superior officer.¹⁰ In such cases, the employing entity would appear to be liable under *Muskopf* on the theory of *respondeat superior*, although it would be the tort of the superior officer rather than that of the subordinate employee which constituted the basis for entity liability. Accordingly, to the extent that the statutes to be discussed recognize or enlarge upon the common law liability of public officers for acts of their subordinates, there would appear to be an equivalent liability, or enlargement of liability, of the respective employing public entities.

Third, where the statutes to be discussed diminish official liability, the injured plaintiff may find it impossible to obtain relief against either the subordinate employee or his superior officer. The employee whose act or omission caused the plaintiff's injury may not be liable (*e.g.*, his conduct may not be actionable due to lack of notice of relevant facts known to his superior officer; or he may be able to assert some defense not available to his superior, such as noncompliance with a claims presentation requirement), while the superior officer (who ordinarily would be answerable under common law principles) may be protected against liability by statute. In such cases, a difficult question will be raised, whether the employing entity may be held liable notwithstanding the nonliability of its officer and employee. To the extent the statutory policy of nonliability is similar to the common law policy underlying the official immunity doctrine, presumably the resolution of the issue will depend upon an evaluation and balancing of the considerations identified in the *Lipman* opinion as being relevant for the purpose. To the extent the statutory rule of nonliability has different policy

⁸ See, *e.g.*, *Union Bank & Trust Co. v. County of Los Angeles*, 11 Cal.2d 675, 81 P.2d 919 (1938). *But cf.* *County of Placer v. Aetna Cas. & Sur. Co.*, 50 Cal.2d 182, 323 P.2d 753 (1958).

⁹ *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943); *Hilton v. Oliver*, 204 Cal. 535, 269 Pac. 425 (1928).

¹⁰ The subordinate employee may possibly be able to assert a successful defense not available to the superior officer. See, *e.g.*, *Barsom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940). It is settled that where the principal's liability is not predicated upon *respondeat superior* but upon an independent wrong, a judgment exonerating the subordinate employee does not exonerate the principal. *Barsom v. City of Reedley*, *supra*; *McCullough v. Langer*, 23 Cal. App.2d 510, 73 P.2d 649 (1937). See also, *Barkett v. Brucato*, 122 Cal. App.2d 264, 264 P.2d

978 (1953); *Jensen v. Southern Pac. Co.*, 129 Cal. App.2d 67, 276 P.2d 703 (1954).

postulates, however, the resolution of the issue may also differ, probably in the direction of affirming entity liability in the absence of compelling reasons not to do so. In either event, public entity tort liability will be affected by the statutes to which we are about to turn.

Statutes in effect in California, relating to the liability of superior officers for the torts of their subordinates, reveal a kaleidoscopic variety of legislative policy decisions and related differences in legislative language. For convenience, they may be classified into seven different categories which are discussed below.

Limitations on Liability of City, County and School District Officers for Torts of Subordinate Personnel

The California Government Code contains two sections relevant to the present topic.

Government Code Section 1953.6. Section 1953.6, enacted in 1951, provides:

No officer of a county, city, or city and county, whose sole compensation by virtue of his office is a fixed salary established by the Legislature, the local governing body, or the board of supervisors, shall be personally liable for the negligent act or omission of any deputy or employee serving under him and performing the duties of his office, where the appointment or qualification of such deputy or employee is required to be and has been approved by the local governing body or the board of supervisors, or by the civil service commission, unless the officer failed to exercise due care in the selection, appointment, or supervision of such deputy or employee, or negligently failed to suspend or secure the discharge of such deputy or employee after knowledge or notice of his inefficiency or incompetency.

Nothing in this section shall be interpreted as placing any liability upon the principal officer for the act of the deputy or employee unless such liability is otherwise imposed upon the principal officer by law, nor shall this section be construed or interpreted as releasing or relieving any such county, city, or city and county of any liability for the negligent act or omission of any such deputy or employee otherwise imposed by law.

This provision incorporates a number of inherent limitations upon its own scope. It extends protection only to officers of cities and counties—but not to officers of the State or other public entities, nor to employees (as distinguished from officers) of any public entities even where such employees exercise supervisory authority over lesser ranked employees.¹¹ It extends only to officers whose sole compensation is a fixed salary established by the Legislature, the city council, or the board of supervisors—thereby apparently withholding its protection

¹¹ The status of an "officer" is a technical one which is not necessarily correlated to the degree of supervisory responsibility vested in the individual. See *Coulter v. Pool*, 187 Cal. 181, 201 Pac. 120 (1921); and compare Government Code Section 24000, listing county officers. Thus, county and city personnel with extensive supervisory authority over subordinate employees may be classified as employees themselves, rather than officers. See, e.g., *County of Marin v. Dufficy*, 144 Cal. App.2d 30, 300 P.2d 721 (1956) (county physician); *Cleland v. Superior Court*, 52 Cal. App.2d 530, 126 P.2d 622 (1942) (superintendent of county farm and hospital).

from officers whose salary is fixed by city or county charter,¹² and from officers whose compensation is not a fixed salary.¹³ It extends only to the tortious acts of deputies and employees whose appointment or qualification is subject to approval by another body, such as the city council, board of supervisors, or civil service commission—thereby apparently precluding application to acts of subordinates whose appointment is within the sole and unrestricted power of the appointing officer.¹⁴

Although one effect of Section 1953.6 is undoubtedly to remove any possible doubt as to the continued existence of the discredited exception under which sheriffs were liable for the torts of their deputies employed under civil service,¹⁵ its language is clearly neither narrow enough to be limited to that purpose nor broad enough to fully accomplish it. By including within its terms both city and county officers, Section 1953.6 manifestly embraces many kinds of officers in addition to county sheriffs; and in view of its other limitations, it apparently does not exonerate all sheriffs from liability for the torts of their subordinates, but only some sheriffs.¹⁶

It is abundantly clear from its second paragraph that Section 1953.6 does not enlarge the liability of any officer beyond what exists at common law or under other statutes. It is not so clear, however, that it does not substantially narrow that liability. It will be noted that Sec-

¹² Municipal and county charters ordinarily fix the compensation of certain designated officers, although the determination of compensation for most personnel is vested in the local governing board. See, e.g., Eureka Charter, § 406, Cal. Stat. 1959, res. ch. 124, p. 5604, 5610 (fixing salary of mayor and city council); San Bernardino Charter, § 24, Cal. Stat. 1959, res. ch. 142, p. 5646, 5647 (fixing salary of mayor); San Francisco Charter, § 35, Cal. Stat. 1959, res. ch. 5, p. 5327, 5331 (compensation of police commissioners).

¹³ Although the fee system of compensating certain public officers, once an established part of California local government, see *In re Dodge*, 135 Cal. 512, 67 Pac. 973 (1902), has largely been superseded by the salary system, see *County of Los Angeles v. Hammel*, 26 Cal. App. 580, 147 Pac. 983 (1915), remnants of the older method are still in existence and recognized by statute law. See, e.g., CAL. GOVT. CODE §§ 24350, 28151, 69947, 71266 (recognizing that certain public officers may retain fees as compensation when authorized to do so by law); *County of San Diego v. Milotz*, 46 Cal.2d 761, 300 P.2d 1 (1956). In addition, it is a frequent practice to compensate members of various types of boards and commissions which meet at intervals on the basis of a stipulated sum per meeting attended. See, e.g., Burbank Charter, § 5, Cal. Stat. 1959, res. ch. 16, p. 5332, 5334 (city council members); Sacramento Charter, § 41a, Cal. Stat. 1959, res. ch. 12, p. 5359, 5362 (members of Civil Service Board, Retirement Board, and Planning Commission); Stockton Charter, § 7-1 of art. VI, Cal. Stat. 1959, res. ch. 11, p. 5355, 5358 (members of city council).

¹⁴ It is a widespread practice throughout city and county government in California to provide for appointment of designated assistants and deputies, who are not in the classified service, directly by the superior officer or department head without necessity for approval by any other body. See, e.g., Bakersfield Charter, § 33, Cal. Stat. 1959, res. ch. 13, p. 5363, 5365 (appointments by city manager); San Diego Charter, § 40, Cal. Stat. 1959, res. ch. 64, p. 5502, 5504 (appointment of deputies by city attorney); San Francisco Charter, § 35.4, Cal. Stat. 1959, res. ch. 5, p. 5327, 5332 (appointments by chief of police). In addition, many appointments to municipal and county positions which are not included in the civil service system are made directly by the local governing body (a situation to which the language of Section 1953.6 is possibly also inapplicable). See e.g., Newport Beach Charter, § 600, Cal. Stat. 1959, res. ch. 17, p. 5386, 5388 (appointments by city council); County of San Diego Charter, § 17, Cal. Stat. 1959, res. ch. 15, p. 5374, 5376 (appointments by Board of Supervisors). Many counties and cities, however, have no civil service system, and appointments of deputies and assistants are generally the responsibility of the appointing officer. See generally, BOLLENS & SCOTT, LOCAL GOVERNMENT IN CALIFORNIA 32-33, 100-101 (1951); CROUCH & MCHENRY, CALIFORNIA GOVERNMENT 274-75 (1949).

¹⁵ See *Payne v. Bennion*, 178 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960), suggesting that Section 1953.6 was intended, in part, to codify the decision in *Lorah v. Biscailuz*, 12 Cal. App.2d 100, 54 P.2d 1125 (1936), holding Los Angeles County sheriff not liable for torts of civil service deputies.

¹⁶ It is possible that sheriffs and constables in some counties are still compensated by the fee system, see note 13 *supra*, while in some counties sheriffs may be authorized to appoint assistants or deputies or both without need for the approval of any other official body, see note 14 *supra*. In either of these cases, of course, Section 1953.6 would not afford protection to the sheriff.

tion 1953.6, in terms, appears to codify only the *second* branch of the twofold common law rule of nonliability. Yet, in terms, it appears to define the *exclusive* conditions upon which personal liability may attach to an officer for the negligent act or omission of a deputy or employee serving under him. Omitting matter not immediately relevant, the essence of the legislative declaration is that "no officer . . . shall be personally liable . . . unless" the stated conditions are established—and the only conditions mentioned are those embraced by the second branch of the common law rule. It could well be argued, in view of this statutory language, that an officer would not be liable (if covered by Section 1953.6) for the tort of his deputy or assistant where the officer personally directed, ordered or ratified the tortious act. Yet, at common law, official liability would exist in such a case, under the *first* branch of the rule. In the absence of any reported decisions clarifying this problem, common sense suggests that it is doubtful that a court would adhere to the suggested interpretation even though it is consistent with the "sound public policy" in favor of limiting the liability of public officers.¹⁷ The need for a clearer legislative statement as to official liability, however, seems evident.

By way of summary, it appears that the effect of Section 1953.6 is fourfold. First, it clearly codifies the second branch of the common law rule, (*i.e.*, limiting liability to employment or retention of unfit employee with notice) as applied to certain city and county officers. Second, it arguably may diminish the liability of such city and county officers by precluding application to them of the first branch of the common law rule (*i.e.*, limiting liability to cases of direction, cooperation, participation or ratification of the employee's tortious act). Third, it extends its benefits to certain county sheriffs formerly not protected against operation of the doctrine of *respondeat superior* at common law. Finally, it impliedly recognizes the continued applicability of both branches of the common law rule, as well as its exceptions, to officers and circumstances not within the protection of Section 1953.6 or of other statutes.

It is clear that nonliability of any city or county officer by virtue of Section 1953.6 will not provide a basis for nonliability of the employing entity. The last sentence of the section expressly declares that its terms do not release or relieve any such entity from liability otherwise imposed by law. Prior to *Muskopf*, of course, the liability thus referred to was relatively narrow because of the limitation imposed by the doctrine of governmental immunity; but there is nothing in the language of Section 1953.6 which would suggest that the enlarged entity liability

¹⁷ Mr. Justice Shenk, concurring in *Fernelius v. Pierce*, 22 Cal.2d 226, 246, 138 P.2d 12, 24 (1943), referred to the "sound public policy which supports the general rule of non-liability of superior public officers for torts of inferior civil service officers and employees." It may be noted that in three recent cases, each decided subsequent to the enactment of Section 1953.6 in 1951, the issue of whether that section impliedly immunized city and county officers from tort liability under the first branch of the common law rule might conceivably have been raised by defense counsel, but was not urged, and hence no decision was made thereon. See *Payne v. Bennion*, 178 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960) (holding defendant county superintendent of schools not liable for negligence of appointee); *Agnew v. Schwartz*, 157 Cal. App.2d 10, 320 P.2d 32 (1958) (holding no cause of action stated against defendant city police chief); *Kangieser v. Zink*, 134 Cal. App.2d 559, 285 P.2d 950 (1955) (*semble*). Although these cases appear impliedly to recognize the continued applicability of the first branch of the common law rule, they are thus not authoritative on the issue whether Section 1953.6 has abrogated that rule.

resulting from abolition of the immunity doctrine would not be fully incorporated by this reference.

Government Code Section 1954. A second statutory provision, closely similar to Section 1953.6 but with a slightly different scope of coverage, is Section 1954 of the Government Code, originally enacted in 1923, which reads:

No member of any board is liable for the negligent act or omission of any appointee or employee appointed or employed by him in his official capacity, whether the appointment or employment was made singly or in conjunction with other members of the board, unless the member or members of the board making the appointment or employment either:

(a) Knew or had notice that the person appointed or employed was inefficient and incompetent to perform or render the service or services for which he was appointed or employed.

(b) Retained such inefficient or incompetent person after knowledge or notice of such inefficiency or incompetency.

This section also appears to be merely a codification of the second branch of the common law rule negating the operation of *respondeat superior* to public officers; but, like Section 1953.6, has its own explicit limitations of scope. The term "board" as used in Section 1954 is defined by Section 1950 to mean the legislative body of a city, county or school district, thereby precluding application of the section to officers of the State or of other local entities, or to officers other than members of governing boards. Unlike Section 1953.6, however, Section 1954 does include members of school district governing boards within the ambit of its protection.

Although Section 1954 appears to codify the second branch of the common law rule, there is one important respect in which this section may well have a different substantive effect from the otherwise closely similar provisions of Section 1953.6 (putting to one side the differences as to the public personnel governed thereby). The latter section, in terms, expressly declares that it is not to be interpreted to enlarge the liability of any officer. No such provision is appended to Section 1954. The statement in Section 1952 (*i.e.*, "This article shall not be construed as enlarging the duty or liability of any public officer.") which purports to declare such a rule is probably inapplicable to Section 1954. That statement originally was enacted in 1919 and, in its original form, was a proviso which modified only what is now Section 1953 of the Government Code.¹⁸ In the course of codification in 1943,¹⁹ the 1919 statute and certain later legislation²⁰ which is now Section 1954 were allocated to the same article (Article 1 of Chapter 6 of Division 4 of Title 1) of the new Government Code. Apparently by inadvertence, the qualification appended as a proviso to the 1919 Act (which was codified as Section 1953) was separated from its original parent section and taken into the new code as Section 1952 with such breadth of language as to appear to modify the entire article, rather than solely

¹⁸ Cal. Stat. 1919, ch. 360, § 1, p. 756.

¹⁹ Cal. Stat. 1943, ch. 134, §§ 1952, 1954, pp. 972, 973.

²⁰ What is now Government Code Section 1954 was originally part of the Public Liability Act of 1923. Cal. Stat. 1923, ch. 328, § 1, p. 675.

Section 1953. Under settled rules of interpretation of codifications,²¹ this technical revision would appear not to alter the original meaning of the law; and it would follow that Section 1952 in reality only modifies and qualifies Section 1953, having no effect on Section 1954.

The significance of the preceding discussion stems from the fact that Section 1954 not only appears to limit the personal tort liability of city, county and school district governing board members to the stated circumstances, but seems also to imply that liability *shall* exist when those circumstances exist. The basis of such liability, however, is not *respondereat superior* but the personal negligence of the board member in connection with the employment or retention in employment of the subordinate employee.²² Several cases, including *Lipman* itself, have affirmed the rule that the official actions of public officers in connection with employing public personnel, investigating their fitness for continued employment, or in discharging them from office, are essentially discretionary in nature and that the responsible officers are immune from liability for torts committed in the course thereof.²³ This well-recognized official immunity seems to be in conflict with the statutory liability declared in Section 1954. Although the problem has not been explicitly considered in any known decision, the common law immunity would presumably yield to a contrary indication of legislative intent.²⁴ In any event, the possibility exists that Section 1954 may (by affirmatively imposing liability where a contrary result would obtain under the discretionary immunity rule) enlarge the tort liability of the officers subject to its terms; and if this is so, an equivalent enlargement of city, county and school district liability under *respondereat superior* would follow in view of the *Muskopf* decision.²⁵

Limitation of Liability of Special District Personnel for Torts of Subordinates—Type 1

Statutes relating to special districts often contain provisions somewhat similar to those discussed above, thereby codifying in part, and with certain variations of scope, the common law rule of inapplicability of *respondereat superior* to public officers. The pattern of statutory language most frequently encountered reads substantially as follows:

²¹ CAL. GOVT. CODE § 2. See also CAL. GOVT. CODE § 9604 and *Ansell v. City of San Diego*, 35 Cal.2d 76, 216 P.2d 455 (1950).

²² *Fernellus v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943).

²³ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957); *Cross v. Tustin*, 165 Cal. App.2d 146, 331 P.2d 785 (1958); *Oppenheimer v. Arnold*, 99 Cal. App.2d 872, 222 P.2d 940 (1950).

²⁴ Only two cases have been discovered since the enactment of what is now Section 1954 in which members of governing boards, as distinguished from other responsible public officers, have been sued in an effort to hold them liable for the torts of their subordinates on the theory of negligent employment or retention. In neither case was any attempt made to assert as a defense the doctrine of official immunity for discretionary acts. *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955) (holding members of county board of supervisors not liable for torts of deputy sheriffs in absence of notice of their unfitness); *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949) (holding city councilmen answerable for negligent appointment of known incompetent police officer, without considering or discussing the immunity doctrine).

²⁵ *Cf. Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961), holding that where a public officer is immune from personal liability for discretionary acts, the employing entity is sometimes immune and sometimes liable for the resulting injury, depending upon an evaluation of relevant policy factors. Where the officer is liable, however, *Muskopf* appears to hold the doctrine of *respondereat superior* always available to impose derivative liability upon the employing entity, barring some statutory limitation thereon.

No officer, agent, or employee shall be liable for any act or omission of any agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which he was appointed or employed or retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

Language substantially of this type appears in the following eleven statutes:

GOVT. CODE § 61627 (community services districts).

WATER CODE § 22726 (irrigation districts).

WATER CODE § 31083 (county water districts).

WATER CODE § 35751 (California water districts).

WATER CODE § 60200 (water replenishment districts).

Antelope Valley-East Kern Water Agency Law, Cal. Stat. 1959, ch. 2146, § 76, p. 5173, CAL. GEN. LAWS ANN. Act 9095, § 76 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-76 (West 1959).

Crestline-Lake Arrowhead Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 40, § 26, p. ----, CAL. GEN. LAWS ANN. Act 9099a, § 26 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 104-26 (West Supp. 1962).

Desert Water Agency Law, Cal. Stat. 1961, ch. 1069, § 24, p. 2772, CAL. GEN. LAWS ANN. Act 9097, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-24 (West Supp. 1961).

San Geronio Pass Water Agency Law, Cal. Stat. 1961, ch. 1435, § 24, p. 3256, CAL. GEN. LAWS ANN. Act 9099, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 101-24 (West Supp. 1961).

Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 21, as added by Cal. Stat. 1951, ch. 62, § 22, p. 200, CAL. GEN. LAWS ANN. Act 5243, § 21 (Deering 1954), CAL. WATER CODE APP. § 20-21 (West 1956).

Upper Santa Clara Valley Water Agency Law, Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 24, p. ----, CAL. GEN. LAWS ANN. Act 9099b, § 24 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 103-24 (West Supp. 1962).

Like Sections 1953.6 and 1954 of the Government Code, discussed above, these statutes appear to codify only the second branch of the common law rule, and impliedly preclude any official liability under the first branch of that rule.²⁶ These provisions, however, are readily distinguishable from those previously discussed. They relate solely to designated types of districts. They do not confine the protection of the nonliability rule to members of the governing board (as is the case with Government Code Section 1954, discussed above) or to narrowly defined classes of officers (as is the case with Government Code Section 1953.6, discussed above), although there is some variation as to which additional personnel are covered.²⁷ Finally, they all require that there

²⁶ The inference of nonliability under the first branch is even stronger here with respect to at least nine of the eleven cited statutes, for the other two statutes are accompanied by companion provisions codifying the first branch of the rule, too. See text accompanying note 32 *infra*, discussing CAL. WATER CODE § 22725 (relating to irrigation districts) and CAL. WATER CODE § 35750 (relating to California water districts). The absence of a similar provision in the remaining nine statutes suggests a difference in legislative policy. See cases cited at 112 note 10 *supra*.

²⁷ Two of the cited provisions extend their protection to any "officer or agent" of the district. CAL. WATER CODE §§ 22726 (irrigation districts), 35751 (California water districts). Two extend somewhat further, embracing any "officer, agent or employee." CAL. GOVT. CODE § 61627 (community services districts); CAL. WATER CODE § 31083 (county water districts). The remaining seven statutes attempt to cover the field, by using a comprehensive list of personnel, described as

be "actual" notice of incompetency or inefficiency, as a condition of liability, as compared to the "knowledge or notice" (which presumably might be construed to mean constructive as well as actual notice)²⁸ required by Sections 1953.6 and 1954. Since it appears that constructive notice would be sufficient to support liability of the superior officer in the absence of statute,²⁹ the cited provisions appear to provide more protection against official liability than was true at common law, and more than is possibly afforded by Sections 1953.6 and 1954 of the Government Code to officers within their scope. The difficulty of establishing official liability under such provisions as this may well mean that few such actions against superior officers will be brought hereafter, and that injured plaintiffs will instead seek relief primarily against the employing districts upon the theory of *respondeat superior*, as approved in *Muskopf*.

Limitation of Liability of Special District Personnel for Torts of Subordinates—Type 2

A second pattern of statutory language, found in several water agency statutes, is typified by words such as these:

No director shall be liable for any act or omission of any appointee or employee appointed or employed by him in his official capacity, whether such employment or appointment was made singly or in conjunction with other members of the board, and no officer, agent or employee of the agency shall be liable for any act or omission of any agent or employee appointed or employed by him except when the director, officer or agent making such appointment or employment knew or had actual notice that the

"director or other officer, agent or employee." A similar discrepancy exists in the enumeration of the personnel whose torts are declared not the basis for derivative liability of the superior officer. Although four of the cited provisions absolve the protected officials from liability (except under the stated conditions) for torts of "any agent or employee," seven of them extend this protection to the torts of "any officer, agent or employee." CAL. WATER CODE § 60200; Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 21, as added by Cal. Stat. 1951, ch. 62, § 22, p. 200, CAL. GEN. LAWS ANN. Act 5243, § 21 (Deering 1954), CAL. WATER CODE APP. § 20-21 (West 1956); Antelope Valley-East Kern Water Agency Law, Cal. Stat. 1959, ch. 2146, § 76, p. 5173, CAL. GEN. LAWS ANN. Act 9095, § 76 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 98-76 (West 1959); Crestline-Lake Arrowhead Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 40, § 26, p. ----, CAL. GEN. LAWS ANN. Act 9099a, § 26 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 104-26 (West Supp. 1962); Desert Water Agency Law, Cal. Stat. 1961, ch. 1069, § 24, p. 2772, CAL. GEN. LAWS ANN. Act 9097, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-24 (West Supp. 1961); San Geronimo Pass Water Agency Law, Cal. Stat. 1961, ch. 1435, § 24, p. 3256, CAL. GEN. LAWS ANN. Act 9099, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 101-24 (West Supp. 1961); Upper Santa Clara Valley Water Agency Law, Cal. Stat. (1st Ex. Sess.) 1962, ch. 28, § 24, p. ----, CAL. GEN. LAWS ANN. Act 9099b, § 24 (Deering Supp. 1962), CAL. WATER CODE APP. 1959 SUPP. § 103-24 (West Supp. 1962).

²⁸ The similar requirement of "knowledge or notice" in CAL. GOV'T. CODE § 53051 has been uniformly construed as meaning either actual or constructive notice. *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945); see text at 49-53 *supra*. On the other hand, the simple statutory requirement of "notice" contained in CAL. GOV'T. CODE § 1953, discussed at 120-125 *supra*, has been construed to require actual notice. See *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); cf. *Shannon v. Fleischhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931).

²⁹ See *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943), sustaining the sufficiency of a complaint alleging that the defendant superior officers "knew, or should have known in the exercise of due care" of the unfitness of the subordinate employees. The court in this case also cites and relies upon the case of *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918) and the RESTATEMENT, TORTS § 307 (1934), both of which adopt the view that either actual or constructive notice is sufficient. See also, to the same effect, *O'Brien v. Olson*, 42 Cal. App.2d 449, 109 P.2d 9 (1941); RESTATEMENT (SECOND), AGENCY § 213, comment d (1958).

person appointed or employed was inefficient or incompetent to perform or render the services for which he was appointed or employed, or retained such inefficient or incompetent person after knowledge or notice of such inefficiency or incompetency.

Language substantially of this type is found in the following ten statutes:

- Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 36, p. 4001, CAL. GEN. LAWS ANN. Act 270, § 36 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-36 (West Supp. 1961).
- Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 9.2, p. 5073, CAL. GEN. LAWS ANN. Act 276, § 9.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-9.2 (West 1959).
- El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 35, p. 5094, CAL. GEN. LAWS ANN. Act 2245, § 35 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-35 (West 1959).
- Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 9.1, p. 2669, CAL. GEN. LAWS ANN. Act 9098, § 9.1 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-9.1 (West Supp. 1961).
- Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 14, p. 2507, CAL. GEN. LAWS ANN. Act 4025, § 14 (Deering 1954), CAL. WATER CODE APP. § 59-14 (West 1956).
- Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 7.2, p. 4692, CAL. GEN. LAWS ANN. Act 4613, § 7.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-7.2 (West 1959).
- Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 36, p. 4974, CAL. GEN. LAWS ANN. Act 5449, § 36 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-36 (West 1959).
- Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 7.2, p. 2529, CAL. GEN. LAWS ANN. Act 5935, § 7.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-7.2 (West 1959).
- Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 35, p. 5039, CAL. GEN. LAWS ANN. Act 9380, § 35 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-35 (West 1959).
- Yuba County Water Agency Act, Cal. Stat. 1959, ch. 788, § 7.2, p. 2790, CAL. GEN. LAWS ANN. Act 9407, § 7.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-7.2 (West 1959).

The statutory pattern exemplified in the cited statutes again seems to codify only the second branch of the common law rule; but the wording differs in certain respects from that which characterizes the provisions identified above as "Type 1."

The present provisions, it will be noted, contain an introductory clause which, taken literally, appears to completely exonerate and immunize members of the board of directors of the agency or district from *any* tort liability for acts of subordinates under *any* circumstances. It is difficult to perceive any other purpose for the introductory clause, for if the legislative intent were merely to codify for the benefit of directors the second branch of the common law rule as to inapplicability of *respondeat superior*, this easily could have been accomplished by the language which follows the introductory clause, and which is closely similar to the wording employed in the provisions identified above as "Type 1." Indeed, it will be noted that the balance of the "Type 2" provision expressly mentions directors, and implies that they (like other officers, agents and employees) *will* be liable for negligently appointing or retaining a culpable employee with knowledge or notice of

his unfitness. Taken literally, this second clause appears to cancel out the introductory one. This obvious and inexplicable ambiguity occurs in all of the cited statutes except one (the Yuba-Bear River Basin Authority Act, which is identical to the provision quoted above except for the omission of the word "director" immediately before the third comma).

All of the present statutes, however, are similar to the "Type 1" provisions in explicitly requiring either knowledge or actual notice of the incompetence or inefficiency of the subordinate employee, thereby narrowing the common law liability.³⁰

Limitation of Liability of Special District Personnel for Torts of Subordinates—Type 3

An entirely different approach to the problem of official liability for torts of subordinates is found in three provisions which read:

No officer shall be personally liable for any damage resulting from the operation of the district or from the negligence or misconduct of any of its officers or employees unless the damage was proximately caused by the officer's own negligence, misconduct, or wilful violation of official duty.

This type of provision is found in the following statutes:

WATER CODE § 22725 (Irrigation districts).

WATER CODE § 35750 (California water districts).

Orange County Water District Act, Cal. Stat. 1933, ch. 924, § 49, p. 2433, CAL. GEN. LAWS ANN. Act 5683, § 49 (Deering 1954), CAL. WATER CODE APP. § 40-49 (West 1956).

Directing our attention solely to the problem of liability of superior officers for the torts of their subordinates, it is apparent at once that the three statutory provisions here cited differ materially from the twenty-one provisions previously examined. All of the latter were characterized by a pattern of language which appears to codify only the *second* branch of the common law rule as to official liability for torts of subordinates. At first glance, the three provisions now before us appear to be worded broadly enough to embrace *both* branches of the common law rule—for although that rule exonerated public officers from liability founded on the doctrine of *respondeat superior*, it imposed liability for personal tortious conduct, either in the direction and supervision of a subordinate, or in his employment and retention after notice of unfitness.³¹ Either of these bases for official liability would plausibly seem to come within the statutory language of the three provisions here cited, as constituting "the officer's own negligence, misconduct, or wilful violation of official duty."

A possible weakness in the suggested interpretation, however, lies in the fact that official liability under the second branch of the common law rule is based on a somewhat indirect causal relationship between the negligent conduct and the actual act resulting in the injury. A public officer's negligence in employing a known unfit subordinate, or in retaining him in employment, may or may not ever result in any harm. It only becomes actionable when the subordinate engages in con-

³⁰ See text at 133-139 *supra*.

³¹ See text at 130-132 *supra*.

duct which is the immediate proximate cause of such harm. It is apparent, however, that the three statutes we are examining emphasize the requirement that plaintiff's injury be *proximately* caused by the officer's *own* negligence, misconduct or wilful violation of duty. It is thus arguable that the Legislature here had in mind and intended to codify only the *first* branch of the common law rule, under which officers are liable when they personally direct, cooperate in, or ratify the tortious act of a subordinate.

Some support for this latter interpretation may be derived from a consideration of pertinent legislative history. The first statute following the present pattern appears to have been the addition to the Irrigation District Law in 1921³² of what is now Water Code Section 22725, cited above. The other two cited provisions were later enacted,³³ and apparently were modeled after the irrigation district statute. If, as originally suggested, these sections codified the substance of *both* branches of the common law rule, it would seem that no further legislation would have been deemed necessary. It is thus significant to note that in 1935, notwithstanding the existence of the 1921 predecessor to Section 22725, the Legislature added another provision (now Section 22726 of the Water Code) to the irrigation district statutes, explicitly codifying the *second* branch of the common law rule.³⁴ (This 1935 enactment is listed above together with other examples of a "Type 1" statute.) In the absence of any cases construing it, one may not unreasonably suggest that the 1935 legislation connoted a legislative belief that the original 1921 act covered only the *first* branch of the rule.

The three statutes being examined appear, in terms, to be intended to state the exclusive conditions of liability of officers of the subject districts. Each declares that "no officer shall be personally liable" for the torts of subordinates "unless" the stated conditions exist, thereby implying that such officers shall be liable *only* when those conditions exist. If, as the foregoing analysis intimates, the stated conditions are limited to those within the first branch of the common law rule, it would follow that officers of these districts would not be liable under the second branch (*i.e.*, for negligent hiring or retention of a known unfit subordinate), unless some other statute is applicable, modifying the exclusiveness of the conditions prescribed. With respect to officers of irrigation districts, such a modifying statute does exist—namely the 1935 legislation mentioned in the preceding paragraph. A similar provision was also enacted³⁵ as part of the California Water District Law, and constitutes a counterpart to Water Code Section 35750, listed

³² Cal. Stat. 1921, ch. 538, § 1, p. 849, codified as part of the Water Code by Cal. Stat. 1943, ch. 372, p. 1897. The immediate occasion for the original statute apparently was the attempt of the plaintiff in *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App.2d 234, 212 Pac. 706 (1922), to assert the liability of irrigation district officers under *respondeat superior* for the negligence of their subordinates. Although the defendant officers had successfully demurred to the complaint in the trial court, the ensuing judgment of dismissal was apparently pending on appeal when the legislation in question was before the Legislature. Without reference to the statute, the court on appeal affirmed on the basis of the common law rule.

³³ CAL. WATER CODE § 35750 was originally enacted by Cal. Stat. 1943, ch. 492, § 1, p. 2033. Section 49 of the Orange County Water District Act was part of the original 1933 legislation creating that district. Cal. Stat. 1933, ch. 924, § 49, p. 2433, CAL. GEN. LAWS ANN. Act 5683, § 49 (Deering 1954), CAL. WATER CODE APP. § 40-49 (West 1956).

³⁴ Cal. Stat. 1935, ch. 833, § 1, p. 2250, codified in 1943 as CAL. WATER CODE § 22726.

³⁵ CAL. WATER CODE § 35751, enacted together with CAL. WATER CODE § 35750 by Cal. Stat. 1943, ch. 492, § 1, p. 2033.

above. The third of our present sections (*i.e.*, Orange County Water District Act, Section 49), however, has no such modifying provision; and hence it is possible that officers of the Orange County Water District are not liable for negligent employment or retention of known unfit subordinates, but only for direct personal participation in the tortious acts of their subordinates.

Our discussion of these three provisions has been directed thus far solely to their impact upon the liability of officers for torts of their subordinates. However, it should be noted that their total impact may not be confined to instances of tortious acts or omissions of subordinate personnel. They may reasonably be construed as declaring also a rule of substantive law that officers of the respective districts are liable in tort for injuries sustained "as a result of the operation of the district" where, but only where, they are personally guilty of negligence, misconduct or wilful violation of duty. Apparently such liability exists *whenever* personal negligence, misconduct or violation of duty is established. Yet, at common law there is a well-settled immunity from liability for official acts of a discretionary nature, even though all the elements of tort liability otherwise exist.³⁶ In the absence of controlling decisions to the contrary, it thus appears that the cited provisions may *increase* the personal liability of the respective officers, by abrogating the common law principle of immunity for discretionary conduct.³⁷ To the extent that this is the case, it would seem to follow that the respective employing districts would be subject to a derivative liability by operation of *respondeat superior*, as contemplated by the *Muskopf* decision; although, if discretionary immunity protected such officers, the districts would, in the absence of statute, be derivatively liable only in certain cases,³⁸ depending upon the particular circumstances and the balance struck in weighing the policy determinants identified in *Lipman*. These provisions thus may have also increased the tort liability of the respective districts.

The conclusions advanced in the foregoing paragraph are founded upon inferences drawn from the statutory language, and are thus only as strong as the underlying inferences. Nothing in the context of Section 49 of the Orange County Water District Act suggests the existence of any legislative intent opposed to the views here suggested. However, in both the irrigation district law and the California water district law there are relevant expressions of legislative intent which must be considered.

Section 22731 of the Water Code (which appears in the same article—*i.e.*, Article 4 of Chapter 4 of Part 5 of Division 11—as Section 22725, cited above) provides: "Nothing in the preceding portion of this article shall be construed as creating any liability . . . unless it would have

³⁶ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961), and cases there cited.

³⁷ No cases have been discovered in which the issue was squarely presented whether, in a situation where a defendant public officer was entitled to claim official immunity for discretionary conduct, statutory language of the type under discussion would make such immunity defense unavailable.

³⁸ Note that irrigation districts and California Water Districts are also under a statutory obligation to satisfy judgments against their officers. CAL. WATER CODE §§ 22730, 35755, discussed at 67 *supra*. No such duty is imposed by the Orange County Water District Act, however.

existed regardless of this article.”³⁹ On its face, this language would seem to refute the suggested interpretation of Section 22725 as having enlarged official liability by abrogating the discretionary immunity. It is unlikely, however, that Section 22731 can properly be so construed. It was originally enacted as part of the Irrigation District Liability Law passed in 1935, and the quoted words then applied solely to that law.⁴⁰ Section 22725 of the Water Code (cited above) was not part of the 1935 legislation, but was an independent provision which had been part of the irrigation district statutes since 1921.⁴¹ The mere fact that in the course of the 1943 codification,⁴² Section 22725 was made part of the same article which comprises the 1935 legislation should not cause the meaning of the statutory language to change, for it is the general rule that codification in substantially the same language as before is to be construed as a continuation of, and thus to retain, the original statutory meaning.⁴³ Accordingly, Section 22731 does not appear to qualify the meaning of Section 22725 of the Water Code, and the suggested enlargement of irrigation district liability by the latter section is not vitiated by the rule of the former.

Under the California Water District Law, on the other hand, the common law immunity for discretionary conduct appears to be fully available for the protection of district officers. Section 35750 of the Water Code (cited above) is located in Chapter 4 of Part 5 of Division 13 of the Water Code, which chapter also contains Section 35756, reading: “Nothing in this article [*sic*] shall be construed as creating any liability unless it would have existed regardless of this article.” Unlike the situation as to irrigation districts, discussed in the preceding paragraph, this qualifying section was enacted contemporaneously with Section 35750 and clearly was intended to modify its provisions.⁴⁴ (The erroneous use of the word “article” rather than “chapter” in the course of codification obviously would not impair this result.) Accordingly, it seems clear that Section 35750 must be construed to limit but not to enlarge the liability of officers of California water districts, and correspondingly does not enlarge the liability of such districts. The fact that the identical language in Section 22725 of the Water Code and Section 49 of the Orange County Water District Act arguably *does* enlarge such liability (because of the absence of any applicable qualifying expression of legislative intent) again highlights the almost unbelievable complexities and inconsistencies which permeate the statutory law of tort liability of public entities and their personnel.

A final observation with respect to these “Type 3” provisions is in order. Each of them, it will be noted, extends the protection of the statute only to “officers” of the respective entities. In this respect they are like the statutes discussed on pages 133 to 137 but are mani-

³⁹ The words which are indicated to have been omitted from the text of Section 22731 are “except as provided in Section 22730.” CAL. WATER CODE § 22730 provides that the irrigation district shall pay any judgment rendered against an officer for any act or omission in the course of official duty.

⁴⁰ Cal. Stat. 1935, ch. 833, § 4, p. 2251.

⁴¹ Cal. Stat. 1921, ch. 538, § 1, p. 849.

⁴² Both sections were codified as part of the series of measures which created the Water Code in 1943. Cal. Stat. 1943, ch. 372, p. 1897.

⁴³ The Water Code declares its own explicit rule to this effect. CAL. WATER CODE § 2. See also CAL. GOVT. CODE § 9604; *In re Trombley*, 31 Cal.2d 801, 193 P.2d 734 (1948); *Childs v. Gross*, 41 Cal. App.2d 680, 107 P.2d 424 (1940).

⁴⁴ CAL. WATER CODE § 35750 was added to the California Water District Law by Cal. Stat. 1943, ch. 492, § 1, p. 2033. CAL. WATER CODE § 35756 was enacted at the same time. Cal. Stat. 1943, ch. 492, § 3, p. 2034.

festly narrower in scope of coverage than the "Type 1" (pages 137 to 139) and "Type 2" (pages 139 to 141) statutes, all of which included other personnel as well as officers. In view of the frequently observed rule of interpretation which postulates an intended change of meaning from a change in the usual pattern of statutory language,⁴⁵ the narrow scope of the "Type 3" provisions suggests the question whether such provisions impliedly withhold their protection from supervisory personnel who are not "officers" of the respective entities. Stated another way, it could be argued that by making the nonliability rule applicable only to "officers," the Legislature impliedly intended to limit such rule to officers and not extend its advantages to other district personnel. If this view were adopted, it would presumably mean that such other (*i.e.*, non-"officer") personnel would be liable for the torts of their subordinates under the common law rules previously discussed or, if the negative implication were extended to its utmost limits, possibly even under the rule of *respondeat superior* to the same extent as private supervisory personnel. Although the latter result is admittedly tenuous, and appears to be one which the courts would appear to be reluctant to reach,⁴⁶ its possibility again underscores the unsatisfactory nature of the present statutory patterns.

Limitation of Liability of Special District Personnel for Torts of Subordinates—Type 4

There are two water agency provisions which in substance are identical to the "Type 3" provisions just discussed, but which have a broader scope of coverage. These two statutes declare that:

No director, officer, employee or agent of the agency shall be personally liable for any damage resulting from the operations of the agency or from the negligence or misconduct of any of its directors, officers, employees or agents unless the damage was proximately caused by his own negligence, misconduct or wilful violation of duty.

This pattern of statutory language appears in:

Contra Costa County Water Agency Act, Cal. Stat. 1957, ch. 518, § 23, p. 1560, CAL. GEN. LAWS ANN. Act 1658, § 23 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-23 (West 1959).

Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 27, p. 5139, CAL. GEN. LAWS ANN. Act 9095, § 27 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-27 (West 1959).

It is evident that the only significant verbal difference between these two provisions and the three statutes listed above as "Type 3" (pages 141 to 145) lies in the fact that here the protection of the statute is not restricted to "officers" but extends to any "director, officer, employee or agent" of the respective water agencies. In other respects, the analysis of the "Type 3" statutes, immediately preceding, would seem to be applicable, subject to the qualification that neither of the present statutes contains (a) any companion provision purporting to codify the

⁴⁵ See, *e.g.*, Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co., 51 Cal.2d 331, 333 P.2d 1 (1958); Pacific Gas & Elec. Co. v. Shasta Dam Pub. Util. Dist., 135 Cal. App.2d 463, 287 P.2d 841 (1955).

⁴⁶ See Shenk, J., concurring in *Fernellius v. Pierce*, 22 Cal.2d 226, 246, 138 P.2d 12, 24 (1943), as quoted in *Payne v. Bennion*, 173 Cal. App.2d 595, 3 Cal. Rptr. 14 (1960), pointing out that sound public policy favors a rule of nonliability of public personnel for the torts of subordinates.

second branch of the common law rule,⁴⁷ nor (b) any provision declaring that the cited sections are intended solely to limit and not to enlarge liability. The interpretations suggested above, that this form of statutory language may only codify the first branch of the common law rule and thereby immunize district personnel from liability under the second branch,⁴⁸ and that it may enlarge official liability by impliedly abrogating the discretionary immunity,⁴⁹ are thus not vitiated by contrary expressions of legislative intent.

Limitation of Liability of Public Personnel to Own Negligence

Each of the 26 statutory provisions discussed in the immediately preceding portion of this study have expressly been framed in terms of the liability of public personnel for tortious acts or omissions of subordinate employees. Two statutes also exist which evidently were intended to accomplish substantially the same purpose, but which make no explicit reference to torts of subordinates. The two statutes referred to both relate solely to school district personnel. They are Education Code Sections 1042 and 13551, which provide :

1042. No member of the governing board of any school district shall be held personally liable for the death of, or injury to, any pupil enrolled in any school of the district, resulting from his participation in any classroom or other activity to which he has been lawfully assigned as a pupil in the school unless negligence on the part of the member of the governing board is the proximate cause of the injury or death.

13551. No superintendent, principal, teacher, or other employee of a school district employed in a position requiring certification qualifications shall be held personally liable for the death of, or injury to, any pupil enrolled in any school of the district, resulting from the participation of the pupil in any classroom or other activity to which he has been lawfully assigned as a pupil in the school unless negligence on the part of the employee is the proximate cause of the injury or death.

Neither of these two provisions appear to have been construed in any reported decision. They appear to be counterparts of one another, both having been originally enacted at the same time in 1935,⁵⁰ one referring to the liability of school board members, the other to liability of certain school district personnel other than school board members.

⁴⁷ Note, however, that the Legislature cannot be assumed to be unaware of the differences between the wording of the provisions codifying the second branch of the common law rule and the wording used in the two sections here cited. One of them, the Mojave Water Agency Law, is part of the same chapter of the 1959 session laws which contains also the Antelope Valley-East Kern Water Agency Law. Cal. Stat. 1959, ch. 2146, p. 5114. Section 27 of that chapter is cited in the text at 145 *supra*, and as suggested above, see text accompanying notes 31-35 *supra*, may codify only the *first* branch of the common law rule. Section 76 of that chapter is cited in the text at 138 *supra*, and as suggested above, see text accompanying note 26 *supra*, appears to codify only the *second* branch of that rule. This inconsistency of legislative language, and presumably of legislative intent, within the same statutory enactment, not only tends to support the analysis in the text, but also illustrates the lack of uniformity of policy which often results from *ad hoc* legislation relating to purely local matters.

⁴⁸ See text accompanying notes 31-35 *supra*.

⁴⁹ See text accompanying notes 36-43 *supra*.

⁵⁰ CAL. EDUC. CODE § 1042 formerly (*i.e.*, prior to the 1959 revision of the Education Code) was Section 1027, which was originally enacted in 1935 as Section 2.807 of the School Code by Cal. Stat. 1935, ch. 552, § 1, p. 1630. CAL. EDUC. CODE § 13551 was, prior to the 1959 revision, Section 13204, which was originally enacted as Section 5.533 of the School Code by Cal. Stat. 1935, ch. 552, § 2, p. 1630.

The fact that both sections limit personal liability to cases in which the officer's or employee's negligence was the proximate cause of the pupil's injury suggests three important problems of statutory interpretation.

First, did the Legislature here, by use of language which appears to make personal negligence the sole and exclusive basis of personal liability for injury to school pupils, intend to impliedly immunize the designated school district personnel from liability for *nonnegligent* (e.g., intentional) torts to school pupils? The difference in wording of these sections, as contrasted to that of the "Type 3" and "Type 4" statutes discussed above, would provide an arguable basis for an affirmative answer. Such immunity, however, would be contrary to the principle that "the rule is liability, immunity is the exception,"⁵¹ and would lead to manifest injustice in many cases; and hence it is believed unlikely that a court would reach such a conclusion.⁵²

Second, in view of the similarity of these two provisions to the language employed in the Type 3 and Type 4 statutes discussed above, was it the intent of the Legislature here to designate the first branch of the common law rule (i.e., official liability for personal participation in a subordinate's tort) as the sole permissible basis for recovery founded upon negligence, thereby impliedly immunizing school personnel from liability under the second branch (i.e., negligent hiring or retention of known unfit subordinate)? Some support for an affirmative answer may be found in the fact that the second branch of the rule had already, in Government Code Section 1954, been codified as to school board members for many years before the enactment of these two sections.

This view, however, if sound, leads to a somewhat anomalous pattern of liability of school district personnel. School board members would appear to be personally liable for injuries to pupils under both branches of the common law rule as codified, respectively, in Education Code Section 1042 and Government Code Section 1954.⁵³ (This conclusion, however, should be modified by consideration of the possible immunity granted by Education Code Section 1041, discussed below.⁵⁴) School personnel, other than board members, who are employed in any "position requiring certification qualifications"⁵⁵ would appear to be liable only in circumstances falling within the first branch of the common law rule (codified in Education Code Section 13551) but not in circumstances falling within the second branch. On the other hand, personnel, other than board members, who are employed in positions not requiring certification qualifications (and hence are not within the

⁵¹ Traynor, J., in *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 219, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

⁵² The suggested conclusion would, of course, be a logical consequence of application of the rule "*expressio unius est exclusio alterius*." That canon of interpretation, however, is not invariably followed, and is often rejected where it would lead to injustice. See, e.g., *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307 (1913); *Sobey v. Molony*, 40 Cal. App.2d 381, 104 P.2d 868 (1940).

⁵³ See discussion of CAL. GOVT. CODE § 1954 in text at 137.

⁵⁴ See text accompanying note 4, p. 151 *infra*.

⁵⁵ CAL. EDUC. CODE §§ 13101-13570 relate to certificated employees only, i.e., school district employees such as teachers and supervisory personnel who are required by law to be licensed to perform specified types of school service. Other school district employees (which may in some instances include supervisory personnel) are governed by Sections 13580 to 13756 of the Education Code. Section 13551 in terms applies only to personnel in positions requiring certification qualifications.

scope of Section 13551)⁵⁶ would appear to be liable solely under the common law.

Third, by the language employed in these two sections, did the Legislature intend to abrogate the common law doctrine of discretionary immunity and impliedly impose liability upon school district personnel for injuries to pupils in every case where their personal negligence was the proximate cause thereof? The interpretative problems involved in this issue are similar to those already touched with respect to other similar statutes discussed above.⁵⁷

Limitation of Liability of Public Personnel to Own Acts of Dishonesty or Crime

An extremely broad rule of personal nonliability has been established in a series of provisions in the Agricultural Code, all relating to the personnel of various advisory boards and councils. The relevant statutory language is substantially in these words:

The members of the council . . . including employees of such council, shall not be held responsible individually in any way whatsoever to any person for liability on any contract or agreement of the council, or for errors in judgment, mistakes, or other acts, either of commission or omission, as principal, agent, servant, or employee, except for their own individual acts of dishonesty or crime. The liability of the members of the council shall be several and not joint and no member shall be liable for the default of any other member.

Provisions of this type are included in the following sections:

AGRIC. CODE § 748 (Dairy Council of California)

AGRIC. CODE § 1300.21 (marketing order advisory committees)

AGRIC. CODE § 2185 (program or grading committees appointed under the Agricultural Producers Marketing Law)

AGRIC. CODE § 2916 (administrative committees, agencies, authorities, boards or other bodies appointed under the California Agricultural Products Marketing Law of 1937)

AGRIC. CODE § 3407 (administrative agencies, boards, committees, authorities or other bodies created under the California Agricultural Products Marketing Law of 1943)

AGRIC. CODE § 5084 (California Beef Council)

AGRIC. CODE § 5312 (California Poultry Promotion Council)

AGRIC. CODE § 5406 (California Fish and Seafood Advisory Board)

AGRIC. CODE § 5571 (California Table Grape Commission)

The most remarkable feature of these provisions is the apparent intent of the Legislature to confer upon members of the designated boards and committees, as well as upon their employees, a blanket immunity from *all* tort liability "except for their own individual acts of dishonesty or crime." It is far from clear, however, whether, in view of the disjunctive use of the words "dishonesty or crime," the word

⁵⁶ See note 55 *supra*.

⁵⁷ See text accompanying note 37 *supra*.

“crime” would include technical violations, such as traffic offenses, which are devoid of any connotations of moral turpitude but may provide a basis for civil liability on the theory of negligence *per se*. It may be that the term, “crime,” as here used, will be restricted by the canon *noscitur a sociis* to more serious violations involving dishonesty or moral turpitude.⁵⁸ Despite its inherent ambiguities, however, this statutory language clearly goes well beyond the protections available under common law principles.

The extent to which the State (all of the respective advisory boards and committees would appear to be agencies of the State) would be liable for torts of members or employees of such agencies, notwithstanding their personal immunity under the cited statutes, would appear to depend upon the specific circumstances of each case. The cited provisions, for example, would seem to confer a personal immunity from liability for negligent operation of a motor vehicle in the course of official business, although in such a case the State's liability under Section 17001 of the Vehicle Code would seem to be beyond question.⁵⁹ On the other hand, the cited statutes also appear to confer immunity which is coterminous with the common law immunity for discretionary official acts; and in such cases, the issue of liability of the employing entity would appear to be governed by the *Lipman* case to the same extent as if there were no statutory immunity. Intermediate between these two extremes, of course, are numerous potential cases in which the cited statutes confer an official tort immunity which, in their absence, would not exist. Here, the desirability of recognizing some remedy for the wronged plaintiff would, in all likelihood, lead the courts to the view that unless persuasive contrary policy considerations were present the State should be held liable, notwithstanding its officer's statutory immunity, if the State would have been liable absent the statute.

Miscellaneous Statutory Immunities of Public Personnel

In addition to the provisions collected above, there are a number of statutory immunities from personal tort liability which have been granted to public personnel without reference to the problem of tortious conduct of subordinate employees. In these statutes, the Legislature apparently desired to protect the designated personnel from liability for particularized reasons stemming out of the activity or responsibility in question. In some, the immunity is not confined to public personnel, but includes private persons as well. Whether the immunity conferred upon a public officer or employee under one of these provisions would also preclude liability of the employing entity is a matter as to which the Legislature ordinarily made no express provision. Apparently it was willing to permit the issue to be resolved along common law lines (which, in most cases, meant that there would be no liability because

⁵⁸ See *Vilardo v. County of Sacramento*, 54 Cal. App.2d 413, 420, 129 P.2d 165, 168-69 (1942), holding that “under the rule of *noscitur a sociis* the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used.” See also, *Pasadena University v. County of Los Angeles*, 190 Cal. 786, 214 Pac. 868 (1923).

⁵⁹ See text at 36-40 *supra*; *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955).

of the governmental immunity doctrine which was accepted law at the time of enactment). In a few instances, however, the legislative intent as to entity liability was spelled out in collateral provisions.

Business and Professions Code Section 2144 (second paragraph)

The second paragraph of Section 2144 of the Business and Professions Code (as amended in 1959) provides:

No person licensed under this chapter, who in good faith renders emergency care at the scene of the emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care.

Section 2144, while not limited to public employees, effectively immunizes from personal liability all public officers and employees who are licensed under the Medical Practice Act (*i.e.*, "this chapter," in the provision as quoted above) and who in good faith render emergency medical care at the scene of an emergency. Its rationale is grounded in the belief that doctors employed by public entities are frequently the first medical personnel to arrive at the scene of an accident or other emergency, and often find it necessary to render aid under conditions which may expose them to unusually large risks of liability.¹ The Legislature has here apparently determined that the need to encourage medical men to render prompt and complete emergency aid without fear of civil liability outweighs the policy of compensatory damages in the event that such aid is rendered negligently. The fear of liability might prevent any aid from being given; and the statute thus represents a policy conclusion that some aid is better than none at all.

The policy underlying the personal immunity of the medical practitioner as granted by this section would also support a persuasive argument in favor of immunity for the employing public entity. It could be argued, for example, that immunity for the employing entity would encourage it to instruct its medical personnel answering emergency and ambulance calls to do everything possible in the way of medical assistance on the scene of the emergency. The inexperienced interne employed at the county hospital, although aware of his personal immunity, might well be deterred from performing an emergency surgical procedure (*e.g.*, amputation of a leg to release a victim pinned beneath wreckage) while on an ambulance call by the fear that his employer might later be held responsible in damages for his failure to measure up to the standard of surgical care appropriate to such an operation. Nothing in the statute law, however, has been found which bears on this problem of entity liability in cases where Section 2144 of the Business and Professions Code confers immunity upon the medical officer, and, of course, at the time of the enactment of that section, it was settled that the entity was immune under the governmental immunity doctrine. Whether such liability would obtain thus appears to depend

¹ One voluntarily rendering assistance to an injured person is liable for negligence in what he does which causes additional injury or aggravates the existing injury. See *Griffin v. County of Colusa*, 44 Cal. App.2d 915, 113 P.2d 270 (1941); RESTATEMENT, TORTS § 324 (1934); PROSSER, TORTS 185-88 (2d ed. 1955); *Selected 1959 Code Legislation*, 34 CAL., S. B. J. 583 (1959).

on the court's view as to the applicability of the policy-balancing test approved in *Lipman*, as well as how the court would strike the balance in particular cases if such test were applicable.

Education Code Section 1041

Section 1041 of the Education Code provides:

1041. No member of the governing board of any school district shall be held personally liable for accidents to children going to or returning from school, or on the playgrounds, or in connection with school work.

Section 1041 was first enacted in 1923 as part of the same legislation which, for the first time, waived the substantive immunity of school districts from tort liability for negligence.² The immunity thus conferred is solely enjoyed by governing board members, and is restricted to injuries to children.³

An immediate difficulty of interpretation of Section 1041 arises from the existence of other later-enacted legislation which appears to be inconsistent with it. For example, Section 1042 of the Education Code,⁴ enacted in 1935, implies that a school board member will be liable for injuries sustained during scheduled school work by enrolled pupils where negligence of the board member is a proximate cause of the injury. As a later and more specific expression of the legislative will, Section 1042 would seem to prevail over Section 1041 to the extent of the inconsistency between them;⁵ but Section 1041 presumably would still confer immunity where no inconsistency exists, as in the case of accidents to children not enrolled in the school district (*e.g.*, children not enrolled as pupils but who are using the school playground as part of an after-school community recreational program) as well as injuries to enrolled pupils sustained outside of regular classroom or other assigned activities. By the same reasoning, Section 15512 of the Education Code,⁶ originally enacted in 1939, implies that school board members are liable for personal negligence or misconduct which proximately causes injury to children in connection with the use of tents or other temporary structures; and it follows that the blanket immunity declared by Section 1041 would appear to be superseded *pro tanto*. Finally, Section 1954 of the Government Code,⁷ which codifies the second branch of the common law rule relating to the liability of public officers for the torts of their subordinates,⁸ implies that school board members are liable when the requisite conditions are established; and

² Cal. Stat. 1923, ch. 145, § 1, p. 298, amending CAL. POL. CODE § 1623. The provision waiving substantive immunity, presently found in CAL. EDUC. CODE § 903, is discussed at 40-42 *supra*.

³ Although the original waiver of substantive immunity of school districts was limited to injuries to "pupils," see p. 40 note 1 *supra*, this waiver was enlarged in 1931 to include injuries "to person or property" generally. Cal. Stat. 1931, ch. 1173, p. 2487. The immunity granted to school board members, however, was not given an equivalently broader scope.

⁴ This section is discussed in the text at 146-48 *supra*.

⁵ A subsequent specific act ordinarily will be deemed to constitute an exception or qualification to a former general one to the extent of inconsistency between them. *In re Williamson*, 43 Cal.2d 651, 276 P.2d 593 (1954); *In re Joiner*, 180 Cal. App.2d 250, 4 Cal. Rptr. 667 (1960).

⁶ This section is discussed in the text at 129 *supra*.

⁷ This section is discussed in the text at 136-37 *supra*.

⁸ As to the common law rules governing liability of public officers for torts of their subordinates, see the text at 130 *supra*.

accordingly Section 1954 presumably supersedes the earlier enacted⁹ blanket immunity of Section 1041 of the Education Code to the extent of the inconsistency between them.

On the other hand, Section 1953 of the Government Code,¹⁰ which makes public officers (including school board members) liable for injuries resulting from the dangerous or defective condition of public property when certain specified conditions are satisfied, was enacted *before* Section 1041 of the Education Code,¹¹ and to the extent of any inconsistency between them, the latter section would seem to prevail.¹² Thus, notwithstanding the liability apparently declared in Section 1953, school board members would appear to be immune if the injury for which suit is brought is to a child going to or from school, or on the school playground, or in connection with school work.¹³ In other cases, however, the liability imposed by Section 1953 would still govern, absent other applicable statutory limitations or immunities.¹⁴

The statutory provisions governing the personal tort liability of school board members manifestly are excessively complicated, and are not characterized by consistency or uniformity of policy. Where the Legislature has granted a personal immunity to such board members, however, it has expressed a consistent intent that the employing district shall nevertheless remain liable to the extent permitted by law.¹⁵ Accordingly, it would seem probable that the qualified immunity granted to school board members would not affect the liability of school districts which would obtain in the absence of such immunity, either pursuant to statutory provisions¹⁶ or under the rulings in *Muskopf* and *Lipman*.

⁹ CAL. GOVT. CODE § 1954 was enacted by Cal. Stat. 1923, ch. 328, § 1, p. 675. CAL. EDUC. CODE § 1041 (the section here being analyzed) was enacted by Cal. Stat. 1923, ch. 145, § 1, p. 298. As the provision with the higher chapter number, it is presumed that Section 1954 was the later enacted of the two bills. CAL. GOVT. CODE § 9605, declared to be merely declaratory of existing law by Cal. Stat. 1955, ch. 5, § 5, p. 441. See Note, 3 U.C.L.A. L. REV. 417 (1956), and cases there cited.

¹⁰ This section is discussed in the text at 120 *supra*.

¹¹ CAL. GOVT. CODE § 1953 was originally enacted by Cal. Stat. 1919, ch. 360, § 1, p. 756, while CAL. EDUC. CODE § 1041 was enacted by Cal. Stat. 1923, ch. 145, § 1, p. 298.

¹² This conclusion seems to derive support not only from the rule that the latest expression of the legislative intent ordinarily prevails over the earlier one, see *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860 (1887); CRAWFORD, STATUTORY CONSTRUCTION § 137 (1940), but also from the manifest intent of the Legislature to grant an immunity to school board members by the 1923 amendment to Political Code Section 1623 which was at least commensurate with the waiver of school district tort immunity which was enacted simultaneously therewith. See text accompanying note 2 *supra*.

¹³ No case expressly considering the interrelationship between these two provisions has been found, but the courts have apparently been willing to give full effect to the immunity granted by Education Code Section 1041 notwithstanding the liability earlier imposed by Government Code Section 1953. See *Mitchell v. Hartman*, 112 Cal. App. 370, 297 Pac. 77 (1931); *Dawson v. Tulare Union High School Dist.*, 98 Cal. App. 138, 276 Pac. 424 (1929).

¹⁴ See CAL. EDUC. CODE §§ 15513, 15514 and 15516, discussed in text at 129-30 *supra*.

¹⁵ Section 1041 of the Education Code (the provision here under analysis) was appended to the original act waiving governmental immunity of school districts. See text accompanying note 2 *supra*. See also, CAL. EDUC. CODE § 15515, declaring that the immunities and limitations on board member liability as declared in Sections 15512, 15513 and 15514 of the Education Code (see notes 6 and 14 *supra*) shall not "be construed as relieving any school district of any liability for injury to person or damage to property imposed by law."

¹⁶ The statutory liability of school districts is discussed in the text, *supra*, in connection with the analysis of Vehicle Code Section 17001, see pp. 36-40 *supra*; Education Code Section 903, see pp. 40-42 *supra*; and the Public Liability Act of 1923, see pp. 42-59 *supra*.

Education Code Section 31301

Section 31301 of the Education Code provides:

31301. Notwithstanding the provisions of Section 1714.5 of the Civil Code, no superintendent, principal, teacher or other employee of a school district employed in a position requiring or not requiring certification qualifications, and no person authorized by the governing board to assist any employee of the district, shall be held personally liable for civil damages on account of personal injury to or death of any person resulting from the participation of the person in a civil disaster, civil defense, or fire drill or test ordered by lawful authority to be held in the schools of the employing district, unless negligence or the wilful act of the employee is the proximate cause of the injury or death.

This provision was added to the Education Code in 1957.¹⁷ Its purpose is somewhat difficult to determine, but the reference to Section 1714.5 of the Civil Code provides a clue. That section, which is analyzed below,¹⁸ confers a broad immunity from personal tort liability upon disaster service workers performing disaster services during a state of extreme emergency, except for wilful torts. Section 31301, it will be noted, grants a comparable immunity except in cases of wilful or negligent torts, is not confined to states of extreme emergency, and relates only to school district personnel participating in authorized civil disaster, civil defense, or fire drills. The key to the significance of Section 31301, then, seems to lie in the fact that school district personnel, while engaged in conducting such drills, may be deemed disaster service workers,¹⁹ and such drills may be deemed a form of disaster service (which includes training to prepare for disaster emergencies).²⁰ If a school pupil or some other person were injured in a civil defense drill when there was no declared state of extreme emergency in effect, Section 1714.5 of the Civil Code would confer no immunity. School district personnel would then be liable, under either Section 13551 of the Education Code or common law tort principles, for negligent (and probably also for wilful) conduct proximately causing the injury,²¹ and Section 31301 would be redundant and unnecessary. On the other hand, if a state of extreme emergency were in effect (such a declaration being permissible under circumstances during which the schools would probably continue to function normally)²² and such an injury occurred during an authorized drill, Civil Code Section 1714.5 would provide a defense against liability unless the school district em-

¹⁷ Cal. Stat. 1957, ch. 2094, § 1, p. 3719.

¹⁸ See text at 159-60 *infra*.

¹⁹ All public employees are declared to be disaster service workers by Labor Code Section 3211.92, as well as civil defense workers by Sections 3100 and 3101 of the Government Code.

²⁰ Labor Code Section 3211.93 defines disaster services under the California Disaster Act to include training activities.

²¹ Education Code Section 13551 relates to personal liability of school district personnel for injuries to pupils in the course of school work, and limits such liability to instances in which the officer's or employee's negligence was a proximate cause of the injury. See discussion in text at 146-48 *supra*. It is doubtful that the statutory reference to liability for negligence in Section 13551 would be construed as impliedly granting immunity from liability for wilful torts; and as to persons injured other than pupils, the ordinary common law principles of tort liability undoubtedly apply in the absence of any other statutory limitations.

²² The statutory definition of "state of extreme emergency" includes a number of possible situations in which a declaration of the existence of such a state would probably not interrupt the normal continuation of educational and other routine civilian functions, except possibly in specific areas. See CAL. MIL. & VET. CODE § 1505.

ployee was guilty of a wilful tort. Here, then, Section 31301 takes on purpose and meaning—for it would recognize that “notwithstanding the provisions of Section 1714.5 of the Civil Code,” personal liability still obtains as to *negligent* torts. Section 31301, in short, appears designed to enlarge upon the personal liability of school employees for negligence in this narrow situation where immunity would otherwise exist under Section 1714.5 of the Civil Code. No other purpose or effect is readily discernible.

One may speculate as to why the Legislature saw fit to impose on school district personnel, in the civil defense and fire drill situation during a state of extreme emergency, a personal liability for negligence which it had expressly withheld from all other public employees by Section 1714.5 of the Civil Code. Perhaps it is relevant to note that school districts are already fully liable for the negligent torts of their employees,²³ and are required by law to insure themselves and their employees against personal liability at school district expense.²⁴ Accordingly, an expansion of the negligence liability of school personnel in effect merely increases the scope of the risks covered by insurance, and thus provides practical assurance that the injured person will be able to realize the fruits of his judgment without actually imposing a heavy financial burden upon the negligent officer or employee.

Except to the extent that Section 31301 increases the possible liability of school district personnel, and thereby also increases the derivative liability of the employing district, this section does not appear to have any significant effect on the tort liability of school districts, nor do *Muskopf* or *Lipman* appear to alter that effect materially.

Government Code Section 1953.5

Section 1953.5 of the Government Code provides:

1953.5. No officer of the State, or of any district, county, city and county, city, or judicial district, is liable for moneys stolen from his official custody unless the loss was sustained because the officer failed to exercise due care.

Section 1953.5 was enacted in 1949, apparently for the purpose of protecting public officers from absolute liability for public funds stolen or embezzled from their official custody. The common law rule was that in the absence of fault or neglect by a public officer, robbery or theft of public funds in his official custody was a defense to an action for their recovery.²⁵ In the case of *Union Bank & Trust Co. v. County of Los Angeles*,²⁶ decided in 1938, however, the Supreme Court had held that absolute official liability did exist in such cases, contrary to the common law rule, because the language of the statutes requiring the bonding of public officers so provided. The addition of Section 1953.5 effectively removed the foundation for the *Union Bank* decision, and thus restored the common law protection.²⁷

²³ CAL. EDUC. CODE § 903, discussed in the text at 40-42 *supra*.

²⁴ CAL. EDUC. CODE §§ 1044, 1045.

²⁵ *Sonoma County v. Stofen*, 125 Cal. 32, 57 Pac. 681 (1899); *City of Healdsburg v. Mulligan*, 113 Cal. 205, 45 Pac. 337 (1896).

²⁶ 11 Cal.2d 675, 81 P.2d 919 (1938).

²⁷ *County of Placer v. Aetna Cas. & Sur. Co.*, 50 Cal.2d 182, 323 P.2d 753 (1958) (holding that Section 1953.5 was applicable to a case of embezzlement of public funds by a clerk of the court).

Since *Muskopf* and *Lipman* appear to have approved the application of ordinary concepts of *respondeat superior* in cases of both negligent and intentional torts by public personnel, it is apparent that the immunity granted to public officers by Section 1953.5 will ordinarily also benefit the employing entity. Of course, in most cases the question is merely academic, for it is ordinarily the employing entity which is seeking to recover the stolen funds from its own officer, and the problem of derivative liability to third parties does not arise. If the stolen funds had been in official custody in trust for a third party, the entity's liability for their loss might well be drawn in issue,²⁸ and the immunity granted by Section 1953.5 would then become highly relevant. However, even where the officer having official custody (*e.g.*, the treasurer for the entity) was not liable because of the statutory protection, the employing entity would presumably still be liable if the thief were proven to be another of its employees acting in the course and scope of his employment (*e.g.*, a deputy or employee in the treasurer's office). The problem of entity liability, in any event, is probably not very important in connection with stolen funds, for the public officers and employees having access to such moneys are generally covered by adequate faithful performance bonds.²⁹

Government Code Section 1955

Section 1955 of the Government Code provides:

1955. If any officer, agent, or employee of the State, a district, county, political subdivision, or city acts in good faith and without malice under the apparent authority of any law of the State, whether an initiative measure or an act enacted by the Legislature and the law subsequently is judicially declared to be unconstitutional as in conflict with the Constitution of the State or of the United States, he is not civilly liable in any action in which he would not have been liable if the law had not been declared unconstitutional, nor is he liable to any greater extent than he would have been if the law had not been declared unconstitutional.

Section 1955, originally added to the Civil Code in 1933³⁰ and subsequently recodified in the Government Code in 1943,³¹ does not appear to have been judicially construed in any reported case. Its purpose is reasonably clear. Prior to its adoption by the Legislature, there had been frequent judicial intimations that a public officer acting pursuant to a statute did so at his peril, for if the statutory authority for such official action was later held to be unconstitutional, he would be personally liable for injuries sustained as a result of his conduct thereunder and reliance upon the invalid statute would not constitute a

²⁸ Cf. *Union Bank & Trust Co. v. County of Los Angeles*, 2 Cal. App.2d 600, 38 P.2d 442 (1934).

²⁹ See CAL. GOVT. CODE §§ 1453, 1480, 1481; 41 CAL. JUR.2d *Public Officers* § 191 (1958).

³⁰ CAL. CIV. CODE § 3342, added by Cal. Stat. 1933, ch. 248, § 1, p. 779, amended by Cal. Stat. 1933, ch. 1053, § 1, p. 2707. The original version applied only to state, county and municipal officers and employees. The amended version expanded the scope of the section to include personnel of districts and political subdivisions.

³¹ Cal. Stat. 1943, ch. 134, § 1955, p. 973.

defense.³² This rule, which was based upon the oversimplified and unsophisticated notion that an unconstitutional statute has no legal force or effect whatever,³³ obviously placed public officers and employees in an extremely hazardous position, since they were required to accurately predict whether their statutory authority would be held constitutional or not—an issue on which the most capable of counsel often disagreed and on which the most eminent of courts was often divided. The difficulty was accentuated by the view, sometimes taken, that the officer could not question the validity of the statute himself but was bound to act thereunder.³⁴ This latter doctrine, fortunately, had been disapproved by the California Supreme Court prior to the enactment of the measure now being considered,³⁵ and it became settled law in California that doubts could be appropriately resolved in test litigation.³⁶ The desire to reduce the necessity for such test litigation, however, may also have motivated the Legislature in granting immunity in the 1933 enactment.

Section 1955, it will be noted, grants immunity from liability in only a portion of the area in which the risk arises. It is limited to action taken under authority of state statutes, either legislative or initiative measures; and apparently does not extend its protection to officers or employees acting under authority of county or city charters or ordinances. Moreover, it applies only to instances in which the law is declared to be unconstitutional; and apparently would not apply to cases of unconstitutional application of a law which is constitutional on its face, nor to cases in which the law appears to grant authority for the official action complained of, but in order to save its constitutionality is narrowly construed not to do so. Finally, it is not clear whether Section 1955 grants immunity when the officer's authority to act is derived only indirectly from a state law, as where his duty flows immediately from the terms of a contract which in turn appears to be authorized by the law in question. In short, Section 1955 is not as broad as the basic problem it purports to deal with, and the necessity for test litigation in doubtful cases still exists.³⁷

The grant of only a limited immunity initially might have been supported by the fact that coupled with the governmental immunity doctrine, the statutory personal immunity would leave the injured

³² *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308, 5 P.2d 585 (1931); *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516 (1896); *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562 (1894); *McCauley v. Weller*, 12 Cal. 500 (1859). See generally, Crocker, *The Tort Liability of Public Officers Who Act Under Unconstitutional Statutes*, 2 So. CAL. L. REV. 236 (1929); Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927).

³³ The theoretical foundations of the rule are exposed and criticized forcefully in Crocker, *op. cit. supra* note 32. See also David, *The Tort Liability of Public Officers*, 12 So. CAL. L. REV. 127, 147-49 (1939).

³⁴ See, e.g., *Marin Municipal Water Dist. v. Dolge*, 172 Cal. 725, 158 Pac. 187 (1916); *City of Los Angeles v. Leland*, 157 Cal. 30, 106 Pac. 218 (1909); *County of Orange v. Backs*, 77 Cal. App. 744, 247 Pac. 519 (1926); Annot., 67 A.L.R. 718 (1930).

³⁵ *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308, 5 P.2d 585 (1931), expressly disapproving the three cases cited in note 34 *supra*.

³⁶ Even in cases where the immunity conferred by Section 1955 appears to be applicable, test litigation is often instituted for the protection of private persons, see *County of Los Angeles v. Byram*, 36 Cal.2d 694, 227 P.2d 4 (1951), or to ensure compliance with legal requirements as a matter of good public policy. See *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959). This technique has received express legislative approval. See Cal. Stat. 1959, res. ch. 184, p. 5742.

³⁷ See, e.g., *City & County of San Francisco v. Boyd*, 22 Cal.2d 685, 140 P.2d 666 (1943), holding test case permissible where city officer could not safely act pursuant to charter provision the constitutionality of which had been challenged. See also, *City & County of San Francisco v. Linares*, 16 Cal.2d 441, 106 P.2d 369 (1940) (*semble*).

plaintiff without any remedy whatever. Now that *Muskopf* and *Lipman* have done away with the entity's immunity, it would seem to be appropriate to reconsider the extent to which official immunity for acts taken under unconstitutional or constitutionally inapplicable statutes should extend. In the absence of any decisions in point, it is difficult to determine whether the employing entity would, under *Muskopf* and *Lipman*, be liable today where Section 1955 grants immunity to public personnel. It seems likely, since the purposes underlying this section seem to be closely similar to those which sustain the common law official immunity for discretionary acts, that entity liability might well obtain in such cases, conditioned upon a balancing of relevant policy considerations in the manner suggested in *Lipman*. In any event, it would seem appropriate that the matter of official immunity and entity liability in these circumstances be considered jointly, and a resolution of the problem incorporated in legislation.

Government Code Section 1957

Section 1957 of the Government Code provides:

1957. Any member of an organized fire department, fire protection district, or other fire fighting unit of either the State or any political subdivision, or any employee of the Division of Forestry, may transport or arrange for the transportation of any person injured by a fire, or by an accident which occurs as a result of any fire fighting or fire protection operation, to a physician and surgeon or hospital, if the injured person does not object to such transportation.

Any member of an organized fire department, fire protection district, or other fire fighting unit of either the State or any political subdivision, or employee of the Division of Forestry shall not be liable for any damages or for any medical, ambulance, or hospital bills incurred in behalf of the injured party.

Section 1957 was added to the Government Code in 1953.³⁸ It seems to have two basic objectives. First, it makes clear the legal authority of fire fighting and Division of Forestry personnel to transport or arrange for transportation of persons injured in fire fighting activities to places where they may obtain medical assistance. In so doing, they would be acting within the scope of their duties, and hence would have the benefit of employer-purchased insurance protection covering tort liabilities which may be incurred while so acting.³⁹ Second, Section 1957 immunizes the officer or employee providing the transportation, or arranging for it, from liability in connection therewith for damages incurred by the injured person. In the absence of this immunity, the officers or employees rendering such assistance would be exposing themselves to personal liability if, as a result of their negligence in the course of transporting the injured individual, he sustained additional injuries or his

³⁸ Cal. Stat. 1953, ch. 667, § 1, p. 1935.

³⁹ Most public entities have authority to purchase liability insurance protecting their officers and employees from personal tort liability for negligence in the course and scope of their duties. CAL. GOVT. CODE § 1956 (granting such authority to the "State, a county, city, district, or any other public agency or public corporation"). See also CAL. VEH. CODE § 17003; 7 OPS. CAL. ATTY. GEN. 209 (1946), ruling that fire district was authorized to purchase insurance against personal liability of personnel operating fire district ambulance.

injuries were aggravated.⁴⁰ The Legislature apparently concluded that sound public policy favored the extension of immediate help to persons injured by fire or firefighting activities, often occurring in remote places distant from medical facilities or personnel, and determined that immunity from tort liability resulting from efforts to render such help would remove a potential deterrent which might otherwise tend to mitigate the demands of simple humanity.

Section 1957 has not been construed by the courts, but its language suggests several interpretative problems.

The second paragraph of this section declares the officer or employee rendering assistance not liable for "any damages." Assuming this grant of personal immunity to refer to damages resulting from the transporting of the injured person to medical aid, the question arises whether the immunity would extend to new injuries (resulting from negligent driving of the transporting vehicle) which are wholly unrelated to the original injuries resulting from the fire or fire fighting activities.⁴¹ If the injured person, while being transported, is deemed to be a "guest" within the meaning of the guest statute,⁴² would the fire district employee be immune even from injuries resulting from his intoxication or wilful misconduct?

The impact of Section 1957 upon the possible tort liability of the employing entity is also difficult to assess. If the negligent operation of the vehicle transporting the injured person results in further or additional injuries, presumably the entity would be liable therefor under the provisions of Section 17001 of the Vehicle Code.⁴³ Indeed, since the first paragraph clearly connotes that the employee is in the course of his employment in transporting the injured party, the application of Section 17001 would seem to be legislatively confirmed. But Section 17001 may be inapplicable in some cases because the driver's negligence does not relate to the operation of the transporting vehicle, but rather to other matters (such as delay, or improper handling of the injured person⁴⁴). The question then arises whether the statutory immunity conferred on officers and employees by Section 1957 would preclude derivative liability of the employing entity. As in the case of the analogous policy expressed in Section 2144 of the Business and Professions Code (immunizing medical personnel from damages for emergency medical aid), discussed above,⁴⁵ the resolution of this problem would seem to depend on whether the courts will regard the policy-balancing approach approved in *Lipman* to be applicable, as well as how such balance is struck in individual cases.

⁴⁰ This rule, incorporated in RESTATEMENT, TORTS § 324 (1934), appears to be the law in California. See, e.g., *Perry v. D. J. & T. Sullivan, Inc.*, 219 Cal. 334, 26 P.2d 485 (1933); *Doherty v. California Nav. & Improvement Co.*, 6 Cal. App. 131, 91 Pac. 419 (1907); *Griffin v. County of Colusa*, 44 Cal. App.2d 915, 113 P.2d 270 (1941). Cf. PROSSER, TORTS 185-88 (2d ed. 1955).

⁴¹ It is here assumed, for the purpose of the discussion, that the immunity granted to operators of emergency vehicles while on emergency calls, CAL. VEH. CODE § 17004, is not applicable. See discussion in text at 166 *infra*.

⁴² See CAL. VEH. CODE § 17158. Cf. *Rocha v. Hulen*, 6 Cal. App.2d 245, 44 P.2d 478 (1935).

⁴³ See discussion in text at 36-40 *supra*.

⁴⁴ See *Greenberg v. County of Los Angeles*, 113 Cal. App.2d 389, 248 P.2d 74 (1952), holding that delay on part of county ambulance driver in transporting injured person to hospital was not actionable negligence under CAL. VEH. CODE § 400 (now § 17001).

⁴⁵ See text at 150-51 *supra*.

Civil Code Section 1714.5 (second paragraph)

The second paragraph of Civil Code Section 1714.5 provides:

No disaster service worker who is performing disaster services ordered by lawful authority during a state of extreme emergency which is either state-wide or within any region or regions of the State shall be liable for civil damages on account of personal injury to or death of any person or damage to property resulting from any act or omission in the line of duty, except one that is wilful.

Section 1714.5 was added in 1955.⁴⁶ The immunity granted is restricted to nonwilful injuries, and is carefully circumscribed and conditioned upon the existence of three facts:

(1) The person whose act or omission caused the injury must be a "disaster service worker." This term is defined by statute⁴⁷ to include public employees.

(2) The act or omission causing the injury must have been in the line of performance of duly authorized "disaster services" duties. This term is defined⁴⁸ to mean all activities authorized by and carried on pursuant to the California Disaster Act⁴⁹ and the Civil Defense Act of 1950,⁵⁰ including training necessary or proper to engage in such activities.

(3) The injury must have been incurred during a "state of extreme emergency." This term means the existence of conditions of extreme peril to the safety of persons and property within the State caused by enemy attack or threatened attack, or by sabotage, air pollution, fire, flood, storm, epidemic, riot or earthquake, where such conditions are so great in magnitude as to be beyond the control of a single city or county and hence require the combined forces of a mutual aid region or regions to combat.⁵¹ Ordinarily such a state exists only upon proclamation by the Governor or the Director of the Disaster Office,⁵² but exists immediately and without proclamation in the event of enemy attack or notice of imminent attack.⁵³

In appraising the relationship of Section 1714.5 to the doctrine of *Muskopf and Lipman*, it must be borne in mind that this legislation was enacted at a time when the doctrine of immunity apparently constituted a complete defense to liability of public agencies for injuries arising out of such clearly "governmental" activities as these, except to the extent that such immunity had been waived by statute. Accordingly, the attention of the Legislature was addressed primarily to the problem of personal liability of individuals, including public employees.

⁴⁶ Cal. Stat. 1955, ch. 1777, § 1, p. 3283.

⁴⁷ Labor Code Section 3211.92 provides in part that "disaster service worker" includes "volunteer civil defense workers and public employees and also includes any unregistered person impressed into service during a state of disaster or a state of extreme emergency by a person having authority to command the aid of citizens in the execution of his duties." An exception to the statutory definition is set out in Labor Code Section 3211.92, fourth paragraph, excluding certain volunteer firemen.

⁴⁸ CAL. LABOR CODE § 3211.93. For an exception, covering activities or services for which the disaster council receives a fee or other compensation, see CAL. LABOR CODE § 3211.93a.

⁴⁹ The California Disaster Act consists of CAL. MIL. & VET. CODE, Division 7, ch. 1 (§§ 1500-1600). See CAL. MIL. & VET. CODE § 1501.

⁵⁰ The Civil Defense Act of 1950 was enacted by Cal. Stat. (3rd Ex. Sess.) 1950, ch. 3, p. 6, but has since been merged into the California Disaster Act. See Historical Note in CAL. MIL. & VET. CODE § 1502.5 (West 1955).

⁵¹ CAL. MIL. & VET. CODE § 1505.

⁵² CAL. MIL. & VET. CODE §§ 1505, 1518.3, 1580.

⁵³ CAL. MIL. & VET. CODE § 1505.5.

Immunity from tort liability was extended to public agencies in a few instances involving defense and disaster programs,⁵⁴ but on the whole the problem was left untouched by legislation. In the absence of statute, therefore, the immunity of a public officer or employee under Section 1714.5 would not, under the doctrine of the *Lipman* case, necessarily immunize the employing entity from derivative liability. The employing public agency would undoubtedly continue to be liable under such pervasive statutory waivers as the Public Liability Act of 1923⁵⁵ and Section 17001 of the Vehicle Code.⁵⁶ Presumably entity liability would also obtain under the rule of *Lipman* unless the court, in balancing relevant policy considerations, determined that the purpose of the immunity conferred on public officers and employees also demanded immunity for the employing entity. A strong argument is readily apparent in favor of entity immunity here, for Section 1714.5 is apparently designed to remove any possible deterrent to swift and vigorous remedial and defense action in emergency situations. The same policy would seem to support entity immunity as well, since concern for tort repercussions upon the local public treasury might well impair resoluteness of public officers and hence the effectiveness of emergency measures taken by them under the Disaster Act.

Attention should be directed to a rather curious, inexplicable and presumably inadvertent omission from Section 1714.5. As already noted, this section is confined in effectiveness to states of extreme emergency. Yet the California Disaster Act contemplates an alternative condition known as a "state of disaster," which includes substantially all of the conditions which characterize a "state of extreme emergency" except for war-caused exigencies.⁵⁷ For some reason not apparent on the face of the legislation, the immunity of Section 1714.5 (as enacted in 1955) was not enlarged to make it applicable to states of "disaster" when that alternative condition was defined and brought within the ambit of the California Disaster Act in 1956.⁵⁸ Other statutes granting personal immunity, however, were amended to make them applicable to both alternative conditions.⁵⁹ In view of the large overlapping meaning of the terms "state of extreme emergency" and "state of disaster," it is difficult to attribute to the Legislature an intent to deliberately withhold the statutory immunity from disaster service workers when the latter condition, rather than the former, has been proclaimed by the Governor. This limitation on official immunity, it should be noted, means a corresponding official liability and, under *Muskopf*, an equivalent derivative liability of the employing public entity. The discrepancy in question appears to call for legislative correction.

⁵⁴ See CAL. CIV. CODE § 1714.5 (first paragraph), discussed in the text at 179-81 *infra*; CAL. MIL. & VET. CODE § 1591(b), discussed in the text at 163-166 *infra*.

⁵⁵ See text at 42-59 *supra*.

⁵⁶ See text at 36-40 *supra*.

⁵⁷ CAL. MIL. & VET. CODE § 1505.

⁵⁸ Prior to 1956, the California Disaster Act employed the term "state of extreme emergency" to define the conditions under which its provisions became applicable. By Cal. Stat. (1st Ex. Sess.) 1956, ch. 56, § 2, p. 439, the new term "state of disaster" was added, as defined in CAL. MIL. & VET. CODE § 1505 (second paragraph).

⁵⁹ See, e.g., CAL. MIL. & VET. CODE § 1587, as amended by Cal. Stat. (1st Ex. Sess.) 1956, ch. 56, § 22.7, p. 447; CAL. MIL. & VET. CODE § 1591, as amended by Cal. Stat. 1957, ch. 1921, § 2, p. 3355. These measures are discussed in the text at 161-163 *infra*.

Military and Veterans Code Section 1587 (second paragraph)

The second paragraph of Section 1587 of the Military and Veterans Code provides:

Any physician and surgeon (whether licensed in this or any other state), hospital, nurse, or dentist that renders services during a period of any state of extreme emergency or any state of disaster, at the express or implied request of any state official or agency or state or local disaster council, shall have no liability for any injury sustained by any person by reason of such services, regardless of how or under what circumstances or by what cause such injuries are sustained; provided, however, that the immunity herein granted shall not apply in the event of a wilful act or omission.

This provision, originally enacted in 1951,⁶⁰ appears to express a general policy which is consistent with that exemplified in Section 1714.5 of the Civil Code, discussed immediately above. The Legislature apparently deemed it vital to the health and welfare of the citizens of the State that all medical personnel be subject to call to perform emergency medical service in times of disaster or extreme emergency; and in order to eliminate all deterrents to and maximize the benefits of such medical services, which might have to be performed under adverse and entirely unforeseeable conditions, determined to grant total immunity from tort liability flowing therefrom. Publicly employed medical and dental personnel are included in the protection granted.

Section 1587, however, is not entirely consistent with the medical services objective suggested in the previous paragraph. In terms, it grants immunity to medical personnel regardless of the cause of the injuries in question—that is, the immunity appears to exist whether the physician, nurse, or dentist is performing medical services or doing some other act. If a physician is rendering service as an emergency firefighter, for example, he would appear to enjoy a total personal tort immunity (except for wilful acts or omissions); yet other persons who are not physicians (or nurses or dentists) but are performing similar services under identical circumstances may not be immune (*e.g.*, they may not qualify for the immunity granted by Civil Code Section 1714.5 since they may not be within the technical class of “disaster service workers,”⁶¹ or the services may be rendered during a “state of disaster” to which Section 1714.5 apparently does not apply).⁶² In short, it seems that Section 1587 may, under some conditions, give a specially favored status of immunity to physicians and surgeons, dentists and nurses, which may have no rational relevancy to their medical training. Although the constitutional difficulty thus suggested could easily be avoided by strict judicial construction, it would be desirable to avoid possible litigation by an appropriate amendment restricting the scope of the immunity to injuries arising from the rendition of medical or dental services.

⁶⁰ Cal. Stat. 1951, ch. 1351, § 16, p. 3263, adding the second paragraph to Section 1587 of the Military and Veterans Code. This paragraph was amended in 1956 to make reference to both a state of extreme emergency and a state of disaster. Cal. Stat. (1st Ex. Sess.) 1956, ch. 56, § 22.7, p. 447.

⁶¹ See the definition of “disaster service worker” as set forth in Labor Code Section 3211.92, as paraphrased in note 47 *supra*.

⁶² See text accompanying note 59 *supra*.

The general comments set forth above⁶³ with respect to the impact of *Muskopf* and *Lipman* upon the immunity granted by Section 1714.5 of the Civil Code are also applicable here. Despite the statutory immunity of the individual, the entity employing the physician, nurse or dentist (if he or she is a public employee) or requesting that the services be performed (which request would presumably create an agency relationship) will probably continue to be liable for resulting injuries where such liability is provided by some applicable statute. In other instances, however, the problem of applying the *respondeat superior* doctrine appears to require a judicial appraisal of the policy considerations such as those held in *Lipman* to be relevant. An expression of legislative intent on the subject would manifestly be both desirable and appropriate.

Military and Veterans Code Section 1591 (paragraph (a))

Section 1591(a) of the Military and Veterans Code provides:

(a) Volunteers duly enrolled or registered with the California Disaster Office or any war, defense or disaster council of any public agency, or unregistered persons duly impressed into service during a state of disaster or a state of extreme emergency, in carrying out, complying with, or attempting to comply with, any order, rule or regulation issued or promulgated pursuant to the provisions of this chapter or any local ordinance, or performing any of their authorized functions or duties or training for the performance of their authorized functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of counties or cities performing similar work for their respective entities.

Section 1591(a) is manifestly designed to protect volunteers, or persons impressed into service, in the performance of defense and disaster activities. The protection, however, is only as extensive as the limitations on liability applicable to city or county employees performing similar work for their respective entities. This would apparently include the statutory limitations upon liability for injuries sustained as a result of defective public property prescribed in Section 1953 of the Government Code;⁶⁴ the limitation on personal liability for stolen public funds prescribed by Section 1953.5 of the Government Code;⁶⁵ the restriction against liability for good faith acts taken under unconstitutional state laws as provided by Section 1955 of the Government Code;⁶⁶ and the immunity from liability granted by Section 17004 of the Vehicle Code for injuries caused while operating authorized emergency vehicles on emergency calls.⁶⁷ Other statutory immunities of county and city personnel are so unlikely to be applicable to volunteer defense and disaster workers that they may be disregarded.⁶⁸ The common law immunities for discretionary acts,⁶⁹ and the common law rule

⁶³ See text at 159-61 *supra*.

⁶⁴ See text at 120-25 *supra*.

⁶⁵ See text at 154-55 *supra*.

⁶⁶ See text at 155-57 *supra*.

⁶⁷ See text at 166 *infra*.

⁶⁸ See, e.g., CAL. GOV'T. CODE § 1953.6, discussed in text at 133-36 *supra*, and CAL. GOV'T. CODE § 1954, discussed in text at 136-37 *supra*.

⁶⁹ See text at 246-60 *infra*.

precluding application of the doctrine of *respondeat superior*⁷⁰ would also appear to be incorporated by reference.

Absent statutory provisions to the contrary, the liability of the public agency having jurisdiction over the disaster council which directed the activities of the volunteer who caused the injury would seem to be governed by the considerations discussed above with respect to entity liability for torts of city and county officers and employees similarly situated.⁷¹

Military and Veterans Code Section 1591 (paragraph (b))

Section 1591(b) of the Military and Veterans Code provides:

(b) No political subdivision, municipal corporation or other public agency under any circumstances, nor the officers, employees, agents, or duly enrolled or registered volunteers thereof, or unregistered persons duly impressed into service during a state of disaster or a state of extreme emergency, acting within the scope of their official duties under this chapter or any local ordinance shall be liable for personal injury or property damage sustained by any duly enrolled or registered volunteer engaged in or training for disaster preparedness or relief activity, or by any unregistered person duly impressed into service during a state of disaster or a state of extreme emergency and engaged in such service. The foregoing shall not affect the right of any such person to receive benefits or compensation which may be specifically provided by the provisions of any federal or state statute nor shall it affect the right of any person to recover under the terms of any policy of insurance.

Section 1591(b) appears to be a corollary provision to the legislative policy, elsewhere expressed, under which civil defense and disaster workers engaged in such activities are brought within the Workmen's Compensation Act.⁷² The officers and employees of public agencies, of course, are already covered by workmen's compensation;⁷³ and the second sentence of this provision makes it clear that registered volunteers (*i.e.*, persons duly registered with a disaster council as disaster service workers) and other persons impressed into service during a state of extreme emergency or disaster are accorded the same protection. The first sentence of Section 1591(b) relates primarily to the problem of personal liability of disaster workers for tortious injuries caused to fellow disaster workers.

The policy enunciated by the first sentence of this section, granting personal immunity for tortious injuries to fellow disaster workers, is distinctly different from that revealed in analogous statutes:

(a) Section 1591(b) alters the rule which otherwise would obtain. Although the workmen's compensation remedy does not affect the injured employee's right of action against a third-party tortfeasor,⁷⁴ he is precluded by statute from suing a coemployee, except for wilful

⁷⁰ See text at 130 *supra*.

⁷¹ See discussions of relationship between *Muskopf* and *Lipman* and the particular statutes discussed at the places cited in notes 64-67 *supra*.

⁷² See CAL. LABOR CODE §§ 4351-4386; CAL. MIL. & VET. CODE §§ 1599-1599.3.

⁷³ See p. 101 *supra*.

⁷⁴ CAL. LABOR CODE §§ 3850-3863. See *Baugh v. Rogers*, 24 Cal.2d 200, 148 P.2d 633 (1944).

or reckless injury or injuries resulting from intoxication.⁷⁵ By granting immunity to disaster service workers for injuries sustained by co-workers, Section 1591(b) apparently assimilates all disaster service workers to the status of coemployees, even though, in a particular factual circumstance, the person injured may be under the direction of a different disaster council or other directing agency from the person allegedly responsible for the injury and would thus not ordinarily come within the rule precluding negligence actions between coemployees.

(b) The more general statutory provisions relating to tort liability of persons giving assistance in emergencies, such as Civil Code Section 1714.5 (page 159 *supra*) and Military and Veterans Code Section 1587 (page 161 *supra*), explicitly except from the immunities thereby granted such injuries as are *wilfully* caused. Even the statutory rule which ordinarily precludes negligence actions against coemployees contains an exception for injuries resulting from wilful and reckless conduct or intoxication.⁷⁶ Section 1591(b), however, fails to adhere to this legislative policy, for it makes no exception for non-negligent torts. The immunity appears to be absolute, regardless of whether the injury resulted from the negligence, intoxication, reckless conduct, or even deliberate and malicious wrongdoing on the part of the fellow public employee or disaster worker.

(c) Section 1591(b) expressly provides, in its last sentence, that the immunity granted therein shall not affect the right of any person to recover under the terms of any policy of insurance. This provision is less than clear. In many cases wherein a public officer is immune under Section 1591(b), except for instances of wilful torts, he would also appear to be immune under Civil Code Section 1714.5; yet the latter section contains no savings clause for insurance policies. The question thus arises whether, in such a case, the injured plaintiff could recover upon a liability insurance policy insuring the culpable public officer or employee against personal liability, notwithstanding the fact that the insured tortfeasor is not personally liable because of the statutory immunity granted by these two sections. In short, does the last sentence of Section 1591(b) mean that plaintiff (or his subrogated employer or compensation insurance carrier) may recover on the liability insurance policy in any case where, were it not for his statutory immunity, the insured public employee would be personally liable?

(d) Section 1591(b) is applicable, apparently, to injuries sustained by registered volunteers whenever they are engaged in disaster preparedness or relief activity or training for such activity, regardless of whether any state of extreme emergency or disaster exists. It also is applicable to injuries sustained by persons impressed into disaster work when either state does exist. Civil Code Section 1714.5, on the other hand, is applicable only when a state of extreme emergency exists.⁷⁷ Thus, Section 1591(b) confers a broader immunity than Section 1714.5. For example, under the latter section, public officers and employees (as disaster service workers) would be liable for tortious injuries sustained by others during disaster and defense activities,

⁷⁵ CAL. LABOR CODE § 3601(a), as amended by Cal. Stat. 1959, ch. 1189, § 1, p. 3275. See analysis in *Selected 1959 Code Legislation*, 34 CAL. S. B. J. 707 (1959).

⁷⁶ *Ibid.*

⁷⁷ See p. 160 *supra*.

such as training exercises, when no state of extreme emergency exists or when only a state of disaster (as contrasted with a state of extreme emergency) exists. Yet, under Section 1591(b), there would be immunity from liability to the extent that such tortious injuries were sustained under identical circumstances by duly enrolled or registered volunteers or by persons impressed into disaster service. In this connection, it should be noted that where, as in the suggested hypothetical case, the public employee's immunity stems exclusively from Section 1591(b) and not from Civil Code Section 1714.5, the savings clause for insurance policy benefits may be construed differently than where the immunity comes from both sources.⁷⁸

Insofar as Section 1591(b) grants a personal immunity, we have seen that it poses certain difficult problems of interpretation, as well as of consistency of legislative policy. At first blush, for example, it would seem reasonably clear that this section precludes the imposition of tort liability upon public *entities* for injuries sustained by registered volunteer and impressed disaster workers as a result of tortious acts of the employees of such entities during defense or disaster activities. The first sentence of this section absolves public agencies of such liability "under any circumstances"; and it seems manifest that the Legislature intended such injuries to be compensated for through the workmen's compensation program.⁷⁹

Substantial doubts as to the complete accuracy of the foregoing conclusion unfortunately exist in view of certain ambiguities in the language of Section 1591(b). It will be noted that entity tort immunity is extended by this section to any "political subdivision, municipal corporation or other public agency." The canon of statutory construction known as *eiusdem generis* tends to support the conclusion that this enumeration impliedly excludes the State itself from the protection of the section;⁸⁰ and the same view seems to be reinforced by the fact that in the companion provisions of Section 1591(a), discussed above, the term "public agency" is used in contradistinction to the "California Disaster Office," the principal state-wide agency operating in the disaster field. Again, it will be noted that immunity for injuries to volunteer workers is only granted with respect to such volunteers as are "duly enrolled or registered," or are "duly" impressed into service. From this language, one might argue that an injured volunteer defense worker should prevail in a tort action against either the public entity or its tortfeasor officer or employee if he established that he had never been effectively registered or that his registration or impressment into service was not "duly" in accordance with law. This conclusion, moreover, derives indirect support from the fact that, had the Legislature intended a contrary result, it could easily have said so—as it has done in analogous situations. For example, the Labor Code contains a positive

⁷⁸ The insurance exception appended at the end of Section 1591(b) might be construed as applicable only to "the foregoing" provisions of that section, i.e., to cases in which the *sole* reason for the injured person's inability to sue the tortfeasor rests in the provisions of Section 1591(b). Thus, if the tortfeasor would be liable save only for the immunity granted by Section 1591(b), recovery under any insurance policy which would otherwise insure against such liability may be permitted; but if immunity concurrently exists also under some other statutory provision (such as Civil Code Section 1714.5), the insurance savings clause does not apply, and such immunity may inure to the benefit of the insurance carrier.

⁷⁹ CAL. LABOR CODE §§ 4351, 4352.

⁸⁰ See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4911, pp. 401-403 (Horack 3rd ed. 1943).

statement of clear legislative intent in the comparable situation of industrial injuries to employees, that the unlawfulness of employment (*i.e.*, the fact that employment was not "duly" in accordance with law) does *not* render the workmen's compensation remedy inapplicable.⁸¹

Subject to the interpretive difficulties noted, it would seem that the liability of public employers under *Muskopf* and *Lipman* is not otherwise enlarged by Section 1591(b).

Vehicle Code Section 17004

Section 17004 of the Vehicle Code provides:

17004. No member of any police or fire department maintained by a county, city, or district, and no member of the California Highway Patrol or employee of the Division of Forestry, is liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or emergency call.

When the conditions specified in Section 17004 are satisfied, there is a total personal immunity of the operator of the publicly owned emergency vehicle from liability for damages arising out of his operation of such vehicle. The legislative purpose undoubtedly was to ensure that personnel assigned to driving of emergency vehicles would not be deterred from the rapid and effective performance of their duties by fear of personal tort liability. The Legislature has nowhere provided, however, that this personal immunity would preclude liability of the employing public entity; and, hence, reading Section 17001 of the Vehicle Code (waiving tort immunity of public entities for vehicle accidents)⁸² *in pari materia* with Section 17004, the courts have uniformly recognized the continued liability of the employing public entity.⁸³ This section, then, appears to have no direct bearing upon the problem of entity tort liability created by *Muskopf* and *Lipman*.

Military and Veterans Code Section 392

Section 392 of the Military and Veterans Code provides:

392. Members of the militia in the active service of the State shall not be liable civilly or criminally for any act or acts done by them in the performance of their duty.

Within the meaning of Section 392, "members of the militia" include all members of the National Guard, the California National Guard Reserve, the Naval Militia, and all other nonexempt able-bodied persons liable for service in the unorganized militia.⁸⁴

The immunity from personal liability granted by Section 392, it will be noted, appears to embrace any kind of tortious injury sus-

⁸¹ CAL. LABOR CODE § 3351. See Massachusetts Bonding & Ins. Co. v. Industrial Acc. Comm'n, 19 Cal. App.2d 583, 65 P.2d 1349 (1937).

⁸² See pp. 36-40 *supra*.

⁸³ *Torres v. City of Los Angeles*, 58 Cal.2d —, 22 Cal. Rptr. 866, 372 P.2d 906 (1962); *Raynor v. City of Arcata*, 11 Cal.2d 113, 77 P.2d 1054 (1938); *Peerless Laundry Services Ltd., v. City of Los Angeles*, 109 Cal. App.2d 703, 241 P.2d 269 (1952).

⁸⁴ See CAL. MIL. & VET. CODE §§ 120, 121, 122, 125.

tained by any person whatever, provided only that the member of the militia claimed to be responsible for the injury was acting in the performance of his duty in the active service of the State. Where applicable, this immunity is thus broader than that granted to disaster service workers by Civil Code Section 1714.5 (which is applicable only during a state of extreme emergency; covers only personal injuries, death or property damage claims; and expressly excludes wilful torts).⁸⁵ Similarly, it is broader than the immunity extended to medical personnel rendering emergency assistance under Military and Veterans Code Section 1587 (which is applicable only during a state of disaster or extreme emergency; and, although not limited to personal injury and property damage claims, again expressly excludes wilful torts).⁸⁶ It is also broader than the immunity from tort liability for injuries to volunteer or impressed disaster workers conferred by Military and Veterans Code Section 1591(b) (which includes wilful torts, but extends only to personal injury and property damage claims, and only when such injuries are sustained by the narrow class of persons there indicated).⁸⁷ Finally, it is broader than the immunity granted to operators of emergency vehicles by Vehicle Code Section 17004 (which covers only personal injury, death and property damage claims, and applies only when the specified circumstances justifying operation of the emergency vehicle as such exist).⁸⁸

Thus, the immunity granted to members of the militia appears to be all-inclusive, and is in that respect an apparently unique expression of legislative intent. Moreover, the significance of the differences between the various statutes just noted, all of which relate to personal immunity during emergency situations of one kind or another, is enhanced by two circumstances. First, the immunity granted by Section 392 is not confined to emergency situations, but appears to be available during nonemergency times, such as during training and practice exercises by the organized militia (*i.e.*, National Guard and Naval Militia). Second, the unorganized militia may be called upon by the Governor for active service (thereby making the immunity applicable) in a variety of circumstances which might also make the other statutory immunities just referred to applicable.⁸⁹ In a state of disaster or extreme emergency, therefore, an individual called upon to serve the State as a member of the unorganized militia would enjoy a greater measure of statutory protection against personal liability than would medical personnel or disaster service workers; yet the type of service and exposure to risk of liability in both instances might be substantially indistinguishable. The discrepancy in legislative policy as between the cited provisions would seem to deserve careful reconsideration.

Section 392 does not appear to have been judicially construed. The Attorney General, however, has expressed the opinion, which appears to be sound, that this section does not relieve the State of liability

⁸⁵ See text at 159-60 *supra*.

⁸⁶ See text at 161-62 *supra*.

⁸⁷ See text at 163-66 *supra*.

⁸⁸ See text at 166 *supra*.

⁸⁹ CAL. MIL. & VET. CODE § 128, authorizing the unorganized militia to be called out for active duty "in case of war, rebellion, insurrection, invasion, tumult, riot, breach of the peace, public calamity or catastrophe, or other emergency, or imminent danger thereof." In many of these situations, if not all of them, the code also authorizes a declaration of extreme emergency or of disaster. CAL. MIL. & VET. CODE §§ 1505, 1575, 1580.

under other applicable statutes waiving immunity.⁹⁰ Whether, in the absence of statute, the State would be liable for torts of the militia under the doctrine of *respondeat superior* as approved in *Muskopf* is, of course, a more difficult question. In some circumstances, at least, it would appear consistent with sound public policy that the State not be held liable for the injurious actions of militia personnel on active duty;⁹¹ and to the extent that injury results from an exercise of military discretion (for which the statutory immunity of Section 392 would be reinforced by the common law immunity for discretionary acts) the public policy considerations identified in *Lipman* would seem to be relevant to the problem. A statement of legislative intent articulating a carefully conceived policy determination and designed to clarify the law would here seem to be desirable.

Welfare and Institutions Code Section 6005

Section 6005 of the Welfare and Institutions Code provides:

6005. Any superintendent or person in charge of the county psychopathic hospital, and any public officer, public employee, or public physician who either admits, causes to be admitted, delivers, or assists in delivering, detains, cares for, or treats, or assists in detaining, caring for or treating, any person pursuant to this chapter shall not be rendered liable thereby either civilly or criminally.

This section is located in Chapter 1 of Part 3 of Division 6 of the Welfare and Institutions Code, which chapter is entitled, "County Psychopathic Hospitals."

The immunity which Section 6005 confers appears in terms to be restricted to liability resulting from admission, detention, care or treatment which is "pursuant to" said Chapter 1. Thus, it would seem to be arguable that no immunity exists where the plaintiff can establish that his admission, detention or treatment was not authorized—as where, for example, such detention or care exceeds the general 90-day limit prescribed therefor by Section 6002⁹² or the 7-day limit allowed after notice of desire for release under Section 6003,⁹³ or where treatment is administered to a patient excused therefrom by Section 6002.5.⁹⁴

In addition, the statutory declaration that the designated public employees shall not be rendered "liable thereby" appears to contemplate that the nonactionable injury be sustained as a proximate result of the delivery, admission, detention, care or treatment of the plaintiff. There would, accordingly, be no immunity for injuries which are not so related. For example, it would seem clear that Section 6005 precludes personal liability for wrongful imprisonment or for malpractice in administering treatment for the plaintiff's mental illness. It is doubtful,

⁹⁰ See 1 OPS. CAL. ATTY. GEN. 515 (1943).

⁹¹ See text at 77-78 *supra*, and authorities there cited. Cf. CAL. CIV. CODE §§ 1714.5 (discussed at 159 *supra*), 1714.6; 2 HARPER & JAMES 938-40, 1046-53, 1650-67.

⁹² CAL. WEL. & INST. CODE § 6002 prescribes the types of persons and conditions under which they are eligible for admission to the county psychopathic hospital, but limits all such admissions to "a period not to exceed ninety days."

⁹³ CAL. WEL. & INST. CODE § 6003 forbids detention of certain classes of patients more than seven days after notice in writing of the patient's desire to leave, or of a minor patient's parents' or guardian's desire to remove him from, the psychopathic hospital.

⁹⁴ CAL. WEL. & INST. CODE § 6002.5 exempts from medical or psychopathic treatment certain persons for whom a statement or affidavit of reliance on healing by prayer or spiritual means is filed.

however, that it would absolve a culpable employee who, for reasons of personal spite or malice, assaulted a patient, or an employee in the psychopathic hospital who negligently maintained the heating system and thereby caused a fire which burned a patient, or even a county physician who negligently treated an inmate for a physical ailment (*e.g.*, acute appendicitis) unrelated to the mental illness for which he was admitted to the hospital.

Although this section has not been judicially construed, it appears reasonably certain that the applicability of the immunity would not absolve the employing county (or other public entity) from liability otherwise imposed by statute, such as Vehicle Code Section 17001 or the Public Liability Act of 1923. As in the case of most of the statutes dealing with the effect of personnel immunity provisions on entity derivative liability under *Muskopf* and *Lipman*, however, it is difficult to predict with accuracy whether the same result would obtain in the absence of statute, and an explicit legislative solution should be adopted.

Welfare and Institutions Code Section 6610.3 (second paragraph)

The second paragraph of Section 6610.3 of the Welfare and Institutions Code provides:

Any local health officer or his employee who makes or assists in making an application under this article shall not be rendered civilly or criminally liable thereby when there is reasonable cause for believing that such application will be for the best interest of the person.

Section 6610.3 is contained in Article 3.5 of Chapter 1 of Part 4 of Division 6 of the Welfare and Institutions Code, which article is entitled "Admission on Certification," and provides an alternative procedure for admission of mentally ill persons to state hospitals on application of the local health officer. Such an application is authorized to be made only when it appears to the health officer, after investigation and when supporting affidavits of at least two licensed physicians are obtained, that there is "reasonable cause" to believe admission to a state hospital will be for the best interest of the person.⁹⁵

The immunity granted by Section 6610.3 is expressed in terms of "reasonable cause," also, although it is not entirely clear whether the health officer's immunity from liability was intended to be identical in scope with his authority. The latter is defined by statute⁹⁶ according to a *subjective* standard (*i.e.*, "If it appears to the health officer that there is reasonable cause for believing") while the immunity appears to be defined in terms of an *objective* standard (*i.e.*, "when there is reasonable cause for believing"). Thus, the health officer and his subordinates may incur the risk that a judge or jury, in a subsequent wrongful imprisonment suit, will disagree with their good faith appraisal of the situation as constituting reasonable cause and may find that the requisite reasonable cause did not exist in fact, in which event there would be no statutory immunity. Admittedly, this suggestion is somewhat speculative and could be dispelled by forthright judicial

⁹⁵ See CAL. WEL. & INST. CODE §§ 6610.3 (first paragraph), 6610.4, 6610.5.

⁹⁶ CAL. WEL. & INST. CODE § 6610.3 (first paragraph). This basic authorizing provision was first enacted by Cal. Stat. 1947, ch. 1061, § 2, p. 2462. The provision quoted in the text, *supra*, is the second paragraph of the same section, as added by amendment in 1951. Cal. Stat. 1951, ch. 702, § 1, p. 1917.

interpretation; and it may in all likelihood not pose a serious problem for health officers in view of the strength of the showing of reasonable cause which ordinarily would be made by the supporting physicians' certificates which the health officer is required to obtain.⁹⁷ The discrepancy, however, is of the type which could invite litigation, especially where the plaintiff believes the normal sympathies of the jury can be reinforced by bringing suit not against the health officer personally, but against the impersonal and more affluent city, county or district employer⁹⁸ on the *Muskopf*-approved theory of *respondere superior*. Consideration should be given, therefore, to the question whether the statute should be amended to make it clear that a subjective standard of reasonable cause governs the officer's immunity as well as his authority.

Apart from the considerations indicated above, it seems possible that Section 6610.3 marks not only the limit of personal liability of the health officer and his subordinates in cases of allegedly wrongful commitment to a state hospital pursuant to Article 3.5, but also the limits of derivative liability of the employing public entity. This section seems to be directed chiefly to defining the limits of the tort of wrongful imprisonment (although it possibly extends also to certain defamation situations) arising out of admission of mentally ill persons to state hospitals on application of the health officer. Unlike many personnel immunity statutes, which simply declare that certain public employees are not liable in situations where they clearly would be absent the statute, Section 6610.3 appears to be intended primarily to define when an actionable tort has occurred in such commitment proceedings. If this conclusion is correct, it would seem to follow that where the health officer is absolved of liability under Section 6610.3, the employing county or city is likewise free of derivative liability under *Muskopf*.

On the other hand, the suggested interpretation creates difficulties of a different sort. If Section 6610.3 is taken to define the scope of liability for wrongful imprisonment, it would seem to recognize by implication the existence of liability in a variety of situations in which, under the common law doctrine of personal immunity for discretionary conduct, the health officer might well be immune from suit.⁹⁹ It is, however, unlikely that this provision was intended by the Legislature to overturn the "discretionary-conduct" immunity, for the full extent of that common law rule has been judicially developed only in recent years, for the most part after the enactment of Section 6610.3.¹⁰⁰ Thus,

⁹⁷ Cf. CAL. WEL. & INST. CODE § 5050.3, as construed in *Whaley v. Jansen*, 208 Cal. App.2d —, 25 Cal. Rptr. 184 (1962). See also CAL. WEL. & INST. CODE § 6610.7, authorizing the superintendent of the state hospital to refuse to accept the inmate if he believes him not mentally ill nor in need of care, supervision and treatment. Acceptance by the superintendent would, under this section, tend to support the local health officer's defense of reasonable cause.

⁹⁸ The local health officer authorized to commit mentally ill persons under Article 3.5 is defined to mean "the county, city, or district health officer charged with the preservation of the public health in the county, city, or district." CAL. WEL. & INST. CODE § 6610.2.

⁹⁹ See, e.g., *Jones v. Czupkay*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960), applying discretionary immunity doctrine to state and local health officers.

¹⁰⁰ The recent trend toward enlargement of the immunity doctrine, and its extension to a large variety of public officers not previously deemed within its scope, is exemplified in such cases as *White v. Towers*, 37 Cal.2d 727, 235 P.2d 209 (1951); *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957); *Dawson v. Rash*, 160 Cal. App.2d 154, 324 P.2d 959 (1958); and *Jones v. Czupkay*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960). The *White* case, decided in 1951 after the adjournment of the legislative session which enacted the provisions of Section 6610.3 here under discussion, explicitly recognized this trend and disapproved of certain limiting language in prior decisions taking a more narrow view.

it is believed likely that this section does not preclude a defense of discretionary immunity where applicable, even though the statutory conditions of nonliability are not met. In such an event, the immunity of the health officer would not necessarily benefit the employing county, city or district, for under the doctrine of *Lipman*, the employing public entity may still be liable, absent countervailing policy criteria, where the nonliability of its officer was founded on the discretionary immunity doctrine rather than on absence of substantive grounds. Manifestly, the entire problem should be resolved by legislation.

Welfare and Institutions Code Section 6610.9

Section 6610.9 of the Welfare and Institutions Code provides:

6610.9. Any public officer or employee who transports or delivers or assists in transporting or delivering or detains or assists in detaining any person pursuant to this article shall not be rendered civilly or criminally liable thereby unless it be shown that such officers [*sic*] or employee acted maliciously or in bad faith or that his negligence resulted in bodily injury to such person.

This section is found in the same Article 3.5 as Section 6610.3, discussed immediately above, and thus is also confined to cases of commitment of mentally ill persons to state hospitals on application of the local health officer. It apparently is designed primarily for the protection of public personnel assigned the responsibility of taking physical custody of the mentally ill person and delivering him to the state hospital, pursuant to the commitment proceedings. In view of the ease and relative informality with which proceedings under this article may be legally terminated simply by verbal protest by the person believed to be mentally ill, or by any relative or friend on his behalf,¹⁰¹ the possibility that the acts of taking into custody and transportation to the state hospital may subsequently be found to be tortious would otherwise expose the officers in question to undue risk of personal liability.

It will be noted that this section grants immunity from liability for all torts except those involving malice or bad faith, and except for personal injuries resulting from negligence. (Query: would wilful misconduct be precluded as a ground of liability if it did not amount to malice, bad faith or negligence?) In this connection, Section 6610.9 should be contrasted with Section 6005 of the Welfare and Institutions Code, discussed above, which contains no exceptions to its blanket grant of immunity for injuries resulting from detention, delivery or admission of inmates to county psychopathic hospitals. The policy reasons which support this difference in immunity are difficult to discern. On the surface, at least, it would seem that mentally ill persons committed to county psychopathic hospitals would deserve at least the same degree of legal protection against torts of public officers as mentally ill persons committed to state hospitals.

Where liability exists under Section 6610.9, it seems probable that the employing entity would also be derivatively liable under the *Muskopf* doctrine. Whether immunity under this section would also pre-

¹⁰¹ See CAL. WEL. & INST. CODE §§ 6610.3 (fourth sentence), 6611.9.

clude liability of the employing entity, however, would appear to depend on whether some other statutory basis for entity liability existed and whether the policy-balancing approach of *Lipman* was deemed applicable. As in the case of the related sections already discussed, legislative clarification seems to be called for.

Welfare and Institutions Code Section 6624

Section 6624 of the Welfare and Institutions Code provides in part:

The sterilization of a patient in accordance with the provisions of this section, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any person participating in the operation liable either civilly or criminally.

This provision is the last sentence in an elaborate section providing a procedure whereby the State Department of Mental Hygiene may proceed, upon authorization of a superior court, to sexually sterilize inmates of state hospitals or state homes who have inheritable mental diseases or other defined mental conditions. Although there appear to be substantial constitutional questions¹⁰² involved as to the validity of this entire procedure, it is reasonably clear in view of Government Code Section 1955 that public officers acting in good faith and without malice pursuant to its provisions would be entitled to the immunity here declared even if the entire section were later held to be unconstitutional.¹⁰³ The immunity expressly granted the "department," however, would presumably only inure to the benefit of the State to the extent that this section, or the immunity clause as a separable part thereof, were held to be valid.

The immunity here granted would seem to extend only to liability resulting directly from the sterilization itself, and would probably not include other tortious conduct incidental thereto, such as malpractice in the course of the operation which resulted in harmful consequences entirely apart from inability to procreate. To the extent there is no immunity, of course, it would follow that *Muskopf* would be applicable, barring some other statutory limitation.

Water Code Section 8576

Section 8576 of the Water Code provides:

8576. No member of the board shall be held personally liable on any obligation or liability of any kind or character arising out of the claim that he has failed to carry out any obligation imposed upon the board by this division and the Legislature expressly declares that discretion is vested in the board and the members thereof to determine how and when the various provisions of this division and the projects contemplated in this division with which the board is concerned may best be carried into effect.

This section relates to members of the Reclamation Board and possible liabilities arising in the execution of their duties of administering

¹⁰² See ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 167-173 (1961), and authorities there cited.

¹⁰³ See discussion of CAL. GOVT. CODE § 1955 in text at 155-57 *supra*.

the affairs of the Sacramento and San Joaquin Drainage District.¹⁰⁴ The personal immunity thus granted appears to be defined in terms which would embrace practically every form of official action taken, or omitted, by the Board *as a whole*. The first clause (preceding the word "and") appears to cover all alleged torts of board nonfeasance; while the second clause (following the word "and") seems to expressly extend to board members the protection of the discretionary immunity doctrine¹⁰⁵ with respect to alleged torts of misfeasance, at least so far as basic policy decisions (*i.e.*, "how and when") are involved. By implication, tortious conduct by a Reclamation Board member which falls outside the somewhat uncertain ambit of the statutory immunity would still be actionable. For example, Section 8576 does not appear to protect a board member from personal liability for negligent operation of a motor vehicle on board business, or for negligence in the inspection and supervision of reclamation work.¹⁰⁶

Since the personal immunity here provided appears to be premised upon a legislative determination that the functions of the Reclamation Board are discretionary in nature, the ruling in the *Lipman* case seems squarely applicable. As will be recalled, the court there held that the employing public entity may, in certain cases, be held liable for the torts of its employees, even though the latter are entitled to immunity under the common law discretionary function exception.¹⁰⁷ It is, however, not entirely clear whether the State would be the entity deemed liable for the torts of board members on the theory that the Reclamation Board is merely a part of the State Government,¹⁰⁸ or whether, since the Board is simply the governing body of the Sacramento and San Joaquin Drainage District, that District, rather than the State, is the responsible entity.¹⁰⁹

It would be desirable to clarify this point by appropriate legislation.

¹⁰⁴ Water Code Section 8502 provides that the management and control of the Sacramento and San Joaquin Drainage District are vested in the State Reclamation Board.

¹⁰⁵ "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority. . . ." *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961). In addition to the cases cited in support of this statement, see the discussion at 246 *infra*.

¹⁰⁶ Water Code Section 8605 authorizes the board to inspect or supervise any work or construction done under the board's jurisdiction. Negligence in the course of actual performance of this function would not be within the scope of the immunity granted by Section 8576 for failure to act or for determination of how and when the project should be carried into effect.

¹⁰⁷ In the *Lipman* case, *supra* note 105, the court pointed out that the determination whether the employing entity should be liable for the discretionary torts of its officers, for which the officers were themselves immune, depended upon a careful judicial evaluation of relevant factors, 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." *Id.* at 230, 11 Cal. Rptr. at 99, 359 P.2d at 467.

¹⁰⁸ The Reclamation Board appears to be a part of the State Department of Water Resources, CAL. WATER CODE § 8550. However, it is also the governing body of the Sacramento and San Joaquin Drainage District, CAL. WATER CODE § 8502, and has been judicially treated as merely an arm of the State for tort liability purposes. See *Western Assur. Co. v. Sacramento & San Joaquin Drainage Dist.*, 72 Cal. App. 68, 237 Pac. 59 (1925). However, the cited decision actually held that there was no liability in view of the principle of governmental immunity, so that any intimations in its opinion that the drainage district and Reclamation Board were state agencies may be classified as mere dictum unnecessary to the decision.

¹⁰⁹ The Sacramento and San Joaquin Drainage District is a body corporate and politic, with power to sue and be sued. CAL. WATER CODE § 8503. The Reclamation Board is designated the governing body of the district. CAL. WATER CODE § 8502. Thus, the district has been treated, analogously to other water and irrigation districts, as a governmental entity which is separate and distinct from the State. See *Galup v. Sacramento & San Joaquin Drainage Dist.*, 171 Cal. 71, 151 Pac. 1142

Water Code Section 8535

Section 8535 of the Water Code provides in part:

8535. . . . [T]he members . . . [of the Reclamation Board] are not responsible or liable for the operation or maintenance of levees, overflow channels, by-passes, weirs, cuts, canals, pumps, drainage ditches, sumps, bridges, basins, or other flood control works within or belonging to the drainage district.

This provision supplements Section 8576, discussed immediately above, and appears to confer a broad immunity from liability for injuries resulting from operation and maintenance of the specified facilities of the Sacramento and San Joaquin Drainage District, without regard for whether the allegedly culpable Reclamation Board members are negligent or even wilfully at fault. Other language in the same section confers a like immunity on the District and the Board as its governing body.¹¹⁰ The desirability of this blanket immunity, which presumably would continue to exist notwithstanding *Muskopf* and *Lipman*, would seem to deserve reconsideration in connection with the general problem of governmental tort liability.

Unclaimed Property Act (Sections 1335, 1378 and 1379 of the Code of Civil Procedure; Penal Code Section 5065; Sections 166.4 and 1019 of the Welfare and Institutions Code)

These sections are not quoted at length here; see pages 192-93 *infra*. In general they provide an express immunity of designated public officers from any liability in connection with the disposal of unclaimed private property in their custody, provided they have proceeded in accordance with the procedures established by law. In most instances, the cited sections also confer immunity from liability upon the employing public entity, and hence they are quoted at length and discussed below from that viewpoint.¹¹¹

Express Statutory Immunities of Public Entities

There are a relatively small number of statutory provisions which expressly confer immunity from tort liability upon public entities, where in the absence of the statute such liability would otherwise exist. Unlike the statutes which have been examined above, these provisions do not relate primarily to the possible tort liability of public officers and employees, but are phrased in terms of liability of the entity itself. Although they are not free from difficulties of interpretation, they generally present a considerably less complex pattern of legislative policy than do the statutes providing for tort immunity of public personnel.

Immunity for Injuries Resulting From Defective Public Property

There are several exceptions created by statute to the general tort liability provisions of the Public Liability Act of 1923 which made

(1915); *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 251 Pac. 207 (1926). In view of this ambivalent status of the Reclamation Board and the district, see note 108 *supra*, the careful plaintiff under present law apparently will proceed against both the State and the district (or the Reclamation Board as its governing body). See, e.g., *Clement v. State Reclamation Bd.*, 35 Cal.2d 628, 220 P.2d 897 (1950).

¹¹⁰ See p. 184 *infra*.

¹¹¹ See pp. 192-93 *infra*.

cities, counties and school districts liable for injuries sustained as a result of dangerous or defective conditions of their property.¹ The provisions in question are not worded in terms of exceptions to that Act, however, and where applicable would seem to be equally available as a defense against suit founded upon common law principles pursuant to the *Muskopf* decision. Included among these provisions are the following.

Streets and Highways Code Section 941 (second paragraph). The second paragraph of Section 941 of the Streets and Highways Code provides in part:

No public or private road shall become a county highway until and unless the board of supervisors, by appropriate resolution, has caused said road to be accepted into the county road system; nor shall any county be held liable for failure to maintain any road unless and until it has been accepted into the county road system by resolution of the board of supervisors.

This provision was enacted in 1955,² apparently for the purpose of avoiding potential dangers which appeared to be presented by the decision of the Supreme Court in *Union Transportation Co. v. Sacramento County*,³ decided the previous year. The court there held that a county could be liable under the Public Liability Act for the defective condition of a bridge on a road which had never been formally offered for dedication or accepted as part of the county road system. This result was based on the legal doctrine of dedication by public use with the acquiescence of the owner, coupled with official action of the county implying acceptance thereof. Evidence tending to show that the county road commissioner had assumed jurisdiction over the road in question for purposes of repair and maintenance was held to be sufficient to establish implied acceptance of the implied dedication.

In effect, the *Union Transportation Company* decision opened the possibility that continuous use by the public of a private road, followed by employment of public personnel and equipment to repair defects therein,⁴ might bring the road within the scope of the Public Liability Act for the purposes of tort liability, regardless of its condition or whether it conformed to the standards generally prescribed for public roads. The 1955 amendment to Section 941 has eliminated this danger by precluding liability for lack of maintenance until there has been an express acceptance of dedication by formal resolution.

The wording of the 1955 amendment, however, suggests a possible ambiguity of meaning. Immunity from liability, it will be noted, is stated solely in terms of liability based on "failure to maintain" the road; yet there are many cases in which liability under the 1923 Act has been predicated not on lack of "maintenance" but upon negligent creation of a defective condition,⁵ negligent failure to establish ade-

¹ See discussion in text at 42-59 *supra*.

² Cal. Stat. 1955, ch. 1219, § 2, p. 2232.

³ 42 Cal.2d 235, 267 P.2d 10 (1954).

⁴ Use of public funds to maintain private roads is authorized by law in certain circumstances. See CAL. STS. & HWYS. CODE § 941, as construed in *Union Transp. Co. v. County of Sacramento*, 42 Cal.2d 235, 267 P.2d 10 (1954); CAL. STS. & HWYS. CODE § 969.5; 28 OPS. CAL. ATTY. GEN. 30 (1956).

⁵ See, e.g., *Packrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945) (defective sidewalk created by negligent spraying with impermeable oil); *Reel v. City of South Gate*, 171 Cal. App.2d 49, 340 P.2d 276 (1959) (unlighted barricades placed in street by city employees).

quate safeguards against foreseeable dangers resulting from use,⁶ and other acts or omissions which would not ordinarily be deemed to involve a failure to maintain.⁷ The implication follows that counties may still be liable for torts other than nonmaintenance, even if the road in question has not been formally accepted into the county road system by resolution, provided a sufficient basis exists for classifying it as "public property" within the meaning of the Public Liability Act.⁸ To the extent that liability is sought to be predicated upon common law principles under *Muskopf*, moreover, implied acceptance of dedication by user, although no longer sufficient to make the road a part of the official county road system in view of Section 941, would also seem to provide a sufficient basis for liability,⁹ except to the extent that immunity is conferred for a failure to maintain.¹⁰

Streets and Highways Code Section 1806. This section provides:

1806. No public or private street or road shall become a city street or road until and unless the governing body, by resolution, has caused said street or road to be accepted into the city street system; nor shall any city be held liable for failure to maintain any road unless and until it has been accepted into the city street system by resolution of the governing body.

Section 1806 was enacted in 1957,¹¹ apparently to extend to cities the same degree of protection that had been given to counties by the amendment to Section 941 in 1955 (discussed above). In view of the almost identical language employed, the same analysis set forth immediately above with respect to Streets and Highways Code Section 941 would seem to obtain and will not be repeated here.

Streets and Highways Code Sections 943 and 954. These sections provide in part:

943. Such board [of supervisors] may . . . (d) Construct and maintain stock trails approximately paralleling any county highway, retain and maintain for stock trails the right of way of any

⁶ See, e.g., *Duran v. Gibson*, 180 Cal. App.2d 753, 4 Cal. Rptr. 803 (1960) (slippery street condition caused by water flushing to remove debris); *Teihet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957) (dangerous condition of highway due to dense smoke drifting across it from weed burning operations nearby).

⁷ See, e.g., *Wood v. County of Santa Cruz*, 133 Cal. App.2d 713, 284 P.2d 923 (1955) (brush cuttings left on highway by maintenance crew); *Sale v. County of San Diego*, 184 Cal. App.2d 785, 7 Cal. Rptr. 756 (1960) (slippery plank to cross water-filled dip near street).

⁸ The cases have intimated that liability under the Public Liability Act does not necessarily depend on proof of title in the local entity, provided it exercises jurisdiction to construct or maintain the facility which is allegedly defective. See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Bacigalupi v. Bagshaw*, 87 Cal. App.2d 48, 196 P.2d 66 (1948).

⁹ As to the interpretative problems involved in an action seeking to apply the *Muskopf* doctrine to facts to which the Public Liability Act also might appear to be applicable, see the discussion in text at 56-59 *supra*.

¹⁰ The interpretation suggested in the text derives some support also from the fact that Section 941 requires that "public" roads as well as private roads be accepted by formal resolution. This language seems to suggest that a road may be "public" and hence be eligible for public maintenance although not a part of the official county road system. The *Union Transportation Co.* case, *supra* note 3, held that the county was legally authorized to maintain the road there in question, although the county was persistently claiming that said road was not a county road. See also CAL. STRS. & HWYS. CODE § 969.5; cf. 28 OPS. CAL. ATTY. GEN. 30 (1956). In any event, it seems unlikely that the courts would give Section 941 an interpretation which would, in effect, permit a county to immunize itself from liability under the Public Liability Act by the simple expedient of declining to adopt resolutions of formal acceptance of roads which, in practice, were being maintained and improved like other county roads.

¹¹ Cal. Stat. 1957, ch. 1397, § 1, p. 2731.

county highway which is superseded by relocation. The county shall not be liable in any way for any damages resulting from the use of such stock trail by any vehicle. . . .

954. . . . After a stock trail has been established or designated as provided in this chapter, the county shall not be liable in any way for any damages resulting from the use of such stock trail by any vehicle. . . .

These two provisions were enacted as companion measures in the 1949 General Session of the Legislature.¹² Neither has been judicially construed, but it seems evident that the latter provision, referring to any stock trails established as provided in "this chapter" (*i.e.*, Chapter 2 of Division 2 of the Code), effectively renders the former provision superfluous.

In terms, the immunity here granted, although confined to injuries resulting from use of a stock trail by any vehicle, is absolute so far as it extends. Undoubtedly, it would constitute a complete defense against county liability resulting from a defective condition of a stock trail which causes injury to a motorist thereon. However, it is less certain that it would be deemed to effectively repeal by implication various other potential bases of county liability, such as the liability established by Section 17001 of the Vehicle Code, in appropriate cases (*e.g.*, negligent driving of truck upon stock trail by county truck operator in course of duties, with resultant injury to farmer and livestock being driven by him along the trail). In view of the probable intent to exonerate the county from the duty to maintain stock trails in fit condition for operation of motor vehicles, it is likely that these provisions may be construed as simply a legislative declaration that one who drives a vehicle on a stock trail does so with full assumption of the risk of injury to *himself* or *his own* vehicle from the physical condition of the trail. Such an interpretation would not impair any available grounds of county liability to members of the public resulting from the use of a *county* vehicle on the stock trail, or from any negligent or intentional torts committed by county employees upon persons operating vehicles on such a stock trail (other than torts consisting of failure to repair or warn of defects or dangerous conditions on such stock trail). Since this interpretation is not consistent with the *literal* meaning of the two sections, an appropriate amendment would seem to be desirable to clarify the legislative intent.

Government Code Section 54002. This section provides:

54002. The State, city, or county, is not liable for damages caused by accidents on the bridle trails.

Section 54002 originally enacted in 1943,¹³ is directly related to a general statutory authorization for the State Department of Public Works, any flood control district, county or city to permit any person or riding club to use for equestrian purposes "any trail, right of way, easement, river, flood control channel, or wash, owned or controlled by

¹² The quoted language from CAL. STS. & HWYS. CODE § 943 was added by Cal. Stat. 1949, ch. 347, § 1, p. 630. The quoted language from CAL. STS. & HWYS. CODE § 954 was added by Cal. Stat. 1949, ch. 346, § 1, p. 629.

¹³ Cal. Stat. 1943, ch. 940, § 1, p. 2812, codified as part of the Government Code by Cal. Stat. 1949, ch. 81, § 1, p. 300.

the State, a city, or county.”¹⁴ It is apparently designed primarily to remove from the entities named the burden of maintaining such riding trails in a sufficiently safe condition as to avoid the possibility of liability under the Public Liability Act of 1923. A flood control channel, for example, may be perfectly adequate and well-designed for flood control purposes, yet expose equestrians to various hazards of injury.¹⁵ The Legislature presumably determined that the use of existing easements, trails or channels as bridle trails for recreational purposes was sufficiently desirable that immunity from liability of public entities providing such trails should be granted in order to encourage their availability.

The legislation unfortunately was not worded with complete clarity. For example, although flood control districts are authorized to permit use of flood control channels for bridle trails, such districts are not identified as one of the types of entities which are granted immunity. This discrepancy may possibly have resulted from the belief of the draftsman that such districts were completely immune from liability in any event, either under the doctrine of governmental immunity or because the Public Liability Act did not apply to them.¹⁶ Under *Muskopf*, however, common law liability would now seem to threaten flood control districts, and yet they apparently obtain no protection from Section 54002.

Another problem with respect to this section relates to the word, “accidents,” as here employed. Assuming that this term should properly be construed broadly to include all injuries,¹⁷ it would seem to grant immunity regardless of the source of injury or person injured. Thus, taken at face value, Section 54002 immunizes the named entities from liability not only where an equestrian is injured as the result of some dangerous or defective condition on the bridle trail (in which case the Public Liability Act would otherwise make the city or county liable) but also where the injury results from negligent operation of a State, county or city vehicle on the right of way in the course of maintenance duties (in which case liability would otherwise obtain under Vehicle Code Section 17001). Indeed, the literal language of Section 54002 even precludes liability for negligent injury to a person who is *not* an equestrian, such as a pedestrian, hiker, or employee of a utility company engaged in inspecting or repairing utility facilities located in the right of way, provided only that the right of way had been authorized for use as a bridle trail.

As in the case of the immunities conferred with respect to stock trails (see discussion immediately preceding, with respect to Streets and Highways Code Sections 943 and 944), these difficulties of interpretation might well be eliminated by construing Section 54002 as intended simply to grant immunity for injuries to equestrians using bridle trails

¹⁴ CAL. GOVT. CODE § 54000.

¹⁵ See, for example, *Palmquist v. Mercer*, 43 Cal.2d 92, 272 P.2d 26 (1954), where an equestrian injured because of a dangerous condition on a flood control channel used as a bridle trail sued the private persons allegedly responsible, but (apparently because of the immunity granted by this section) made no effort to hold the county or flood control district liable.

¹⁶ See *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950).

¹⁷ See *Young v. County of Ventura*, 39 Cal. App.2d 732, 104 P.2d 102 (1940). To construe this term in the narrow sense of “unavoidable accident” would, of course, be unrealistic since it would deprive the section of any practical substantive significance.

which would otherwise be actionable under the Public Liability Act. The literal language, however, is considerably broader than that. Consideration should thus be given to amending this section both for the purpose of clarifying the scope of the immunity, and for the purpose of conforming its policy regarding flood control districts with whatever general policies are adopted in the light of *Muskopf*.

Civil Code Section 1714.5 (first paragraph). The first paragraph of this section provides:

1714.5. There shall be no liability on the part of one, including the State of California, county, city and county, city or any other political subdivision of the State of California, who owns or maintains any building or premises which have been designated a shelter from destructive operations or attacks by enemies of the United States by any council of defense or any public office, body, or officer of this State or of the United States, or which have been designated or used as mass care centers, first aid stations, temporary hospital annexes, or as other necessary facilities for civil defense purposes, for any injuries arising out of the use thereof for such purposes sustained by any person while in or upon said building or premises as a result of the condition of said building or premises or as a result of any act or omission, or in any way arising from the designation of such premises as a shelter, or the designation or use thereof as a mass care center, first aid station, temporary hospital annex, or other necessary facility for civil defense purposes, except a wilful act, of such owner or occupant or his servants, agents or employees when such person has entered or gone upon or into said building or premises for the purpose of seeking refuge, treatment, care, or assistance therein during destructive operations or attacks by enemies of the United States or during tests ordered by lawful authority.

This long and technically worded provision may, for present purposes, be summarized briefly as follows: Public entities are not liable to persons injured in civil defense shelters or other aid facilities located on public premises where (a) the injured person entered the premises for refuge or assistance during enemy attack or a civil defense test drill, and (b) the injury resulted from the condition of the premises, any nonwilful act or omission of the entity or its personnel, or the designation of the premises as a civil defense shelter or aid facility.

One purpose of this provision undoubtedly was to grant immunity to public entities, where the Public Liability Act would otherwise impose liability, for injuries resulting from defective conditions of civil defense shelter areas or other aid facilities. As part of the civil defense program, well-protected areas within buildings (such as basements and windowless interior sections) often prove to be the best and most suitable locations for the shelter or other civil defense purposes listed in the statute. Because of the permanence which often characterizes public buildings, many of these areas undoubtedly would be situated therein. Yet, many of them would not be suitable for ordinary routine use of members of the public, and might well be areas from which the public ordinarily is excluded (*e.g.*, subterranean storage or utility service rooms) because of possible risks of injury therein. Section 1714.5 in

effect permits all such areas as may be most suitable for the purpose to be designated as shelters or other aid centers without regard for the possible tort consequences of the designation. Immunity is granted only during attacks or drills, for during ordinary circumstances the public entity may protect itself against liability by simply excluding the public, limiting access, or providing precautions which may be appropriate to limited numbers of persons but wholly inadequate where large crowds enter for shelter or assistance during attacks or drills.

The rationale suggested in the preceding paragraph, however, is manifestly too narrow. Section 1714.5 appears in terms to grant an immunity for injuries incurred *anywhere* in or upon the building or premises, even though only a small portion thereof may have been designated as a shelter or aid station. Taken literally, it would appear to mean that persons sitting in a courtroom on the second floor of the county courthouse would have the benefit of the Public Liability Act up to the moment the air raid siren began to sound; and thereafter, while engaged in walking to as well as thereafter staying in the designated shelter area in the courthouse basement, would not have any such protection because of the countervailing immunity of Section 1714.5. The immunity thus seems to be broader than the suggested occasion for its enactment as outlined above. It is clear, moreover, that Section 1714.5 is not limited to providing immunity under the Public Liability Act, for it is applicable to entities other than those governed by that Act (*i.e.*, cities, counties and school districts) and the scope of immunity goes well beyond dangerous or defective conditions of the premises.

Where applicable, Section 1714.5 grants immunity for injuries sustained as the result of negligent (*i.e.*, all except wilful) acts or omissions of public personnel. The immunity of the public entity, in this connection, is apparently complete and all-inclusive, even if the negligent act or omission had no relationship whatever to the designation or maintenance of the building as a shelter or civil defense aid center. Thus, acts or omissions of public personnel which, under *Muskopf* or applicable statutes, would ordinarily result in liability of the employing entity if they occurred anywhere else are not actionable if they occur on premises designated as a shelter or civil defense aid center, and happen during an enemy attack or a test drill. If, for example, a public employee negligently moves a public vehicle parked in an underground garage which has been designated a defense shelter area, liability for resulting injuries to third parties would ordinarily obtain under Vehicle Code Section 17001, but not if the tort occurred during a defense test.¹⁸

This extensive entity immunity, it should be noted, is considerably broader than the statutory immunity from personal liability granted to the public officers or employees in question.¹⁹ The employing entity, it seems, will often be immune under Section 1714.5 where its employee is liable.

¹⁸ Even this conclusion is subject to some doubt, for, as indicated in the text immediately following, there may be doubt as to whether injury received by a person already present, and hence who has not entered for the purpose of seeking refuge or aid, is within the scope of the statutory immunity.

¹⁹ See CAL. CIV. CODE § 1714.5 (second paragraph), discussed in text at 159-60 *supra*. See, generally, text at 110-174 *supra*, for discussion of immunities of public personnel.

On the other hand, Section 1714.5 appears to imply that the employer will be liable for wilful torts of its employees. Of course, at the time this provision was drafted, it was generally understood that the doctrine of governmental immunity would preclude entity liability for most wilful torts of public employees; hence the implication was presumably believed to be harmless as far as public entity employers were concerned but useful insofar as the section also was applicable to private employers. Now that *Muskopf* and *Lipman* have removed the basis for this understanding, the possibility of entity liability in instances of wilful torts within the scope of this section is entirely realistic.

One final observation as to the scope of Section 1714.5 may serve to illustrate, along with the preceding analysis, the desirability of a careful reconsideration of its terms. This section appears to grant immunity only with respect to injuries sustained by a person who "has entered or gone upon or into" the premises designated as a shelter or aid station during an attack or test drill "for the purpose of *seeking*" refuge or assistance. Thus, it would seem that no such immunity would obtain with respect to injuries to persons who were already present or who entered for *other* purposes. To be sure, other statutory provisions may provide immunity from tort liability to such other persons if they are performing duties in their capacity as disaster service workers;²⁰ but it is readily conceivable that many classes of persons who are not employed by the owner-entity and are not disaster service workers might be present when the attack or test begins, or might thereafter enter, for a variety of reasons—perhaps to deliver a message, or to administer (not seek) assistance, or for other purposes. Injuries to these individuals would apparently be actionable, even though incurred under circumstances otherwise identical (but not actionable) to those confronting members of the public entering solely to seek shelter or assistance.

The interpretative difficulties mentioned above suggest that in the commendable zeal to adequately encourage and stimulate voluntary cooperation with civil defense preparations, Section 1714.5 may have been drafted without the careful scrutiny which its provisions deserve. Reconsideration and redrafting of this provision to harmonize it with basic policy choices involved in the *Muskopf* problem would appear to be urgently needed.

Streets and Highways Code Section 5640. This section provides:

5640. If, because any graded street or sidewalk is out of repair and in condition to endanger persons or property passing thereon, any person, while carefully using the street or sidewalk and exercising ordinary care to avoid the danger, suffers damage to his person or property, through any such defect therein, no recourse for damages thus suffered shall be had against the city.

Section 5640, which is manifestly inconsistent with the Public Liability Act of 1923, has repeatedly been held to have been superseded by the latter statute, at least to the extent of the conflict between

²⁰ Disaster service workers (which term is defined to include public employees) are generally covered by workmen's compensation with respect to injuries received in the course of their duties as such. See notes 72 and 73 *supra* and related text.

them.²¹ In its present form, therefore, it would seem to constitute a possible trap which may dissuade an unwary claimant from proceeding against a city through ignorance of his rights under the 1923 Act.

Section 5640, however, cannot be dismissed as a mere bit of superfluous legislation which should simply be repealed as a matter of routine. Despite the decisions applying the principle of implied repeal to this section,²² it must be remembered that repeals by implication ordinarily extend only to the areas of inconsistency between the earlier and the later enactment.²³ There are several situations, readily conceivable as within the realm of possibility, in which Section 5640 would not be inconsistent with the Public Liability Act, and hence apparently continues to have substantive effect today. For example, the term, "city," as used in Section 5640 is elsewhere defined to include "counties, cities, cities and counties and all corporations organized and existing for municipal purposes, together with . . . resort districts."²⁴ The Public Liability Act, however, does not apply to entities other than cities, counties and school districts.²⁵ Accordingly, Section 5640 would seem to be fully applicable to confer immunity upon resort districts and other entities (such as transit authorities, housing authorities and water agencies) which are not affected by the Public Liability Act.²⁶ It is also possible, in some cases where the defective street or sidewalk is under the jurisdiction of a city or county, that the plaintiff may be unable to prove one of the elements of liability required by the Public Liability Act, such as the requisite statutory notice of defect.²⁷ Yet, the evidence may bring the case fairly within applicable common law principles of tort liability. (As previously indicated,²⁸ the common law rules are in some respects more liberal than the statutory rules of liability under the Public Liability Act.) Here, too, Section 5640 may still function without conflicting with the Public Liability Act.

In certain types of cases relating to injuries resulting from defective streets and sidewalks, it thus appears that Section 5640 may effectively confer substantive immunity from tort liability upon some public entities.²⁹ This conclusion, it should be observed, is significant only in light of the *Muskopf* decision. Prior thereto, it was settled that the doctrine of

²¹ *Jones v. City of South San Francisco*, 96 Cal. App.2d 427, 216 P.2d 25 (1950); *Ackers v. City of Los Angeles*, 40 Cal. App.2d 50, 104 P.2d 399 (1940). Section 5640 was originally enacted as part of the Improvement Act of 1911, Cal. Stat. 1911, ch. 397, § 39, p. 750, and was codified in its present form by Cal. Stat. 1941, ch. 79, § 1, p. 877.

²² Cases cited note 21 *supra*.

²³ See *Southern Pac. Co. v. Railroad Comm'n*, 13 Cal.2d 89, 87 P.2d 1055 (1939); *Ex parte Cannon*, 167 Cal. 142, 133 Pac. 740 (1914); *Wong Him v. City & County of San Francisco*, 87 Cal. App.2d 80, 196 P.2d 135 (1948).

²⁴ CAL. STS. & HWYS. CODE § 5005.

²⁵ See p. 43, notes 5-11 *supra*, and related text.

²⁶ See pp. 126-127, notes 42, 49-51 *supra*, and related text.

²⁷ On the notice requirement under the Public Liability Act, see the text at 49 *supra*.

²⁸ See text at 58 *supra*.

²⁹ See pp. 125-29 *supra*. It is believed unlikely that Section 5640 would be construed as applicable only to streets and sidewalks which have been constructed or improved in proceedings under the Improvement Act of 1911, of which that section is a part. Nothing in the literal language of Section 5640 or any other part of the Act requires any such limited interpretation. On the other hand, Section 5640 appears to be modeled after a similar provision in the old Vrooman Act, Cal. Stat. 1885, ch. 153, § 23, p. 161, repealed by Cal. Stat. 1933, ch. 345, § 1, p. 948, which provision expressly applied only to injuries resulting from defects in streets "improved under the provisions of this act." See *Edwards v. Brockway*, 16 Cal. App. 626, 117 Pac. 787 (1911). The omission of similar restrictive words from Section 5640 would seem to indicate an intention of the Legislature to remove the limitation. See DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS 169 n.708 (1936).

governmental immunity shielded public entities from liability founded upon street and sidewalk defects, except to the extent such immunity had been waived by the Public Liability Act.³⁰ *Muskopf* reversed the situation, and in effect declared that governmental tort liability exists unless there is a statutory or judicially formulated immunity which applies. With respect to cases of this type arising before *Muskopf*, Section 5640 was merely a redundant statutory reinforcement of the common law rule of immunity. Now, under *Muskopf*, it suddenly emerges as a significant potential source of nonliability—for, as suggested previously,³¹ the California courts will probably recognize the existence of tort liability of public entities on common law principles whenever liability under the Public Liability Act cannot be established. (Where all the conditions of that Act are present, of course, Section 5640 affords no protection.)

The foregoing analysis of Section 5640 discloses an unfortunate and unexpected consequence of the *Muskopf* decision. The general rule of public liability seemingly established in *Muskopf* now appears to be partially eroded by a statutory immunity applicable only to cases of defective streets and sidewalks, but *not* to cases of other types of equally dangerous property. This immunity is available to cities and counties when liability cannot be established under the Public Liability Act and plaintiff relies solely on common law principles, but is *not* available to school districts under identical circumstances. It also is available to resort districts and to certain ambiguously defined public entities (*i.e.*, those which are “corporations organized and existing for municipal purposes”) but *not* to other types of entities of similar structure and function. The net effect is one of inconsistency and uncertainty where uniformity and consistency would seem to be highly desirable. Manifestly, the repeal or amendment of Section 5640 should be carefully considered in connection with a comprehensive legislative treatment of the basic problem of public liability for injuries resulting from defective public property.

Inglewood City Charter, Article XXXVI, Section 33. This charter provision provides in part:

If in consequence of any public street, alley, avenue, highway, road, lane or public place, being out of repair within said city, and in condition to endanger persons or property passing thereon or using the same, any person while lawfully and/or carefully using said street, alley, avenue, highway, road, lane or public place, and exercising ordinary care to avoid the danger, suffers damage to his person or property, through, on account, or by reason of any such defect therein, no recourse for damages thus suffered shall be had against such city

This charter provision, adopted in 1927³² with full notice of the Public Liability Act of 1923, was evidently designed to immunize the City of Inglewood in part from the liabilities imposed by the 1923 Act. In form, it was modeled after similar language which then appeared

³⁰ See *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937). *Cf.* *Taylor v. Manson*, 9 Cal. App. 382, 99 Pac. 410 (1908); *Barnett v. County of Contra Costa*, 67 Cal. 77, 7 Pac. 177 (1895).

³¹ See text at 56-57 *supra*.

³² Inglewood City Charter, Cal. Stat. 1927, res. ch. 28, art. XXXVI, § 33, p. 2250.

in the Vrooman Act,³³ the Municipal Corporations Act,³⁴ and the Improvement Act of 1911,³⁵ all of which provisions were apparently then believed not to have been superseded by the 1923 legislation.³⁶ The general validity of such a charter immunity had long been settled by an early decision relating to a similar provision in the original San Francisco Charter.³⁷

In a deliberate and intentional *dictum* inserted in an important opinion handed down in 1929,³⁸ the Supreme Court intimated (and subsequent decisions have reaffirmed³⁹) that tort liability of local entities is a matter of state-wide concern and not a municipal affair over which charter cities have home-rule autonomy. Accordingly, it seems clear today that the cited charter provision is of no legal force and effect, and that the tort liability of the City of Inglewood is governed solely by state law. Although similar provisions formerly contained in other city charters have all been repealed,⁴⁰ the Inglewood Charter has never been amended to eliminate this legal deadwood. It thus continues to exist as a potential trap for the unwary claimant who, not being fully advised as to his legal rights, forbears to sue in the mistaken belief that suit would be unavailing. Fair play and substantial justice alike warrant its early repeal.

Water Code Section 8535. This section provides:

8535. The drainage district, the board and the members thereof are not responsible or liable for the operation or maintenance of levees, overflow channels, by-passes, weirs, cuts, canals, pumps, drainage ditches, sumps, bridges, basins, or other flood control works within or belonging to the drainage district.

Section 8535, which appears in terms to confer a blanket immunity from tort liability upon the Sacramento and San Joaquin Drainage District and the State Board of Reclamation (the governing body of the said District), presents several unresolved problems of statutory interpretation.

³³ Cal. Stat. 1885, ch. 153, § 23, p. 161, repealed by Cal. Stat. 1933, ch. 345, § 1, p. 948.
³⁴ Cal. Stat. 1883, ch. 49, §§ 87, 376, pp. 130, 199, repealed by Cal. Stat. 1947, ch. 804, § 1, p. 1895.

³⁵ Cal. Stat. 1911, ch. 397, § 39, p. 750, subsequently codified as CAL. STS. & HWYS. CODE § 5640, discussed at length at 131-33 *supra*.

³⁶ See DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS 169 n.708 (1936), suggesting that since the Public Liability Act of 1923 contained no repealing clause, the more specific provisions of the Municipal Corporations Act and of city charter provisions based thereon should still be applicable. The same author argues also at length, *id.* at 170-71, that the 1923 Act had not superseded Section 39 of the Improvement Act of 1911 (now Streets and Highways Code Section 5640). The former suggestion was already dubious when made in light of the cases cited, notes 38, 39 *infra*, while the latter argument was subsequently found at least partially unavailing in the cases cited in note 21 *supra*. The position advocated by Mr. David (then Assistant City Attorney of Los Angeles, and now Judge of the Los Angeles Superior Court) was, however, not only plausible but undoubtedly shared by many other municipal attorneys, including the draftsmen of the Inglewood Charter.

³⁷ *Parsons v. City & County of San Francisco*, 23 Cal. 462 (1863).

³⁸ *Rafferty v. City of Marysville*, 207 Cal. 657, 665, 280 Pac. 118, 122 (1929).

³⁹ *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353 (1935); *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947).

⁴⁰ See, e.g., similar provisions formerly in the San Francisco Charter, Cal. Stat. 1899, res. ch. 2, art. I, § 5, p. 243, superseded by new charter of 1931, Cal. Stat. 1931, res. ch. 56, p. 2973 (see Cal. Stat. 1931, res. ch. 56, § 113, p. 3044); and in the Fresno Charter, Cal. Stat. 1921, res. ch. 6, art. I, § 5, p. 1826, superseded by new charter of 1957, Cal. Stat. 1957, res. ch. 277, p. 4630. A search of all city charters as of January 1, 1963, disclosed no other municipal charter provisions presently in effect purporting to immunize a city from tort liability, except for the Inglewood provision presently being discussed. No county charter is known to contain any such provision.

First, it is noteworthy that this immunity provision was originally enacted after⁴¹ a judicial decision had declared that there was no statutory authority for an action to be brought against the District or the Board of Reclamation for the torts of its personnel.⁴² Dictum in the cited case, however, had analyzed the relevant statutes as establishing the Sacramento and San Joaquin Drainage District as "a governmental agency of the state in the strictest sense—as much so, indeed, as any other governmental agency or department created by the legislature, such as the state highway commission, the state board of education, the state board of health, the state mining bureau, and the numerous other like instrumentalities through and by means of which the state exercises and applies portions of its sovereign authority."⁴³ Query: by granting an express statutory immunity to the district and the board in what is now Section 8535, did the Legislature intend to ratify the quoted judicial analysis, thereby implying that any liability for torts of personnel of the district would be a liability of the State alone, subject to whatever substantive principles might condition or limit such liability? This view, it should be noted, would not be unique. Various types of local public entities established for similar purposes are deemed in law to be merely instrumentalities or subdivisions of the county or city in which they function, and hence the *parent* entity rather than the subsidiary is deemed liable for the actionable torts of the latter.⁴⁴ Possibly Section 8535 merely places the Sacramento and San Joaquin Drainage District in a similar position. If so, notwithstanding Section 8535, the State would now be liable under *Muskopf* for the torts of district personnel.

Second, it should be noted that the analysis just suggested is weakened by other statutory language which declares that the Sacramento and San Joaquin Drainage District is a body corporate and politic with power to sue and be sued,⁴⁵ and which confers on the Reclamation Board financial powers apparently sufficient to make it fiscally independent of the State.⁴⁶ Several cases, moreover, have described the district in terms which treat it as an entity separate and apart from the State,⁴⁷ and in at least one decision, the Supreme Court appears to have regarded the district as an independent entity against which a judgment for damages in inverse condemnation could properly be rendered.⁴⁸ If this interpretation is accepted, it would, of course, in many cases deprive injured persons of *any* effective remedy for their injuries—for by our present hypothesis, the State as a separate entity would not be liable, and the district, the Reclamation Board, and all of its members would under Section 8535 be immune. An action against

⁴¹ See Cal. Stat. 1927, ch. 774, § 2, p. 1504.

⁴² *Western Assur. Co. v. Sacramento & San Joaquin Drainage Dist.*, 72 Cal. App. 68, 237 Pac. 59 (1925).

⁴³ *Id.* at 73, 237 Pac. at 61. See also, *Argyle Dredging Co. v. Chambers*, 40 Cal. App. 332, 181 Pac. 84 (1919).

⁴⁴ See, e.g., *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955) (holding county liable for tortious activities of a storm maintenance district which was a mere instrumentality of the county); *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899 (1920) (holding county liable for actions taken by protection district proceedings under Protection District Act of 1895).

⁴⁵ CAL. WATER CODE § 8503.

⁴⁶ See CAL. WATER CODE §§ 8750-8890.

⁴⁷ See *Gallup v. Sacramento & San Joaquin Drainage Dist.*, 171 Cal. 71, 151 Pac. 1142 (1915); *Sacramento & San Joaquin Drainage Dist. v. Riley*, 199 Cal. 668, 251 Pac. 207 (1926).

⁴⁸ *Clement v. State Reclamation Bd.*, 35 Cal.2d 628, 220 P.2d 897 (1950). See also, *Beckley v. Reclamation Board*, 205 Cal. App.2d —, 23 Cal. Rptr. 428 (1962).

an inferior employee or agent of the district would, in the absence of insurance coverage, often prove fruitless.

Third, it is difficult to determine the scope of the statutory immunity here extended in connection with the "operation and maintenance" of designated flood control facilities. Assuming that this language would limit the immunity to injuries resulting in some way from operational or maintenance activities (excepting of course such liabilities as are required to be compensated under Section 14 of Article I of the Constitution⁴⁹) the question remains: What activities will be deemed to be connected with "operation" and "maintenance" to a sufficient degree as to fall within the immunity? Does Section 8535, for example, grant an immunity from liability for personal injuries sustained as a result of a district employee's negligent operation of a motor vehicle while engaged in routine inspections of district facilities?⁵⁰ Would the negligent failure of the district to maintain either its headquarters building or a field office in safe condition be deemed so closely related to maintenance of flood control facilities that an otherwise actionable injury sustained therefrom by a business invitee on the premises would be declared nonactionable under Section 8535, notwithstanding the abolition of governmental immunity by *Muskopf*? In the absence of cases, the potential problems of this sort which might arise under Section 8535 would seem to be quite numerous.

Manifestly, Section 8535 is in need of legislative clarification. In addition, the underlying policy considerations involved in its potentially extensive grant of substantive immunity should be carefully evaluated in the light of the broader issues posed by *Muskopf* and *Lipman*.

Immunity From Liability for Relocation of Facilities of Franchise Holders

It is settled in California that—in the absence of statute—public entities, in the exercise of the police power, may compel occupiers of the public streets under franchise privileges to remove or relocate their facilities where necessary to improve the streets or to accommodate other public facilities therein, such as sewers and storm drains, and that such action does not impose liability upon such entities for the cost of such removals or relocations.⁵¹ It is customary to include express stipulations to this effect in the terms of franchises,⁵² so that the question of liability for cost of relocations is governed by contractual agree-

⁴⁹ *Ibid.* See also, *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), and discussion in text at 102-108 *supra*.

⁵⁰ See CAL. VEH. CODE § 17001, discussed in text at 36-40 *supra*.

⁵¹ *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958); *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958). See discussion in text at 79-91 *supra*, and Note, 6 U.C.L.A. L. REV. 336 (1959).

⁵² See, e.g., *Los Angeles County Ordinance 6765*, § 32 (1955), cited in Note, 6 U.C.L.A. L. REV. 336 (1959). Code provisions relating to franchise grants frequently authorize the granting authority, in general terms, to attach reasonable conditions to the franchise. See, e.g., CAL. PUB. UTIL. CODE § 6002 (Broughton Act franchises authorized to include "such . . . additional terms and conditions . . . as in the judgment of the legislative body . . . are to the public interest"); CAL. PUB. UTIL. CODE § 6203 (*semble*, as to gas and electric franchises); CAL. PUB. UTIL. CODE § 7556 (franchises for elevated or underground railroads authorized upon "such regulations, restrictions, and limitations, and upon such terms . . . as the county, city and county, or city may provide"); CAL. PUB. UTIL. CODE § 7804 (authorizing franchises for street railways with authority in city governing body to "impose such terms, restrictions, and limitations . . . as it deems to be for the public safety or welfare"). The power to impose reasonable conditions of this type has been held to exist even in the absence of express statutory authority. *Contra Costa County v. American Toll Bridge Co.*, 10 Cal.2d 359, 74 P.2d 749 (1937).

ment,⁵³ as well as by the police power doctrine. In addition, several statutory provisions themselves impose conditions of this type which, being a part of every franchise to which they apply, thereby confer immunity upon the public entity granting the franchise.

Streets and Highways Code Section 680. This section provides in part:

680. . . . The department may require any person who has placed and maintained any pole, pole line, pipe, pipe line, conduit, street railroad tracks, or other structures or facilities upon any state highway, whether under such or any franchise, to move the same at his own cost and expense to such different location in the highway as is specified in a written demand of the department, whenever necessary to insure the safety of the traveling public or to permit of the improvement of the highway; provided, that no such change of location shall be required for a temporary purpose. . . .

Section 680 has been held to be constitutionally valid, and not an undue impairment of the franchise, as applied to require the expenditure of large sums by a franchise holder for utility relocation.⁵⁴ The court observed that since the statute applied in terms only where the relocation was necessary to insure safety of the public and permit highway improvement, it was restricted to instances in which the benefit to the public as a whole clearly outweighed the burden imposed on the franchise grantee.

Section 680, it should be noted, represents a deliberate conclusion of legislative policy as to where the burden should fall; for in the comparable case of utility relocations on freeways, as distinguished from other state highways, legislative policy favors the franchise holder and generally requires the cost to be borne by the State as part of the cost of construction and improvement.⁵⁵ As observed previously,⁵⁶ the legislative pattern with respect to situations of this sort is permeated with many inconsistencies and discrepancies.

Public Utilities Code Section 6297. This section provides:

6297. The grantee shall remove or relocate without expense to the municipality any facilities installed, used, and maintained under the franchise if and when made necessary by any lawful change of grade, alignment, or width of any public street, way, alley, or place, including the construction of any subway or viaduct, by the municipality.

Section 6297 is found in the Franchise Act of 1937,⁵⁷ which establishes a procedure under which municipalities may grant franchises for the distribution of gas and electricity. (It is expressly declared to be an alternative procedure to that prescribed by the Broughton Act or

⁵³ A franchise grant, when accepted by performance thereunder, is deemed a contract protected against impairment under the Constitution. *City of Los Angeles v. Southern Cal. Tel. Co.*, 32 Cal.2d 378, 196 P.2d 773 (1948), *appeal dismissed*, 336 U.S. 929 (1949). The fact that a franchise contains certain express conditions, however, does not preclude the application of implied conditions, such as the duty to bear the cost of utility relocations made necessary by an exercise of the police power, for such franchises are strictly construed against the grantee and in favor of the public interest. See cases cited in note 51 *supra*.

⁵⁴ *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941).

⁵⁵ See CAL. STS. & HWYS. CODE §§ 760-711, cited in text at 88 *supra*.

⁵⁶ See text at 89-90 *supra*.

⁵⁷ CAL. PUB. UTIL. CODE §§ 6201-6302.

by any applicable provisions of a freeholders' charter.⁵⁸) The validity and effectiveness of Section 6297 to immunize the municipality from liability for necessary relocation costs has been impliedly sustained, but the court refrained from deciding whether Section 6297 also covered removal costs, or if so, whether it would be valid.⁵⁹

Public Utilities Code Section 7812. This section provides:

7812. In every grant to construct street railroads, the right to grade, sewer, pave, macadamize, or otherwise improve, alter, or repair the streets or highways, is reserved to the city and cannot be alienated or impaired. The work shall be done so as to obstruct the railroad as little as possible, and, if required, the street railway corporation shall shift its rails so as to avoid the obstructions made thereby.

Section 7812 is part of Chapter 2 of Division 4 of the Public Utilities Code, which provides for the granting by a city or a consolidated city and county of franchises for the operation of street railways. Its general legal effect appears to be similar to the other provisions discussed immediately above.

Municipal Charter Provisions. Except in certain situations where the nature of the utility service demonstrates that it is a matter of statewide concern,⁶⁰ the granting of franchises for the operation of utility structures on public streets has been regarded as a municipal affair with respect to which freeholders' charter cities may exercise home-rule powers independent of state law.⁶¹ Statutory provisions occasionally recognize this principle by expressly authorizing statutory franchise-granting procedures to be employed by charter cities as an alternative to other procedures authorized by city charter.⁶² Thus, it has become customary in the drafting of municipal charters to include provisions relating to franchises and the conditions which may be attached to franchise grants. Often the charter provisions are very general in nature and contemplate the elaboration of detailed conditions by subsequent ordinance.⁶³ A substantial number of city charters, however, spell out in some detail the liability of the franchise holder to relocate or alter its facilities upon demand from the city for stated purposes. A typical provision of this type⁶⁴ reads:

⁵⁸ CAL. PUB. UTIL. CODE §§ 6204, 6205.

⁵⁹ See *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958).

⁶⁰ See *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal.2d 766, 336 P.2d 514 (1959), holding that telephone services are no longer a "municipal affair," as they had been held to be in 1911 in *Sunset Tel. & Tel. Co. v. City of Pasadena*, 161 Cal. 265, 118 Pac. 796 (1911), but were now a matter of statewide concern in the light of technological, social and economic changes in the interim period.

⁶¹ *City of San Diego v. Southern Cal. Tel. Co.*, 92 Cal. App.2d 793, 208 P.2d 27 (1949); *City of San Diego v. Kerckhoff*, 49 Cal. App. 473, 193 Pac. 801 (1920). See also, cases cited in note 60 *supra*.

⁶² See, e.g., CAL. PUB. UTIL. CODE §§ 6204, 7555.

⁶³ See, e.g., *Fresno Charter*, § 1300, Cal. Stat. 1957, res. ch. 277, p. 4680, 4719 (city council authorized to "prescribe the terms and conditions of any such grant"); *Hayward Charter*, § 1502, Cal. Stat. 1956, res. ch. 2, p. 154, 188 ("terms and conditions . . . as in the judgment of said Council are in the public interest"); *Pacific Grove Charter*, Art. 47, Cal. Stat. 1955, res. ch. 157, p. 4064, 4082 ("other conditions . . . not inconsistent with the constitution and general laws of the State"); *Riverside Charter*, § 1400, Cal. Stat. 1953, res. ch. 49, p. 3878, 3909 ("terms and conditions"); *Roseville Charter*, § 9.05, Cal. Stat. 1955, res. ch. 13, p. 3718, 3744 ("such other and additional terms and conditions . . . as in the judgment of the Council are in the public interest").

⁶⁴ The quoted language is found in the *Dairy Valley Charter*, § 1005(d), Cal. Stat. 1959, res. ch. 94, p. 5554, 5578.

By its acceptance of any franchise hereunder, the grantee shall covenant and agree to perform and be bound by each and all of the terms and conditions imposed in the grant or by procedural ordinance and shall further agree to: . . .

(d) Remove and relocate without expense to the City any facilities installed, used and maintained under the franchise if and when made necessary by any lawful change of grade, alignment or width of any public street, way, alley or place, including the construction of any subway or viaduct, or if the public health, comfort, welfare, convenience or safety so demands.

Provisions substantially incorporating the quoted language are found in the following city charters:

ARCADIA CHARTER § 1405 (d)	Cal. Stat. 1951, res. ch. 117, p. 4541
CHULA VISTA CHARTER § 1405(d)	Cal. Stat. (1st Ex. Sess.) 1949, res. ch. 9, p. 149
COMPTON CHARTER § 1506(d)	Cal. Stat. 1948, res. ch. 11, p. 269
CULVER CITY CHARTER § 1505 (d)	Cal. Stat. 1947, res. ch. 24, p. 3408
DAIRY VALLEY CHARTER § 1005 (d)	Cal. Stat. 1959, res. ch. 94, p. 5573
GRASS VALLEY CHARTER, Art. XII, § 8 (d)	Cal. Stat. 1952, res. ch. 11, p. 250
HUNTINGTON BEACH CHARTER, Art. XIV, § 6 (d)	Cal. Stat. 1949, res. ch. 56, p. 3040
LOS ANGELES CHARTER, Art. XXXIII, § 454(19)	Cal. Stat. 1937, res. ch. 3, p. 2605
MERCED CHARTER § 1405 (d)	Cal. Stat. 1949, res. ch. 126, p. 3190
NEEDLES CHARTER § 1305 (d)	Cal. Stat. 1959, res. ch. 35, p. 5465
NEWPORT BEACH CHARTER § 1305 (d)	Cal. Stat. 1955, res. ch. 1, p. 3650
OAKLAND CHARTER § 147	Cal. Stat. 1947, res. ch. 116, p. 3607
SAN LUIS OBISPO CHARTER § 1305 (d)	Cal. Stat. 1955, res. ch. 167, p. 4133
SANTA ANA CHARTER § 1304 (d)	Cal. Stat. 1953, res. ch. 4, p. 3779
SANTA MONICA CHARTER § 1605 (d)	Cal. Stat. 1947, res. ch. 8, p. 3341

The legal significance of the foregoing charter provisions is perhaps not great. These provisions, however, obviously were not intended to be merely superfluous or redundant. To be sure, the courts have demonstrated their willingness to invoke the police power doctrine as a basis for *implying* a common law duty of the franchise holder to relocate its facilities without expense to the public entity "when necessary to make way for a proper governmental use of the streets."⁶⁵ Indeed, the cases indicate that in utility relocation situations the public entity ordinarily is liable only if made so by statute,⁶⁶ or by the terms of the franchise,⁶⁷ or by the constitutional principle that private property cannot be taken or damaged for public use without

⁶⁵ *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 716, 329 P.2d 289, 290 (1958), and cases there cited.

⁶⁶ The statutes requiring the public entity to assume the cost of such relocations are collected in the text at 79-91 *supra*.

⁶⁷ See, e.g., CAL. STS. & HWYS. CODE §§ 700-711, governing rights of franchise holders in freeways. Cf. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958), suggesting that the Legislature could validly grant, or authorize the granting of, franchises containing a right in the grantee to compensation for relocating its lines.

payment of just compensation.⁶⁸ Since the police power rationale disposes of the third of these possibilities, and mere statutory and contractual silence would preclude liability under the first two, the purpose of the express statutory condition is not easily apparent, except possibly as legal barriers against voluntary assumption of relocation costs by city councils in franchise award proceedings.

Upon reflection, however, one may discern a substantial practical difference in the legal posture of the situation where an express statutory condition of the foregoing type is attached to a franchise, as compared to a similar factual situation in which the statute and franchise terms are silent as to relocation costs. The express condition places the public entity in a nearly impregnable position of nonliability, for the issue will ordinarily be simply whether the particular relocation demanded by the public entity is within the fair meaning of the condition.⁶⁹ The statutory language is ordinarily so broad as to afford little opportunity for successful attack by the franchise holder on these grounds.⁷⁰ Where the public entity, however, must rely solely upon the police power doctrine as the basis for its claim of nonliability, unsupported by any express condition, the issue is ordinarily treated as a question of inverse condemnation to be resolved by balancing the private detriment against the public advantage.⁷¹ There may thus be potential utility relocation situations in which a contractual stipulation of the type indicated would support a holding of nonliability of the public entity, but in which the common law balance would be struck against the public entity in the absence of such an express condition.

For reasons already explored,⁷² it appears unlikely that the abolition of governmental immunity by *Muskopf* would have any impact upon the problem here discussed. However, the nonuniformity of existing law, and the contrariety of results which potentially might be reached under different franchises or in different parts of the State, in otherwise closely comparable utility relocation situations, suggests the need for legislative treatment.

⁶⁸ See Note, 6 U.C.L.A. L. Rev. 336 (1959).

⁶⁹ See *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941). In *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958), in which a strong attack was made upon a claim of immunity for relocation costs, the utility company conceded that it was required to bear the expense of such relocations where expressly so required as a condition attached to its franchise. Ordinarily, of course, the acceptance of the benefits of a franchise will preclude the grantee from challenging the burdens voluntarily assumed at the time of acceptance. *Contra Costa County v. American Toll Bridge Co.*, 10 Cal.2d 359, 74 P.2d 749 (1937). See also *Gregory v. Hecke*, 73 Cal. App. 268, 238 Pac. 787 (1925).

⁷⁰ It seems clear that the conditions which may be appended to the grant of a franchise, and which upon acceptance become binding upon the franchise holder, may include liabilities more extensive than what would be implied at common law in the absence of such an express condition. See *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 338-39, 333 P.2d 1, 5 (1958). *Cf. Schmidt v. Market St. & W. G. R.R.*, 90 Cal. 37, 27 Pac. 61 (1891); *Albany v. United States Fid. & Guar. Co.*, 38 Cal. App. 466, 176 Pac. 705 (1918); *St. Helena v. San Francisco, N. & C. Ry.*, 24 Cal. App. 71, 140 Pac. 600 (1914); 22 CAL. JUR.2d *Franchises* § 19 (1955). In addition, the possibility of resisting liability under such an express condition is further reduced by the general rule that franchises are to be construed strictly against the grantee and in favor of the public entity. *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal.2d 713, 329 P.2d 289 (1958).

⁷¹ See *State v. Marin Municipal Water Dist.*, 17 Cal.2d 699, 111 P.2d 651 (1941); cases cited in note 51 *supra*. *Cf. Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960) and discussion in text at 104-105 *supra*.

⁷² See text at 90-91 *supra*.

Miscellaneous Statutory Immunities from Liability

There are several isolated statutory provisions which grant immunity from tort liability to governmental entities in specific situations. The underlying legislative policy reflected in these measures is readily apparent, and few problems of statutory interpretation appear to be present. Among the provisions referred to are the following.

Government Code Section 1408. This section provides:

1408. This State is not liable or accountable in any way for the appointment of such special policeman or for any act or omission on his part in connection with his powers and duties under this article.

Section 1408 relates to special policemen appointed upon the application of the Governor of any sister state for the purpose of protecting property owned by the other state, or in which it has some interest, which property is situated wholly or in part in California.⁷³ The immunity granted by Section 1408 is simply a corollary to the statutory declaration that such special policemen are employees of the state requesting that the appointment be made and are not employees of California.⁷⁴

Streets and Highways Code Section 942.5. This section provides:

942.5. The board of supervisors may restrict the use of, or close, any county highway whenever the board considers such closing or restriction of use necessary:

- (a) For the protection of the public.
- (b) For the protection of such county highway from damage during storms.
- (c) During construction, improvement or maintenance operations thereon.

No liability shall attach to the county, or to the board of supervisors, for the restriction of use, or closing, of any county highway for the above public purposes.

This section does not constitute a change in, but is declaratory of the pre-existing law.

Section 942.5 was added by the Legislature in 1957.⁷⁵ The nonliability clause was apparently thought to be desirable, in order to forestall any possible attempts to impose liability upon the county for obstructing the highways. A number of cases, involving actions between private individuals, support the view that private unauthorized obstructions of public highways are nuisances⁷⁶ and, provided some special private injury can be shown, constitute a basis for recovery against the obstructor.⁷⁷ Since recent cases have affirmed the proposition that a public entity, even though otherwise protected from liability under the doctrine of governmental immunity, may be held liable for injuries

⁷³ See CAL. GOVT. CODE § 1402.

⁷⁴ CAL. GOVT. CODE § 1407.

⁷⁵ Cal. Stat. 1957, ch. 1876, § 1, p. 3283.

⁷⁶ See *Flavio v. McKenzie*, 177 Cal. App.2d 274, 2 Cal. Rptr. 79 (1960); *People v. Henderson*, 85 Cal. App.2d 653, 194 P.2d 91 (1948); *Sacramento v. Pacific Gas & Elec. Co.*, 173 Cal. 737, 161 Pac. 978 (1916).

⁷⁷ See *Leverone v. Weakley*, 155 Cal. 395, 101 Pac. 304 (1909); *Ball v. Stephens*, 68 Cal. App.2d 843, 158 P.2d 207 (1945). Cf. *Gardner v. Stroever*, 89 Cal. 26, 26 Pac. 618 (1891); *Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106 (1891).

sustained as a result of nuisances created by its officers or employees,⁷⁸ the danger of county liability on a nuisance theory in cases of officially ordered obstructions of county highways was not entirely theoretical, even before *Muskopf*.

Section 942.5 purports to declare a substantive rule of law. Notwithstanding the legislative statement that such rule is merely declaratory of pre-existing law, therefore, it follows that the *Muskopf* decision abrogating the immunity doctrine would not impair the force of the statutory immunity here granted. The scope of the immunity, however, is not entirely clear. Apparently the county is relieved of liability solely for damages resulting from the *fact* of closing or restricting use of the highway for the indicated purposes. It would, however, apparently not be relieved from liability if the devices used to close the highway were negligently set up in such a way as to cause injury (*e.g.*, unlighted barricades), or if injury resulted to the limited traffic permitted to pass on a restricted highway as a result of some other type of unrelated negligence (*e.g.*, negligent operation of county vehicle thereon), or in consequence of some dangerous and defective condition existing thereon without adequate warnings or safeguards.⁷⁹ The exact scope of the statutory immunity remains to be determined in future litigation, although it would perhaps be advisable to seek legislative clarification in order to preclude the need for such litigation.

Unclaimed Property Act. The following provisions were enacted in 1951 as a part of the Unclaimed Property Act:⁸⁰

CODE CIV. PROC. § 1335. When payment or delivery of money or other property has been made to any claimant under the provisions of this chapter, no suit shall thereafter be maintained by any other claimant against the State or any officer thereof for or on account of such property.

CODE CIV. PROC. § 1378. No suit shall be maintained by any person against the State or any officer thereof, for or on account of any transaction entered into by the Controller pursuant to this chapter.

CODE CIV. PROC. § 1379. With the prior approval of the State Board of Control, the Controller may destroy or otherwise dispose of any personal property other than cash deposited in the State Treasury under the provisions of this title, if such property is determined by him to be valueless or of such little value that the costs of conducting a sale would probably exceed the amount that would be realized therefrom; and neither the Treasurer nor Controller shall be held to respond in damages at the suit of any person claiming loss by reason of such destruction or disposition.

⁷⁸ See *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959); *Am-brosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

⁷⁹ See *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961), where the court held that a county ordinance forbidding the riding of bicycles on sidewalks, purportedly enacted pursuant to Section 942.5 of the Streets and Highways Code, did not prevent county liability for a dangerous and defective condition of such a sidewalk which resulted in injury to a child riding his bicycle thereon. Holding that the purpose of the ordinance was to protect pedestrians from negligent bicycle riders on the sidewalks, the court concluded that in the absence of affirmative enforcement action by the county, the mere prohibition could not relieve the county of its statutory duty to maintain the sidewalk in a safe condition for all who use it for ordinary and usual purposes.

⁸⁰ Cal. Stat. 1951, ch. 1708, p. 3933. The official title of this legislation as the Unclaimed Property Act is found in Cal. Stat. 1951, ch. 1708, § 58, p. 3983.

PEN. CODE § 5065. When any personal property has been destroyed as provided in Section 5061 or 5062, no suit shall thereafter be maintained by any person against the State or any officer thereof for or on account of such property.

WEL. & INST. CODE § 166.4. When any personal property has been destroyed as provided in Sections 166 or 166.1, no suit shall thereafter be maintained by any person against the State or any officer thereof for or on account of such property.

WEL. & INST. CODE § 1019. When any personal property has been destroyed as provided in Section 1015 or 1016, no suit shall thereafter be maintained by any person against the State or any officer thereof for or on account of such property.

In effect, the foregoing provisions immunize the State (which possibly could have been liable on a theory of conversion⁸¹ or assumpsit⁸² prior to *Muskopf*) and its officers from liability for loss of property which is disposed of in accordance with procedures established by law. Manifestly, these provisions would not be affected by the abolition of the governmental immunity doctrine.

Immunity by Implication From Statutory Language

The immediately preceding discussion (pages 187-193) has dealt with statutes which in terms purport to confer immunity from tort liability upon public entities or their personnel under varying, and sometimes ambiguously defined, conditions. Legislative intent, however, is not always found in express statutory language, but may be derived by implication from nonexplicit but relevant statutory provisions. It is proposed to examine various statutory patterns of language which might plausibly support a contention that governmental tort immunity was impliedly intended to be conferred thereby. Although in certain instances, it will be concluded that the suggested implications to this effect would probably be deemed by a court to be too tenuous to be deemed substantial, the existence of even a plausible contention is obviously germane to the purposes of this study. Any potential legal argument (however weak and unpromising it may appear) constitutes the seed of a possible lawsuit. Avoidance of litigation by increasing the certainty of the law clearly is a desirable goal for consideration in the development of any program of legislation relating to governmental tort liability; but the elimination of grounds for dispute by enactment of clear and positive affirmations of legislative policy requires that the sources of such disputes first be identified. To that task we now turn.

Statutory Disclaimers of Intent to Enlarge Liability

In a number of statutory provisions relating to special districts, the Legislature has inserted a clause declaring in substance that nothing therein "shall be construed as creating any liability unless it would have existed regardless of" the provisions referred to. Such disclaimers of intent to enlarge liability, however, are not entirely uniform in

⁸¹ See *Bertone v. City & County of San Francisco*, 111 Cal. App.2d 579, 245 P.2d 29 (1952). Cf. *Reynolds v. Lerman*, 138 Cal. App.2d 586, 292 P.2d 559 (1956).

⁸² See *Union Bank & Trust Co. v. County of Los Angeles*, 2 Cal. App.2d 600, 38 P.2d 442 (1934).

language or context, and may for present purposes be classified into three different groups for purposes of analysis.

The first class of provisions to be examined consists of Water Code Sections 22731 and 31089:

22731. Nothing in the preceding portion of this article shall be construed as creating any liability except as provided in Section 22730 unless it would have existed regardless of this article.

31089. Nothing in Sections 31083 to 31088, inclusive, shall be construed as creating any liability unless it would have existed regardless of those sections

Both of these sections are found in special district laws, Section 22731 being part of the Irrigation District Law and Section 31089 being part of the County Water District Law. The context is closely similar in each case.

The "preceding portion of this article," referred to in Section 22731, consists of two sections limiting the personal liability of district officers,¹ a statutory provision governing presentation of claims against the district,² and a provision (Section 22730) requiring the district to satisfy any judgments against its officers.³ Section 22731, it will be noted, simply declares that the indicated provisions shall not be construed to create any new liability *except for* the statutory liability to satisfy personal judgments against district officers.

The sections referred to in Section 31089 are closely similar. Section 31083 is a limitation upon the personal liability of county water district personnel.⁴ Section 31084 is a general procedural claims provision, while Sections 31085, 31086 and 31087, formerly parts of a specialized claims procedure for county water districts, have been repealed.⁵ Section 31088 merely authorizes the employment of counsel to defend actions brought against a district or any of its personnel. Section 31089 then simply declares that these provisions shall not be construed to create any new liability. The similarity to the irrigation district statutory pattern is emphasized by the fact that there is also a statutory provision which requires county water districts to satisfy judgments against their personnel;⁶ but this provision is not referred to in Section 31089 and hence (as in the case of the Irrigation District Law) is in effect *excepted* from the "no new liability" declaration made in that section.

These two sections pose a difficult problem of interpretation in light of *Muskopf*. In terms they merely state that nothing in the statutory provisions referred to should be construed to create any new liability that would not otherwise exist. Liability under the *Muskopf* decision, resulting from the abolition of the governmental immunity doctrine, however, would exist under common law rules, independent of the

¹ CAL. WATER CODE § 22725, discussed in the text at 141-45 *supra* (see especially, pp. 143-44 for a discussion of the interrelationship between this section and CAL. WATER CODE § 22731, the provision presently being analyzed), and CAL. WATER CODE § 22726, discussed in the text at 138-39 *supra*.

² CAL. WATER CODE § 22727.

³ CAL. WATER CODE § 22730, discussed in the text at 67 *supra*.

⁴ CAL. WATER CODE § 31083 is discussed in the text at 138-39 *supra*.

⁵ The repeal of these sections was effected by the 1959 legislation creating a uniform general claims procedure, adopted pursuant to a recommendation of the California Law Revision Commission. Cal. Stat. 1959, ch. 1727, § 66, p. 4155. See 2 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, Recommendation and Study at A-1, A-1 to A-16 (1959).

⁶ CAL. WATER CODE § 31090, discussed in the text at 65-66 *supra*.

statutory provisions referred to. Thus, it would be possible, without construing or relying upon the provisions referred to in Sections 22731 and 31089, to hold that irrigation districts and county water districts may now be held *directly* liable in tort on common law principles. Such new liability would have been "created" by judicial elimination of the immunity doctrine, and not by "construing" the statutory provisions mentioned in these two sections. This literal view, if sound, would lead to the conclusion that these two sections afford no basis for any claim of district immunity from tort liability.

The difficulty with the analysis just presented is that it is directly contrary to views expressed by the Supreme Court prior to *Muskopf*. In a decision construing Section 22731 (which is the codified form of what was originally Section 4 of the Irrigation District Law), the court, speaking through Mr. Chief Justice Gibson (and with only the late Mr. Justice Carter dissenting) stated:

There is no doubt that section 4 of the act and section 22731 of the code show a legislative intent not to abrogate the rule of governmental immunity for irrigation districts except with respect to the payment of such judgments [against district officers pursuant to section 22730]. . . .

Most of the authorities who have recently written on the subject strongly advocate abolition or modification of the principle of governmental immunity However, the abrogation or restriction of this doctrine is primarily a legislative matter . . . , and, *where, as here, the Legislature has clearly expressed its intention to maintain immunity, that intention is controlling.* [Emphasis added.]⁷

The court, it seems, construed Section 22731 as indicating not only a legislative intent to preclude any interpretation of the statutory law as providing for district tort liability, but also as indicating a legislative intent to preclude any relaxation of the district's common law immunity. The italicized language from the court's opinion, however, was clearly unnecessary to the decision. Thus, in a recent decision announced after the *Muskopf* case, the Supreme Court disregarded the dictum in question, and held that a county water district was liable in tort upon common law grounds, governmental immunity having been abrogated, notwithstanding the language of Section 31089.⁸ Doubtless the same rule would obtain with respect to irrigation districts, notwithstanding Section 22731. The literal interpretation advanced above apparently is now the law.

Sections 22731 and 31089, however, remain on the statute books and may prove to be a trap for the unwary litigant. One unfamiliar with the recent cases might well conclude, consistently with the court's intimations in the above-quoted portions of the *Vater* opinion, that a tort judgment against district personnel was a prerequisite to liability of the district. In certain cases, however, an injured person may experience considerably more difficulty in locating, obtaining personal jurisdiction of, and establishing personal liability of an identified officer or employee than would be experienced in proceeding solely

⁷ *Vater v. County of Glenn*, 49 Cal.2d 815, 820, 323 P.2d 85, 88 (1958). See also, *Powers Farms, Inc. v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717 (1942).

⁸ *Lattin v. Coachella Valley County Water District*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

against the district as employer.⁹ Defenses may be available to the employee which are not available to the district.¹⁰ And practical considerations may favor the employee defendant.¹¹ Thus, to the extent that these sections induce an unfounded belief that district liability is still limited to the payment of judgments against its personnel, irrigation and county water districts enjoy a measure of nonliability not shared by other like entities.

Moreover, the statutory duty imposed by Sections 22731 and 31089 upon irrigation and county water districts does not appear to be identical. Irrigation districts are required to satisfy only personal tort judgments against "officers" while county water districts must satisfy judgments against "an officer, agent, or employee."¹² Moreover, an irrigation district must satisfy a judgment of liability for "any act or omission" done by its officer in his official capacity, while a county water district is excused from liability for paying a judgment based on "actual fraud or actual malice."¹³ Thus, it appears that if a tort claim of any type has been reduced to judgment against an irrigation district officer, the district must satisfy the judgment without recourse against the officer in fulfillment of its statutory duty under Section 22731. If the judgment is against only an employee of the irrigation district, however, no statutory duty to satisfy it arises; and the plaintiff seemingly must bring an action against the district upon common law principles of *respondeat superior*, in which action the district may be able to assert defenses (e.g., noncompliance with the claims presentation procedures) not available to the employee.¹⁴ A county water district, on the other hand, would appear to have a statutory duty to satisfy judgments against any category of its personnel, in view of Section 31089, thereby precluding it from interposing any special defenses which might otherwise be successful if it were sued directly on the theory of *respondeat superior*; but such duty would not extend to torts involving actual malice and fraud.

In short, it seems that Sections 22731 and 31089 may at times serve as a trap which reduces district tort liability as a practical matter, while at other times they may actually provide a legal basis for tort liabilities which could be successfully resisted in their absence, even within the framework of the *Muskopf* rule. Obviously, Sections 22731 and 31089 and their companion provisions are in need of legislative amendment or abolition. Not only are they substantively inconsistent

⁹ The *Vater* case itself, *supra* note 7, provides an apt illustration. The alleged wrongful death for which plaintiff was there suing resulted from negligent maintenance of an irrigation district bridge in a dangerous condition. The complaint alleged that the defect had existed for some 40 years and was known to the district. Suit was brought against the district apparently in part because plaintiff was unable to identify the particular officers responsible for maintaining, and hence for correcting the defective condition of, the bridge.

¹⁰ See the statutory limitations of personal liability cited in notes 1 and 4 *supra*. Cf. p. 70 *supra*, notes 9 and 10 and related text.

¹¹ See text at 70-71 *supra*.

¹² Compare CAL. WATER CODE § 22730 with CAL. WATER CODE § 31090.

¹³ *Ibid.* Emphasis added.

¹⁴ The statutory provisions requiring presentation of claims before suit against public entities are more comprehensive than the provisions requiring presentation of claims before suit against public officers and employees. As to the former provisions, CAL. GOVT. CODE §§ 600-730, see McDonough, *The New Claims Statute*, 34 CAL. S.B.J. 964 (1959). The loopholes, inadequacies and shortcomings of the latter provisions, principally found in CAL. GOVT. CODE §§ 800-803, are examined in Van Alstyne, *Claims Against Public Employees: More Chaos in California Law*, 3 U.C.L.A. L. Rev. 497 (1961). The last-cited article documents numerous situations in which failure to present a claim would be a conclusive defense to a tort action against a public entity, but would be unavailing as a defense in an action against the entity's personnel.

(without any apparent supporting policy reasons) but they constitute a potential threat of injustice to litigants unaware of their inter-relationship with the *Muskopf* rule. These provisions, undoubtedly deemed to be quite liberal when originally adopted, would seem to be ill-adapted to and anachronistic in a system of tort law from which the governmental immunity doctrine has generally been eradicated.

The second class of provisions to be analyzed consists of only one statutory provision, Water Code Section 35756, which reads:

35756. Nothing in this article shall be construed as creating any liability unless it would have existed regardless of this article.

Section 35756 is part of the California Water District Law. It appears at first glance to be identical in substance to the irrigation district provision discussed immediately above, and bears internal evidence of having been drafted with the irrigation district provisions as a guide. Its separate classification here stems from a peculiar interpretative problem which is involved, and which in all likelihood was a mere inadvertent oversight of the draftsman.

Section 35756, like the two sections previously discussed, declares that nothing "in this article" shall be construed to create any new liability. (The section, however, is not part of any "article" but appears in *Chapter 4 of Part 5 of Division 13 of the Water Code*. In its original form as enacted in 1943 prior to codification, the word "article" was not present, and the section referred to "this chapter."¹⁵ This error in codification, however, is clearly of no substantive significance and is not the basis for the interpretative problem referred to.) Yet, Chapter 4 (*i.e.*, the so-called "article" in which Section 35756 appears) also contains a provision (Section 35755) identical to that in the Irrigation District Law, requiring the district to satisfy tort judgments against its officers without obligation for repayment. Obviously, prior to *Muskopf*, such liability to satisfy judgments did not exist in the absence of Section 35755; yet Section 35756 flatly declares that Section 35755 shall *not* be construed to create any new liability unless it *would* have existed without that section. In short, Section 35756 expressly takes away precisely what Section 35755 expressly gives.

This internal contradiction within Section 35756 may, of course, be deemed an inadvertence, and Section 35755 given effect as an implied exception to the general rule of Section 35756. So regarded, the effect of Section 35756 would appear to be identical to that of Section 22731, discussed above, so far as present purposes are concerned, and the need for legislative treatment would seem to be equally apparent.

The third class of provisions containing a disclaimer of intent to enlarge liability consists of like language found in 11 special acts governing individual water agencies. Each of these acts contains a section exonerating agency *personnel* from personal liability for acts or omissions of their employees or appointees in the absence of actual notice of the inefficiency or incompetence of the latter. This section is then followed by one making explicit reference to it by number, declaring, in terms of which the following are typical, that:

Nothing contained in Section . . . shall be considered as creating any liability or responsibility unless the same would have

¹⁵ Cal. Stat. 1943, ch. 492, § 3, p. 2034, subsequently codified as CAL. WATER CODE § 35756 by Cal. Stat. 1951, ch. 390, § 1, p. 1206.

existed without the enactment of said section, nor shall the provisions of said section be deemed to amend, modify or repeal the provisions of Chapter 6 (commencing at Section 1950) of Division 4 of Title 1 of the Government Code.

Provisions substantially identical to this appear in:

Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 37, p. 4001, CAL. GEN. LAWS ANN. Act 270, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-37 (West Supp. 1961).

Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 9.3, p. 5073, CAL. GEN. LAWS ANN. Act 276, § 9.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-9.3 (West 1959).

El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 36, p. 5094, CAL. GEN. LAWS ANN. Act 2245, § 36 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-36 (West 1959).

Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 9.2, p. 2669, CAL. GEN. LAWS ANN. Act 9098, § 9.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-9.2 (West Supp. 1961).

Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 16, p. 2508, CAL. GEN. LAWS ANN. Act 4025, § 16 (Deering 1954), CAL. WATER CODE APP. § 59-16 (West 1956).

Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 7.3, p. 4693, CAL. GEN. LAWS ANN. Act 4613, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-7.3 (West 1959).

Nevada County Water Agency Act, Cal. Stat. 1959, ch. 2122, § 37, p. 4974, CAL. GEN. LAWS ANN. Act 5449, § 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 90-37 (West 1959).

Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 7.3, p. 2529, CAL. GEN. LAWS ANN. Act 5935, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-7.3 (West 1959).

Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 7.3, p. 4828, CAL. GEN. LAWS ANN. Act 9096, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-7.3 (West 1959).

Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 36, p. 5040, CAL. GEN. LAWS ANN. Act 9380, § 36 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-36 (West 1959).

Yuba County Water Agency Act, Cal. Stat. 1959, ch. 788, § 7.3, p. 2790, CAL. GEN. LAWS ANN. Act 9407, § 7.3 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 84-7.3 (West 1959).

These 11 provisions, it will be noted, relate entirely to the liability of agency officers and employees. Taken in their literal sense, they would seem to merely establish a rule of construction requiring the courts to refrain from construing the statutory provisions referred to (*i.e.*, the provisions limiting personal liability for torts of subordinates) as impliedly enlarging the liability of agency officers, agents and employees. From this viewpoint, the elimination of the governmental immunity of public entities by *Muskopf* would not be impaired at all, and the cited sections would not diminish the corporate tort liability of water agencies as entities.¹⁶

On the other hand, each of the cited special acts also contains a provision similar to that in the irrigation district law requiring the agency to satisfy tort judgments against its personnel.¹⁷ For reasons

¹⁶ See *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

¹⁷ See provisions cited in text at 65-67 *supra*.

analogous to those already advanced in connection with Sections 22731 and 31089 of the Water Code, it is submitted that clarifying legislation is needed.¹⁸

Statutory Declaration of Nature of Entity's Functions

In a number of statutes relating to public entities, the Legislature has included a statement describing the purpose of the statute or the functions of the entity in terms which suggest a legislative intent to confer tort immunity.

Prior to the *Muskopf* decision, it will be recalled, there were numerous California decisions in which the determination whether a public entity was liable in tort was grounded on a distinction between "governmental" and "proprietary" functions.¹⁹ If the particular activity out of which the particular injury arose was judicially classified as "governmental" in nature, the immunity doctrine obtained, absent a statutory waiver.²⁰ Moreover, in seeking to find some rational criteria upon which to predicate the classification, the courts often singled out the so-called "police power" as a relevant factor.²¹ Thus, if the activity in question constituted an exercise of the "police power," in that it was clearly an essential activity designed to protect the public health, safety and welfare, it was easily classifiable as a "governmental" (and hence immune) activity rather than a "proprietary" or business-type function.²² In addition, an activity designed to promote the general health and welfare was readily describable as a "public" rather than a "private" activity—and the term "public" was deemed practically synonymous with "governmental."²³

¹⁸ See text at 194-97 *supra*.

¹⁹ Many of the cases, together with a discussion of the inconsistencies and inequalities arising because of the distinction, are cited in *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961). See also *Planka v. State*, 46 Cal.2d 208, 293 P.2d 458 (1956); *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953); *People v. Superior Court*, 29 Cal.2d 754, 173 P.2d 1 (1947).

²⁰ See, e.g., *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953); *Legg v. Ford*, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

²¹ See, e.g., *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 40, 257 P.2d 22, 26 (1953), holding hospital district immune under governmental function test (prior to *Muskopf*) because, "In the exercise of its police power the state may act to provide for the public health and welfare and this in essence is what the Local Hospital District Law was designed to accomplish." *Accord*: *Chafor v. City of Long Beach*, 174 Cal. 478, 487, 163 Pac. 670, 674 (1917), ". . . the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young"; *Farrell v. City of Long Beach*, 132 Cal. App.2d 818, 819, 283 P.2d 296, 297 (1955), "The maintenance of children's playgrounds and recreational centers . . . are [sic] referable solely to the duty of maintaining public health. . . . The fostering and safeguarding of public health is a governmental function."

²² *Talley v. Northern San Diego County Hosp. Dist.*, *supra* note 21 (public hospital district); *Miller v. City of Palo Alto*, 208 Cal. 74, 280 Pac. 108 (1929) (municipal garbage and refuse disposal); *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958) (municipal swimming pool for health and recreation); *Chappelle v. City of Concord*, 144 Cal. App.2d 822, 301 P.2d 968 (1956) (municipal police department).

²³ In *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 39-40, 257 P.2d 22, 26 (1953), the court declared that "The test of governmental is whether the particular activity in which the governmental agency is engaged at the time of injury is of a public or a private nature." *Accord*: *Carr v. City & County of San Francisco*, 170 Cal. App.2d 48, 338 P.2d 509 (1959) (following *Talley*); *Guidi v. State*, 41 Cal.2d 623, 627, 262 P.2d 3, 6 (1953) (holding State not immune where amusement activities at fair "do not differ from those of private enterprise in the

In view of these judicially developed doctrines, it would appear to be significant that the Legislature has intentionally and explicitly described the functions of certain public agencies as "public," "governmental" and "police" functions. Admittedly such appellations may also be relevant to purposes other than tort liability.²⁴ The legal context in which such terminology undoubtedly has had its most significant import, however, has been that of torts. It is thus difficult to escape the conclusion that the Legislature enacted these provisions with, at least in part, the intent and expectation that they would result in substantially broader tort immunity than would otherwise obtain.

The statutory provisions in question may be divided for convenience into three groups, each of which is characterized by a similar (although not necessarily identical) form of language. For purposes of comparison, brief quotations of the significant words of the cited provisions will be appended in each instance.

First, there are at least eight provisions which label the activities of particular entities as "governmental" or "public and governmental" in nature:

HARB. & NAV. CODE § 1906—Board of State Harbor Commissioners authorized to exercise only "a governmental function."

H. & S. CODE § 33261—community redevelopment agency "exercises governmental functions." (See also H. & S. CODE §§ 33040-33047.)

H. & S. CODE § 33979—urban renewal agency operations constitute "governmental functions of state and community concern in the interest of the health, safety and general welfare."

H. & S. CODE § 34310—housing authority described as "exercising public and essential governmental functions." (See also H. & S. CODE § 34201.)

H. & S. CODE § 35493—operation of a temporary housing project stated to involve "essential public and governmental purposes and . . . a governmental function."

STS. & HWYS. CODE § 32501—parking districts exercise "governmental functions."

WATER CODE § 11127—in administering the Central Valley Project, the state Department of Water Resources "shall be regarded as performing a governmental function."

WATER CODE § 20570—irrigation districts are declared organized for "governmental purposes."

entertainment industry"); *General Petroleum Corp. v. City of Los Angeles*, 22 Cal. App.2d 332, 334, 70 P.2d 998, 999 (1937) (holding that "when a municipality engages in functions that are ordinarily exercised by private persons and which have no relation to the public health or police power, it is engaged in proprietary functions."); See also, *People v. Superior Court*, 29 Cal.2d 754, 762, 178 P.2d 1, 6 (1947) (drawing a distinction for liability purposes between functions which are "public and governmental" and those which are "commercial and non-governmental"); *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760 (1906) (*semble*).

²⁴ A legislative declaration that a statute is enacted as a "police power" measure may, for example, assist the court in sustaining its validity against attack on constitutional grounds. See, e.g., *Housing Authority of County of Los Angeles v. Dockweiler*, 14 Cal.2d 437, 94 P.2d 794 (1939). It may also help to support a judicial conclusion that the power of eminent domain may be properly exercised in aid of the powers granted, see *Redevelopment Agency of City & County of San Francisco v. Hayes*, 122 Cal. App.2d 777, 266 P.2d 105 (1954), or a holding that injury sustained by private property through an exercise of the powers thus granted is noncompensable in inverse condemnation because it is legally deemed to be *damnum absque injuria*, see *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960); *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930).

Second, there are some 11 provisions which explicitly describe statutes governing particular public agencies as having been enacted in the exercise of "police" powers:

AGRIC. CODE § 740—act authorizing creation of California Dairy Industry Advisory Board declared enacted "in the exercise of the police power of this State for the purposes of protecting and furthering the public health and welfare."

AGRIC. CODE § 1300.10—act authorizing creation of marketing order advisory boards declared enacted "in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State."

AGRIC. CODE § 2022—act authorizing creation of Agricultural Prorate Advisory Commission and of producers marketing program committees declared enacted "in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State."

AGRIC. CODE § 4200—act authorizing creation of local and regional control boards in milk marketing stabilization program declared enacted "in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State."

AGRIC. CODE § 5300—act creating the California Poultry Promotion Council declared enacted "in the exercise of the police power of this State for the purposes of protecting and furthering the public health and welfare."

AGRIC. CODE § 5400—act creating the California Fish and Seafood Advisory Board declared enacted "in the exercise of the police power of this State for the purposes of protecting and furthering the public health and welfare."

HARB. & NAV. CODE § 6406—act authorizing creation of recreational harbor districts declared to be "necessary in the exercise of . . . police powers" of the State.

H. & S. CODE § 20025—police protection districts authorized to be created "to protect and safeguard life and property . . . [and for] otherwise securing police protection."

PUB. RES. CODE § 11201—resort districts declared to possess and exercise "police and regulatory powers . . . indispensable to the public interests."

PUB. UTIL. CODE § 21252—declares that the California Division of Aeronautics exercises "general police powers in aid of the enforcement of . . . state laws relating to aeronautics."

WATER CODE § 39059—powers conferred on water storage district boards of directors declared to be "police and regulatory powers . . . necessary to the accomplishment of a purpose that is indispensable to the public interest."

Third, there are several code sections which do not employ the technical expression "police power," but which describe the statutory purposes in terms which unmistakably invoke public welfare and police power concepts:

AGRIC. CODE § 5025—act creating the California Beef Council declared to have been enacted "in the exercise of the power of this State for the purposes of protecting and furthering the public health and welfare."

H. & S. CODE § 13314—act authorizing creation of fire protection districts declared to be "necessary for the public health, safety, and welfare."

H. & S. CODE § 24199—air pollution control district enabling statute declared to be "necessary . . . to safeguard life, health, property and the public welfare."

H. & S. CODE § 24346.1—act creating Bay Area Air Pollution Control District declared to be "necessary . . . to safeguard life, health, property and the public welfare."

WATER CODE § 13000—act creating State Water Pollution Control Board and Regional Water Pollution Control Boards declared to be "necessary to the health, safety and welfare of the people of this State."

The courts have observed that legislative declarations of policy and intent are entitled to judicial deference although they are not necessarily binding or conclusive.²⁵ It could be argued, therefore, that such statements constitute a sufficient indication of implied legislative intent, when coupled with the settled distinction between "governmental" and "proprietary" activities which prevailed at the time of their enactment, to justify a holding of continued tort immunity today notwithstanding the decision in *Muskopf*. No statutory declaration of this type, it should be observed, was in the hospital district law involved in that case.

The suggestion advanced in the preceding paragraph is, however, extremely tenuous when evaluated against the decisional law. In a series of cases involving housing authorities, for example, the appellate courts have displayed little reluctance to disregard the legislative declaration that such authorities exercise "public and governmental" powers (see Health and Safety Code Section 34310 above), and have consistently classified their functions as "proprietary" for purposes of tort liability.²⁶ It should be observed, however, that in each of the cited cases, the alleged tortious conduct occurred in the routine management of apartment houses as rental accommodations—a type of activity which is markedly similar in its physical and functional aspects to ordinary private business operations for commercial purposes. Housing authorities may thus possibly be deemed to act in a "governmental" capacity, consistent with the statutory statement, in the course of some of their functions; for it is clear from the cases that public entities which ordinarily exercise only governmental powers may, in some circumstances, be regarded as acting in a proprietary capacity.²⁷

Even more directly relevant to the issue here under consideration is a flat statement in a recent case relating to the activities of the Board of State Harbor Commissioners.²⁸ Referring to the statutory declaration that such Board was authorized to exercise only "a governmental function" (see Harbor and Navigation Code Section 1906 above), Mr. Justice Peters (then a Justice of the District Court of Appeal) pointed out that it is "the inherent nature of the activity that determines whether it is proprietary or governmental," and hence if the Board's activities are in fact proprietary, "the Legislature could not transform them to governmental functions by legislative mandate."²⁹

This statement, which appears to suggest that the statutory provisions here collected have little or no legal effect, was clearly only *dictum*, for the decision sustained a judgment for the defendant State on the ground of insufficiency of evidence. Moreover, the court observed that the particular activity (*i.e.*, the operation of a marine terminal)

²⁵ See, *e.g.*, *Housing Authority of County of Los Angeles v. Dockweiler*, *supra* note 24.
²⁶ *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948), followed in *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951).
 See also *Manney v. Housing Authority of the City of Richmond*, 79 Cal. App.2d 453, 180 P.2d 69 (1947).

²⁷ *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 458 (1956); *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953); *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954); *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950).

²⁸ *Schwerdfeger v. State*, 148 Cal. App.2d 335, 306 P.2d 960 (1957). This decision was recently cited approvingly by the Supreme Court in *Good v. State*, 57 Cal.2d 512, 20 Cal. Rptr. 637, 370 P.2d 341 (1962).

²⁹ *Id.* at 343, 306 P.2d at 965-66.

out of which the plaintiff's injury arose was highly commercial in nature and in competition with nearby private business of the same type. Thus, the quoted dictum probably need not be taken to mean that a statutory classification of an entity's activities as "governmental" is wholly immaterial and of no effect whatever; but rather that such a declaration may be disregarded by the court when it is grossly incompatible with the particular factual setting in which the injury was sustained. Such an interpretation would, it is believed, be consistent with the housing authority cases, and would permit the courts to give effect to the declared legislative intent in situations where the correct category is a matter of substantial judicial doubts. In short, the legislative mandate would exert a possibly persuasive influence in peripheral cases, but would seldom control the result.³⁰ Even this somewhat minimal effect, however, would seem to warrant legislative attention to these provisions in connection with any statutory program seeking to bring order and consistency into the law of governmental tort liability.

An indication that the legislative classification may significantly alter the result in an appropriate case is found in a recent judicial reference to the irrigation district provision, Water Code Section 20570 listed above, declaring such districts to be organized for "governmental" purposes. The plaintiff, seeking to recover damages in tort against a *sanitary* district, was met with a contention by the defendant that it was immune on the same basis as an irrigation district. The appellate court quickly disposed of this argument by pointing out that irrigation districts were declared by statute to be "organized for governmental purposes," while there was no such statutory designation as to sanitary districts. Further analyzing the statutes governing the sanitary district, the court concluded that it possessed both "governmental" and "proprietary" powers, and hence could be held liable in tort when acting in the latter capacity.³¹

It is worth noting that the irrigation district provision referred to (Water Code Section 20570) was enacted in 1949 to "reaffirm" the status of such districts.³² The cases had previously repeatedly held such districts immune from tort liability on the ground that they exercised "governmental" functions.³³ Although this reaffirmation by

³⁰ That this may have been the intent of the court's quoted remarks in the cited case, *supra* note 28, appears from a reference to *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947), wherein the Supreme Court had previously declared the operation of the State Belt Railroad by the Board of State Harbor Commissioners to be a "proprietary" activity. Conceding that the statutory description of the board's activities as "governmental" was not discussed in that case, Mr. Justice Peters nevertheless suggests that "Necessarily implicit in *People v. Superior Court*, *supra*, is the holding that Section 1906 of the Harbor and Navigation Code is *not controlling* in passing on the question under discussion." *Id.* at 343, 306 P.2d at 966 (emphasis supplied). To the same effect, see *Good v. State*, 57 Cal.2d 512, 20 Cal. Rptr. 637, 370, P.2d 341 (1962).

³¹ *Ambrosini v. Allsal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

³² Cal. Stat. 1949, ch. 1366, § 1, p. 2378, adding Section 20570 to the Water Code, reading: "It is reaffirmed that districts are state agencies formed and existing for governmental purposes." The term "district," is elsewhere defined to mean an irrigation district as used in Section 20570. See CAL. WATER CODE § 20513.

³³ *Nissen v. Cordua Irr. Dist.*, 204 Cal. 542, 269 Pac. 171 (1928); *Whiteman v. Anderson-Cottonwood Irr. Dist.*, 60 Cal. App. 234, 212 Pac. 706 (1922). Under some circumstances, however, as where an irrigation district exercises its statutory powers to operate an electrical transmission and power system, it is deemed to be liable on the theory that such activity is "proprietary." See *Yolo v. Modesto Irr. Dist.*, 216 Cal. 274, 13 P.2d 908 (1932). The earlier cases describing irrigation district activities as "governmental" and hence immune

the Legislature thus would seem to be a particularly weighty indication of legislative intent to ratify and approve the immunity doctrine as to such districts, the most recent decision in point neither cited nor discussed its significance, but intimated (almost as a pure judicial *ipse dixit*) that irrigation districts were now fully liable in tort under the *Muskopf* rule.³⁴

Perhaps the most striking illustration of the possible influence of statutory declarations of the type here collected is in the recent case of *Hunter v. Adams*,³⁵ which related to the urban renewal agency law, Health and Safety Code Section 33979 cited above. In this case, the plaintiff sought to invalidate a resolution freezing building permits within a proposed urban renewal area, claiming that the resolution in effect amounted to a taking of his property without payment of just compensation as required by the California Constitution. After carefully analyzing the statutory provisions governing urban renewal agencies, the court concluded that the resolution constituted an exercise of the police power of the State for a governmental purpose, and that any damage sustained by plaintiff was *damnum absque injuria*. There was no contention here that liability could be asserted on any basis other than inverse condemnation; but in view of the court's conclusion, obviously a holding of governmental immunity would also have been reached to bar any tort liability.

The cases discussed seem to indicate that prior to *Muskopf* statutory provisions such as those here collected were deemed to have some relevance to the issue of tort liability, although not controlling. *Muskopf*, however, eliminated the distinction between "governmental" and "proprietary" functions as a test of tort immunity. Whether these sections would be accorded any significance now (assuming the *Muskopf* rule to be applicable) is thus highly conjectural.

Logically, they would seem to remain a relevant indication of legislative intent formulated in terms of accepted legal doctrine at the time of their enactment, thereby tending to support a conclusion of tort immunity. On the other hand, it could also be argued that they only indicate an intent to preserve for the benefit of the affected public entities whatever advantages, including immunity from tort liability, might flow from the classification of their functions as "governmental" and "police"; and that the Legislature, by failing to expressly declare a rule of tort immunity, in effect simply wished to make such entities immune only to the same extent that other "governmental" and "police" activities might be deemed immune under applicable decisional law. When the immunity of other entities was terminated by judicial decision in *Muskopf*, it would thus be consistent with this latter interpretation to conclude that any immunity intended to be conferred by the cited provisions also ended.

Resolution of the indicated interpretative problem, of course, must await future judicial decision. It would appear desirable, however, to preclude the need for any such litigation by appropriate statutory

were consistently followed subsequent to the adoption of Section 20570 in 1949. See, e.g., *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *McKay v. County of Riverside*, 175 Cal. App.2d 247, 345 P.2d 949 (1959); *Neff v. Imperial Irr. Dist.*, 142 Cal. App.2d 755, 299 P.2d 359 (1956).

³⁴ See *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

³⁵ 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960).

amendment. Whatever program of legislation regarding governmental tort liability is ultimately devised, it is submitted, should clarify the effect of the provisions here collected by negating any possible implications therefrom regarding tort liability or immunity.

Statutory Limitations Upon Financial Ability of Entity to Satisfy Judgments

In his *Muskopf* opinion, Mr. Justice Traynor noted that the rule of county and local district immunity did not originate with the concept of sovereign immunity, but developed as the result of an unnecessary application of the decision rendered in 1778 in the English case of *Russell v. Men of Devon*.³⁶ In that case, a tort action was disallowed against the inhabitants of an unincorporated county for the reason, in part, that there was no corporate fund out of which the judgment could be paid. Mr. Justice Traynor pointed out that the underlying rationale of the *Russell* case could have no application to Muskopf's tort action against the Corning Hospital District, for a "suit against a county hospital or hospital district is against an entity legally and financially capable of satisfying a judgment."³⁷

By implication, the quoted statement intimates that a tort action will not lie against a public entity which is not capable of satisfying the judgment. Similar intimations had appeared in earlier decisions. In *Hensley v. Reclamation District No. 556*,³⁸ decided in 1898, a tort action for damage to property as the result of negligence by a reclamation district employee was dismissed. In sustaining the order, the Supreme Court observed that the district had no leviable property out of which a judgment could be satisfied, and it could obtain means to pay such a judgment only by levying assessments. "But," said Mr. Justice McFarland, "it has no power to levy assessments for that purpose. It is given power to levy assessments and issue warrants for one purpose only, namely, 'for the works of reclamation'."³⁹ Since the district could not legally satisfy the judgment sought against it, therefore, the action had been properly dismissed by the trial court.

The defense of inability to pay a judgment was also asserted in a relatively recent case involving the question whether a county fire protection district could be held liable for negligent operation of a district motor vehicle pursuant to the provisions of what is now Section 17001 of the Vehicle Code.⁴⁰ The district contended that it had no statutory authority to levy taxes to pay any such judgment, and hence should be deemed immune from liability. Impliedly conceding that the contention was sound in principle, the Supreme Court found it to be deficient in fact, for the controlling statutes authorized the district to levy a tax to defray the cost of "maintenance" of the district. Thus the contention failed, for "[o]ne of the costs of maintenance would be a judgment of this nature, arising from the manner in which the

³⁶ 2 Term. Rep. 667, 100 Eng. Rep. 359 (1778). A full account of this case and its historical background is contained in DAVID, MUNICIPAL LIABILITY FOR TORTIOUS ACTS AND OMISSIONS 30-45 (1936). See also, Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 41-45 (1924); Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937).

³⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 216, 11 Cal. Rptr. 89, 91, 359 P.2d 457, 459 (1961).

³⁸ 121 Cal. 96, 53 Pac. 401 (1898). *Accord*: *Sels v. Greene*, 88 Fed. 129 (C.C.N.D. Cal. 1898).

³⁹ *Hensley v. Reclamation Dist. No. 556*, *supra* note 38, 121 Cal. at 98, 53 Pac. at 402.

⁴⁰ *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940).

operations of the district are carried on”⁴¹ It may be noted that the statutes governing the hospital district which was held liable in *Muskopf* similarly authorized the imposition of a tax sufficient in amount “to maintain the district.”⁴²

In the light of the cited cases, it would appear to be necessary as a condition to a successful tort action against a public agency to ascertain first that the entity is legally and financially capable of satisfying the judgment. In the absence of adequate power to do so, the entity would seem to enjoy a form of implied (*i.e.*, fiscal) immunity from liability. Since there can be no reasonable doubt as to the financial responsibility in tort of the State, or of any county, city or school district, this problem relates principally to other forms of local public entities which are ordinarily established for limited purposes and granted limited powers commensurate therewith.

A survey of the statutes relating to local public entities suggests that the provisions therein relating to power to raise funds through taxation, assessment or otherwise may, for present purposes, be classified into five different categories:

First, there are two statutory provisions which expressly authorize particular special districts to levy assessments for the purpose of satisfying tort damage claims “incurred through the negligent conduct” of district personnel. These provisions are:

WATER CODE § 51480 (relating to reclamation districts).

Flood Control and Water Conservation District Act, Cal. Stat. 1931, ch. 641, § 10, p. 1371, CAL. GEN. LAWS ANN. Act 9178, § 10 (Deering 1954), CAL. WATER CODE APP. § 38-10 (West 1956).

Although it seems abundantly clear that these provisions were enacted to eliminate the very type of defense which had been successfully asserted in the *Hensley* case, *supra*, both of the cited sections are restricted in terms to tort claims founded in negligence. By implication, intentional torts would appear to be excluded from their scope, and districts governed thereby may thus be impliedly immune from liability for the intentional torts of their personnel.⁴³

Second, it appears that the great preponderance of local public entities have fiscal powers described in statutory terms broad enough to include by inference the raising of funds to satisfy tort judgments. Bearing in mind the cases discussed above in which the power to tax for maintenance was held to be sufficient,⁴⁴ the following provisions are illustrative of the breadth and variety of language relevant to the issue found in most local entity governing statutes:

H. & S. CODE § 4891—authorizing county sewer maintenance districts to levy assessments “to defray the cost of maintaining, operating, and repairing the sewers in the district, [and] of maintaining the district.”

PUB. UTIL. CODE § 16641—authorizing a public utility district to levy taxes “for the purpose of carrying on its operations and paying its obligations.”

WATER CODE § 25652—authorizing an irrigation district to levy assessments to pay “all obligations of the district which have been reduced to judgment.”

⁴¹ *Id.* at 386, 101 P.2d at 1095. The relevant statute is CAL. H. & S. CODE § 14480.

⁴² See the Local Hospital District Law, CAL. H. & S. CODE § 32202. The court in *Muskopf* does not refer to or discuss the possible effect of CAL. H. & S. CODE § 32203, which imposes a tax limit of 20¢ per hundred dollars of assessed valuation. See discussion in text at 212-14 *infra*.

⁴³ See discussion of these two provisions in the text at 59-63 *supra*.

⁴⁴ See notes 40-42 *supra*, and related text.

WATER CODE § 31702—authorizing a county water district to levy a tax adequate to pay "all . . . expenses or claims against the district."

WATER CODE § 47101—authorizing a water storage district to make a levy to raise funds "for the operation of its works or for the conduct and management of the district or its works."

WATER CODE § 55700—authorizing levy of a tax sufficient to "pay the cost and expenses of maintaining, operating, extending and repairing" the facilities of a county waterworks district.

WATER CODE § 60251—authorizing a water replenishment district to levy a tax "for all other purposes of the district."

Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, § 40, as amended by Cal. Stat. 1957, ch. 1435, § 1, p. 2765, CAL. GEN. LAWS ANN. Act 2202, § 40 (Deering Supp. 1961), CAL. WATER CODE APP. § 8-40 (West Supp. 1961)—authorizing a levy to pay the "incidental expenses of the district."

Municipal Water District Act of 1911, Cal. Stat. 1911, ch. 671, § 22, as amended by Cal. Stat. 1955, ch. 1318, § 6, p. 2399, CAL. GEN. LAWS ANN. Act 5243, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. § 20-22 (West 1956)—authorizing a tax levy to "pay the operating expenses of the district."

Palo Verde Irrigation District Act, Cal. Stat. 1923, ch. 452, § 26, as amended by Cal. Stat. 1947, ch. 508, § 2, p. 1498, CAL. GEN. LAWS ANN. Act 3880, § 26 (Deering 1954), CAL. WATER CODE APP. § 33-26 (West 1956)—authorizing assessments "for the operation and maintenance of the district and for carrying into effect the purposes of this act."

Sacramento River Levee District Act, Cal. Stat. 1915, ch. 361, § 7, as amended by Cal. Stat. 1931, ch. 715, § 1, p. 1506, and § 7½, as added by Cal. Stat. 1939, ch. 151, § 1, p. 1264, CAL. GEN. LAWS ANN. Act 4296, §§ 7, 7½ (Deering 1954), CAL. WATER CODE APP. §§ 26-7, 7½ (West 1956)—authorizing assessments for the purpose of providing "funds for maintenance and repair."

Water Conservation District Act of 1927, Cal. Stat. 1927, ch. 91, § 23, as amended by Cal. Stat. 1949, ch. 846, § 3, p. 1603, CAL. GEN. LAWS ANN. Act 9127a, § 23 (Deering 1954), CAL. WATER CODE APP. § 34-23 (West 1956)—authorizing assessments "to pay the incidental expenses of the district, and . . . the estimated cost of repairs to and maintenance of any property or works of the district."

In view of the prevalence of express statutory provisions such as those here cited, counsel for public entities seldom have urged inability to satisfy a judgment as a defense against a tort action. In most of the reported decisions dealing with tort actions against local districts, the absence of any judicial discussion of the matter presumably reflects an undoubtedly sound determination by counsel that the defense of financial inability was simply unavailable.⁴⁵ In a few cases,⁴⁶ however,

⁴⁵ See, e.g., *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959), where the relevant statute, CAL. H. & S. CODE § 2300, authorized a tax levy to raise funds "necessary for the district's purposes;" *Mulloy v. Sharp Park Sanitary Dist.*, 164 Cal. App.2d 433, 330 P.2d 441 (1958) and *Ambrosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957), where the relevant statute, CAL. H. & S. CODE § 6697, authorized a tax levy to "pay any lawful claims against the district"; *Yolo v. Modesto Irr. Dist.*, 216 Cal. 274, 13 P.2d 908 (1932), where the relevant statute, now CAL. WATER CODE § 25652, authorized assessments to be levied to pay "all obligations of the district which have been reduced to judgment"; *Morrison v. Smith Bros., Inc.*, 211 Cal. 36, 293 Pac. 53 (1930), where the relevant statute, now CAL. PUB. UTIL. CODE § 12391, authorized a tax levy for "any lawful purpose."

⁴⁶ See, e.g., *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958), where, in addition to revenues from operation of a district fair, the district had no independent power to raise money but was limited to allocations of state appropriated funds, see CAL. AGRIC. CODE § 92; *Shields v. Oxnard Harbor Dist.*, 46 Cal. App.2d 477, 116 P.2d 121 (1941), where under the relevant statute the district apparently could raise money to pay judgments only through charges for services and facilities furnished users of the harbor, see CAL. HARB. & NAV. CODE § 6079, its power to tax then being limited to the purpose of repaying principal and interest on capital improvement bonds, see CAL. HARB. & NAV. CODE §§ 6090-6092. (The power of harbor districts to tax for "ordinary annual expenses," CAL. HARB. & NAV. CODE §§ 6093, 6093.4, which would seem broad enough to authorize satisfaction of a tort judgment, was not added until 1953, Cal. Stat. 1953, ch. 905, §§ 5, 9, pp. 2260, 2261-62.) See also *Muses v.*

the ability of the agency to satisfy the tort judgment was sufficiently questionable that some discussion of the relevant statutes would seem to have been appropriate; but, since no such analysis is found in the opinions, whether through inadvertence of court or of counsel, the decisions in question must be regarded as inconclusive.

Third, a few types of special districts which bear the ordinary indicia of independent public entities do not have any independent fund-raising powers, but are dependent for their financial resources upon appropriations from some other agency or agencies. Among these are:

H. & S. CODE § 24209—providing that county air pollution control districts derive their funds from appropriations made by and within the discretion of the county board of supervisors.

San Diego County Flood Control District Act, Cal. Stat. 1945, ch. 1372, § 17, p. 2563, CAL. GEN. LAWS ANN. Act 6914, § 17 (Deering 1954), CAL. WATER CODE APP. § 50-17 (West 1956)—providing that the district has no independent fund-raising power but has only such funds as are given to it by the county or other public or private persons.

In the case of a tort judgment against an entity of this type, the ability of the defendant to satisfy the judgment might well be doubtful. Perhaps if the district possessed an unencumbered appropriation of county funds sufficient to make the necessary payment, it could be compelled to apply such funds to the judgment by means of a writ of mandate.⁴⁷ However, if unencumbered district funds were not available, it seems doubtful that mandamus could be invoked to compel the county board of supervisors to provide sufficient funds to pay the judgment, in view of the apparently discretionary nature of the county board's functions.⁴⁸ No reported judicial decisions have explored these matters. It seems manifest, however, that legislation clarifying the situation by making adequate provision for payment of judgments by such entities is desirable.

Fourth, there are a number of governing statutes relating to local public entities which positively forbid the entity to "incur any debt or liability whatever in excess of the express provisions" of the act, and which flatly declare that any "debt or liability so incurred is void." Provisions containing language substantially to this effect include:

PUB. RES. CODE § 9404—relating to soil conservation districts.

PUB. UTIL. CODE § 16574—relating to public utility districts.

WATER CODE § 24250—relating to irrigation districts.

WATER CODE § 44400—relating to water storage districts.

Housing Authority, 83 Cal. App.2d 489, 189 P.2d 305 (1948), holding housing authority liable in tort where relevant statutes did not authorize authority to levy taxes, but did authorize it to borrow money on revenue bonds "for any of its corporate purposes," CAL. H. & S. CODE § 34350, and to charge rentals for dwelling accommodations at levels sufficient to "meet the cost of, and to provide for, maintaining and operating the projects, including the cost of any insurance, and the administrative expenses of the authority." CAL. H. & S. CODE § 34321.

⁴⁷ The propriety of mandamus as a means of compelling the payment of claims legally owing is recognized by both statute, see CAL. GOVT. CODE § 718, and case law. *San Francisco Sav. Union v. Reclamation Dist. No. 124*, 144 Cal. 639, 79 Pac. 374 (1904); *Mitchell v. County Sanitation Dist.*, 150 Cal. App.2d 366, 309 P.2d 930 (1957).

⁴⁸ Mandamus will not lie to control the exercise of official discretion. See 32 CAL. JUR.2d, *Mandamus* § 28, pp. 181-84 (1956).

- Drainage District Act of 1903, Cal. Stat. 1903, ch. 238, § 56, p. 307, CAL. GEN. LAWS ANN. Act 2202, § 56 (Deering 1954), CAL. WATER CODE APP. § 8-56 (West 1956).
- Fresno Metropolitan Flood Control Act, Cal. Stat. 1955, ch. 503, § 12, p. 978, CAL. GEN. LAWS ANN. Act 2791, § 12 (Deering Supp. 1961), CAL. WATER CODE APP. § 73-12 (West 1956).
- Orange County Water District Act, Cal. Stat. 1933, ch. 924, § 41, as amended by Cal. Stat. 1953, ch. 770, § 53, p. 2068, CAL. GEN. LAWS ANN. Act 5683, § 41 (Deering 1954), CAL. WATER CODE APP. § 40-41 (West 1956).
- Protection District Act of 1907, Cal. Stat. 1907, ch. 25, § 54, p. 32, CAL. GEN. LAWS ANN. Act 6175, § 54 (Deering 1954), CAL. WATER CODE APP. § 11-54 (West 1956).
- Water Conservation District Act of 1927, Cal. Stat. 1927, ch. 91, § 24, p. 172, CAL. GEN. LAWS ANN. Act 9127a, § 24 (Deering 1954), CAL. WATER CODE APP. § 34-24 (West 1956).
- Water Storage and Conservation District Act, Cal. Stat. 1941, ch. 1253, § 138, p. 3180, CAL. GEN. LAWS ANN. Act 9126a, § 138 (Deering 1954), CAL. WATER CODE APP. § 44-138 (West 1956).

Closely analogous to the provisions illustrated in the foregoing list are legislative prohibitions against the incurring of "any indebtedness or liability in any manner or for any purposes exceeding in one year the income and revenue provided for such year," and similarly declaring any indebtedness or liability incurred in violation of the prohibition to be "absolutely void and unenforceable." Among the statutes containing language substantially along these lines are the following acts:

- Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 13, p. 5075, CAL. GEN. LAWS ANN. Act 276, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-13 (West 1959).
- El Dorado County Water Agency Act, Cal. Stat. 1959, ch. 2139, § 44, p. 5096, CAL. GEN. LAWS ANN. Act 2245, § 44 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 96-44 (West 1959).
- Lassen-Modoc County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2127, § 17, p. 5020, CAL. GEN. LAWS ANN. Act 4200, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-17 (West 1959).
- Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 13, p. 4694, CAL. GEN. LAWS ANN. Act 4613, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-13 (West 1959).
- Mendocino County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 995, § 11, p. 1816, CAL. GEN. LAWS ANN. Act 4830, § 11 (Deering 1954), CAL. WATER CODE APP. § 54-11 (West 1956).
- Placer County Water Agency Act, Cal. Stat. 1957, ch. 1234, § 13, as amended by Cal. Stat. 1959, ch. 815, § 14, p. 2825, CAL. GEN. LAWS ANN. Act 5935, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 81-13 (West 1959).
- Plumas County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2114, § 17, p. 4923, CAL. GEN. LAWS ANN. Act 5964, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-17 (West 1959).
- Sacramento County Water Agency Act, Cal. Stat. (1st Ex. Sess.) 1952, ch. 10, § 9, as amended by Cal. Stat. 1959, ch. 1992, § 5, p. 4601, CAL. GEN. LAWS ANN. Act 6730a, § 9 (Deering Supp. 1961), CAL. WATER CODE APP. § 66-9 (West Supp. 1961).
- Santa Barbara County Water Agency Act, Cal. Stat. 1945, ch. 1501, § 9, p. 2791, CAL. GEN. LAWS ANN. Act 7303, § 9 (Deering 1954), CAL. WATER CODE APP. § 51-9 (West 1956).
- Shasta County Water Agency Act, Cal. Stat. 1957, ch. 1512, § 91, as amended by Cal. Stat. 1959, ch. 2106, § 3, p. 4875, CAL. GEN. LAWS ANN. Act 7530, § 91 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 83-91 (West 1959).

Sierra County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2123, § 17, p. 4989, CAL. GEN. LAWS ANN. Act 7661, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-17 (West 1959).

Siskiyou County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2121, § 17, p. 4957, CAL. GEN. LAWS ANN. Act 7688, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-17 (West 1959).

Solano County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1656, § 9, p. 3760, CAL. GEN. LAWS ANN. Act 7733, § 9 (Deering 1954), CAL. WATER CODE APP. § 64-9 (West 1956).

Sonoma County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 994, § 11, as amended by Cal. Stat. 1961, ch. 957, § 1, p. 2600, CAL. GEN. LAWS ANN. Act 7757, § 11 (Deering Supp. 1961), CAL. WATER CODE APP. § 53-11 (West Supp. 1961).

Sutter County Water Agency Act, Cal. Stat. 1959, ch. 2088, § 13, p. 4830, CAL. GEN. LAWS ANN. Act 9096, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 86-13 (West 1959).

Tehama County Flood Control and Water Conservation District Act, Cal. Stat. 1957, ch. 1280, § 16, p. 2591, CAL. GEN. LAWS ANN. Act 8510, § 16 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-16 (West 1959).

Yolo County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1657, § 11, as amended by Cal. Stat. 1961, ch. 895, § 3, p. 2507, CAL. GEN. LAWS ANN. Act 9307, § 11 (Deering Supp. 1961), CAL. WATER CODE APP. § 65-11 (West Supp. 1961).

The foregoing debt limitations, whether formulated in terms of a prohibition on exceeding the express provisions of the governing statute or the income and revenue provided for the year, are believed not to pose serious limitations upon the tort liability of the entities affected thereby. They appear to embody a legislative purpose to make applicable to the respective districts a form of debt limitation comparable to that found in Section 18 of Article 11 of the California Constitution. This section, which is applicable only to cities, counties and school districts, forbids (except where prior approval of two-thirds of the voters at an election has been secured) the incurring of "any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." The similarity of the quoted language to that of the above-cited provisions is striking. Thus, it is significant that the constitutional debt limitation has consistently been held to be applicable only "to those forms of indebtedness and liability which may have been created by the voluntary action of the officials of the city, county or school district . . . and to have no application to cases of indebtedness or liability imposed by law or arising out of tort."⁴⁹ Presumably the cited provisions would be given the same interpretation.

The conclusion that these provisions would not preclude tort liability, although believed to be sound under the cases construing the constitutional debt limit, is subject to possible reservations based upon statutory language found in some of the cited statutes. The interpretation of Section 18 of Article 11 as not being applicable to tort liabilities is supported by external indications that the intent of the constitutional framers was to restrict only the discretionary and voluntary incurring

⁴⁹ *City of Long Beach v. Lisenby*, 180 Cal. 52, 57, 179 Pac. 198, 200 (1919); *Cary v. Long*, 181 Cal. 443, 184 Pac. 857 (1919); *Metropolitan Life Ins. Co. v. Deasy*, 41 Cal. App. 667, 183 Pac. 243 (1919). See also, *County of Los Angeles v. Byram*, 36 Cal.2d 694, 227 P.2d 4 (1951); *County of San Diego v. Perrigo*, 155 Cal. App. 2d 644, 318 P.2d 542 (1957).

of financial obligations.⁵⁰ Whether the statutory provisions here cited should be accorded a similar interpretation because of the similarity of language, would appear to depend on whether any intimations of a contrary legislative intent exist. Slight variations in statutory language and context may indicate a difference of legislative intent sufficient to support major differences in liability.⁵¹

Plausible arguments tending to suggest that at least some of the cited provisions restrict tort liability are readily at hand. It may be observed, for example, that several of the provisions above cited are accompanied by express statutory requirements that the district pay certain tort judgments against district personnel, as well as by a statutory declaration that the debt limitation "shall have no application to debts or liabilities incurred pursuant to the provisions of this act."⁵² Faced with this pattern of language, it is not inconceivable that a court might conclude that the Legislature intended the debt limitation *not* to restrict such tort liability as was expressly authorized by the act (*i.e.*, the assumption of tort judgments against district personnel) but to *be* applicable as a limitation upon all *other* types of tort liability. Since the provisions requiring payment of tort judgments against personnel seldom, if ever, cover all possible types of torts for which the district would, under *Muskopf*, be liable,⁵³ the suggested interpretation would substantially limit the liability of the affected districts.

Even those district statutes which do not impose any assumption-of-judgment requirement may contain indications that the Legislature contemplated tort liabilities as being within the debt restriction. Some of the cited provisions, for example, are accompanied by a statement that the debt limitation "shall have no application to . . . the execution of contracts with the United States,"⁵⁴ thereby focusing attention

⁵⁰ See discussions of the purpose underlying the constitutional limitation in *City of Long Beach v. Lisenby*, 180 Cal. 52, 179 Pac. 198 (1919), and *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641 (1882). *Cf.* *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 353 (1896).

⁵¹ See *Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.*, 51 Cal.2d 331, 333 P.2d 1 (1958); *Pacific Gas & Elec. Co. v. Shasta Dam Pub. Util. Dist.*, 135 Cal. App.2d 463, 287 P.2d 841 (1955).

⁵² *E.g.*, compare CAL. WATER CODE § 22730, relating to irrigation districts, with CAL. WATER CODE § 24250, cited in text at 208 *supra*; *Amador County Water Agency Act*, Cal. Stat. 1959, ch. 2137, §§ 9.4, 13, pp. 5073, 5075, CAL. GEN. LAWS ANN. Act 276, §§ 9.4, 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 95-9.4, 95-13 (West 1959), cited in text at 209 *supra*; *El Dorado County Water Agency Act*, Cal. Stat. 1959, ch. 2139, §§ 37, 44, pp. 5094, 5096, CAL. GEN. LAWS ANN. Act 2245, §§ 37, 44 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 96-37, 96-44 (West 1959), cited in text at 209 *supra*; *Mariposa County Water Agency Act*, Cal. Stat. 1959, ch. 2036, §§ 7.4, 13, pp. 4693, 4694, CAL. GEN. LAWS ANN. Act 4613, §§ 7.4, 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 85-7.4, 85-13 (West 1959), cited in text at 209 *supra*; *Placer County Water Agency Act*, Cal. Stat. 1957, ch. 1234, § 7.4, p. 2529, § 13, as amended by Cal. Stat. 1959, ch. 815, § 14, p. 2825, CAL. GEN. LAWS ANN. Act 5935, §§ 7.4, 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 81-7.4, 81-13 (West 1959), cited in text at 209 *supra*; *Sutter County Water Agency Act*, Cal. Stat. 1959, ch. 2088, §§ 7.4, 13, pp. 4829, 4830, CAL. GEN. LAWS ANN. Act 9096, §§ 7.4, 13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 86-7.4, 86-13 (West 1959), cited in text at 210 *supra*.

⁵³ See text at 72 *supra*.

⁵⁴ See, *e.g.*, *Lassen-Modoc County Flood Control and Water Conservation District Act*, Cal. Stat. 1959, ch. 2127, § 17, p. 5020, CAL. GEN. LAWS ANN. Act 4200, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-17 (West 1959), cited in text at 209 *supra*; *Plumas County Flood Control and Water Conservation District Act*, Cal. Stat. 1959, ch. 2114, § 17, p. 4923, CAL. GEN. LAWS ANN. Act 5964, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 88-17 (West 1959), cited in text at 209 *supra*; *Sierra County Flood Control and Water Conservation District Act*, Cal. Stat. 1959, ch. 2123, § 17, p. 4989, CAL. GEN. LAWS ANN. Act 7661, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-17 (West 1959), cited in text at 210 *supra*; *Siskiyou County Flood Control and Water Conservation District Act*, Cal. Stat. 1959, ch. 2121, § 17, p. 4957, CAL. GEN. LAWS ANN. Act 7688, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-17 (West 1959), cited in text at 210 *supra*.

upon the district's authority to execute such contracts. One of the most significant aspects of the typical statutory permission to contract with the United States, however, is an express or implied authorization for the district to agree to save the United States harmless from any tort liability arising out of the contract.⁵⁵ Thus, it may be argued, the Legislature apparently contemplated that the debt restriction should not be applicable to indirect tort liabilities under such a save harmless clause; but, by implication, other forms of or occasions for tort liability were arguably intended to be within the restriction.

Admittedly, the contentions advanced in the preceding two paragraphs are somewhat tenuous, and in view of the manifest judicial determination shown by *Muskopf* and *Lipman* to open as widely as possible the gates to governmental tort liability, they would probably not succeed. The fact that such arguments may be not unreasonably advanced, however, is a sufficient ground of concern, for even an implausible argument may provide fuel for litigation. The problem could, of course, be eliminated by a direct and positive legislative declaration to the general effect that any public entity which is otherwise legally liable in tort (pursuant to whatever standards or limitations on substantive liability are ultimately adopted) shall have no immunity therefrom by reason of any statutory restriction upon the incurring of debts or liabilities.

Fifth, many governing statutes relating to local public entities contain explicit limitations upon the maximum permissible rate of property taxation by the district. The maximums prescribed vary considerably, ranging from a low of less than one mill to a high of one hundred mills. Illustrative of these limitations are the following provisions (the tax rate maximums are expressed in terms of cents per hundred dollars of assessed valuation):

HARB. & NAV. CODE § 6362 (port districts)—\$.10

HARB. & NAV. CODE § 6942 (river port districts)—\$.10

HARB. & NAV. CODE § 7262 (small craft harbor districts)—\$.75

H. & S. CODE § 2302.1 (mosquito abatement districts)—\$.40

H. & S. CODE § 2871 (pest abatement districts)—as fixed in original organization petition

H. & S. CODE § 4183 (garbage and refuse disposal districts)—\$.15

H. & S. CODE § 6695 (sanitary districts)—\$.60

H. & S. CODE § 8981 (cemetery districts)—\$.02

H. & S. CODE § 14704 (rural fire protection districts)—\$1.00

H. & S. CODE § 20111 (police protection districts)—\$.50

H. & S. CODE § 24370.1 (Bay Area Air Pollution Control District)—\$.01

H. & S. CODE § 32203 (local hospital districts)—\$.20

PUB. RES. CODE § 5545 (regional park districts)—\$.05

PUB. RES. CODE § 9364 (soil conservation districts)—\$.02

PUB. UTIL. CODE § 22907 (airport districts)—\$.20

PUB. UTIL. CODE § 29123 (San Francisco Bay Area Rapid Transit District)—\$.05

⁵⁵ See statutory provisions cited, and discussion in text related thereto, at 97-101 *supra*.

STS. & HWYS. CODE § 31823 (parking districts)—\$.05

WATER CODE § 56115 (county drainage districts)—\$.25

Alameda County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 1275, § 12(1), as amended by Cal. Stat. 1959, ch. 567, § 1, p. 2527, CAL. GEN. LAWS ANN. Act 205, § 12(1) (Deering Supp. 1961), CAL. WATER CODE APP. § 55-12(1) (West Supp. 1961)—\$.015.

Contra Costa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1617, § 18.5, as amended by Cal. Stat. 1961, ch. 1725, § 5, p. 3736, CAL. GEN. LAWS ANN. Act 1656, § 18.5 (Deering Supp. 1961), CAL. WATER CODE APP. § 63-18.5 (West Supp. 1961)—\$.20.

Contra Costa County Water Agency Act, Cal. Stat. 1957, ch. 518, § 12, p. 1557, CAL. GEN. LAWS ANN. Act 1658, § 12 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 80-12 (West 1959)—\$.03.

Kings River Conservation District Act, Cal. Stat. 1951, ch. 931, § 37, p. 2527, CAL. GEN. LAWS ANN. Act 4025, § 37 (Deering 1954), CAL. WATER CODE APP. § 59-37 (West 1956)—\$.025.

Lake County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1544, § 13, as added by Cal. Stat. (1st Ex. Sess.) 1954, ch. 62, § 24, as amended by Cal. Stat. 1961, ch. 860, § 3, p. 2255, CAL. GEN. LAWS ANN. Act 4145, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. § 62-13 (West Supp. 1961)—\$.50.

Napa County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1449, § 13, as amended by Cal. Stat. 1957, ch. 921, § 2, p. 2129, CAL. GEN. LAWS ANN. Act 5275, § 13 (Deering Supp. 1961), CAL. WATER CODE APP. § 61-13 (West Supp. 1961)—\$.15.

Santa Clara-Alameda-San Benito Water Authority Act, Cal. Stat. 1955, ch. 1289, § 44, p. 2358, CAL. GEN. LAWS ANN. Act 9102, § 44 (Deering Supp. 1961), CAL. WATER CODE APP. § 76-44 (West 1956)—\$.10.

Santa Cruz County Flood Control and Water Conservation District Act, Cal. Stat. 1955, ch. 1489, § 193, p. 2711, CAL. GEN. LAWS ANN. Act 7390, § 193 (Deering Supp. 1961), CAL. WATER CODE APP. § 77-193 (West 1956)—\$.02.

Vallejo Sanitation and Flood Control District Act, Cal. Stat. (1st Ex. Sess.) 1952, ch. 17, § 17, as amended by Cal. Stat. 1957, ch. 357, § 277, p. 1137, CAL. GEN. LAWS ANN. Act 8934, § 17 (Deering Supp. 1961), CAL. WATER CODE APP. § 67-17 (West Supp. 1961)—\$.50.

The tax limits imposed by the foregoing provisions are not, of course, formulated in terms of a limitation upon tort liability. However, they must be recognized as constituting a practical limitation upon the power of the public entity to satisfy a tort judgment against it. The Legislature has given recognition to this matter, in connection with similar tax limitations imposed upon school districts⁵⁶ and cities,⁵⁷ by establishing procedures whereby tort liabilities may be paid in installments over a period of years⁵⁸ or may be funded by issuance of bonds which are repayable over a period of years.⁵⁹ No such provisions have been found which are applicable to any of the entities represented in

⁵⁶ See CAL. EDUC. CODE § 20751.

⁵⁷ General law cities are subject to the tax limits declared in CAL. GOVT. CODE § 43068. Home rule charter cities are subject to such tax limits as are declared in the governing charter. See, e.g., Eureka City Charter, § 600, Cal. Stat. 1959, res. ch. 124, p. 5604 (tax limit of \$1.50).

⁵⁸ See CAL. EDUC. CODE § 904(b) (authorizing school districts to spread judgments over three-year period); CAL. GOVT. CODE §§ 50170-50175 (authorizing cities and counties to spread judgment over not to exceed ten-year period); and CAL. WATER CODE §§ 31091-31096 (authorizing county water districts to spread judgments over not to exceed ten-year period).

⁵⁹ See CAL. GOVT. CODE §§ 43720-43747, authorizing funding of judgments against cities. This procedure was held to be valid in Metropolitan Life Ins. Co. v. Deasy, 41 Cal. App. 667, 183 Pac. 243 (1919). See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 14 (1959), indicating that over \$5 million in municipal liability was funded by the City of Los Angeles in connection with the St. Francis Dam disaster in the late 1920's.

the foregoing list. It seems possible, therefore, that in certain instances where a large tort liability judgment is rendered against an uninsured district having both a relatively low assessed valuation and a low tax ceiling, the judgment may for all practical purposes be substantially unpayable. Such a result, so far as the injured plaintiff is concerned, is about the same as if the district had been declared immune from tort liability. The prevalence of tax limits of the type here listed⁶⁰ thus indicates the need for careful legislative attention to be given to the matter of fiscal ability to satisfy judgments, in connection with any statutory program designed to unify and rationalize the law of governmental tort liability.

Functional Immunity of Nonindependent Entities

One of the technical difficulties besetting an injured plaintiff is the accurate identification of the public entity responsible for the activities which allegedly caused the injury. Confusion of identity may result from a variety of circumstances, such as the fact that public employees frequently perform functions for other entities under contract arrangements¹ or function as *ex officio* personnel of special districts within the larger entity by which they are employed.² In addition, substantial problems of an interpretative nature occasionally arise in view of the ambiguous terminology in which statutes relating to local governmental activities are often formulated.

The fact that tortious activities may have been engaged in by a "district," for example, does not necessarily mean that such "district" is liable in tort, even assuming that a tenable theory of liability may be predicated upon a statute or the absence of sovereign immunity. In either case, the district must possess the status of an independent entity before a tort action against it may be maintained.³ Those types of districts which are really only territorial subdivisions or instrumentalities of the county or city in which they exist do not possess any

⁶⁰ In addition to the statutory tax limits cited in the text, *supra*, the same result of practical inability to satisfy a judgment might also obtain under certain statutory provisions limiting the payment of liabilities incurred by various state agencies to funds collected and administered by the agency. See, e.g., CAL. AGRIC. CODE § 5406, declaring that all "obligations and liabilities incurred by [the California Fish and Seafood Advisory Board] shall be payable only from funds collected under the provisions of this chapter." To the same effect, see also CAL. AGRIC. CODE §§ 748 (California Dairy Industry Advisory Board), 5084 (California Beef Council) and 5312 (California Poultry Promotion Council).

¹ See, e.g., the Joint Exercise of Powers Act, CAL. GOVT. CODE §§ 6500-6578, construed in *City of Oakland v. Williams*, 15 Cal.2d 542, 103 P.2d 168 (1940), and *Beckwith v. County of Stanislaus*, 175 Cal. App.2d 40, 345 P.2d 363 (1959). Certain charter counties, e.g., Los Angeles County under its well-known "Lakewood Plan," also perform a variety of municipal services by contract pursuant to authority in the county charter as authorized by CAL. CONST., Art. XI, § 7½.

² A typical provision is found in the San Mateo County Flood Control District Act, Cal. Stat. 1959, ch. 2108, § 4, p. 4889, CAL. GEN. LAWS ANN. Act 7261, § 4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 87-4 (West 1959): "The District Attorney, County Engineer, County Assessor, County Tax Collector, County Controller, County Manager, County Purchasing Agent, and County Treasurer of the County of San Mateo, and their successors in office, and all their assistants, deputies, clerks, and employees, and all other officers of said San Mateo County, their assistants, deputies, clerks and employees, shall be *ex officio* officers, assistants, deputies, clerks and employees respectively of said San Mateo County Flood Control District . . ."

³ *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940).

corporate existence, and hence are not subject to suit or liability.⁴ In such cases, the plaintiff must proceed against the parent entity rather than the subsidiary district.

The problem thus posed, it should be noted, is not identical with the question whether the Legislature has authorized suit against the particular entity.⁵ To be sure, the absence of statutory consent to be sued is a relevant criterion of nonindependent status.⁶ But, as already pointed out, many districts which are undoubtedly independent entities contain no such express statutory consent to be sued;⁷ and the absence of express consent may be cured in some cases by statutory implication.⁸ Moreover, if the Legislature were to enact a broad general statute consenting to suit against all types of local governmental entities, the present question whether a particular district has in fact any independent status as a corporate entity, or is merely a subordinate instrumentality of a city or county, would still remain.

The criteria for classifying districts as independent entities are not entirely clear. An express statutory declaration that the particular entity is "a body corporate and politic" would presumably foreclose further inquiry;⁹ but in the absence of such a statement other factors necessarily require evaluation. Although no decision has ever attempted to lay down any hard and fast rules, factors which have been judicially treated as relevant to a determination that a particular district is not an independent entity include:¹⁰ whether the district has an independent governing body from that of the city or county; whether the statute creating it contemplates that it has perpetual succession; whether the statute authorizes the district to hold title to property, levy taxes, issue bonds, and incur indebtedness; and (perhaps most significant of all) whether the act contemplates that the district will perform continuous and permanent functions involving the use of its own personnel and equipment or, on the other hand, has a limited and specified purpose which will be fully accomplished within a relatively short period of time. In substance, the court must seek to determine from the statute as a whole whether its intent and purpose "requires the districts created pursuant thereto to enjoy a legal personality separate from" that of the creating city or county.¹¹

⁴ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955). See also *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899 (1920).

⁵ See the text at 17-33 *supra*.

⁶ See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809 (1919).

⁷ See text at 30-32 *supra*.

⁸ See text at 31 *supra*.

⁹ See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955).

¹⁰ See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940); *Marr v. Southern Cal. Gas Co.*, 198 Cal. 278, 245 Pac. 178 (1926); *Elliott v. County of Los Angeles*, 183 Cal. 472, 191 Pac. 899 (1920); *Pasadena Park Improvement Co. v. Lelande*, 175 Cal. 511, 166 Pac. 341 (1917); *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 Pac. 809 (1919); *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 (1899); *Mortimer v. Acquisition & Improvement Dist. No. 36*, 105 Cal. App.2d 298, 233 P.2d 113 (1951); *Brigden v. Dodge*, 54 Cal. App. 266, 201 Pac. 631 (1921); *Harpham v. Board of Supervisors of Ventura County*, 41 Cal. App. 192, 182 Pac. 324 (1919).

¹¹ *Bauer v. County of Ventura*, 45 Cal.2d 276, 288, 289 P.2d 1, 9 (1955). See also *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 218, 183 Pac. 809, 812 (1919), holding that when "it appears that no express grant of corporate existence has been made, it should not be held that there is a grant of such existence by implication in the absence of a clear and affirmative showing that the legislative intent cannot otherwise be fully and fairly accomplished."

Applying a test such as that here suggested, the courts have held certain types of special districts to be mere instrumentalities of a larger entity and thus to possess no independent corporate existence:

- County road divisions (see CAL. STS. & HWYS. CODE §§ 1160-1197).¹²
- Improvement assessment districts.¹³
- Protection districts formed under the Protection District Act of 1895.¹⁴
- Storm drain maintenance districts formed under the Storm Drain Maintenance District Act.¹⁵
- Street opening districts formed under the Street Opening Act of 1889.¹⁶

Other types of local entities which appear not to be independent corporate bodies, but for which no reported decision so holding has been found, include:

- Community redevelopment agencies (see CAL. H. & S. CODE §§ 33200-33333).
- County free public library taxing districts (see CAL. EDUC. CODE §§ 27151-27165).
- County road districts (see CAL. STS. & HWYS. CODE §§ 1550-1554).
- County road maintenance districts (see CAL. STS. & HWYS. CODE §§ 5820-5854).
- County service areas (see CAL. GOVT. CODE §§ 25210.1-25210.98).
- Drainage improvement districts formed under the Drainage District Improvement Act of 1919, Cal. Stat. 1919, ch. 354, p. 731, CAL. GEN. LAWS ANN. Act 2203 (Deering 1954), CAL. WATER CODE APP. § 31-1 *et seq.* (West 1956).
- Flood control maintenance areas (see CAL. WATER CODE §§ 12878-12878.45).
- Joint harbor improvement districts (see CAL. HARB. & NAV. CODE §§ 5700-5784).
- Limited water districts formed under the Limited Water District Law of 1959, Cal. Stat. 1959, ch. 2136, p. 5048, CAL. GEN. LAWS ANN. Act 5243a (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 94-1 *et seq.* (West 1959).
- Maintenance districts formed under the Improvement Act of 1911 (see CAL. STS. & HWYS. CODE §§ 5820-5854).
- Municipal sewer districts formed under the Municipal Sewer District Act of 1911 (see CAL. H. & S. CODE §§ 4600-4639).
- Municipal water districts formed under the Municipal Water District Act of 1935, Cal. Stat. 1935, ch. 73, p. 423, CAL. GEN. LAWS ANN. Act 9131 (Deering 1954), CAL. WATER CODE APP. § 41-1 *et seq.* (West 1956).
- Parking authorities formed under the Parking Law of 1949 (see CAL. STS. & HWYS. CODE §§ 32500-33550).
- Police protection tax districts (see CAL. H. & S. CODE §§ 20300-20349).
- Sewer maintenance districts (see CAL. H. & S. CODE §§ 4860-4926).
- Special road maintenance districts (see CAL. STS. & HWYS. CODE §§ 1550.1-1550.3).
- Street lighting districts formed under the Street Lighting Act of 1919 (see CAL. STS. & HWYS. CODE §§ 18000-18193).

¹² Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 183 Pac. 809 (1919).

¹³ Marr v. Southern Cal. Gas Co., 198 Cal. 278, 245 Pac. 178 (1926); Mortimer v. Acquisition & Improvement Dist. No. 36, 105 Cal. App.2d 298, 233 P.2d 113 (1951). Although the statutes under which these cases were decided appear to have been repealed, many districts created thereunder are still in existence; and the principle of the decisions appears to apply fully to assessment districts created for local improvement purposes under the Improvement Act of 1911 and similar laws or ordinances.

¹⁴ Elliott v. County of Los Angeles, 183 Cal. 472, 191 Pac. 899 (1920); Pasadena Park Improvement Co. v. Lelande, 175 Cal. 511, 166 Pac. 341 (1917).

¹⁵ Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955).

¹⁶ Gill v. City of Oakland, 124 Cal. 335, 57 Pac. 150 (1899).

Street lighting districts formed under the Street Lighting Act of 1931 (see CAL. STS. & HWYS. CODE §§ 18300-18404).

Street lighting maintenance districts formed under the Municipal Lighting Maintenance District Act of 1927 (see CAL. STS. & HWYS. CODE §§ 18600-18781).

The nonliability which the types of entities here listed apparently enjoy as a corollary to their lack of independent corporate status is offset by the equivalent liability of the parent city or county. In the absence of any defense of governmental immunity, injuries sustained as a result of such nonindependent local district activities for the localized benefit of persons in the district were, prior to *Muskopf*, and still are today a liability not of the district but of the entire city and county, many of whose residents receive no benefit from the activity whatever. This result undoubtedly has certain practical advantages flowing from the distribution of the risk over a broader taxable base, but it is not entirely consistent with the essentially equitable notion that the social costs of governmental activities should be borne by the taxpayers who are benefited thereby.

Moreover, the consequences in question are frequently a mere fortuitous consequence of a choice of legal vehicles for accomplishing a given objective. Many of the purposes for which the nonindependent (and hence nonliable) entities in the foregoing list may be utilized also could be accomplished through the creation of a different form of local district which would be an independent corporate entity subject to tort liability. For example, whether additional police protection is provided through a county service area or through the medium of a police protection district; whether flood protection is administered through a protection district or a flood control district; whether a water system is constructed by means of an assessment district proceeding or through the establishment of an independent water district—these and other similar choices are available under existing statutes, and are ordinarily made without particular reference to the tort liability consequences. Matters such as administrative convenience, fiscal and political policy, methods of financing available, local citizen interest in maintaining localized control, and custom and tradition, are all far more significant factors in determining which of several alternative statutory procedures will be employed for a given project. Yet, as an incidental byproduct of the choice, tort liabilities which are subsequently incurred may in one case be chargeable against all of the taxpayers of the county or city, while in another such liability may be required to be borne by the taxpayers in the district alone, whether its resources be large or small.

The nonindependent entity problem is manifestly only a part of the larger issues involved in the present study. The existence of both independent and subservient legal instrumentalities created to accomplish similar purposes simply underscores the need for reconciling the general interest in fairly distributing the risk of tort liability with the even more basic interest in preserving the effectiveness of government against the threat of catastrophic financial loss. It also once again illustrates the tremendous variety and complexity of the statutory law which must be carefully considered in the formulation of any sound and consistent legislative program seeking to resolve the issues raised by *Muskopf* and *Lipman*.

NONSTATUTORY 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."¹ 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,² 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.³ 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,"⁴ at least where a mere

¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 216, 11 Cal. Rptr. 89, 92, 359 P.2d 457, 460 (1961).

² *Id.* at 219, 11 Cal. Rptr. at 93-94, 359 P.2d at 461-462.

³ *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).

⁴ 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).

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.⁵ 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.⁶ 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 controlled 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.⁷

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,⁸ water system,⁹ airport,¹⁰ harbors and docks,¹¹ railroad,¹² public transit system,¹³ and public entertainments or spectacles.¹⁴ 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,¹⁵

⁵ 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*, 46 Cal.2d 208, 293 P.2d 458 (1956).

⁶ 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); Borchard, *Government Responsibility in Tort*, 36 YALE L. J. 1, 757, 1039 (1926-27); 28 COLUM. L. REV. 577, 734 (1928); David, *Municipal Liability in Tort in California*, 6 SO. CAL. L. REV. 269 (1932); 7 SO. CAL. L. REV. 48, 214, 295, 372 (1933); Fuller & 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); Seansongood, *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. PROB. 179-367 (1942).

⁷ *Guidi v. State*, 41 Cal.2d 623, 625-26, 262 P.2d 3, 5 (1953), and cases there cited. See also *Good v. State*, 57 Cal.2d 512, 20 Cal. Rptr. 637, 370 P.2d 341 (1962).

⁸ *Good v. State*, 57 Cal.2d 512, 20 Cal. Rptr. 637, 370 P.2d 341 (1962); *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).

⁹ *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).

¹⁰ *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).

¹¹ *Schwerdtfeger v. State*, 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).

¹² *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1 (1947).

¹³ *Hession v. City & County of San Francisco*, 122 Cal. App.2d 592, 265 P.2d 542 (1954).

¹⁴ *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953); *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958). See also *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 458 (1956); *Chafor v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917).

¹⁵ *Bright v. East Side Mosquito Abatement Dist.*, 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).

providing of public health services,¹⁶ operation of a police force,¹⁷ maintenance of a jail for law violators,¹⁸ maintenance of public streets and highways,¹⁹ vehicular traffic control,²⁰ operation of the courts,²¹ fire prevention and suppression,²² administration of public relief programs,²³ and enforcement of building inspection and safety regulations.²⁴

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,"²⁵ 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.²⁶ 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,"²⁷ it would seem evident that the operation of a merry-go-round or a swimming pool in a park, the main-

¹⁶ 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).

¹⁷ 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).

¹⁸ 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).

¹⁹ Yarrow v. State, 53 Cal.2d 427, 2 Cal. Rptr. 137, 348 P.2d 687 (1960); Zeppi v. State, 174 Cal. App.2d 484, 345 P.2d 33 (1959); Bettencourt v. State, 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).

²⁰ 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).

²¹ Dineen v. City & County of San Francisco, 38 Cal. App.2d 486, 101 P.2d 736 (1940).

²² Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980 (1952); Thon v. City of Los Angeles, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962). See also Johnson v. Fontana County Fire Protection Dist., 15 Cal.2d 380, 101 P.2d 1092 (1940).

²³ Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

²⁴ 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).

²⁵ See Guidi v. State, 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 nongovernmental"); Schwerdtfeger v. State, 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, 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.)

²⁶ See Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 257 P.2d 22 (1953) (public hospital charging prevailing fees for purpose of making profit); Keilar 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 (1953) (municipal swimming pool); Manning v. City of Pasadena, 58 Cal. App. 666, 209 Pac. 253 (1922) (municipal collection service operated to produce revenue).

²⁷ See Pianka v. State, 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, 41 Cal.2d 623, 627, 262 P.2d 3, 6 (1953) (stating that "the

tenance 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."²⁸

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,²⁹ demonstrations designed to attract enlistments into the National Guard,³⁰ the operation of a health-promoting recreational facility such as a golf course,³¹ the operation of a housing project intended to eliminate slums and unsanitary living conditions,³² operation of a municipal hospital,³³ and the conducting of a harbor pilot service to safely guide ships to berth.³⁴

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 fairly 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

state is acting in a proprietary capacity when it enters into activities . . . to amuse and entertain the public"); *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 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).

²⁸ 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 344, 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).

²⁹ *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958) (street connecting entertainment areas at fair grounds).

³⁰ *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 453 (1956) (public shooting exhibition designed to attract recruits).

³¹ *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

³² *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

³³ *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).

³⁴ *General Petroleum Corp. v. City of Los Angeles*, 22 Cal. App.2d 332, 70 P.2d 998 (1937).

“proprietary” in nature.³⁵ 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 indispensable; yet these activities are classified as “governmental.”³⁶

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 compensable in a tort action if the water is being transmitted for domestic or industrial consumption by “proprietary” customers of the municipal water department;³⁷ 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,”³⁸ but may recover if injured while visiting the housing authority office to rent an apartment, since public housing is “proprietary.”³⁹ 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?⁴⁰

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,⁴¹ or to visit the art gallery⁴² or zoo,⁴³ or to let his children ride the miniature train;⁴⁴ but if he had a “proprietary” purpose in mind, such as to play golf,⁴⁵ or witness a play in the community theater,⁴⁶ or observe a fireworks display,⁴⁷ his damages are fully compensable. One can only conjecture

³⁵ *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).

³⁶ See cases cited in note 28 *supra*.

³⁷ 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 930 (1952).

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

³⁹ See *Muses v. Housing Authority*, 83 Cal. App.2d 489, 189 P.2d 305 (1948).

⁴⁰ 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.

⁴¹ *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958).

⁴² *Burnett v. City of San Diego*, 127 Cal. App.2d 191, 273 P.2d 345 (1954).

⁴³ *McKinney v. City & County of San Francisco*, 109 Cal. App.2d 844, 241 P.2d 1060 (1952).

⁴⁴ *Meyer v. City & County of San Francisco*, 9 Cal. App.2d 361, 49 P.2d 893 (1935).

⁴⁵ *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

⁴⁶ *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); *Chafar v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917).

⁴⁷ *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953).

at the result if plaintiff's purpose was to engage in all of these activities during the same visit.⁴⁸

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 benefited 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.⁴⁹ 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.⁵⁰ 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 con-

⁴⁸ 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.

⁴⁹ Reflections of this view may be found in many of the cases which treat the term "proprietary" as synonymous with "commercial." See cases cited in note 25 *supra*. 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 waterfront] 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 expenses 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.)

⁵⁰ 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

tinued public commitment to socially valuable activities having, at best, relatively marginal claims upon public financial support.⁵¹

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.⁵²

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."⁵³

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."¹ Although undoubtedly a correct statement of the case law,²

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."

⁵¹ 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.)

⁵² 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 at 260-66 *infra*.

⁵³ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

¹ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 219, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

² 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 163, 78 P.2d 1021 (1938); *Adams v. City of Modesto*, 131 Cal. 501, 63 Pac. 1083 (1901).

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.³ 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.⁴ Only the briefest hint of legal theory is conveyed by the court's brief comment to the effect that the city "had such *proprietaryship* of the . . . hospital as to render it liable in damages."⁵ 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.⁶

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."⁷ 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.⁸

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

³ *Davis v. City of Sacramento*, 59 Cal. 596 (1881).

⁴ *Bloom v. City & County of San Francisco*, 64 Cal. 503, 3 Pac. 129 (1884).

⁵ *Id.* at 504, 3 Pac. at 129. (Emphasis supplied.)

⁶ The quoted language from *Bloom v. City & County of San Francisco*, 64 Cal. 503, 3 Pac. 129 (1884), 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 Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

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

⁸ For a full discussion of inverse condemnation, see the text at 102-108 *supra*.

exception on an inverse condemnation rationale was reinforced, but only feebly, by a few later opinions showing recognition of this theory.⁹ The general stream of decisions, however, ignored the doctrinal content introduced in the 1885 decision, and simply followed its holding.¹⁰ Various forms of governmental activity were thereby found to be actionable nuisances, including both negligent maintenance of facilities like sewers and storm drains,¹¹ as well as deliberate construction of improvements, which caused foreseeable flooding or other injurious consequences to private property.¹²

In recent years several decisions¹³ 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;¹⁴ 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*.¹⁵ 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

⁹ See, e.g., *Tyler v. Tehama County*, 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).

¹⁰ In addition to the cases cited in notes 11 and 12 *infra*, 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).

¹¹ *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, 32 Pac. 334 (1905) (negligent maintenance of storm drain); *Ambrosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957) (negligent maintenance of sewer outfall line); *Mulloy v. Sharp Park Sanitary Dist.*, 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 937 (1959) (negligent maintenance of rubbish dump); *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959) (negligent mosquito abatement activities).

¹² *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); *Weissand 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).

¹³ *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*, 174 Cal. App.2d 484, 345 P.2d 33 (1959); *Mulloy v. Sharp Park Sanitary Dist.*, 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).

¹⁴ CAL. CIV. 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."

¹⁵ 309 P.2d 844 (1957), vacated and superseded by 49 Cal.2d 815, 323 P.2d 85 (1958).

and usual enjoyment as to impair its value.¹⁶ 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.¹⁷ The concept of inverse condemnation, however, is wholly inapplicable unless some *property* has been either taken or damaged.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

¹⁶ Of the nuisance cases cited in notes 2-12 *supra*, 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 6 *supra*.

¹⁷ 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*, 23 Cal.2d 238, 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 Dist.*, 45 Cal. App.2d 306, 114 P.2d 14 (1941).

¹⁸ See discussion in text at 102-104 *supra*.

¹⁹ *Vater v. County of Glenn*, 309 P.2d 844 (Cal. App. 1957).

²⁰ *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958).

²¹ *Bright v. East Side Mosquito Abatement Dist.*, 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 23, 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*, 174 Cal. App.2d 484, 345 P.2d 33 (1959) (*semble*).

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;²² 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.²³ 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,²⁴ 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.²⁵ 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,²⁶ but relief may be obtained under the Public Liability Act,²⁷ or where that statute does not apply, in an action founded on a nuisance theory.²⁸

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.²⁹ Even the express statutory admonition that "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"³⁰ 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.³¹ 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

²² *Teilheth v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957).

²³ *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959).

²⁴ *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).

²⁵ See *Behr v. County of Santa Cruz*, 172 Cal. App.2d 697, 342 P.2d 987 (1959).

²⁶ See *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), as discussed in the text at 105-106 *supra*.

²⁷ 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).

²⁸ *Mulloy v. Sharp Park Sanitary Dist.*, 164 Cal. App.2d 438, 330 P.2d 441 (1958); *Ambrosini v. Alisal Sanitary Dist.*, 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).

²⁹ *Accord*, PROSSER, TORTS 779 (2d ed. 1955).

³⁰ CAL. CIV. CODE § 3482.

³¹ *Hassell v. City & County of San Francisco*, 11 Cal.2d 168, 79 P.2d 1021 (1938); *Bright v. East Side Mosquito Abatement Dist.*, 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 Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

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.³² 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 where such interferences must be borne by the injured person alone, the risk of disrupting or frustrating the legitimate and desirable expectancies of property ownership becomes 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. Sound public administration, in other words, demands a reasonable degree of care in the planning and maintenance of public improvements of this type which, if not done carefully, threaten serious injury of a lasting nature. Since the resulting financial burdens, for the most part, are avoidable, the threat of liability for nuisance may be greatly reduced by, and thus constitutes an incentive to, good government.

The rationale here suggested admittedly is not explicated in any of the reported cases. It seems consistent with the results reached, however; and at least may suggest certain realistic considerations of sound policy which may justify somewhat different legislative treatment of injuries resulting from public improvements and maintenance of conditions on public property which may affect surrounding property and persons thereon, as compared to other types of tortious governmental conduct. A similar distinction already has motivated much of the existing legislation in California relating to governmental tort liability.³³ To treat the nuisance cases as simply irrational anomalies would, it is submitted, overlook potentially distinguishing policy considerations which deserve careful exploration.

³² See the cases cited in notes 3, 4, 7, 10, 11 and 12 *supra*.

³³ See the discussions in the text of Public Liability Act at 42-59 *supra*; statutory liabilities in weed abatement work at 63-65 *supra*; damages resulting from public improvement projects at 78-97 *supra*. Compare the statutory immunities from liability discussed at 174-90 *supra*.

Intentional Torts

Apart from the nuisance cases, it appears to have been settled law in California prior to the *Muskopf* decision that the doctrine of governmental immunity extended to intentional torts as well as those involving negligence. Public entities, although liable for intentional torts of their employees when acting in the course and scope of proprietary activities,³⁴ were repeatedly declared immune in their governmental capacity for injuries sustained as a consequence of wrongful arrest,³⁵ false imprisonment,³⁶ assault and battery,³⁷ malicious prosecution,³⁸ wrongful destruction of personal property,³⁹ and other types of intentional torts.⁴⁰

The case law, however, is not quite as clear and uncomplicated as it might appear from the cases just cited (putting to one side for the moment the inherent ambiguities in the "governmental"- "proprietary" distinction). At least four lines of cases involving intentional torts would seem, on the surface at least, to modify the immunity doctrine.

First, there are a number of carefully considered opinions which either declare or assume that there is no immunity for governmental acts which are "inherently wrong."⁴¹ The leading decision is *Perkins v. Blauth*,⁴² in which the Supreme Court stated:

The principles to be deduced from the decisions in this state are that municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the city. . . . Upon the other hand, *if the act is one commanded by the municipality itself, if inherently wrong*, the municipality and the agent who performed it will both be liable.⁴³

Nowhere in the *Perkins* opinion does the Court explain what it means by the phrase, "inherently wrong." In theory it seems possible that the concept thus introduced into the law of governmental tort liability might well have developed into an exception to the immunity doctrine with potential capacity for swallowing up that doctrine completely. In

³⁴ 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).

³⁵ *Chappelle 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).

³⁶ *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).

³⁷ *Chappelle 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).

³⁸ *Norton v. Hoffman*, 34 Cal. App.2d 189, 93 P.2d 250 (1939).

³⁹ *Lertora v. Riley*, 6 Cal.2d 171, 57 P.2d 140 (1936).

⁴⁰ See *Armstrong v. City of Belmont*, 158 Cal. App.2d 641, 322 P.2d 999 (1958) (allegedly wilful and malicious refusal of 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).

⁴¹ See *Kaufman v. Tomich*, 208 Cal. 19, 280 Pac. 130 (1929); *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50 (1912); *Black v. Southern Pac. Co.*, 124 Cal. App. 321, 12 P.2d 981 (1932).

⁴² 163 Cal. 782, 127 Pac. 50 (1912).

⁴³ *Id.* at 789, 127 Pac. at 53 (Emphasis supplied.).

actual fact, however, the "inherently wrong" concept has had little or no impact on the law. This result may be attributed in part to the fact that the language above quoted was obviously only *obiter dictum*,⁴⁴ and in part to the fact that even as *dictum* it was not supported by the authorities cited by the Court.⁴⁵ In any event, the later cases have treated the concept of "inherently wrong" acts as simply one among several variant formulations of the kind of governmental conduct which may provide a basis for an inverse condemnation action.⁴⁶ So far as the reported decisions are concerned, therefore, this concept has not operated as a common law exception to the governmental immunity doctrine but has been assimilated entirely into the constitutional mandate that just compensation be paid for the taking or damaging of private property for public use.⁴⁷

Second, a few cases involving "governmental" activities contain loose language suggesting that a public entity "is not exempt from liability for a trespass caused by its corporate act."⁴⁸ A close examination of such opinions, and of the authorities cited in support of such statements, discloses, however, that the basis of liability in each case is really either ordinary inverse condemnation (see discussion in text,

⁴⁴ The action in *Perkins v. Blauth*, *supra* note 42, 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.

⁴⁵ In support of the statement quoted in the text, the court in *Perkins* cites *Brownell v. Fisher*, 57 Cal. 150 (1880), and *DeBaker v. Southern Cal. Ry.*, 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.

⁴⁶ 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 *Weiss-hand 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 Dist. 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) (Carter, J., dissenting); *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947); *Ambrosini v. Alisal Sanitary Dist.*, 154 Cal. App.2d 720, 317 P.2d 33 (1957).

⁴⁷ The only significant deviation from the indicated pattern is in the case of *Black v. Southern Pac. 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 45 *supra*) is inapplicable to personal injury actions. See text at 104, note 20 *supra*.

⁴⁸ *Los Angeles Brick & Clay Frods. Co. v. City of Los Angeles*, 60 Cal. App.2d 478, 485, 141 P.2d 46, 50 (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 renowned Chief Justice Cooly 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"); *Conniff v. City & County of San Francisco*, 67 Cal. 45, 49, 7 Pac. 41, 44 (1885) (affirming municipal liability for a "flagrant trespass").

supra, pp. 102-108) or its nuisance derivative (see text, *supra*, pp. 225-30).⁴⁹ No California cases have been discovered in which tort liability of a public entity has been held to exist on the theory of common law trespass by public employees in the course of governmental activities, and it is believed that the intimations to the contrary in the cited cases may safely be disregarded as inadvertent.

Third, there is a modest body of case law which suggests that public entities may be liable in tort for conversion. The bulk of the cases involve money which has come into the possession and control of municipalities in the course of proceedings (such as tax or special assessment levies, or sales of public property) which for some reason are later determined to be illegal and void, thereby giving rise to a duty to refund or make restitution.⁵⁰ In such cases, to describe the situation as one of conversion of private funds to municipal purposes may possibly be acceptable as a purely technical matter; but the terminology of "conversion" is employed chiefly to explain and justify the invocation of the restitutionary remedy of *assumpsit*.⁵¹ Even in the rare case of a misappropriation of tangible personalty by a public entity, the theory of conversion is asserted simply as the doctrinal foundation for a waiver of the tort and suit in *assumpsit*.⁵² No instances of a true tort recovery in a trover action against a public entity have been discovered in the California cases. The availability of *assumpsit* (a *contractual* remedy) in such cases, of course, greatly simplifies the liability problem; for the doctrine of governmental immunity applies only to *torts*, and governmental entities generally are amenable to suit and liability

⁴⁹ See *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles*, *supra* note 47, at 485-86, 141 P.2d at 60, in which the court predicates the city's liability in trespass upon "either the state or the federal Constitution," and concludes that the facts established the existence of a nuisance *per se*; *Newberry v. Evans*, *supra* note 47, 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 47, 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 *Conniff v. City & County of San Francisco*, *supra* note 47, at 49, 7 Pac. at 44, 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).

⁵⁰ 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, 33 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).

⁵¹ See, e.g., *Union Bank & Trust Co. v. County of Los Angeles*, 2 Cal. App.2d 600, 610, 33 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, 232-233 (1860).

⁵² See *Fountain v. City of Sacramento*, 1 Cal. App. 461, 82 Pac. 637 (1905).

in contract to the same extent as private persons,⁵³ subject to certain variations founded upon considerations of public policy or statutory compulsion.⁵⁴ The conversion language in the cited cases thus may be disregarded as not particularly material to the purposes of the present study of governmental immunity.

Fourth, it appears to be settled by a recent decision, apparently one of first impression in California, that a fraud action against a public entity will lie, notwithstanding the governmental immunity doctrine, if the action is pleaded as one for fraudulent breach of contract.⁵⁵ In the cited case, a sewer contractor was seeking to hold a city liable for allegedly intentional misrepresentation of soil conditions in specifications upon the basis of which the contractor had computed a bid for certain sewer construction. Pointing out that the doctrine of governmental immunity does not apply to contract actions, the Supreme Court in a unanimous decision classified the action as one grounded upon a breach of an implied warranty of the correctness of the city's specifications, and thus a contract action. "The fact that the breach is fraudulent," said Mr. Chief Justice Gibson, "does not make the rule inapplicable."⁵⁶ To the extent that this decision in effect permits what is essentially a tort to be successfully prosecuted in the form of a contract action, it would appear to be of relatively narrow and probably insignificant dimensions, since facts supporting its application undoubtedly will seldom occur.

It appears from the foregoing discussion that despite confusing language in some opinions the general principle of governmental immunity was applied to intentional torts as well as negligent torts prior to the *Muskopf* decision. Although that decision actually involved only a claim of negligence, there is little doubt that the court intended with reference to both negligent and intentional torts to abrogate what it described as "the doctrine of governmental immunity for torts for which its agents are liable."⁵⁷ The companion *Lipman* case, it should be noted, actually involved allegations of intentional and malicious defamation together with malicious interference with a contractual relationship—in short, typical intentional torts. To be sure, the court concluded that the defendant school district was immune from liability in that case; but the basis for this conclusion was *not* the doctrine of governmental immunity. Instead, the court ruled that under certain circumstances, to be determined by a discriminating evaluation of relevant policy determinants, a public entity may still be immune from liability where its officers are personally immune under the "discretionary conduct" rationale.⁵⁸ There are strong implications in the *Lip-*

⁵³ *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 Fin. 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).

⁵⁴ See, e.g., *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34 (1942); *Dynamic Indus. Co. v. City of Long Beach*, 159 Cal. App.2d 294, 323 P.2d 768 (1958).

⁵⁵ *Souza & McCue Constr. Co. v. Superior Court*, 57 Cal.2d 508, 20 Cal. Rptr. 634, 370 P.2d 338 (1962).

⁵⁶ *Id.* at 511, 20 Cal. Rptr. at 636, 370 P.2d at 340. See also cases cited in note 53 *supra*.

⁵⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

⁵⁸ For a discussion of the "discretionary act" immunity of public officers, see the text at 246-60 *infra*.

man opinion⁵⁹ that no such immunity will be recognized where the culpable officer or employee was acting in a "ministerial" (rather than "discretionary") capacity, whether the alleged tort was negligent or intentional in nature.

It is thus a defensible assumption that under the *Muskopf* and *Lipman* cases liability of public entities for the torts, both negligent and intentional, of their officers and employees is now the general common law rule, and that immunity, as an exception thereto, must be founded either upon statute or compelling considerations of public policy.

This apparent equivalence of the rule relating to intentional torts with the rule governing negligence, it should be noted, is at variance with the general trend of legislative policy. The survey of California statutes set forth earlier in the present study contains numerous instances in which the Legislature has relaxed the principle of governmental immunity as to negligent torts but not as to intentional wrongs.⁶⁰ Similarly, in many statutes relating to public officers and employees, the Legislature has demonstrated its concern for the difficulties which may stem from personal liability for official conduct in the public service. It has thus granted a measure of protection against such liability for negligence in many instances, but has often denied protection in the case of at least some types of intentional torts.⁶¹ It is perhaps not unfair to infer that the legislative approach has generally reflected the view that the public officer or employee who is "guilty" of an "intentional" wrong should quite properly be solely responsible for his misconduct, and his employer should be immune.

This approach, which tends to categorize negligent and intentional torts as separate and disparate forms of legally culpable conduct susceptible to being treated as logically different for purposes of governmental liability, tends to obscure rather than elucidate a complex problem. Like most legal classifications, the pigeonholes of "negligence" and "intentional tort" are both attractively symmetrical and deceptively simple. A rational appraisal of and intelligently planned solution to the governmental tort liability problem, it is submitted, should attempt to mark out the desirable boundaries of public responsibility for private injuries without regard for mere labels or categories. The effort should be directed to identifying relevant considerations of public policy and striking a proper balance along sound functional lines. In this attempt, the so-called "intentional" torts should receive the same analytical treatment as the "negligent" torts of public personnel.

⁵⁹ See, e.g., *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 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.

⁶⁰ See, e.g., the Public Liability Act of 1923, now CAL. GOVT. CODE § 53051, discussed in the text at 42-59 *supra*; CAL. VEH. CODE § 17001, discussed at 36-40 *supra*; CAL. EDUC. CODE § 903, discussed at 40-42 *supra*; and other statutory provisions discussed at 59-65 *supra*.

⁶¹ 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 at 65-72 *supra*; statutes limiting liability of certain public officers to their own individual acts of dishonesty or crime, discussed at 143-49 *supra*.

Valid reasons for disregarding the traditional bipartite division are readily apparent. The distinction between a negligent tort and an intentional one is often exceedingly subtle and may be simply a matter of degree dependent upon mental condition or attitude. A police officer's gun, while being pointed in the direction of a criminal suspect under investigation or arrest, suddenly discharges a bullet into the suspect. Was the pressure of the officer's finger on the trigger a conscious and deliberate act, or was it the product of lack of adequate care? The District Attorney initiates an unsuccessful criminal prosecution which subsequently forms the basis for a malicious prosecution action. Was the decision to prosecute made deliberately and with malice, lacking in probable cause, or was it the consequence of negligent investigation or careless evaluation of the applicable law? When the officer in charge of the city jail fails to provide medical assistance at the request of a prisoner, thereby aggravating existing illness or injuries or even possibly resulting in death, can one be certain that the refusal was morally wrong, being malicious and with intent to cause harm? Or may it possibly have been a mere negligent exercise of judgment in light of the facts apparent to the officer?

The traditional dichotomy between intentional and negligent torts thus overlooks the fact that the difference is largely one of degree and of subjective mental condition. Moreover, conduct which generally is classified as within the "intentional" category frequently occurs under circumstances where the public officer or employee appears to be simply carrying out his express duties. When the supervisor of a public playground attempts to eject an unruly troublemaker, and finds it necessary to employ force to do so, should he inevitably have to incur the risk of personal liability in an ensuing assault and battery suit? And even if the jury ultimately decides that unnecessary force was employed, would sound public policy be served by holding the employing entity immune? Cannot a plausible argument be advanced that conscientious—indeed, even zealous—performance of duty by public officers and employees is something deserving encouragement rather than a penalty? The price to be paid for yielding to (or complying with) an insistent public demand for vigorous law enforcement, for example, may well be the cost of resisting, and satisfying judgments in, more false arrest or malicious prosecution suits against public officials and (assuming common law immunity at an end) also against public entities.

Whether governmental immunity constitutes a satisfactory means for allocating the risks of loss in cases like these manifestly cannot be determined by any facile generalization to the effect that, after all, these are "intentional" torts. The fact must be faced that government, by its very nature, possesses unusual powers not ordinarily possessed by private persons. In the exercise of such powers by fallible individual officers and employees, unusual risks of harm to private interests will inevitably result. Whether the risks are characterized by "negligence" or "intent" is, in this context, only one among many factors which require appraisal in deciding the ultimate issues. Those issues are fundamentally policy questions as to who should properly bear the loss—the injured person, the public officer or employee, or the taxpayers as a whole.

Bases for Nonliability Other Than Governmental Immunity

The *Muskopf* decision, in terms, only rejected the doctrine of governmental immunity as a limitation upon the responsibility of public entities for the torts of their personnel. It thus may be significant to observe that the common law decisions in California have articulated *other* theoretical grounds for nonliability, apparently independent of the governmental immunity doctrine.

To be sure, the development of the law in this area has been neither smooth nor marked by particular clarity of decision-writing; and hence it is difficult to estimate with any assurance how much doctrinal vigor these other rules had at the time of their judicial invocation or whether (and to what extent) they may have been simply tentative and preliminary attempts to formulate a sound theoretical foundation for governmental immunity. To the extent that they are simply corollaries to or hybrid forms of the immunity doctrine, they presumably have been discarded as common law along with the dominant doctrine by *Muskopf*. However, the cases suggest at least a strong possibility that they actually had some independent force in judicial lawmaking in the past, and hence may provide a reservoir of authority from which new channels of judicial lawmaking may be charted in the future. Their existence thus deserves consideration in the development of a legislative program relating to public tort responsibility, so that whatever expressions of legislative policy emerge will take them into account.

The common law bases for nonliability other than governmental immunity are fourfold:

- (1) The inapplicability of *respondeat superior* to torts of a public officer who is acting as a "servant of the law";
- (2) The inapplicability of *respondeat superior* to torts of public personnel who are acting *ultra vires*;
- (3) The doctrine of immunity for discretionary conduct; and
- (4) The absence of liability for official nonfeasance, as contrasted with misfeasance.

Each of these lines of case-law development will be discussed separately.

The Public Officer as a "Servant of the Law"

One of the earliest cases in California relating to the problem of public tort responsibility, curiously enough, was almost a counterpart to *Muskopf*—an action for medical malpractice in a county hospital.¹ The plaintiff contended that the county, as a public corporation engaged in the operation of the hospital in question, should be responsible in tort for the negligence of its employees to the same extent as a private corporation similarly engaged. The court found the analogy to be unconvincing. County hospital personnel, unlike comparable private employees, were not employed to advance the corporate benefit of the county as an entity, but were appointed "in the exercise of the sovereign power of the State, by the requirements of a public law, and simply for the public benefit."² Since the county, as a corporation, derived no benefit

¹ *Sherbourne v. Yuba County*, 21 Cal. 113 (1862).

² *Id.* at 115.

from the hospital operation, it was not obligated to assume the burden thereof (*i.e.*, *respondeat superior* was not applicable) in the absence of statute.

This 1862 decision, it will be noted, squints in the direction of the "governmental"—"proprietary" distinction, by suggesting that there may be a difference between county functions for "public" as contrasted with "corporate" benefit. Its chief emphasis, however, was upon the fact that the county hospital personnel had been appointed pursuant to *statutory* mandate—that is, because of the compulsion of law and not because of the county's voluntary choice or decision in its corporate capacity.

This latter theme dominates the public entity tort decisions for several decades after 1862, during which cities and counties were often found to be not liable for the torts of their officers and employees in carrying out their statutory duties.³ *Respondeat superior* was simply not applicable, declared the Supreme Court two years later, for the relationship between a public body and one of its officers in such a case "bears no available resemblance to that of master and servant, nor to that of employer and employee."⁴ On the contrary, since such offices and their duties were created and declared by public law, the appointees, in carrying out their responsibilities, were "the agents and servants of the law" rather than of the public entity within and for which they were appointed. For their torts, such officials were personally liable, but the employing entity was not.⁵

The logic of the cited decisions was neat and symmetrical. So long as a statute or charter provision vested the duty upon the officer personally, liability for its negligent exercise was also personal to him. Astute counsel soon pressed the contention that where the statute spoke of the duty as one placed upon the *entity* as such, rather than on a specified official, public liability should obtain, for then the officer's act would be one in behalf of the entity as its servant or agent rather than as an agent of the law. After twice avoiding the issue through the simple tactic of ignoring it,⁶ the court in 1889 finally took refuge in the doctrine of *stare decisis*, declaring the rule of nonliability too well settled to require any further theoretical analysis.⁷ The basic doctrine, however, was too useful to discard completely; and hence it was hauled out upon appropriate occasions thereafter and relied upon when needed to sustain a holding that a public entity was not liable for the acts of its personnel performed as "servants of the law."⁸

³ See cases cited at notes 4-8 *infra*.

⁴ *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).

⁵ *Ibid.*; see also, *Winbigler v. City of Los Angeles*, 45 Cal. 36 (1872); *Hoagland v. City of Sacramento*, 52 Cal. 142 (1877).

⁶ See *Tranter v. City of Sacramento*, 61 Cal. 271 (1882); *Barnett v. County of Contra Costa*, 67 Cal. 77, 7 Pac. 177 (1885).

⁷ *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*.

⁸ *Slevers v. City & County of San Francisco*, 115 Cal. 648, 47 Pac. 647 (1897).

In the meantime, the doctrine of public liability for torts committed in the course of "proprietary" activities had developed considerable strength in other jurisdictions and in scholarly writings,⁹ and shortly after the turn of the century was firmly planted in California's fertile judicial soil.¹⁰ Obviously, since the "servant-of-the-law" concept could result in immunity in the proprietary realm as well as in the governmental, it was summarily rejected as having any force whatever where proprietary activities were concerned.¹¹ Yet, perhaps out of respect for its longevity, the concept was repeatedly voiced as an alternative and independent basis for nonliability of public entities, additional to the governmental immunity doctrine. We find the Supreme Court in 1912, for example, after a conscientious and detailed survey of the cases, concluding that

. . . municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law; and when an injury results from the wrongful act or omission of a municipal officer charged with duty prescribed and limited by law, the doctrine of *respondere superior* is inapplicable. The officer is not treated as the agent or servant of the corporation in the performance of such duty, but is held to be *the servant and agent of and controlled by the law* . . .¹²

Similar expressions, and decisions founded thereon, are contained in subsequent opinions rendered as recently as 1937.¹³

The "servant-of-the-law" rationale for precluding the operation of the principle of *respondere superior* appears to be excessively technical and at least as anachronistic as the more widely known "governmental"-"proprietary" distinction. There is little ground for believing that the Supreme Court which decided *Muskopf* would accord it any present legal significance whatever.

It does, however, have some practical relevance to the problem here being studied, since it directs attention to the somewhat unique nature of certain types of public employment. Today, just as in 1862, certain public officers and employees hold their positions pursuant to direct statutory authority, and exercise duties which are prescribed and limited almost exclusively by statute. Although the entity in and for which they function may pay their compensation and provide the physical facilities essential to carry out their responsibilities, they sometimes are wholly (as for example, in the case of some elected officials) or partially independent of control and direction by the

⁹ See, e.g., the approving quotations from 2 DILLON, MUNICIPAL CORPORATIONS § 997 (3rd ed. 1881) 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).

¹⁰ 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).

¹¹ *Davoust v. City of Alameda*, *supra* note 10.

¹² *Perkins v. Blauth*, 163 Cal. 782, 789, 127 Pac. 50, 53 (1912) (emphasis added).

¹³ 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).

governing body of the entity. In certain instances, therefore, unusually difficult questions may arise in attempting to identify a particular public entity as the responsible employer for the purpose of applying *respondeat superior* (assuming, for the present, that that doctrine will ultimately be made applicable to some extent in line with *Muskopf*).

The most obvious illustration of the sort of difficulties here suggested relates to the personnel of the judicial system. The authorities have repeatedly stated that the superior courts are not county but *state* courts,¹⁴ and that individuals employed in the superior court system, including judges¹⁵ and various attachés,¹⁶ are not county but *state* officers and employees. Yet other equally respectable authorities declare that a county is liable for tortious injuries resulting from a dangerous or defective condition of public property in the courtroom of a superior court, for such a court is to some extent and for some purposes not only "a state court, it is also a *county* court";¹⁷ that unlike other superior court attachés, a probation officer is a *county* officer;¹⁸ and that although an official court reporter of a superior court is for most purposes a state officer, he may be acting in the capacity of an *independent contractor* in carrying out some of his duties.¹⁹ Similarly, although a deliberate and forceful dictum of the Supreme Court intimates that attachés of municipal and justice courts will be deemed *county* employees for tort liability purposes,²⁰ there are plausible grounds for believing that the judges of such courts may be classified as *state* officers.²¹ In the present condition of the law, it is indeed difficult to predict where ultimate tort responsibility would rest for torts of judicial personnel and attachés if the doctrine of *Muskopf* were applicable.

Other similar perplexities are readily conceivable in light of the highly complex and interrelated local governmental structure in California. Should city employees engaged in performing duties under the direction of an independent "commission" or "agency" established by

¹⁴ *Sacramento & San Joaquin Drainage Dist. v. Superior Court*, 196 Cal. 414, 238 Pac. 687 (1925); cases cited in notes 15 and 16 *infra*. See also 27 OPS. CAL. ATTY. GEN. 338 (1956).

¹⁵ See *Pickens v. Johnson*, 42 Cal.2d 399, 267 P.2d 801 (1954).

¹⁶ 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).

¹⁷ *Dineen v. City & County of San Francisco*, 38 Cal. App.2d 486, 490, 101 P.2d 736, 740 (1940) (emphasis added).

¹⁸ *Nicholl v. Koster*, 157 Cal. 416, 108 Pac. 302 (1910).

¹⁹ *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."

²⁰ *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.

²¹ 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 20, 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."

a joint powers agreement²² be deemed no longer acting in the course and scope of employment for the city, thereby insulating it from tort liability for their negligence? When a county employee is performing municipal services within a city pursuant to contractual arrangements,²³ should his tortious conduct be attributable to the county or to the city? Should the torts of specialized and expert personnel employed outside of ordinary civil service procedures by contract²⁴ be attributable to the employing entity, or should such individuals be treated in all respects as independent contractors?²⁵ Much of the routine work of special districts is performed by city or county personnel acting in *ex officio* capacity as the personnel of such districts.²⁶ In such capacity, does it necessarily follow that tort liability for their negligence is (or should be) imputed to the often small and impetuous district rather than to the larger and more financially responsible city or county which selected and employed them? The county clerk, it should be noted, has been held "not answerable to the county, nor is the county liable for his tortious acts" when he is acting, *ex officio*, as clerk of the superior court.²⁷

²² 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," CAL. GOVT. CODE § 6507, and which may be authorized to incur liabilities which are not the liability of the contracting entities, CAL. GOVT. CODE § 6508. The statutory language of the Act is sufficiently broad and nonspecific 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.

²³ Counties operating under freeholders' charters are authorized, pursuant to the provisions of CAL. CONST., Art. XI, § 7½, 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 Officers and Lakewood City Administrator, The Lakewood Plan (mimeo., Jan. 1956).

²⁴ 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 *respondent 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."

²⁵ 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 § 26.11.

²⁶ See, e.g., the typical provision found in the Mariposa County Water Agency Act, Cal. Stat. 1959, ch. 2036, § 8, p. 4693, CAL. GEN. LAWS ANN. Act 4613, § 8 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-8 (West 1959): "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"

²⁷ *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).

Problems of the type indicated here are in reality part of the much larger and more fundamental issue of risk distribution which must be evaluated in attempting to formulate a rational legislative solution to the governmental tort liability problem as a whole. The established contours of the relationship of master and servant, or employer and employee, which characterize the application of *respondeat superior* in purely private tort situations, it is submitted, may not be appropriate or desirable in all instances where public tort responsibility is concerned. Indeed, the original development of the "servant-of-the-law" rationale of public entity tort immunity appears to underscore judicial sensitivity to the often marked differences between the position of the public officer or employee performing duties laid down and confined by law for the advancement of the public interest, and that of the private employee acting under the substantially unrestricted direction of a private employer in the pursuit of his own personal interest. In the future, differences of this type (perhaps involving unusual relationships such as those suggested above) may lead some court to invoke once again the "servant-of-the-law" rationale rather than to force the private law analogy of *respondeat superior* beyond its logical limits. It would be preferable that relevant distinctions between private and public employment be recognized and incorporated in advance into the legislative program so far as possible.

Nonliability for *Ultra Vires* Torts

In the *Lipman* case, Mr. Chief Justice Gibson holds a school district immune from liability, under the particular circumstances there involved, for the torts of its officers within the scope of their discretionary powers. He then observes, without elaboration, that "familiar principles of agency" preclude the court from holding the district liable for the torts of its officers "outside the scope of their authority."²⁸ Ample case law supports this *ultra vires* rationale for public nonliability in tort,²⁹ and it has even been said to be a "fundamental" rule in California.³⁰ In view of its reaffirmance in *Lipman*, it must be taken into account as a continuing limitation upon the tort liability of public entities, even if the "governmental" immunity doctrine be regarded as completely abolished.

The abstract generalization encompassed within the phrase, "*ultra vires*," however, unfortunately tends to obscure significant differences between essentially dissimilar legal problems. On this point, the language of the opinions often is confusing, and may well be misleading, because of the frequent failure of the courts to observe the different considerations of public policy which are at stake in the different kinds of cases presenting the issue. If we examine closely the application of the rule in the reported cases, at least three different meanings can be discerned as having attached to these words.

²⁸ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 230, 11 Cal. Rptr. 97, 100, 359 P.2d 465, 468 (1961).

²⁹ The leading California cases are *Healdsburg Elec. Light & Power Co. v. City of Healdsburg*, 5 Cal. App. 553, 90 Pac. 955 (1907) and *Foxen v. City of Santa Barbara*, 166 Cal. 77, 134 Pac. 1142 (1913). See also, the other cases cited at notes 30-41 *infra*.

³⁰ *Ravettino v. City of San Diego*, 70 Cal. App.2d 37, 160 P.2d 52 (1945).

One meaning of "*ultra vires*" is that the public entity has no authority to engage in the particular type of conduct or to do the particular act under any circumstances.³¹ Nonliability in this sense is a logical (although not necessarily desirable) corollary to the general principle that 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.³² 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,³³ 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.³⁴ 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, intends 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.³⁵ 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,

³¹ See, e.g., *Tyler v. Tehama County*, 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.

³² 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).

³³ *Healdsburg Elec. Light & Power Co. v. City of Healdsburg*, 5 Cal. App. 558, 90 Pac. 955 (1907).

³⁴ *Ravettino v. City of Los Angeles*, 70 Cal. App.2d 37, 160 P.2d 52 (1945).

³⁵ This rationale for the rule has been expounded, somewhat unpersuasively, by David, *Municipal Tort Liability in California*, 7 So. CAL. L. REV. 48, 70-71 (1933).

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 *intra* 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.³⁶ The person injured in a non-volitional 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 *ultra vires* torts as to torts which are clearly *intra vires*. The question whether the public entity whose enterprise caused the harm should be liable for the ensuing damages 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 represented 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.³⁷ A county may be authorized to operate a public

³⁶ See *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34 (1942); *Reams v. Cooley*, 171 Cal. 150, 152 P.2d 293 (1915).

³⁷ *Lertora v. Riley*, 6 Cal.2d 171, 57 P.2d 140 (1936).

hospital for governmental purposes 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.³⁸ 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 noncompensable.³⁹ Other illustrations are set out below.⁴⁰

This second 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 strenuously 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 reconsideration 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 applica-

³⁸ *Calkins v. Newton*, 36 Cal. App.2d 262, 97 P.2d 523 (1939), followed in *Latham v. Santa Clara County Hosp.*, 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).

³⁹ *Foxen v. City of Santa Barbara*, 166 Cal. 77, 134 Pac. 1142 (1913).

⁴⁰ 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).

tion of *respondeat superior* where the employee tortfeasor 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.⁴¹ 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.⁴² 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.⁴³ 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.¹ 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 respon-

⁴¹ *Ruppe v. City of Los Angeles*, 186 Cal. 400, 403, 199 Pac. 496, 497 (1921).

⁴² See generally, 2 HARPER & JAMES 1374-1394, and cases there cited.

⁴³ 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*, 186 Cal. 400, 199 Pac. 496 (1921). 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).

¹ 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).

sibility 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:

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.²

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 related, 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.

² *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

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*,³ 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:

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.⁴

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 jurors⁵ and judges.⁶ 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.⁷

³ 6 Cal. 94 (1856).

⁴ *Id.* 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.

⁵ *Turpen v. Booth*, 56 Cal. 65 (1880); *Irwin v. Murphy*, 129 Cal. App. 713, 19 P.2d 292 (1933).

⁶ *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).

⁷ In the very next decision following *Downer v. Lent*, 6 Cal. 94 (1856), 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

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.⁸ Concurrently, the courts also enlarged upon the kinds of activities which could be regarded as "discretionary" and hence a basis for immunity.⁹

The spectrum of public officers protected by the California doctrine today ranges from the judge¹⁰ to the building inspector,¹¹ legislator¹² to game warden,¹³ county supervisor¹⁴ to local health officer,¹⁵ public prosecutor¹⁶ to policeman on the beat.¹⁷ It extends to such public personnel as a city engineer,¹⁸ county clerk,¹⁹ county counsel,²⁰ court reporter,²¹ civil service administrator,²² city manager,²³ building and loan commissioner,²⁴ superintendent of schools,²⁵ tax assessor,²⁶ county surveyor,²⁷ school trustees²⁸ and city councilman.²⁹

The kinds of tortious activities deemed to be discretionary and hence within the doctrine are 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,³⁰ conspired to injure a property owner by wrongfully enforcing building code requirements,³¹

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 in notes 45-49 *infra*.

⁸ See, e.g., *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530 (1890) (tax assessor held immune for wrongful assessment); *Gridley School Dist. v. Stout*, 134 Cal. 592, 66 Pac. 785 (1901) (school superintendent held immune for wrongful reappointment of school funds). See also, cases cited at notes 11-29 *infra*.

⁹ 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 and Loan Commissioner). See also cases cited in notes 30-39 *infra*.

¹⁰ See cases cited in note 6 *supra*.

¹¹ *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. Brinkman*, 23 Cal. App.2d 307, 73 P.2d 254 (1937).

¹² *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).

¹³ *White v. Towers*, 37 Cal.2d 727, 235 P.2d 209 (1951).

¹⁴ *Lavine 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).

¹⁵ *Jones v. Czapkay*, 182 Cal. App.2d 192, 6 Cal. Rptr. 132 (1960).

¹⁶ *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).

¹⁷ *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).

¹⁸ *Miller v. City & County of San Francisco*, 187 Cal. App.2d 480, 9 Cal. Rptr. 767 (1960).

¹⁹ *Legg v. Ford*, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960).

²⁰ *Ibid.*

²¹ *Ibid.*

²² *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).

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

²⁴ *Jones v. Richardson*, 9 Cal. App.2d 657, 50 P.2d 810 (1935).

²⁵ *Gridley School Dist. 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).

²⁶ *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530 (1890).

²⁷ *Oppenheimer v. Arnold*, 99 Cal. App.2d 872, 222 P.2d 940 (1950).

²⁸ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

²⁹ *Martelli v. Pollock*, 162 Cal. App.2d 655, 328 P.2d 795 (1958).

³⁰ *Miller v. City & County of San Francisco*, 187 Cal. App.2d 480, 9 Cal. Rptr. 767 (1960). See also *Legg v. Ford*, 185 Cal. App.2d 534, 8 Cal. Rptr. 392 (1960) (alleged conspiracy to defraud).

³¹ *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).

negligently failed to enforce proper quarantine precautions against a contagious disease,³² assaulted a witness appearing before a legislative investigating committee,³³ wrongfully published a defamatory letter,³⁴ conspired to interfere with an established contractual relationship,³⁵ fraudulently changed the location of a county courthouse after condemning the originally chosen site,³⁶ maliciously prosecuted various types of criminal charges,³⁷ wrongfully induced a breach of contract,³⁸ and maliciously procured the dismissal of a subordinate public employee.³⁹ 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."⁴⁰ 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.⁴¹ 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 Mr. Chief Justice Gibson:

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."⁴²

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

³² *Jones v. Czapkay*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

³³ *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).

³⁴ *Cross v. Tustin*, 165 Cal. App.2d 146, 331 P.2d 785 (1958). *Cf. Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961) (allegedly defamatory communications).

³⁵ *Martelli v. Pollock*, 162 Cal. App.2d 655, 328 P.2d 795 (1958).

³⁶ *Lavine v. Jessup*, 161 Cal. App.2d 59, 326 P.2d 238 (1958).

³⁷ *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).

³⁸ *Hancock v. Burns*, 158 Cal. App.2d 785, 323 P.2d 456 (1958).

³⁹ *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957). See also, *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

⁴⁰ *Hardy v. Vial*, 48 Cal.2d 577, 582, 311 P.2d 494, 496 (1957).

⁴¹ *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).

⁴² *Hardy v. Vial*, 48 Cal.2d 577, 583, 311 P.2d 494, 497 (1957).

motives, would reasonably be deemed to serve to promote those underlying purposes.⁴³ 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 judgments⁴⁴ manifestly cannot explain the present breadth of the rule. The modern explanation offered in *Lipman* is this:

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.⁴⁵

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.⁴⁶ In what is perhaps the leading case on the subject,⁴⁷ 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."⁴⁸ 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."⁴⁹

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,⁵⁰ and there seems little reason to doubt that

⁴³ *White v. Towers*, 37 Cal.2d 727, 733, 235 P.2d 209, 213 (1951), quoting with approval from *Nesbitt Fruit Prods. v. Wallace*, 17 F. 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).

⁴⁴ See discussion in text accompanying note 4 *supra*.

⁴⁵ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

⁴⁶ 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 1644.

⁴⁷ *Gregoire v. Biddle*, 177 F.2d 579 (2d 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).

⁴⁸ *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), quoted with approval in *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 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).

⁴⁹ *Ibid.*

⁵⁰ See discussion in text at 65-72 *supra*, under heading "Statutory assumption by public entity of tort liability of its officers and employees."

other entities probably could legally follow suit if they wished to do so as a matter of policy.⁵¹ Moreover, the fear of personal loss can easily be, and undoubtedly widely is, mitigated by insurance protection.⁵² 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.⁵³ 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.⁵⁴ Again, the particular conduct which

⁵¹ 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 CAL. CONST., Art. IV, § 31, depends upon a judicial evaluation whether the funds are being expended for a public or private purpose. See *Diittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1960); *Subsequent Injuries Fund v. Industrial Acc. Comm'n*, 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 Acc. 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 government 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.

⁵² 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; CAL. EDUC. CODE § 1044; CAL. GOVT. CODE § 1231. Cf. *Estrada v. Indemnity Ins. Co. of No. America*, 158 Cal. App.2d 129, 322 P.2d 294 (1958).

⁵³ 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 Acc. Ins. 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 motive); *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530 (1890) (*semble*).

⁵⁴ See, e.g., *Caruso v. Abbott*, 133 Cal. App.2d 304, 284 P.2d 113 (1955) (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

caused the injury may be construed as not involving discretion or judgment, but as wholly "ministerial" duty, to which the doctrine does not apply.⁵⁵ 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.⁵⁶

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" concept⁵⁷ strongly suggests that judicial attempts to classify an official act as *ultra vires* the officer, in order to evade the immunity, will ordinarily be 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.⁵⁸ 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,⁵⁹ 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

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. 2d 837, 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).

⁵⁵ See *Armstrong v. City of Belmont*, 153 Cal. App.2d 641, 322 P.2d 999 (1958) (city officers were 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).

⁵⁶ 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*, 41 Cal.2d 623, 262 P.2d 3 (1953). The holding of liability in *Wolfson 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.

⁵⁷ See discussion in the text accompanying notes 42-43 *supra*.

⁵⁸ 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* 1644.

⁵⁹ See text accompanying notes 5-7 *supra*.

cases⁶⁰ 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 nonliability is founded on the theory that the decision *not* to make an arrest involves judgment and discretion and hence is within the immunity doctrine.⁶¹ 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?⁶² 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,⁶³ as well as the district attorney who is alleged to have wrongfully prosecuted the arrested person through spite and malice,⁶⁴ 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.⁶⁵ 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.⁶⁶ 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 nonactionable,⁶⁷ 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.⁶⁸

⁶⁰ De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95 (1892); Inos v. Winspear, 18 Cal. 397 (1861).

⁶¹ 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).

⁶² Dragna v. White, 45 Cal.2d 469, 289 P.2d 423 (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).

⁶³ Frazier v. Moffatt, 108 Cal. App.2d 379, 239 P.2d 123 (1951); Perry v. Metkle, 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 23 (1933); Platz v. Marion, 35 Cal. App. 241, 169 Pac. 697 (1917).

⁶⁴ 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).

⁶⁵ 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 Dist., 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

⁶⁶ See Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943).

⁶⁷ Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

⁶⁸ Davie v. Board of Regents, 66 Cal. App. 689, 227 Pac. 247 (1924).

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 "preventive 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 actual *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.⁶⁹ Manifestly, public officials should not be exposed to risks of this magnitude. The policy behind the immunity doctrine—

⁶⁹ Cf. cases cited in notes 54, 60, 62 *supra*. See the trenchant criticism in 3 DAVIS, ADMINISTRATIVE LAW § 26.05, p. 531 (1958).

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, except so far as limitations currently in effect preclude liability arising from the operation of an authorized emergency vehicle.⁷⁰ 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.

Moreover, the proposed broad statutory grant of personal immunity for public officers and employees 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.

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

⁷⁰ See CAL. VEH. CODE § 17004, discussed at 166 *supra*.

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 might be desirable to the proposed general immunity of the public entity from liability for its employees' reasonable 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.⁷¹ 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.⁷² 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.⁷³ 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 merely erroneous decisionmaking 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

⁷¹ See discussion in text at 74-75 *supra*.

⁷² See discussion in text at 42-59 *supra*.

⁷³ See discussion in text at 72-73 *supra*.

done,⁷⁴ 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 the 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 tortfeasor should be the objective if possible, for that result would tend to best effectuate the threefold 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.⁷⁵) 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.⁷⁶

⁷⁴ See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), quoted with approval in *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) and *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957).

⁷⁵ See generally 3 DAVIS, *ADMINISTRATIVE LAW* 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).

⁷⁶ 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. §§ 330-36; *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, p. 4214. 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.

Incentive to sue may be further reduced by limiting recovery to actual damages incurred and, possibly, by precluding recovery of exemplary or punitive damages.⁷⁷ 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)⁷⁸ 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.⁷⁹

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 him with a free defense 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.⁸⁰ (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, as well as to avoid possible conflicts of interest, 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.⁸¹)

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.⁸² 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

⁷⁷ 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.

⁷⁸ See 2 CHADBOURN, GROSSMAN & VAN ALSTYNE, CALIFORNIA PLEADING § 982, p. 67 (1961).

⁷⁹ A strong recommendation along these lines is made in 3 DAVIS, ADMINISTRATIVE LAW § 26.04, p. 529 (1958).

⁸⁰ This suggestion is founded upon the analogous provisions of CAL. GOVT. CODE § 2001, which authorizes a defense at public expense for State, county, city, district, and agency personnel being sued in an official or individual capacity for harm caused by the condition of public property, the employee's negligence, or his act or omission in the course of employment. The entity, however, is authorized to recover the costs and expenses of such defense if it is ultimately established that the employee acted with malice or in bad faith. See 39 ADV. OPS. CAL. ATTY. GEN. 71 (1962).

⁸¹ The Attorney General has ruled that where the attorney for the employing entity is disqualified from representing an officer or employee under former Sections 2001 and 2002 of the Government Code, 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. 35 OPS. CAL. ATTY. GEN. 103 (1960). The substance of these sections was retained when the Legislature enacted a new Section 2001 in 1961. Cal. Stat. 1961, ch. 1692, § 2, p. 3669. See 39 ADV. OPS. CAL. ATTY. GEN. 71 (1962).

⁸² See in general agreement that malicious and corrupt conduct by public officers may rationally be treated differently from mere honest mistake, 2 HARPER & JAMES 1645; Gray, *Private Wrongs of Public Servants*, 47 CALIF. L. REV. 303 *passim* (1959); 3 DAVIS, ADMINISTRATIVE LAW § 26.04, pp. 526-30 (1958).

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 be meritorious.

The foregoing discussion also presupposes (as appears to be accepted by much existing legislation)⁸³ 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,¹ 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.²

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.³ If the *Muskopf* principle of

⁸³ 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 at 65-72 *supra*.

¹ See Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 800 (1956).

² 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 omission. See, e.g., *Pianka v. State*, 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 in note 3 *infra*.

³ 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*, 153 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

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 enact⁴ or repeal⁵ an ordinance, to abate a nuisance,⁶ to build a bridge,⁷ to provide medical care for its prisoners,⁸ to maintain or adequately supervise its jail facilities,⁹ to issue building permits,¹⁰ to enforce safety regulations,¹¹ to direct traffic at a crowded intersection after failure of the traffic signal¹² or to provide speedy ambulance service.¹³

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, might 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 gov-

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*, 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).

⁴ *Cf. Seybert v. County of Imperial*, 162 Cal. App.2d 209, 327 P.2d 560 (1958).

⁵ *Cf. Shipley v. City of Arroyo Grande*, 92 Cal. App.2d 748, 208 P.2d 51 (1949).

⁶ *Cf. Lewis v. County of Contra Costa*, 130 Cal. App.2d 176, 278 P.2d 756 (1955).

⁷ *Cf. Coffey v. City of Berkeley*, 170 Cal. 258, 149 Pac. 559 (1915).

⁸ *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).

⁹ *Cf. Oppenheimer v. City of Los Angeles*, 104 Cal. App.2d 545, 232 P.2d 26 (1951).

¹⁰ *Cf. Armstrong v. City of Belmont*, 153 Cal. App.2d 641, 322 P.2d 999 (1958).

¹¹ *Cf. Campbell v. City of Santa Monica*, 51 Cal. App.2d 626, 125 P.2d 561 (1942).

¹² *Cf. Hoel v. City of Los Angeles*, 136 Cal. App.2d 295, 288 P.2d 989 (1955).

¹³ *Cf. Greenberg v. County of Los Angeles*, 113 Cal. App.2d 389, 248 P.2d 74 (1952).

ernment within constitutional limitations are therefore necessarily non-tortious”¹⁴

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 re-examination 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 *improper* 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.¹⁵ 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 ade-

¹⁴ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 220, 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* § 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).

¹⁵ See 2 HARPER & JAMES 1645 n. 39.

quate relationship between the nonaction and the injuries can be established to meet the ordinary tests of proximate causation.¹⁶)

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 be 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.¹⁷ 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.

¹⁶ 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).

¹⁷ See text at 251-58 *supra*.

The duty of the officer in charge of a jail to prevent "kangaroo court" proceedings and to provide medical aid to prisoners,¹⁸ 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.¹⁹ 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 nonliability 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.

¹⁸ These duties are statutory in origin. See CAL. PEN. 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).

¹⁹ *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 1626 n.40.

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 non-discretionary duty to maintain public property in a safe condition.²⁰ 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.²¹ 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.²² To the extent this criticism has merit, it may be disposed of by amendment of the statute; but the underlying principle of liability for nonperformance 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 then focused 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 nonliability 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 action-

²⁰ Prior to the enactment of the Public Liability Act, which is discussed in the text at 42-59 *supra*, 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).

²¹ See discussion in text at 42-59 *supra*, 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). Some decisions have suggested that the scope of statutory liability for nonfeasance may be narrower under the Public Liability Act than for misfeasance. See *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962), citing and following *Stang v. City of Mill Valley*, 38 Cal.2d 486, 240 P.2d 980 (1952), where a city was 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 latter 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 nonpropertied persons who receive little direct proprietary benefit from the fire protection service.

²² See text at 49-53 *supra*, 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 U.C.L.A. L. REV. 1, 14-18, 39-40 (1959).

able (or possibly nonactionable), excluding all other cases from the operation of the rule. Since in either event, periodic re-examination 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.

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.¹ 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 ex-

¹ Cal. Stat. 1961, ch. 1404, p. 3209, 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 adjournment of the 1963 Regular Session of the Legislature. Cal. Stat. 1961, ch. 1404, § 3, p. 3210. See *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

tensive 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 "*intra 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,² and in fact created new and perplexing problems of interpretation of statutes and of application of pre-*Muskopf* case law.³ 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,⁴ 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

² See, e.g., the issues explored in the discussion in text, *supra*, relating to intentional torts (pp. 231-36), the application of *respondeat superior* to the peculiar employment relationships found in some areas of local government (pp. 239-42), the operation of the often ambiguous "*ultra vires*" doctrine (pp. 242-46), the relationship between the doctrine of official immunity and the abolition of governmental immunity (pp. 246-60), and the proper scope of tort liability for non-feasance (pp. 260-66).

³ 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. 36-40), CAL. EDUC. CODE § 903 (see pp. 40-42), the Public Liability Act of 1923, now CAL. GOVT. CODE § 53051 (see pp. 42-59), CAL. WATER CODE § 50152 (see pp. 59-63).

⁴ 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. CL. ACT § 8. It has encountered serious difficulties in New York which have led to statutory and judicial exceptions. See text at 357-62 *infra*.

to public entities involved therein.⁵ 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 unacceptable 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

⁵ 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 Annot., 6 L. Ed.2d 1422 (1962).

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.⁶ 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

⁶ See related text and the references cited in notes 2 and 3 *supra*.

other bases for nonliability in tort have frequently been adumbrated by the courts where public entities have been sued,⁷ 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 subproblems 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 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.⁸ A more recent tendency, as exemplified in the Workmen's Compensation Acts, is to impose liability without regard to fault on the

⁷ See text at 237-66, *supra*, under heading, "Bases for Nonliability Other Than Governmental Immunity."

⁸ See 2 HARPER & JAMES §§ 12.1-12.4, and authorities there collected.

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.⁹ 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.¹⁰ 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."¹¹ 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

⁹ 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 U. CHI. L. REV. 654 (1955); 3 DAVIS, ADMINISTRATIVE LAW § 25.17 (1958).

¹⁰ See 2 HARPER & JAMES §§ 13.3-13.7; 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).

¹¹ 3 DAVIS, ADMINISTRATIVE LAW 503 (1958).

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 twofold approach is accepted, the following general policy considerations may be identified as pertinent to the empiric evaluation of specific tort situations:

(1) *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,¹² 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. (It will be recalled that in some cases good faith decisions of this type have resulted in personal liability of public officers and employees.¹³) 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 an initially responsible source for satisfaction of the judgment, subject, however, to possible subrogation rights against the faithless employee.¹⁴

(2) *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.

¹² See text at 246-60 *supra*.

¹³ See cases cited at 252-54, notes 54 and 60 *supra*.

¹⁴ See text at 258-60 *supra* for a more detailed exploration of this suggestion.

An affirmative answer to this issue 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.*, ultrahazardous 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 nuisance¹⁵ and the remedy of inverse condemnation¹⁶ 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, Government Code Section 50140, and the statute providing for indemnity for livestock killed by dogs, Agricultural Code Section 439.55) declared liable in damages without regard to fault.¹⁷ Our workmen's compensation law, which we have seen is applicable to public personnel,¹⁸ 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.¹⁹ 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,²⁰ and the Unclaimed Property Act²¹) may be explained on this basis.

(3) *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.²² These objectives are not always of equal significance, but may vary from one type of case to another, and are subject to being sub-

¹⁵ See text at 225-30 *supra*.

¹⁶ See text at 102-108 *supra*.

¹⁷ See text at 72, 73 *supra*.

¹⁸ See text at 101 *supra*.

¹⁹ 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 §§ 14.1-14.16.

²⁰ See text at 159-66 *supra*.

²¹ See text at 192-93 *supra*.

²² 1 HARPER & JAMES § 11.5.

ordinated 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 above²³ 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 exists 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.²⁴ 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*

²³ See text at 221-24 *supra*.

²⁴ See text at 79-91 *supra*.

County.²⁵ 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:

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.²⁶

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,²⁷ 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

²⁵ *County of Contra Costa v. Central Contra Costa Sanitary Dist.*, 182 Cal. App.2d 176, 5 Cal. Rptr. 783 (1960).

²⁶ *Id.* at 179-80, 5 Cal. Rptr. at 786.

²⁷ See statutes cited in text at 87 *supra*.

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.²⁸

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*.²⁹ 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

²⁸ See text at 258-60 *supra*.

²⁹ 38 Cal.2d 486, 240 P.2d 980 (1952).

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:

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.³⁰

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),³¹ 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 by relegating the plaintiff to an action for injunctive relief and abatement of the nuisance, without necessarily awarding money damages. Where reliance on such non-pecuniary remedies is made the sole protection of the injured party, consideration might be given 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.

(4) *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* re-

³⁰ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 230, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961).

³¹ See text at 255-58 *supra*.

dress. 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."³² 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.³³ Restricting liability thereunder to cases of *actual* notice would appear to deserve consideration as a possible statutory 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.³⁴

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 princi-

³² David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 15 (1959).

³³ *Ibid.*

³⁴ 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 at 358 *infra*.

pally 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 preventive 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 that 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.³⁵ 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.

(5) *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 foresee-

³⁵ The data are summarized and the authorities collected in 2 HARPER & JAMES § 11.4.

able 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.

(6) *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."³⁶ 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.³⁷ 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

³⁶ The full quotation is set forth in the text at 247 *supra*.

³⁷ See the text at 255-56 *supra*. To the same general effect, see Peck, *Federal Tort Claims—Discretionary Function*, 31 WASH. L. REV. 207, 225-26, 230-31, 240 (1956).

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 vehicles³⁸—a waiver originally enacted in 1929—as well as the general waiver of school district immunity for negligent torts³⁹ 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.).⁴⁰

(7) *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 involving 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

³⁸ See text at 36-40 *supra*.

³⁹ See text at 40-42 *supra*.

⁴⁰ See text at 253-59 *supra*.

various ways in which this may be done, consideration should especially be given to the following matters:

(a) Elimination of existing inconsistencies of policy as reflected in numerous closely similar statutes.

(b) Elimination of all remnants of the old "governmental" and "proprietary" classifications of activities of public entities.

(c) Avoidance of rules postulating liability and immunity upon purported distinctions between "intentional" and "negligent" torts.

(d) 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.

(e) 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.

(f) 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.

(g) Development of precepts for imposing liability upon public entities for negligent exercises of official discretion where the officer is personally immune.

(h) Clarification of the lines of responsibility between various public offices and public entities for purposes of applying the doctrine of *respondeat superior*.

Policy Considerations Relevant to Financial Administration of Governmental Tort Liability

The preceding pages have explored some of the fundamental policy considerations which are deemed relevant to the ascertainment of sound substantive rules of tort liability or immunity of governmental entities. Before final conclusions are drawn, however, certain collateral matters should be carefully evaluated. The practical fiscal consequences which might foreseeably flow from any enlargement of tort responsibility undoubtedly deserve to be analyzed to the fullest extent possible, for at least two reasons. In the first place, the interests of justice demand that provision be made for something more than a mere theoretical liability which an injured plaintiff is authorized to assert. Attention should thus be directed to the development of a system of fiscal administration which will furnish assurance that meritorious tort claims, when proven, will actually be paid. A second, and even more significant, basis for concern relates to the potential repercussions upon the financial health of the public entity found to be liable. Public entities are engaged in a wide variety of public functions of differing degrees of importance to the public health, safety and welfare, all of which make competing demands upon the financial resources available. The public interest demands assurance that prospective, as well as actual, tort liabilities will not disrupt the orderly administration of public finances nor interfere with the diligent performance of public functions. Where financial capacity is limited, public entities especially need some form of protection against the potentially crippling consequences of extremely large "catastrophe" liabilities.

Providing Assurance That Meritorious Claims Will Be Paid

Judgments against public entities, unlike those against private persons, ordinarily cannot be satisfied by the usual procedures of execution against the assets of the judgment debtor, for public property and funds are generally immune from execution.¹ Where an enforceable statutory duty exists, however, the judgment creditor may obtain a writ of mandate to compel the payment of his judgment and, if need be, the levy of a tax to provide the funds with which to make such payment.² The problem of assuring that tort judgments will be satisfied is thus focused upon the development of means for making sure that the responsible public entity has power to raise the necessary funds and to expend them in satisfaction of the judgment.

At an earlier point in the present study, attention was directed to cases indicating that authority to satisfy a judgment imposing tort liability may be a *sine qua non* of such liability.³ Various statutes relating to local public entities were there collected, with respect to some of which there is room for doubt as to whether the requisite authority to pay exists under present law.⁴ In view of the different types of local entities as well as the varieties of fiscal provisions involved, it is suggested that consideration be given to at least five avenues for legislative development:

(1) The preponderance of local public entities have express statutory authority to levy (or to cause some other entity, such as the county in which the entity exists, to levy) an annual tax or ad valorem special assessment to raise funds for the purposes of the entity. A general statutory provision would appear to be desirable, as a means of eliminating any doubts as to whether such authority is adequate for the purpose, to require such entities to satisfy tort judgments out of any otherwise unappropriated and unencumbered funds in the treasury of the entity, coupled with a duty to include in the tax or assessment levy for the next fiscal year a rate sufficient to satisfy all such judgments which are unsatisfied at the time of (or shortly prior to the time of) such levy. Existing statutory provisions along these lines which could be employed as precedents include Government Code Sections 50170-50175 (providing for tax levy for payment of judgments against cities, counties, and cities and counties)⁵ and Education Code Section 904

¹ *Irvine v. Bossen*, 25 Cal.2d 652, 155 P.2d 9 (1944); *El Camino Irr. Dist. v. El Camino Land Corp.*, 12 Cal.2d 378, 85 P.2d 123 (1938), and authorities there cited. A still unresolved question is whether property owned in a proprietary capacity and neither devoted to nor held for public use may be subjected to levy of execution, as intimated in occasional dicta. See, e.g., *Kubach Co. v. City of Long Beach*, 8 Cal. App.2d 567, 48 P.2d 181 (1935); *Marin Water & Power Co. v. City of Sausalito*, 49 Cal. App. 78, 193 Pac. 294 (1920). Cf. Note, 9 So. CAL. L. Rev. 415 (1936).

² *Title Guar. & Trust Co. v. City of Long Beach*, 4 Cal.2d 56, 47 P.2d 472 (1935); *Cary v. Long*, 181 Cal. 443, 184 Pac. 857 (1919); *Metropolitan Life Ins. Co. v. Deasy*, 41 Cal. App. 667, 183 Pac. 243 (1919). *But cf.* *Westinghouse Mfg. Co. v. Chambers*, 169 Cal. 131, 145 Pac. 1025 (1915) (judgment against State may not be enforced by mandamus).

³ See text at 205-206 *supra*.

⁴ See text at 206-14 *supra*.

⁵ Government Code Sections 50170-50175 require the county clerk to file with the auditor and legislative body of any cities or counties designated as judgment debtors in final judgments of record in his office a list of such judgments at least 15 days before a tax levy is made. The governing body is then required to include in the tax levy for the next fiscal year a rate sufficient to satisfy the judgments, or in its discretion, an amount sufficient to pay not less than 10 percent of the total amount. When the latter alternative is used, a similar percentage must be levied in each successive year until the whole amount is paid, and the treasurer is required to pay each judgment creditor the percentage of his judgment raised by the levy in each of said years.

(providing for tax levy for payment of judgments against school districts).⁶

(2) Certain types of local public entities are either required by law, or are authorized, to raise funds for various purposes by specific lien assessments according to benefits rather than by general ad valorem assessments.⁷ It would seem to be desirable to enact general enabling legislation expressly authorizing entities of this type to pay tort judgments out of the proceeds of specific lien assessments and requiring them to levy assessments for that purpose when other funds are not available. Existing statutory provisions which may be adapted for this purpose are found in Water Code Section 51480 (relating to reclamation districts) and in Section 10 of the Flood Control and Flood Water Conservation District Act.⁸ It is here assumed, of course, that the entities which would be thus empowered to levy assessments to satisfy tort judgments are independent governmental entities which may be held responsible in tort (to whatever extent such liability may exist), and are not mere fiscal or administrative subdivisions of some larger entity.⁹ The problem of satisfying tort liabilities arising out of activities or projects carried on through the device of a nonindependent taxing or assessment districts will be treated below.¹⁰

(3) A few types of public entities appear to be independent for functional purposes but are nevertheless financially dependent upon some other larger entity from whom they derive their funds.¹¹ It would thus seem to be in order to enact general enabling legislation that would authorize entities of this type to satisfy tort judgments out of any available funds at their disposal; but such legislation should also impose a collateral duty upon the "parent" entity to include in the next

⁶ Education Code Section 904 requires the governing board of a school district to pay any tort judgments out of funds currently available, or in the alternative, to include the amount of the judgment in the tax levy for the next ensuing tax year (or in three annual instalments spread over the next ensuing three consecutive tax years).

⁷ See, e.g., CAL. WATER CODE §§ 51320-51349 (authorizing specific lien assessments by reclamation districts for purposes of operation and maintenance; such districts may employ the ad valorem assessment method as an alternative under CAL. WATER CODE §§ 51360-51365); CAL. PUB. RES. CODE §§ 12070-12086 (authorizing resort districts to levy specific lien assessments for maintenance, repairs and operations); CAL. WATER CODE §§ 47100-47157 (authorizing water storage districts to levy specific lien assessments for maintenance purposes; such districts are alternatively authorized to provide for such expenses by imposing fees and charges for irrigation and other services rendered, see CAL. WATER CODE §§ 47180-47185); Flood Control and Flood Water Conservation District Act, Cal. Stat. 1931, ch. 641, § 11, p. 1372, CAL. GEN. LAWS ANN. Act 9178, § 11 (Deering 1954), CAL. WATER CODE APP. § 38-11 (West 1956) (specific lien assessments for payment of debts and for maintenance of facilities); Protection District Act of 1895, Cal. Stat. 1895, ch. 201, § 21, as amended by Cal. Stat. 1919, ch. 282, p. 462, CAL. GEN. LAWS ANN. Act 6174, § 21 (Deering 1954), CAL. WATER CODE APP. § 6-21 (West 1956) (assessment in proportion to benefits for maintenance and repair); Protection District Act of 1880, Cal. Stat. 1880, ch. 63, §§ 5-11, pp. 56-58, CAL. GEN. LAWS ANN. Act 6172, §§ 5-11 (Deering 1954), CAL. WATER CODE APP. §§ 4-5 to 4-11 (West 1956) (specific lien assessments for additions, repairs and improvements to protection works; such districts may alternatively levy ad valorem special taxes in lieu of the specific lien assessment, see Protection District Act of 1880, Cal. Stat. 1880, ch. 63, § 18, as added by Cal. Stat. 1955, ch. 565, p. 1067, CAL. GEN. LAWS ANN. Act 6172, § 18 (Deering Supp. 1961), CAL. WATER CODE APP. § 4-18 (West 1956)).

⁸ Flood Control and Flood Water Conservation District Act, Cal. Stat. 1931, ch. 641, § 10, p. 1371, CAL. GEN. LAWS ANN. Act 9178, § 10 (Deering 1954), CAL. WATER CODE APP. § 38-10 (West 1956).

⁹ See text at 214-17 *supra*.

¹⁰ See text at 324 *infra*.

¹¹ See text at 208 *supra*.

appropriation of funds for the purposes of the dependent entity sums sufficient to pay such judgments as are then unsatisfied. The inability of such entities to raise their own funds by exercise of the taxing power, in other words, should not be permitted to shield them from tort liability where under applicable substantive rules they would otherwise be liable. It would seem desirable, however, to retain the legal incidence of the liability as being upon the dependent entity, so that the possible threat to its budget (*i.e.*, the possibility that an increase in tort liability may be reflected in a decreased appropriation from the "parent" entity for *other* purposes) will have its maximum effect as an inducement to safety.

(4) Express statutory provisions authorize many, but apparently not all, types of local public entities to be dissolved under specified circumstances.¹² Such dissolution may present a serious problem for a tort claimant, both in terms of how he is to comply with the statutory requirements for the presentation of a claim against a previously dissolved and hence nonexistent entity, and in terms of how he is to enforce such a claim by legal action and satisfy it when reduced to judgment. The directions of suggested legislative policy to care for such situations (rare though they may be assumed to be) may be discerned in existing statutory provisions.

Dissolution of local public entities ordinarily is authorized in two types of cases: first, where the entity has been included within some larger entity which is authorized to provide the same functions and services; and, second, where it is determined either by vote of the electors or by some authorized tribunal (such as the superior court or the county board of supervisors) that the public benefit will no longer be served by its continued existence. In the first situation, statutes occasionally provide that the larger entity into which the dissolved entity has been absorbed shall succeed to the liabilities of the latter.¹³ In the second case, it is sometimes provided that the board of supervisors of the county shall take title to any assets of the dissolved entity for the purpose of applying them or the proceeds of their sale to the discharge of any of its obligations, and shall have power to levy taxes within the territory of the dissolved entity to satisfy any otherwise unpaid liabilities as they mature.¹⁴ A third legislative tech-

¹² Although elaborate provisions governing dissolution of special districts are contained in most district enabling acts (see, *e.g.*, Community Services District Law, CAL. GOVT. CODE §§ 61850-61881, 61890; County Water District Act, CAL. WATER CODE §§ 32850-32914), there are some statutes governing districts which are silent on the subject of dissolution. See, *e.g.*, Regional Park District Act, CAL. PUB. RES. CODE §§ 5500-5595; Alameda County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 1275, as amended by Cal. Stat. 1951, ch. 1629, p. 3672 *passim*, CAL. GEN. LAWS ANN. Act 205 (Deering 1954), CAL. WATER CODE APP. § 55-1 *et seq.* (West 1956). Certain specified types of districts are also authorized to be dissolved pursuant to the general provisions of the District Organization Law, CAL. GOVT. CODE §§ 58300-58308, and the District Investigation Law of 1933, CAL. GOVT. CODE §§ 58950-58980.

¹³ See, *e.g.*, CAL. H. & S. CODE § 4927 (declaring that sanitary district succeeds to liabilities of sewer maintenance district dissolved by inclusion therein); CAL. STS. & HWYS. CODE §§ 19271-19273 (cities declared liable for all existing obligations of highway lighting districts dissolved by inclusion therein).

¹⁴ See, *e.g.*, CAL. H. & S. CODE §§ 4850-4856 (governing dissolution of county sanitation districts); CAL. WATER CODE §§ 32910-32914 (county water districts). Generally, similar provision is made in the District Organization Law, CAL. GOVT. CODE §§ 58306-58307. See also, CAL. H. & S. CODE § 13970 (fire protection districts) and CAL. WATER CODE § 55955 (county waterworks districts) providing that dissolution does not relieve former district of liability for taxes to satisfy unpaid obligations.

nique for resolving the problem of liability of dissolved entities entails a procedural requirement that all claimants against an entity which is proposed for dissolution must present a claim therefor in the course of dissolution proceedings or be thereafter barred from asserting it.¹⁵ This last procedure would appear to be reasonably fair with respect to contract claimants, but might well penalize tort claimants who are either not aware that they have sustained injury at the time of the entity's dissolution or who in fact do not sustain such injury until a later date (as might be possible in the case of injury sustained as the result of a defective condition of some public improvement previously constructed by the now dissolved entity). With respect to tort claims, at least, the first two procedures would thus seem to be more fair and equitable than the third.

The existing statutory provisions governing local public entities are neither uniform nor consistent in their detailed provisions relating to the handling of liabilities following dissolution, although the general form of the existing provisions generally may be classified as within one or another of the three types here outlined. Unfortunately, also, there are some local entities for which no statutory provision can be found relating to the handling of claims against the entity following its dissolution.¹⁶ It is thus suggested that a general provision be enacted, which in terms applies to all types of local public entities, and which establishes procedures for disposing of tort liabilities following dissolution along the lines of the first two legislative techniques above described.

(5) Attention was directed earlier in the course of the present study to a number of statutes which contain language purporting to declare void any liabilities which are incurred under circumstances not expressly authorized in the particular statute¹⁷ or which would exceed the income or revenue provided for the entity's current fiscal year.¹⁸ Although it is probable that statutory language of this type would be liberally interpreted by the courts so as not to preclude tort liability, it would seem to be a sound precaution to enact a general legislative declaration to that effect. In addition, it was earlier noted that there may be some limiting effect, derived from statutory tax limits, upon the capability of certain public entities to satisfy tort judgments.¹⁹ Consideration should be given to a possible general statutory declaration removing tort liabilities from the scope of such tax limits.²⁰

¹⁵ See CAL. GOVT. CODE §§ 58950-58965 (comprising the dissolution procedures applicable under the District Investigation Law of 1933); CAL. PUB. UTIL. CODE §§ 18000-18004 (relating to dissolution of public utility districts).

¹⁶ See, e.g., CAL. WATER CODE §§ 55930-55935 (providing for dissolution of county waterworks district upon annexation to city with existing water distribution system).

¹⁷ See statutory provisions cited on pp. 208-09 *supra*.

¹⁸ See statutory provisions cited on pp. 209-10 *supra*.

¹⁹ See text at 212-14 *supra*.

²⁰ Whether a tax limit bars the entity governed thereby from levying a tax in excess of the limit for the purpose of satisfying a tort liability appears to be a matter of statutory interpretation. See *Arthur v. Horwege*, 28 Cal. App. 738, 153 Pac. 980 (1915). Since the matter of tort liability appears to be a matter of statewide concern, and not a municipal affair, the suggested statutory provision should prove fully effective to supersede municipal charter tax ceilings as well as those which are statutory in origin. See *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957); *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947).

Providing Assurance Against Disruptive Financial Consequences to Public Entities

Arguments against enlargement of tort liability of governmental entities often dwell upon the allegedly frightful financial risks which such liabilities might entail. Such arguments probably can be discounted considerably in view of the modern development of means for shifting and spreading the risk of liability over a sufficiently broad base to effectively dilute the financial impact upon any one defendant, commercial liability insurance being the most obvious example.¹ Even so, expansion of tort liability may increase the cost of government to some extent, although it is unrealistic to assume that the burden in any particular case will necessarily be borne entirely out of funds in the treasury of the public entity held liable. It is thus essential to understanding of the problem that an effort be made to ascertain exactly how such additional costs (whether they consist of increased insurance premiums, appropriations to reserve funds maintained for self-insurance purposes or outright payments in satisfaction of judgment) may tend to disrupt orderly financial administration of public affairs. Attention may then be directed to alternative techniques which might be applied to minimize such adverse consequences, and to their integration into the over-all legislative program.

An initial problem arises from the unpredictability of tort judgments, and the range of variation in amounts, as revealed in recent experience familiar to all lawyers. Modern techniques of advocacy and of cooperative interchanging of experience among members of the personal injury bar, for example, have been allied with a generally inflationary economy to produce a trend to larger judgments in accident cases.² Indeed, some liability insurance companies have apparently embarked upon campaigns of advertising to attempt to condition prospective jurors against the rendition of "excessive" verdicts.³ As the damages potentially recoverable in tort situations increase in magnitude,

¹ See CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT (Sec. No. 1), MUNICIPAL LIABILITY INSURANCE (1953); NEVADA LEGISLATIVE COUNSEL BUREAU, A STUDY OF STATE BONDING AND INSURANCE PROBLEMS (Bull. No. 41, Dec. 1960) and undated addenda thereto, A SUMMARY OF INSURANCE COVERAGES AND COSTS FOR THE STATE OF NEVADA AND ITS POLITICAL SUBDIVISIONS. Extensive studies by Hon. Leon David, Judge of the Superior Court and formerly City Attorney of Palo Alto and Assistant City Attorney of Los Angeles, support his conclusion that, so far as Los Angeles is concerned, "the day-to-day liabilities in this large city do not support the premise that tort immunities are needed to protect its financial structure." David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 14 (1959). See, to the same effect, Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROB. 363 (1942); Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1413-15 (1954); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

² A comprehensive collection of cases illustrating the trend to higher damage awards in personal injury cases is contained in 4 & 5 BELL, MODERN TRIALS *passim*. (1954). See also, Symposium, *Personal Injury Damage Award Trends*, 10 CLEV.-MAR. L. REV. 193-301 (1961); Comment, *Verdicts or Awards Exceeding \$50,000*, 26-27 NACCA L. J. 445 (1961); Spray, *Current Trends in Jury Verdicts*, 20 INS. COUNSEL J. 109 (1953); Bell, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

³ See CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT, MUNICIPAL LIABILITY INSURANCE 94-95, 104 (1953). Attempts to muzzle such insurance industry advertising by legal action have failed. *People ex rel. Barton v. American Auto. Ins. Co.*, 132 Cal. App.2d 317, 282 P.2d 559 (1955), cert. denied, 350 U.S. 886 (1955); *Hoffman v. Perrucci*, 222 F.2d 709 (3d Cir. 1955). The battle of words has not been entirely one-sided. See Lusby, *The Impact on the Casualty Insurance Industry of Recent Developments in the Personal Injury Litigation Field*, 27 INS. COUNSEL J. 23 (1960).

the risk being carried by insurers may well require increasingly higher premiums as policy limits are revised upwards in the interests of adequacy of protection. There is even a possibility that insurance against certain kinds of liabilities may become unavailable through ordinary commercial channels where the risks are too great or unpredictable, and for the same reason self-insurance may become unduly hazardous in such cases.⁴ These considerations suggest that attention be devoted to means for reducing the element of unpredictability of both liability and damages where torts of public entities are made actionable, and that the desirability of limitations on the amount of damages which are recoverable should be explored.

A second factor which requires evaluation in devising a system of public tort responsibility relates to the extreme variations which exist in the financial capacity of public entities to fund the potential liabilities. The governmental structure of California comprises a great variety of different types of public agencies, some (like the State and some of the larger cities, counties and districts) possessing enormous financial resources calculated in millions of dollars, others (including some counties and cities and many districts) being vested with only the most meager and marginal fiscal capacity.⁵ The population of California public agencies varies from many millions at one extreme to a few hundred at the other.⁶ Assessed valuations of taxable property within public entities likewise ranges from many millions in some cases to a few thousands in others.⁷ The total *annual* revenues of some public agencies are less than the *monthly* earnings of many private individuals of modest means.⁸ Nomenclature offers not even the slightest guide to

⁴ Considerable evidence was presented to an Assembly Interim Committee in 1953 indicating that liability insurance companies were becoming increasingly reluctant to underwrite municipal tort liabilities, and then only at sharply increasing premium rates, in view of recent tort trends. CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT (Section No. 1), MUNICIPAL LIABILITY INSURANCE *passim* (1953). The experience in the City of Piedmont is instructive. According to a letter from the mayor of this city, *id.* at 50-51, eleven representative underwriters in the casualty and liability field declined to bid on proposals made in 1952 for a comprehensive liability policy for the city, despite unusually favorable loss experience during the past three years; and although four bids were finally secured after two months' effort, the lowest was nearly two and one-half times higher than the previous premium for identical coverage.

⁵ An excellent recent survey is VIEG *et al.*, CALIFORNIA LOCAL FINANCE (1960). Detailed financial information is available in the Annual Reports of the State Controller. See, e.g., CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA, FISCAL YEAR 1959-60 (1960).

⁶ In 1958, of 351 cities in California, 149 (or 42 percent) had populations of less than 5000. Source: VIEG *et al.*, CALIFORNIA LOCAL FINANCE 39 (1960). The population of California's 58 counties, as declared by the Legislature on the basis of the 1960 federal census, ranges from 6,038,771 for Los Angeles to 397 for Alpine; and it is noteworthy that 17 counties had total populations of less than 20,000. CAL. GOVT. CODE §28020. The range of populations of special districts is equally extreme, as shown by the fact that there are two or more special districts (excluding school districts) in every county in the State. See CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5, at 3.

⁷ The total assessed valuation of taxable property within the Los Angeles County Flood Control District in 1959-60, for example, exceeded eight billion dollars (\$8,000,000,000); while the total assessed valuations of some special districts were less than \$100,000, and of many were less than \$500,000, during the same fiscal year. Source: CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5, *passim*.

⁸ The per capita personal income of California residents in 1958 was \$2,334.00, or slightly less than \$200 per month. VIEG *et al.*, CALIFORNIA LOCAL FINANCE 47 (1960). Examples of special districts with extremely small annual revenues during the same period include Eastern Alameda County Soil Conservation District (\$129.69), Atascadero (San Luis Obispo County) Garbage Disposal District (\$193.07), Lancaster Heights (Los Angeles County) Highway Lighting District (\$500.80), and North Mammoth (Mono County) Fire Protection District (\$786.35). CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5, at 193, 118, 147, 161.

financial ability; for some districts are far more affluent than many cities, while some cities have vastly greater capacity to respond in damages than many counties.⁹

Disparities of size, population, and general fiscal capacity, however, do not tell the whole story. Other important variables exist which also relate to fiscal responsibility. Not only are there extreme differences in total assessed valuations of taxable property in various public entities, but the tax base itself is not uniform. The power to tax or levy special assessments sometimes is extended by law to all property, sometimes only to land, and sometimes to land and improvements but not personality.¹⁰ Property taxes or assessments are the sole source of revenues of some entities, while others derive substantial revenues from fees and charges for services rendered, taxes other than property taxes (*e.g.*, sales and use taxes, business license taxes, etc.), subventions and grants from state or federal sources, and the proceeds of property rentals, concessions, royalties and franchise agreements.¹¹ Most public entities have power to borrow funds, usually as represented by general obligation or revenue bond issues, but some do not;¹² and even where borrow-

⁹ Data collected in VIEG *et al.*, CALIFORNIA LOCAL FINANCE 396-401 (1960), indicates that many cities operate on *annual* budgetary expenditures of less than \$50,000 for all costs of government, while some of the larger cities (*e.g.*, Los Angeles, over \$315 million; Oakland, over \$36 million; and San Diego, over \$41 million—all as of 1957) expend more than that in a single *day*. Many special districts also calculate their annual revenues in millions of dollars (*e.g.*, Los Angeles County Consolidated Fire Protection District, \$9.6 million; Northern San Diego County Hospital District, over \$1 million; Golden Gate Bridge and Highway District, \$5 million; West Basin (Los Angeles County) Municipal Water District, \$1.8 million), although many others, see note 8 *supra*, have extremely small revenues. CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5. County revenues show a similar variation, ranging from a low of less than \$50,000 for some of the smaller counties to a maximum of over \$500 million for Los Angeles County. VIEG *et al.*, CALIFORNIA LOCAL FINANCE 396-401 (1960).

¹⁰ *E.g.*, community services districts are authorized to levy taxes upon "all taxable property within the district," CAL. GOVT. CODE § 61755.5, unless the district was organized for the sole purpose of supplying irrigation water, in which case the levy is "upon the land only, disregarding improvements and personal property," CAL. GOVT. CODE § 61752. The tax base applicable to each special district in the State is listed in Table 16 in CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5, at 117-228.

¹¹ VIEG *et al.*, CALIFORNIA LOCAL FINANCE 150 (1960), reports that in 1957 only 46.1 percent of local governmental receipts for all local entities in the State came from property taxes, while 5.9 percent were derived from other taxes (including sales and business license taxes), 13.4 percent from nontax receipts, and 34.6 percent from grants-in-aid and subventions. The proportions of revenue of cities and counties derived from these sources were approximately in the same order of magnitude as for all entities, *id.* at 152, 154; but special districts were reported to obtain 56.5 percent of total revenues from property taxes (about 10 percent above the statewide average) and 38.6 percent from nontax revenues (about 25 percent above the statewide figure), with only 4.9 percent derived from grants-in-aid. *Id.* at 157. As between individual public entities, of course, there are extreme variations in each of the major sources of revenues. See CALIFORNIA STATE CONTROLLER, *op. cit. supra* note 5, Table 17, at 229-342.

¹² General obligation bonds have been the principal historical medium for public borrowings, see VIEG *et al.*, CALIFORNIA LOCAL FINANCE 228 (1960), but in recent years there has been a decided trend toward the use of revenue bonds, assisted in part by the liberalizing of the legal provisions governing such bonds. See LEB & SCOTT, FINANCING LOCAL PUBLIC WORKS 16-17 (1951). Illustrative statutes include CAL. GOVT. CODE §§ 54300-54700 (the Sanitation, Sewer, and Water Revenue Bond Law of 1941); CAL. H. & S. CODE §§ 4950-4997 (the Sewer Revenue Bond Law); CAL. STS. & HWYS. CODE §§ 35400-35431 (revenue bond provisions of the Parking District Law of 1951); Los Angeles Metropolitan Transit Authority Act, Cal. Stat. 1957, ch. 547, §§ 5.1-5.40, pp. 1624-1630, CAL. GEN. LAWS ANN. Act 4481, §§ 5.1-5.40 (Deering Supp. 1961) CAL. PUB. UTIL. CODE APP. 1, §§ 5.1-5.40 (West Supp. 1961). Other devices to facilitate borrowing for certain purposes are also available to some entities, such as tax anticipation warrants (see, *e.g.*, CAL. GOVT. CODE §§ 53840-53844), certificates of indebtedness (see, *e.g.*, CAL. GOVT. CODE §§ 53800-53814) and promissory notes (see, *e.g.*, CAL. GOVT. CODE §§ 53850-53855). On the other hand, some types of districts have no general borrowing authority whatever. Examples include Air Pollution Control Districts, CAL. H. & S. CODE §§ 24198-24341; Cemetery Districts, CAL. H. & S. CODE §§ 8890-9677; Garbage Disposal Districts, CAL. H. & S. CODE §§ 4100-4165.7; Highway Lighting Districts, CAL. STS. & HWYS. CODE §§ 19000-19312; and Police Protection Districts, CAL. H. & S. CODE §§ 20000-20352.

ing power is available, it may be limited to specific purposes and restricted in amount to some specified ratio of total assessed valuation.¹³ Where debt limitations of this type exist, it should be observed that any proposal to fund tort liabilities through a bond issue may be aborted by the debt limit or, if within the prescribed limit, may increase existing debt to the point that subsequent borrowings for other public purposes becomes either legally impermissible or fiscally impracticable under prevailing market conditions.¹⁴ Finally, substantial variations in taxing power exist between public entities as reflected in the differing tax limits imposed by statute.¹⁵ But, even assuming that no tax limit was applicable or that tort liabilities were declared by statute to be an exception thereto, strong practical differences in taxing power would continue to be felt, compounded of variations in economic resources, historic levels of tax rates, demographic elements, delinquency experience and political expediency.¹⁶ Factors such as these all tend to suggest the wisdom of developing methods of relieving public entities lacking adequate financial resources from all or part of the burden of tort liability (including the burden of funding such liability through insurance or otherwise).

A third complicating element which enters the picture at this point relates to the functional alternatives available to public entities to accomplish given objectives. If tortious injury results from a particular activity aimed at the accomplishment of a given public objective, the practical incidence of the liability may differ markedly depending upon the legal mechanism selected by the civic authorities to accomplish that objective. Under existing law, alternative modes of procedure are often available. If residents in an unincorporated community are desirous of securing more adequate police protection, for example, the county board of supervisors may respond to their appeal in one of several ways. Additional sheriff's deputies may be assigned to police patrol

¹³ Counties are restricted to issuance of bonds which do not exceed 5 percent of the assessed value of *taxable* property in the county, except for the purpose of "water conservation, flood control, irrigation, reclamation, or drainage," in which cases the bond limit is increased to 15 percent. CAL. GOVT. CODE § 29909. General law cities are forbidden to incur a bonded indebtedness for public improvements which exceeds 15 percent of the assessed value of *all real and personal property* in the city, while debt limits of charter cities fluctuate above and below this figure, with some municipal charters prescribing no limit at all. The limits on incurring of bonded indebtedness by districts vary considerably, but in general range between 5 percent and 20 percent of assessed valuation. See LEE & SCOTT, FINANCING LOCAL PUBLIC WORKS 14-17 (1951); CALIFORNIA TAXPAYERS ASSOCIATION, COMPARATIVE ANALYSIS OF SELECTED CALIFORNIA SPECIAL DISTRICT STATUTES (1950); CALIFORNIA DEPT. OF WATER RESOURCES, GENERAL COMPARISON OF CALIFORNIA WATER DISTRICT ACTS *passim* (1958). Some districts with borrowing capacity have no statutory limitations upon the extent of their indebtedness. See, e.g., CAL. WATER CODE §§ 35150-35155.1 (providing for general obligation bonds of California water districts, with no limit as to amount of indebtedness).

¹⁴ When the area which is responsible for the payment of principal and interest on bonded indebtedness is heavily weighted with such debt, a higher interest rate may be required to market the bonds in view of the greater danger of delinquency. Under some conditions of economic stress or inflation, the current interest rate may well exceed what is economically prudent as well as what is permissible in view of statutory limits on the interest rate at which bonds may be marketed. See, e.g., CAL. GOVT. CODE § 29916 (setting maximum interest rate of 6 percent on county bonds); CAL. GOVT. CODE § 43610 (maximum of 6 percent on municipal bonds); Sierra County Flood Control & Water Conservation District Act, Cal. Stat. 1959, ch. 2123, § 24, p. 4992, CAL. GEN. LAWS ANN. Act 7661, § 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 91-24 (West 1959) (maximum rate of 5 percent on district bonds).

¹⁵ See text at 212-13 *supra*, giving examples of tax ceilings ranging from one mill to one hundred mills for various types of special districts.

¹⁶ For an economic analysis of the problem, see VIEG *et al.*, CALIFORNIA LOCAL FINANCE 1-64 (1960).

in the area at general county expense. Or proceedings may be instituted for the creation of a county service area for the purpose of charging the additional expense to the benefited taxpayers.¹⁷ Possibly the formation of a police protection district will be sponsored;¹⁸ or, because other related needs appear also to exist, perhaps a community services district will be formed.¹⁹ If conditions are perceived to require it, a district with carefully tailored powers may be recommended for creation by special act of the Legislature.²⁰ Choices between practical alternatives of this sort are often available in a wide variety of circumstances and to a large number of public agencies.

It is readily apparent that the financial incidence of tort liability arising out of the particular activity (*e.g.*, police protection in the preceding illustration) will not be the same under each of the alternatives. If the objective is achieved through the services of existing officers and employees of the governing entity, that entity would necessarily bear the tort liabilities, if any, flowing therefrom. If a service area or special district is formed which constitutes a mere taxing or administrative subdivision of the entity, the tort consequences, under present law, at least, will still remain upon that entity.²¹ But if the problem is solved by creation of an independent public entity, under general law or by special statute, the incidence of liability shifts to the new body and the original entity which instituted the proceedings to meet the need is insulated from responsibility.

The possibility of results such as this point up the fact that the actual operating policies and local government may modify substantially the practical impact of the risk and fault theories of tort liability, as applied to public entities. To hold an independent district liable in tort for its employees' delicts would seem to be consistent with the policy of administering liability in accordance with fault while at the same time spreading the loss over the beneficiaries of the injury-producing enterprise. But what is to be said for the fact that liability is *not* imposed in that manner if the operating district (or other entity) is *not* fully independent, or if the same activity is engaged in for primarily local benefit but is administered simply as a phase of general county service? Then the liability rests upon the taxpayers of the larger entity, most of whom are *not* beneficiaries of the enterprise, and the concept of imposing liability in accordance with fault is extremely attenuated. On the other hand, the independent district may be financially incapable of adequately funding its potential tort liabilities in advance. Imposition of the full burden of tort liability upon it may thus prove to be a double source of injustice, once to the injured party who finds himself with a partially unenforceable judgment, and once to the district and its taxpayers who find that the burden may be unduly great in proportion to benefits realized and to the financial resources of the entity.

¹⁷ County service areas are expressly authorized to be established to provide "extended police protection." CAL. GOVT. CODE § 25210.4.

¹⁸ See CAL. H. & S. CODE §§ 20000-20352.

¹⁹ See CAL. GOVT. CODE §§ 61000-61934.

²⁰ See *e.g.*, the Embarcadero Municipal Improvement District Act, Cal. Stat. (1st Ex. Sess.) 1960, ch. 81, § 79, p. 447, authorizing the district to "acquire, construct, maintain and operate a police department."

²¹ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955).

Closely analogous considerations would also seem to be relevant in cases of torts arising in the performance of joint powers agreements, especially where the agreement establishes an agency to carry out its terms which is entirely separate and independent from any of the contracting entities and which has legal authority to incur liabilities separate from any of the contracting entities.²² Whether the torts of personnel employed by such independent joint powers agencies might under any circumstances be imputed to the parties to the agreement is still an open question; but to the extent that such agencies are assimilated to the legal position of independent political entities, the same general policy considerations suggested above would seem to be applicable.

In general, the preceding analysis emphasizes the advisability of seeking to strike an accommodation between the fault policy and the risk policy of tort law in a way consistent with the realities of governmental organization. What is needed, perhaps, is a basis for determining liability in accordance with the fault principle, but distributing the loss over the beneficiaries of the loss-producing activity only to an extent commensurate with financial capability, so that other significant and worthwhile governmental objectives are not unduly impeded thereby. In short, the interest in maintaining the effectiveness of existing and proven ways of administering complex governmental business may well justify the shifting of part of the losses resulting from certain phases of that business to other channels which are more capable of absorbing and distributing them equitably.

Before attempting to articulate policy criteria for the solution of the functional problems identified in the immediately preceding discussion, however, consideration should be given to various practical techniques which are available to help minimize adverse financial consequences. At least five classes of such techniques readily come to mind.

(1) *Insurance.* Although it is perhaps doubtful whether public entities may legally pay out of public funds premiums on insurance policies covering substantive risks for which there is no liability on the part of the entity or its personnel,²³ it is clear that purchase of liability insurance is a legally permissible use of public funds to protect against liabilities which do exist as well as against the expense of litigation of unfounded claims as to which the insured is immune.²⁴ Numerous statutes in California either authorize or require such insurance coverage.

One form which such statutes often take is authorization for public agencies to purchase insurance protection against *personal* liability of

²²The Joint Exercise of Powers Act authorizes the contracting entities to create a "commission or board" to execute the agreement, and to authorize it in its own name to "incur debts, liabilities or obligations which do not constitute the debt, liability or obligation of any of the parties to the agreement," and to "sue and be sued in its own name." CAL. GOVT. CODE §§ 6506, 6508.

²³*People v. Standard Acc. Ins. Co.*, 42 Cal. App.2d 409, 108 P.2d 923 (1941). See also, *Burns v. American Cas. Co.*, 127 Cal. App.2d 198, 273 P.2d 605 (1954); *Frisbie v. O'Connor*, 119 Cal. App. 601, 7 P.2d 316 (1932). *But cf. Jurd v. Pacific Indem. Co.*, 57 Cal.2d 699, 21 Cal. Rptr. 793, 371 P.2d 569 (1962) (holding insurance carrier liable on school district policy covering school employee as an "additional insured" when operating district vehicle with permission but not in course of employment).

²⁴*Burns v. American Cas. Co.*, 127 Cal. App.2d 198, 273 P.2d 605 (1954); *People v. Standard Acc. Ins. Co.*, 42 Cal. App.2d 409, 108 P.2d 923 (1941).

their officers and employees, the principal example being Section 1956 of the Government Code. This section authorizes every conceivable type of public entity, at public expense, to insure its personnel against liability for negligence or carelessness, and against liability resulting from false arrest and false imprisonment. Section 1956, however, does not authorize insurance protection against intentional torts *other than* false arrest and false imprisonment.²⁵ Thus, for example, a city park director who is required by the terms of his employment to maintain order in a city park, and who acts in good faith but with excessive force in removing a rowdy from the park area, would not be protected by the insurance authorized by Section 1956.²⁶ Section 1044 of the Education Code, which applies only to school districts, is another instructive statute of the same general type. Section 1044, however, makes it mandatory for every school district governing board to insure its officers and employees against personal liability for negligence, and permissive to insure them against personal liability "for any act or omission performed in the line of official duty." The quoted language from Section 1044 is clearly broad enough to cover any intentional tort. The deviations between these two cited sections are matched in other statutory provisions, some of which permit insurance coverage of an extremely broad type,²⁷ others of which are limited to relatively narrowly defined types of personal liability of public personnel.²⁸

A second form in which insurance authorizations are found in the statute books relates to insurance against tort liability of the entity itself. The principal authority for local public entities to purchase insurance against their own tort liability is Section 1956.5 of the Government Code.²⁹ This section provides local public entities with broad authority to insure against any tort liability, both negligent and intentional. Other statutes that apply to particular types of local public entities or to particular kinds of activities are somewhat inconsistent with this general provision. Section 1044 of the Education Code, for

²⁵ See 29 OPS. CAL. ATTY. GEN. 65 (1957).

²⁶ Although not authorized to insure the employee against personal liability arising from intentional torts, the city would be required by Section 2001 of the Government Code to provide counsel and pay the other costs of defending an action brought against him. Section 2001 requires the public entity to provide for the defense of an action against an employee for "any damages caused by any act or failure to act by such employee occurring during the course of his service or employment." The cost of the defense can be recovered from the employee only if he "acted or failed to act because of bad faith or malice." CAL. GOVT. CODE § 2001. See 39 ADV. OPS. CAL. ATTY. GEN. 71 (1962).

²⁷ *E.g.*, CAL. WATER CODE § 22732 (authorizing an irrigation district to "pay for insurance to cover any liability of . . . its officers, employees, or any of them"); CAL. WATER CODE § 35757 (*accord*); Lower San Joaquin Levee District Act, Cal. Stat. 1955, ch. 1075, § 12, as added by Cal. Stat. (1st Ex. Sess.) 1958, ch. 32, p. 227, CAL. GEN. LAWS ANN. Act 4298, § 12 (Deering Supp. 1961), CAL. WATER CODE APP. § 75-12 (West Supp. 1961) (*accord*). See also Bethel Island Municipal Improvement District Act, Cal. Stat. (1st Ex. Sess.) 1960, ch. 22, § 95, p. 334 (authorizing the district to "take out insurance in the form and in the amounts as the board may deem necessary for the adequate protection of the district's . . . officers [and] employees").

²⁸ *E.g.*, CAL. GOVT. CODE § 1231 (authorizing local governmental entities to purchase malpractice liability insurance protection for medical and dental personnel). This section in terms does not restrict such insurance coverage to malpractice claims arising out of negligence in the course of official duty, but taken literally would seem to authorize such coverage even as to malpractice which is outside the scope of official duty.

²⁹ This section provides: "A county, city, district, or any other public agency or public corporation may insure itself against any liability, other than a liability which may be insured against pursuant to Division 4 of the Labor Code, either by self insurance or in any insurer authorized to transact such insurance in the State. The premium for such insurance is a proper charge against such county, city, district or other public agency or public corporation."

example, requires school districts to carry insurance against liability for negligence (but is silent on the question whether a school district may insure itself against liability for intentional torts of its personnel).³⁰ Section 53056 of the Government Code authorizes cities, counties and school districts to insure themselves against liability arising from a dangerous or defective condition of public property. Section 17003 of the Vehicle Code authorizes public agencies to insure themselves against liability arising out of the negligent (but not the intentionally tortious) operation of motor vehicles by their personnel in the course of employment.³¹ In addition, certain other local public entities are authorized to purchase insurance against liability (usually restricted to negligence cases) in *specific* types of situations.³² The extent to which the broad authority given to local public entities by Section 1956.5 of the Government Code may be limited by the so-called "special" insurance statutes like those mentioned above is not clear. The State, however, appears to have ample power to insure against any form of tort liability, negligent or intentional.³³

The continued existence of numerous special insurance statutes in the face of the broad authority to insure granted by Government Code Sections 1956 and 1956.5 indicates the lack of a uniform legislative policy with respect to authorizing public entities to carry insurance against tort liability. It should also be noted that in *some* of the statutes which do expressly authorize or require insurance to be purchased from public funds, it is explicitly provided that such protection may be in the form of a self-insurance system.³⁴ In most of the above-cited statutes, however, with the notable exception of Section 1956.5, the distinction between insurance purchased from private carriers and self-insurance

³⁰ School districts also are authorized or directed expressly to insure against liabilities arising out of courses in automobile driving (CAL. EDUC. CODE § 8112), operation of child care centers (CAL. EDUC. CODE § 16638), operation of mentally retarded and physically handicapped child care centers (CAL. EDUC. CODE § 16645.25) and activities financed under the provisions of the Junior College Revenue Bond Act of 1961 (CAL. EDUC. CODE § 22254). It is worthy of note that the language of each of these cited provisions is not limited to liabilities founded on negligence, as is the case with the general authorization found in Education Code Section 1044, but is broad enough to apparently cover intentional torts as well.

³¹ *But cf.* Jurd v. Pacific Indem. Co., cited *supra* note 23, where the Supreme Court, without considering Vehicle Code Section 17003, impliedly approved the inclusion in a school district automobile liability policy of an omnibus coverage clause pursuant to Vehicle Code Section 16451 by holding the carrier liable thereunder for a tort judgment against a school district employee operating a district vehicle not in the course of employment. See also Section 14455.3 of the Health and Safety Code, which expressly permits county fire protection districts to operate ambulances and to "take out liability and other insurance therefor." The quoted authorization appears to be broad enough to cover intentional tort liabilities, unlike the language of Vehicle Code Section 17003, discussed in the text.

³² See CAL. GOVT. CODE § 53057 (authority to purchase insurance against damages resulting from negligence of weed abatement crews in controlling burning operations); CAL. GOVT. CODE § 54462 (authority to insure operations of any enterprise financed under Sanitation, Sewer, and Water Revenue Bond Law of 1941); CAL. STS. & HWYS. CODE § 33969 (authority to insure against personal injury and property damage in connection with parking projects under the Parking Revenue Bond Law of 1949).

³³ See CAL. GOVT. CODE § 624. *Cf.* more explicit provisions of CAL. PUB. RES. CODE § 4004 (authorizing State to insure against liability under any "save harmless" clause agreed to in contracts for use of private facilities by State Forester in providing for communications systems for forest firefighting purposes); CAL. HARB. & NAV. CODE § 3354 (authorizing Board of State Harbor Commissioners to insure against public liability and property damage arising from activities under the jurisdiction of that board in administering control over San Francisco harbor).

³⁴ See CAL. GOVT. CODE § 1956 (authorizing public entities to insure their officers and employees against personal liability "either by self-insurance, or in any insurer authorized to transact such insurance in the State"); CAL. EDUC. CODE § 1045 (authorizing certain school districts to self-insure either in whole or in part under the insurance requirements of CAL. EDUC. CODE § 1044).

(either in whole or in part) is not made, thereby possibly conveying an implication that self-insurance is not permissible. Flexibility with respect to insurance methods would seem to be highly desirable in view of the tremendous range of sizes and financial resources which characterize public entities in California. Full coverage insurance may be practically indispensable for the continued economic stability of many small entities if tort liability of such entities is enlarged, while many large and fiscally powerful entities may determine that adequate protection at the lowest possible cost could be procured through a program of self-insurance or a combination of self-insurance plus an excess coverage policy purchased from a commercial underwriter.³⁵

The obvious utility of insurance as a device for mitigating the adverse impact of tort liability warrants consideration of legislation to accomplish the following purposes:

(a) Express authority for all types of public entities to purchase insurance against personal liability of their officers, employees and agents for *all* types of torts in the course and scope of their public employment, leaving to the sound discretion of the appropriate governing body the decision to what extent such insurance should be purchased. Such authority is presently enjoyed by only a few public entities.

(b) Express authority for *all* types of public entities to insure themselves against liability for *all* types of torts for which such entities may be liable under the law. Such authority is now expressly granted as to all entities for all types of torts by Section 1956.5. The potential conflict between this broad authority and the "special" insurance statutes should, however, be removed. Insurance for public entities is necessary even where insurance against personal liability of officers, employees and agents is already held; for there may be instances (exemplified in *Lipman* for example) where official immunity is not a defense against entity liability. Moreover, the injured person may be unable to identify the particular tortfeasor employee, or serve him even if his identity is known; and again, the plaintiff may choose (or possibly may be compelled, because of failure to comply with an employee claim statute) to sue the employer without joining the insured tortfeasor employee as a defendant.

(c) Express authority for public entities to insure either by purchasing commercial liability insurance from a private carrier, or by adopting a program of self-insurance through the establishment of financial reserves, or by any combination of the two methods. This, too, is presently afforded by Section 1956.5, but in order that self-insurance

³⁵ The practical considerations which may influence the public entity's determination whether to self-insure municipal tort liabilities are well set forth by Cockins & Hard, Santa Monica Chose Partial Self-Insurance (undated mimeographed statement, circa 1956, by City Attorney and City Controller of the City of Santa Monica). See also, CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT, MUNICIPAL LIABILITY INSURANCE 57-61 (1953); David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 45-47 (1959). One of the significant factors that should be considered, of course, is the fact that an entity which self-insures, in whole or in part, will necessarily have to provide personnel and administrative procedures for investigating and processing claims, whereas this form of service is ordinarily purchased from and supplied by the insurance company along with protection when a full coverage liability insurance policy is taken out.

programs be soundly handled, standards should be declared by law to govern the operation of such programs. One possible device that might be used would prescribe a minimum amount to which the self-insurance fund must adhere, with a duty in some impartial officer, at the entity's expense, to purchase coverage where the minimum is not adhered to. Another, based upon the established pattern presently in effect as to school districts,³⁶ would establish qualifications of eligibility to self-insure expressed in terms of assessed valuation, size of annual budget, population or other factors relevant to fiscal responsibility. A suggestion might also be borrowed from the Workmen's Compensation Act, which requires self-insuring employers (other than public entities) to establish their financial responsibility to the satisfaction of an independent state agency.³⁷

(d) Helpful flexibility might also be provided by express authority for two or more public entities, by mutual agreement, to pool their insurance needs and purchase the necessary protection, either in a commercial or self-insurance program, on a cooperative basis, thereby securing the cost advantages (if any are obtainable) which would flow from broad unitary coverage as compared with individual separate plans.

With statutory improvements along the indicated lines, there can be little doubt that insurance could provide a significant means for alleviating the potentially disruptive consequences of enlarged governmental tort liability.

(2) **Official bonds.** Insurance against tort liability should not be confused with official bonds. The insurance policy essentially is an agreement under which the insurer obligates itself to pay any losses incurred by the insured and covered by the terms of the agreement, with no right to recover any part thereof from the insured. In short, the insurance policy protects the *insured* against loss. The official bond, on the other hand, is an agreement designed not for the protection of the bonded official but for the protection of the *obligees* named (either expressly or by implication of law) therein, under which the bonding company pays the obligee for losses sustained as a result of derelictions by the principal on the bond (*i.e.*, the officer who is bonded). The bonding company then has a right to recovery over from the principal, who is ultimately financially responsible.

It is apparent that official bonds may thus provide a measure of protection to public entities against unfavorable fiscal consequences of expansion of their tort liability. If the injured plaintiff prosecutes his claim directly against the culpable officer, the surety on the latter's official bond would satisfy the judgment (assuming the loss is one covered by the bond, and that it inures to the plaintiff's benefit) and thereby protect the public treasury from any loss. If the plaintiff elects to sue the public entity, on the other hand, any judgment founded on a delict embraced by the culpable official's bond would still be satisfied by the surety company (assuming that the bond inures to the entity's benefit), thereby again protecting the public treasury. In both cases,

³⁶ Education Code Section 1045 authorizes self-insurance, in whole or in part, against tort liability only with respect to school districts "situated within or partly within cities having a population of more than 500,000."

³⁷ See CAL. LABOR CODE §§ 3700-3703.

however, the surety would have a right of action against the officer for reimbursement.

The most significant California statutory provision pertaining to the role of official bonds in relation to tort liability is Section 1550 of the Government Code, which provides:

Every official bond, given pursuant to law and executed by any officer of the State, of any county or any subdivision thereof, or of any city is in force and obligatory upon the principal and sureties therein to and for:

- (a) The State of California, or such municipal corporation;
- (b) The use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity.

Any person so injured or aggrieved may bring suit on the bond in his own name, without an assignment thereof.

A companion provision (Section 1553 of the Government Code) provides that the obligation of the bond is not made void on the first recovery of a judgment thereon, but that successive suits may be brought from time to time until the "whole penalty of the bond is exhausted."

Under settled principles of interpretation, these statutory provisions are deemed incorporated into and made a part of every official bond to which they are applicable, whether mentioned therein or not.¹ The language of Section 1550, it will be noted, is broad enough (*i.e.*, "wrongful act or default") to authorize an action on the official bond in the case of any type of actionable tort, negligent or intentional.² For reasons which are difficult to ascertain, there have apparently been few suits on such bonds in tort cases, possibly because the amount of the obligation of such bonds is often relatively low, but possibly even more because attorneys as a whole are simply unfamiliar with the fact that such a suit may be brought.³

Section 1550, however, poses a number of interpretative problems, particularly with respect to its scope of application.

First, Section 1550 is limited to official bonds of officers of "the State, of any county or any subdivision thereof, or of any city." (Emphasis supplied.) There are, of course, numerous statutes requiring the filing of official bonds in varying amounts by state,⁴ county⁵ and mu-

¹ County of Placer v. Aetna Cas. & Sur. Co., 50 Cal.2d 182, 323 P.2d 753 (1958); Wood v. Lehne, 30 Cal. App.2d 222, 85 P.2d 910 (1939).

² See, *e.g.*, Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943) (wrongful death resulting from malicious physical beating); Miller v. Turner, 49 Cal. App. 653, 194 Pac. 66 (1920) (false imprisonment).

³ See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. Rev. 1, 37 (1959), suggesting that a need exists to educate lawyers as to the availability of the suit on the official bond as a remedy where governmental immunity bars relief against the public agency and the public official is personally judgment-proof. "Few litigants sue on official bonds in California." *Id.* at 53.

⁴ See CAL. GOV'T. CODE §§ 12301 (State Treasurer's bond in mandatory sum of \$100,000), 12401 (State Controller—\$50,000), 12802 (administrators of designated state agencies—\$50,000), 13003 (State Director of Finance—\$100,000), and 14003 (State Director of Public Works—\$25,000). Some of the bond limits are much more modest. CAL. GOV'T. CODE §§ 13008, 13401 (requiring \$5,000 minimum official bond of accountants in State Department of Finance and of state warehouse and storage depot supervisors, respectively).

⁵ Government Code Section 24150 requires the amount of the official bond of the principal officers of counties to be fixed by the county board of supervisors.

nicipal⁶ officers, and there is also general permissive authority for "the appointing power" to require each officer, agent or employee employed by it to give an official bond in an amount to be fixed by such employing entity.⁷ Another general statutory provision provides that the premium or charge demanded by surety companies for official bonds "shall be paid" by the public entity.⁸

The principal difficulty with the foregoing provisions lies in the fact that the crucial provision of Section 1550, which authorizes suit on the bond by any private person injured by the bonded official, does not cover all types of entities. Home rule charter cities, for example, have been held not within the scope of Section 1550 on the theory that the bonding of public officials of cities is a "municipal affair" with respect to which charter cities are independent of state law.⁹ Special districts likewise seem not to be covered by Section 1550; indeed, legislative recognition that this is the case may be inferred from the fact that most of the individual official bond provisions found in special district statutes (not all of which have such provisions) are inconsistent with Section 1550, some being so broadly worded as to permit the governing body to prescribe the terms and conditions of such official bonds without reference to Section 1550 or any other statutory limitation,¹⁰ others explicitly declaring that the bond shall be given to or inure to the benefit of the special district (thereby impliedly precluding members of the public from being obligees),¹¹ and still others explicitly restricting liability upon the official bond to "wilful violation" of official

⁶ Ordinarily the city council will fix the amount of the official bond required of municipal officers. See, e.g., CAL. GOVT. CODE §§ 36518, 37209. *But cf.* CAL. GOVT. CODE § 38607 (setting bond for fire chief at \$1,000).

⁷ CAL. GOVT. CODE §§ 1480-1481. See also, CAL. GOVT. CODE §§ 11156 (authorizing the head of each department in state government to require subordinates in that department to be bonded in such sum as he determines) and 13075 (authorizing the Director of Finance to require an official bond in such sum as he fixes of any person in charge of, or who "handles or has access to" any state property).

⁸ CAL. GOVT. CODE § 1651. Under this provision, the premiums on bonds of personnel of judicial districts is required to be paid by the county in which the judicial district is situated. A companion provision (CAL. GOVT. CODE § 1652) provides that no premium paid by the State, a county, city or district upon an official bond shall exceed one-half of 1 percent per annum on the amount of the bond.

⁹ *Sunter v. Fraser*, 194 Cal. 337, 228 Pac. 660 (1924). See also, *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943); *Wood v. Lehne*, 30 Cal. App.2d 222, 85 P.2d 910 (1939).

¹⁰ See, e.g., CAL. GOVT. CODE §§ 61245, 61737.04 (officers of community services districts); CAL. PUB. UTIL. CODE § 22443 (officers and employees of airport utility districts); CAL. PUB. UTIL. CODE § 11936 (appointive officers of municipal utility districts); CAL. STS. & HWYS. CODE § 25101 (treasurers of joint highway districts); CAL. WATER CODE § 30561 (officers of county water districts).

¹¹ See, e.g., CAL. HARB. & NAV. CODE § 7073 (requiring officers and employees of small craft harbor districts to give a bond "to the district"); CAL. PUB. RES. CODE § 10409 (bonds of resort district officers "shall be made payable to the district"); CAL. STS. & HWYS. CODE § 26084 (bonds of officers of boulevard districts shall be given "to the district"); CAL. STS. & HWYS. CODE § 27186 (bonds of officials of bridge and highway districts "shall inure to the benefit of the district . . . as well as the officer under whom the employee serves"); CAL. WATER CODE § 30561 (county water district bonds to be given "to the district"); *Los Angeles Metropolitan Transit Authority Act*, Cal. Stat. 1957, ch. 547, § 3.7, p. 1616, CAL. GEN. LAWS ANN. Act 4481, § 3.7 (Deering Supp. 1961) CAL. PUB. UTIL. CODE APP. 1, § 3.7 (West Supp. 1961) (requiring official bonds to be "payable to the authority"). It is clear from the cases that, in the absence of a statute to the contrary, there is no cause of action available to an injured plaintiff upon the official bond except against the named obligee therein. *Sunter v. Fraser*, 194 Cal. 337, 228 Pac. 660 (1924). See also, *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943). Of course, Government Code Section 1550 (formerly CAL. POL. CODE § 961), being deemed a provision of every official bond to which it is in terms applicable, in effect makes any person injured by an official's torts an obligee under the tortfeasor's bond. *Fernelius v. Pierce*, *supra*; *Wood v. Lehne*, 30 Cal. App.2d 222, 85 P.2d 910 (1939); *Miller v. Turner*, 49 Cal. App. 653, 194 Pac. 66 (1920). Section 1550, however, does not appear to be applicable to the official bonds written under the special district provisions cited, *supra*, in this note.

duty.¹² Even in the few instances in which special district statutes expressly direct that official bonds thereunder be in "the form prescribed for county official bonds,"¹³ the advantages of suit on the bond under Section 1550 are still denied the injured third party, for it has been held that the designation of the obligee in whose favor the bond runs is not a matter of "form."¹⁴

There is, perhaps, a possibility that *some* special districts might be within the ambit of Section 1550 to the extent that they can be regarded as county "subdivisions," as referred to in the ambiguous statutory phrase, "county or *any subdivision* thereof." This clause, however, appears to be more apt, and hence probably was intended, in Section 1550, as a succinct description of the nonindependent taxing or administrative subdivisions of counties to which reference has been made at an earlier point in the present study.¹⁵ In any event, even giving to this vague expression its maximum possible significance, it is clear that there are numerous types of public entities which could not reasonably be regarded as "subdivisions" of a county in any sense of the word.¹⁶

A second difficulty with Section 1550 arises from its use of the words, "official" and "officer." These terms have traditionally been employed in contradistinction to the terms "employee" and "agent"; and the traditional distinction is underscored by the fact that in the companion Section 1480 of the Government Code, which grants permissive authority for public entities to require bonds of public personnel who are not required by statute to give them, the Legislature very studiously distinguished between the terms, "officer," "agent" and "employee," as well as between the terms, "official bond" and "other form of individual bond." The cases intimate that where a statutory right of action is given upon the bond of an "officer," such right is ordinarily deemed to be impliedly withheld so far as the torts of subordinate public employees are concerned.¹⁷ Accordingly, Section 1550 may be deficient in scope with respect to the categories of personnel, as well as with respect to the types of entities, to which it is applicable.¹⁸

¹² See, e.g., CAL. PUB. RES. CODE § 10410 (official bonds of personnel of resort districts); CAL. WATER CODE § 21146 (official bonds of officers of irrigation districts). By way of contrast, it will be recalled that Section 1550, quoted in the text at 298 *supra*, authorized liability on the bond for any "wrongful act or default" of the bonded official in his official capacity.

¹³ See, e.g., CAL. PUB. RES. CODE §§ 9167-9169 (bonds of officers of soil conservation districts); CAL. PUB. UTIL. CODE §§ 15968-15969 (bonds for directors of public utility districts); CAL. WATER CODE § 21143 (bonds of irrigation district officers).

¹⁴ Municipal Bond Co. v. City of Riverside, 138 Cal. App. 267, 32 P.2d 661 (1934), cited with approval but distinguished in *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943).

¹⁵ See text at 214-17 *supra*.

¹⁶ E.g., special districts which comprise territory located in several counties, such as joint highway districts (CAL. STRS. & HWYS. CODE § 24025) and metropolitan water districts (Metropolitan Water District Act, Cal. Stat. 1927, ch. 429, p. 695, CAL. GEN. LAWS ANN. Act 9129 (Deering Supp. 1961), CAL. WATER CODE APP. § 35-1 *et seq.* (West 1956)), or multi-county special law districts such as San Francisco Bay Area Rapid Transit District (CAL. PUB. UTIL. CODE § 23500 *et seq.*) and the Lassen-Modoc County Flood Control & Water Conservation District (Cal. Stat. 1959, ch. 2127, p. 5009, CAL. GEN. LAWS ANN. Act 4200 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 92-1 *et seq.* (West 1959)) would not appear to fit the designation as "subdivisions" of the respective counties in which they are partially situated. It is also doubtful whether a special district which comprises all of the territory of a county, as do many special act flood control districts and county water agencies, would ordinarily be deemed a "subdivision" thereof.

¹⁷ *Lorah v. Biscailuz*, 12 Cal. App.2d 100, 54 P.2d 1125 (1936).

¹⁸ In *Lorah v. Biscailuz*, *supra* note 17, the court held that since Section 1550 (then CAL. POL. CODE § 961) was restricted in terms to torts of officers, a person injured by a deputy of a bonded officer was not authorized to bring an action on

The use of official bonds which inure to the benefit of the public should be carefully evaluated in connection with the general policy considerations inherent in the governmental tort liability problem. If it is determined, as a matter of sound policy, that public officers and employees generally should *not* be ultimately financially responsible for their good faith torts,¹⁹ then it would follow that they should not be *bonded* with respect to such torts but instead should be *insured* against personal liability thereon. Similarly, if it is determined that public personnel generally should be ultimately financially responsible for their torts which are characterized by malice, corruption, fraud or dishonesty,²⁰ the official bond technique would appear to be a satisfactory device for protecting the public treasury against the direct impact of such torts. Statutory changes to accomplish these objectives, however, would be necessary in view of the inadequacy and non-uniformity of existing law. In order to give maximum opportunity for local officials to utilize this device, moreover, the scope of Section 1550 of the Government Code should be expanded to cover all types of public entities²¹ and all levels of public personnel, while at the same

his bond. This decision was expressly disapproved on this point in the later case of *Union Bank & Trust Co. v. County of Los Angeles*, 11 Cal.2d 675, 81 P.2d 919 (1938), where the Supreme Court pointed out that Section 959 of the Political Code (which was neither cited nor discussed in the *Lorah* case) expressly declared the principal and sureties on every official bond to be bound thereby for breaches not only by the bonded officer but also for breaches committed or suffered by "his deputy, or clerk." Section 959 of the Political Code was subsequently recodified as Section 1504 of the Government Code; and in 1955, Section 1504 was amended (Cal. Stat. 1955, ch. 390, § 1, p. 846) to provide, as an exception to the general rule therein declared, that no city or county officer on a fixed salary shall be personally liable for the negligent acts or omissions of a civil service employee or deputies serving under him unless the officer was himself negligent in selection or supervision of the subordinate, or was negligent in failing to suspend or discharge him after receiving notice of his incompetency or state inefficiency. In 1957, a similar amendment granted a corollary immunity to state officers. Cal. Stat. 1957, ch. 1642, § 2, p. 3012. Since the introductory words of Section 1504 continue to make the bond obligatory on both "the principal and sureties therein," it follows that the exception, where applicable, necessarily exonerates the sureties too. It seems apparent that the purpose behind these two amendments was to overrule the *Union Bank* case and restore the *Lorah* rule, in part at least; and with the prevalence of civil service systems today, it appears that a faithful performance bond executed by an officer of the State, or of a city or county, ordinarily will not inure to the benefit of an injured member of the public where the negligent act or omission is attributable to a deputy or employee serving under such officer. Such bond, however, will provide a basis of action if (a) the officer himself was negligent in the selection, supervision or failure to discharge the culpable subordinate, or (b) the deputy or employee is not a civil service worker, or one whose appointment was approved by the local governing body, or (c) the tort of the deputy was not a "negligent act or omission" within the exception created by Government Code Section 1504, but was an intentional tort and hence actionable on the bond as a form of "wrongful act or default" referred to in Government Code Section 1550, thereby constituting a breach of condition by a deputy which, under the original language of Government Code Section 1504, constitutes a liability of the bonded officer and his sureties. The policy reasons why the exception embodied in Section 1504 was limited to negligence are obscure; but, in any event, the superior officer usually can obtain protection against intentional torts of his deputies and other subordinates by requiring that they also be bonded. See note 7 *supra*, and accompanying text.

¹⁹ See suggestion in the text to this effect at 255-56 *supra*.

²⁰ See suggestion in the text to this effect at 258-60 *supra*.

²¹ It is recognized that statutory provisions of the type suggested in the text, *supra*, could not constitutionally affect the "home rule" powers of charter cities relating to official bonds under the views expressed in the cases cited, *supra* note 9. There is some room to doubt whether the matter of official bonds would today be deemed strictly a "municipal affair," especially if the suggested statutory provisions modifying the rules applicable to such bonds were formulated as part of a comprehensive legislative program for regulating the problem of governmental tort liability. See, *e.g.*, *Wilson v. Beville*, 47 Cal.2d 852, 306 P.2d 789 (1957) (holding that a "home rule" city charter was not applicable to an inverse condemnation claim, since the matter was one of statewide concern with respect to which the Legislature had fully occupied the field). The only way to clarify the question, of course, in the absence of intervening judicial decisions squarely in point, would be the adoption of a constitutional amendment.

time it is restricted to only those types of tortious conduct in which ultimate financial responsibility is intended to be imposed upon the officer or employee personally.

(3) **Instalment payment of judgments.** The practical fiscal impact of a large tort judgment upon a small public entity with a very modest tax and revenue base may be rendered more tolerable by authorizing the judgment, under stated circumstances, to be paid in instalments over a term of years. Three statutes of this type already exist in California law.

Sections 50170-50175 of the Government Code authorize cities and counties to spread the payment of judgments which have become final against such entities over a period of up to ten years. All such judgments are required to be reported to the auditor and legislative body of the city or county at least 15 days before a tax levy is made (Section 50170), and the levy is then required to contain a rate applicable to their payment (Section 50171). Instead of providing for a rate sufficient to satisfy all such final judgments in full, the legislative body is authorized to provide in the tax levy for paying at least 10 percent of the total amount, with a similar percentage being provided in the levies for successive years until the whole amount is paid (Section 50173). Each judgment creditor is then entitled to be paid annually the percentage of his unpaid judgment which equals the percentage fixed in the rate for that year (Section 50174).

Water Code Sections 31091-31096, enacted in 1961, authorize county water districts to spread the payment of final judgments over a period not exceeding ten years. The authority provided in these sections is almost identical to the authority granted to cities and counties by Government Code Sections 50170-50175, discussed above.

Section 904 of the Education Code provides a similar authorization for school districts to satisfy judgments in instalments. This section, however, restricts the school district to a maximum of three years in which to make instalment payments, and requires the governing board of the district to determine that payment in full in one year would create an "undue hardship," as a condition precedent to employment of the instalment device.

Authority to spread the payment of a tort judgment over several years undoubtedly should help to reduce the disruption to fiscal planning which a large judgment of unanticipated proportions might otherwise bring.²² The delay in receiving payment, however, would not unduly harm the injured judgment creditor. As Judge Leon David has pointed out:

Such instalment judgments carry the legal rate or other specified rate of interest, and the needy claimant may discount them for ready cash. The annual tax necessary to pay the instalment and interest may be compelled by mandamus.²³

Under present law, however, authority for payment of judgments over a period of years is confined to cities, counties, school districts

²² David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. Rev. 1, 45 (1959), stating that: "Under a ten or fifteen year payment plan, there are few judgments that could be thought ruinous."

²³ David, *loc. cit. supra* note 22.

and county water districts. It would seem to be appropriate to expand the scope of the existing statutes to all types of public entities (at least to local public entities); to provide for adequate flexibility by allowing a reasonably long period of years over which payments could be spread (possibly 10 or 15); and to provide some assurance as to the availability of a market for sale or discount of such judgments by making them legal investments for trustees and fiduciaries to the same extent as bonds or other obligations of the public entity named as the judgment debtor therein.

(4) **Financing tort liabilities through bond issue or other evidence of indebtedness.** When the amount of liability is too great to be conveniently handled through other means, it may be desirable to vest in public entities authority to issue and sell general obligation bonds to fund the debt. Sections 43720-43747 of the Government Code, for example, expressly authorize cities to fund such liabilities by issuance of bonds with a maximum duration of 40 years and a maximum interest rate of 6 percent. This authority was employed to good effect by the City of Los Angeles, for example, in funding the multi-million dollar liabilities resulting from the bursting of the St. Francis Dam several decades ago.²⁴ Similar authority, it would seem, should be extended to other public entities, possibly restricted to those which already are vested with power to issue and sell bonds for other purposes.

The sale of general obligation bonds, however, is not the only method for borrowing funds which is presently contemplated by law. The use of promissory notes and certificates of indebtedness for limited purposes has been authorized in a number of special district statutes enacted in recent years.²⁵ General enabling legislation would seem to be desirable under which tort liabilities could be readily funded through issuance of negotiable evidences of indebtedness patterned after statutes of this type.

(5) **Reduction of the risk by controlling or shifting the damages.** Several possibilities for reducing the potential amount of tort liability are deserving of consideration as means for protecting governmental entities against unduly burdensome financial stress.

²⁴ David, *op. cit. supra* note 22, at 14 n.25, indicating that nearly six million dollars in liabilities were financed in this manner.

²⁵ General authorization to "borrow money with repayment to commence at a future date from revenues of the agency" is found in a number of special district acts. See, e.g., Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 23.5, p. 3998, CAL. GEN. LAWS ANN. Act 270, § 23.5 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-23.5 (West Supp. 1961); Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 4.13, p. 5066, CAL. GEN. LAWS ANN. Act 276, § 4.13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-4.13 (West 1959); Kern County Water Agency Act, Cal. Stat. 1961, ch. 1003, § 4.13, p. 2657, CAL. GEN. LAWS ANN. Act 9098, § 4.13 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 99-4.13 (West Supp. 1961); Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, § 22, p. 5037, CAL. GEN. LAWS ANN. Act 9380, § 22 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 93-22 (West 1959). More explicit provisions for short-term borrowing on promissory notes is contained in other legislation. See CAL. GOVT. CODE §§ 61742-61749 (short-term borrowing of community services districts on notes with 5-year maximum maturity and at maximum interest rate of 6 percent, total amount of notes issuable in any one fiscal year being limited to 1 percent of assessed valuation of taxable property in district); CAL. PUB. UTIL. CODE §§ 25841-25844 (*semble*, transit districts); CAL. PUB. UTIL. CODE §§ 29230-29234 (San Francisco Bay Area Rapid Transit District); Mojave Water Agency Law, Cal. Stat. 1959, ch. 2146, § 17.5, p. 5136, CAL. GEN. LAWS ANN. Act 9095, § 17.5 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 97-17.5 (West 1959).

(a) A statutory limitation upon the extent of damages which are recoverable against a public entity might remove a considerable element of financial uncertainty, especially in personal injury cases. Two general approaches may be suggested. The first, which is already represented in at least one California statute (*i.e.*, Penal Code Sections 4900-4906, authorizing payment of compensation not to exceed \$5000 to persons erroneously convicted of felonies) and has been adopted in several other states,²⁶ would establish fixed dollar amounts as the maximum damages for which public entities could be held liable in particular cases. This approach, however, is essentially arbitrary, for fixed maximums prescribed in advance would seldom, if ever, correspond to the realities of particular tort situations, sometimes being grossly inadequate to even compensate for out-of-pocket expense and sometimes being a suggestive inducement to an award which is more than generous in relation to actual losses sustained. An alternative approach which is also not without precedent²⁷ is believed to be more consistent with the underlying purposes of tort law as well as with accepted standards of particularized justice: it would limit the recoverable damages to actual pecuniary losses, or, as an alternative, restrict the total damages recoverable to a fixed multiple of actual pecuniary damages. A rule of this type, for example, might authorize recovery of costs of medical care and treatment, loss of earnings, impairment of earning capacity and increases in living expenses as a result of the injury sustained by plaintiff; but it would restrict recovery of general damages for pain and suffering, embarrassment and humiliation, and other elements of a nonpecuniary nature which presently are recoverable in analogous private tort litigation. It would also restrict recovery of exemplary and punitive damages. Since general damages for pain and suffering are often regarded as the major element in the award in personal injury litigation,²⁸ as well as the most unpredictable ele-

²⁶ Fixed limits on recovery are prescribed in ILL. ANN. STAT., ch. 37, § 439.8D (Smith-Hurd Supp. 1961) (maximum of \$25,000 award possible under State Court of Claims Act in tort claims against the state); KY. REV. STAT. § 44.070(5) (1960) (maximum of \$10,000 award under State Board of Claims Act); N.C. GEN. STAT. § 143-291 (1958) (maximum award of \$10,000 under Tort Claims Act); ORE. REV. STAT. § 368.935 (1953) (maximum of \$2,000 recoverable in damages resulting from defective highway or bridge); S.C. CODE ANN. § 33-229 (Supp. 1960) (maximums of \$3,000 property damage and \$8,000 personal injury or death awards in actions founded on defects in state highways or negligent operation of state highway department vehicles). Many states also prescribe fixed maximums which are recoverable in wrongful death actions between private individuals. See tables in Belli, *The Adequate Award*, 39 CALIF. L. REV. 1, 33-39 (1951).

²⁷ A recommendation to this effect was advanced by Professors Fuller and Casner in their excellent article, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941). In support of their proposal, the authors argue: "Practically, the purposes of tort law would be sufficiently served with complete municipal liability limited by statute to the recovery of actual monetary damages. . . . Persons victimized by . . . torts [of public employees] would receive damages more in proportion to their real losses, and the unpredictable results of emotionalized jury verdicts would be largely eliminated. Payments to tort victims would be made more promptly if damages were confined to pecuniary losses, because the reasons for long and expensive jury trials would largely cease to exist." *Id.* at 461-462. This recommendation has been adopted in Kentucky, where in tort claims against the state, the legislature has declared that "compensation shall not be allowed, awarded or paid for pain and suffering." KY. REV. STAT. § 44.070(1) (1959).

²⁸ See Oliver, *The Evaluation, Negotiation and Settlement of Personal Injury Claims*, in CONTINUING EDUCATION OF THE BAR, MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 471, 473-474 (1955), indicating that as a rough rule of thumb many attorneys and insurance adjusters estimate general damages at three times the "specials." See, generally, Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951); 2 BELL, *MODERN TRIALS* 1622-1655 (1954).

ment, this proposal should tend to keep the amounts of potential damages within more easily projected limits and thus permit of more orderly fiscal planning to prepare for tort liabilities through insurance and other protective programs.

(b) In connection with any statutory limitations upon the amount of damages which are recoverable in cases of governmental torts, consideration should be given to the matter of attorneys' fees. It is common knowledge that the great bulk of personal injury litigation is handled for the plaintiff by means of contingent fee contracts of employment, under which the compensation of the plaintiff's attorney is contingent upon the amount of recovery he obtains for his client. Contingent fees in California are reportedly in the range of 25 to 40 percent of the ultimate net recovery in most cases.²⁹ If a statutory limitation is placed upon recoverable damages, restricting them to actual pecuniary losses, it is clear that a judgment thereunder would not be truly compensatory to the plaintiff, for a substantial portion thereof would be allocated to payment of the plaintiff's attorney for his services. Accordingly, consideration should be given to a statutory rule which either prescribes a fixed percentage of the plaintiff's damages as the attorney's fee, possibly subject to specified maximums, or which requires the attorney's fee to be fixed by the court at a reasonable figure, and which requires such amount to be added to the award. Similar limits should be established also, although with lower maximum limits, for instances in which tort claims are allowed in whole or in part by administrative action or are settled as a result of negotiations.

(c) Attention has been directed at an earlier point in the present study to the proliferation of statutes which authorize various public entities to enter into contracts whereby they agree to hold harmless the other contracting party for damages resulting from activities under the contract.³⁰ Such indemnity agreements may also be employed to advantage as a means by which public entities, in certain situations, can shift the burden of tort loss to other shoulders. Even where the public entity has been held liable in tort to the injured party, it is entitled to recover over against any private party who has agreed to save it harmless from such damages.³¹ Experts on the problems of governmental tort liability have frequently urged that public entities utilize the save harmless clause as a means of protecting themselves against liability arising from operations under all franchises, leases, permits, concession agreements, licenses and other contracts made by the entity.³² Provisions of this type are already commonplace in fran-

²⁹ HOLBROOK, A SURVEY OF METROPOLITAN TRIAL COURTS, LOS ANGELES AREA 364-365 (1956); CONTINUING EDUCATION OF THE BAR, MEDICOLEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 223, 225 (1955).

³⁰ See text at 97-101 *supra*.

³¹ County of Los Angeles v. Cox Bros. Constr. Co., 195 Cal. App.2d 836, 16 Cal. Rptr. 250 (1961); San Francisco Unified School Dist. v. Cal. Bldg. Maintenance Co., 162 Cal. App.2d 434, 328 P.2d 785 (1958).

³² See Hutchinson, *Municipal Liability*, in CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT, MUNICIPAL LIABILITY INSURANCE 11, 36 (1953); Robinson, Management's Responsibility for the Selection and Administration of Liability Insurance 5 (mimeographed synopsis of address presented at annual conference of League of California Cities, September 1957).

chises,³³ and the County of Los Angeles has inserted them as a matter of routine procedure in most of its contracts to provide governmental services to cities under its well-known "Lakewood Plan."³⁴ Any doubts as to the validity and effectiveness of such clauses could be easily dispelled, and additional flexibility of techniques to reduce the fiscal impact of tort liability would result, if a general statutory provision were enacted authorizing the insertion of such indemnity clauses into any contracts as to which the governing board of an entity deemed it appropriate.

Policy Summation

The preceding discussion suggests several general policy considerations which are relevant to the problem of shielding governmental entities from disruption of their normal functions by reason of the possible fiscal consequences of enlarged tort liability. By way of summary, these considerations are:

1. A sound legislative program should seek to make available to all types of public entities a wide variety of permissive techniques for minimizing the financial impact of tort liability, shifting the economic burden to other responsible persons, and distributing the losses as widely as possible over a broad financial base and over substantial periods of time. The need for such an arsenal of devices is greatest in connection with small entities lacking in extensive financial resources; but large and affluent entities may find the availability of practical alternatives to be useful in planning an orderly financial program which accommodates potential tort liabilities into a realistic reconciliation with other competing demands upon the public treasury. Suggestions as to the forms which the alternative techniques may take are set forth in the immediately preceding pages.

2. A sound legislative program should seek to make the economic consequences of enlarged tort liability reliably predictable, by adopting reasonable expedients to reduce as much as possible the variables and uncertainties inherent in ordinary tort litigation. Unpredictability makes rational planning and administration extremely difficult and financially hazardous, while it may tend to increase the cost of insurance and of official bonds to levels which are unrealistic as compared to ordinary budgetary considerations. Thus, the legislative program should endeavor to define the boundaries of liability and immunity of governmental entities with as great a precision as may be possible, thereby reducing the need for litigation centered chiefly upon issues of law. It should seek to reduce the possible range of variation in damage awards so that predictability in terms of amounts of damages may be improved. And it should avoid placing risks upon governmental entities which cannot be protected against by reasonable administrative

³³ See, e.g., CAL. PUB. UTIL. CODE § 6296, providing with respect to gas and electric franchises, that "The grantee shall indemnify and hold harmless the municipality and its officers from all liability for damages proximately resulting from any operations under the franchise." Many city charters contain similar provisions. See, e.g., Arcadia City Charter, § 1405(c), Cal. Stat. 1951, res. ch. 117, p. 4541; Culver City Charter, § 1505(c), Cal. Stat. 1947, res. ch. 24, p. 3408; Dairy Valley Charter, § 1005(c), Cal. Stat. 1959, res. ch. 94, p. 5573; Santa Monica Charter, § 1605(c), Cal. Stat. 1947, res. ch. 8, p. 3341.

³⁴ See Comment, 73 HARV. L. REV. 526, 548-550 (1960).

precautions, safety programs, routine inspection procedures and other sound management techniques which are within feasible budgetary limits.

3. A sound legislative program should attempt to place flexible means at the disposal of public entities by which the risk of tort liability, and the cost of funding such liability in advance through insurance and official bond premiums, will be borne primarily by the particular segment of the community which is especially benefited thereby. The available choices between direct extension of public services out of general funds, establishment of an administrative subdivision or taxing area to finance additional services, creation of a special district under a general enabling act or by special legislation, or the negotiation of a joint powers agreement—and other alternatives which are permitted by law as varying means to accomplish governmental objectives consistently with local traditions and political considerations—should not be drastically affected by the intrusion of the new factor of tort liability. General legislative authorizations should be developed which would authorize the governing body of the interested entity to decide whether to impose the cost of funding tort liability upon the general funds or upon the benefited area as part of the cost of the project. A suggestion to this effect is found in Section 53057 of the Government Code which, after making local agencies liable for negligence in connection with weed burning operations, declares: "The cost of insuring the liability imposed by this section may be added to any assessment authorized to be levied by a local agency to defray the costs of burning weeds and rubbish on vacant property." Similarly, the risk of tort liability arising out of public improvement projects financed by direct lien special assessments might be shifted to the benefited property owners by simple provisions in the contract specifications under which the successful bidder must assume full liability for any and all injuries sustained as a result of the performance of the work, and must submit evidence that he is insured within specified limits against such liability.³⁵ Provisions such as this would result in the cost of insurance being included in the cost of the project and thus passed on to the benefited property owners in the form of somewhat increased assessments (although part of the cost might, under certain competitive situations, be absorbed by the contractor). Similarly, joint powers agreements should be required to clearly specify which of the contracting public entities shall be liable for torts arising in the course of performance of the agreement, and how such tort liabilities are to be funded, with possibly a rule of joint liability (with right of contribution) where no such provision is set forth in the agreement. In short, the Legislature should authorize maximum flexibility in the choice of means to fund the prospective liabilities which may ensue from different types of public activities, leaving the decision as to which shall be employed chiefly in the hands of the responsible authorities who are

³⁵ The basic policy of charging expenses arising out of the improvement project as part of the cost to be assessed against the benefited property is exemplified, *inter alia*, by the Improvement Act of 1911 (Cal. Stat. 1911, ch. 397, p. 730), which defines as part of the "incidental expenses" of a project thereunder the "cost of relocating or altering any public utility facilities as required by the improvement in those cases where such cost is the legal obligation of the city." CAL. STRS. & HWYS. CODE § 5024(1).

most intimately involved in the practical problems of raising and allocating public funds to various purposes.

4. Maximum flexibility in choice of means for funding tort liabilities, however, probably would not solve the problem of the small and financially weak entity which is faced with a tort liability of crippling magnitude (*i.e.*, an amount which to larger entities might pose no financial difficulty at all, but which in proportion to the annual revenue and the available revenue-producing resources of the particular entity is a "catastrophe judgment"). Many public entities are simply incapable of absorbing the cost of insuring against the potential tort liabilities to which any general extension of tort liability beyond present limits would expose them. If it be assumed (solely for the sake of illustration) that increased taxes or assessments to the extent of 20 cents per \$100 of assessed valuation would not be an unduly exorbitant price to pay for the elimination of the archaic and outworn governmental immunity doctrine, the increased revenues derived from such a levy by many entities would in all likelihood be entirely inadequate to fund the additional liabilities. According to official figures for the fiscal year 1958-59, a substantial number of special districts, for example, would have realized from a full 20-cent additional tax or assessment levy less than \$2,000 and many others less than \$1,000.³⁶ During the fiscal year ending June 30, 1960, there were 366 incorporated cities in California. Of this number, assuming a full 20-cent tax levy, five would have been able to realize less than \$1,000 in revenues, ten would have realized between \$1,000 and \$2,000, and eighty-three would have been able to raise between \$2,000 and \$10,000.³⁷ During the same year, a 20-cent tax rate would have produced less than \$100,000 in at least 16 out of the 58 counties in the State.³⁸

It is at once apparent from these figures that many public entities simply do not have the fiscal resources to self-insure against potential tort liability, particularly when it is kept in mind that personal injury judgments expressed in amounts of five and six figures are no longer

³⁶ CALIFORNIA STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS, 1958-59 FISCAL YEAR 129-238 (1959). A random sampling of the data in the cited pages is instructive. From information appearing on pages 129, 137, 145, 159, 180, 193 and 233, fifteen special districts were identified with a total assessed valuation of taxable property amounting to less than \$100,000 (which would thus produce less than \$200 at a full 20-cent tax levy); forty were identified with a total assessed valuation between \$100,000 and \$500,000 (which would produce between \$200 and \$1,000 revenue at a full 20-cent levy); and thirty-seven districts were identified as having an assessed valuation between \$500,000 and \$1,000,000 (which would produce between \$1,000 and \$2,000 at a full 20-cent levy). The remaining 148 districts for which data is given on the cited pages had total assessed valuations in excess of one million dollars.

³⁷ CALIFORNIA STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA, 1959-60 FISCAL YEAR 253-271 (1960). The 5 cities listed with total assessed valuations amounting to less than \$500,000 (which would thus produce less than \$1,000 revenue at a 20-cent rate) are Amador, Loyalton, Plymouth, Tehama and Trinidad. The 10 cities with assessed values totaling between \$500,000 and \$1 million (which would produce between \$1,000 and \$2,000 at a full 20-cent rate) are Biggs, Cabazon, Etna, Fort Jones, Maricopa, Parlier, Point Arena, Westmoreland, Wheatland and San Joaquin. Eighty-three cities are listed as having total assessed values between one and five million dollars (which would produce between \$2,000 and \$10,000 at a 20-cent rate).

³⁸ CALIFORNIA STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING COUNTIES OF CALIFORNIA, 1959-60 FISCAL YEAR 43 (1960). The 16 counties listed as having total assessed valuations of less than 50 million dollars, and hence, which could raise not more than \$100,000 by a 20-cent levy, are: Alpine, Butte, Calaveras, Contra Costa, Del Norte, Inyo, Lake, Lassen, Mariposa, Modoc, Nevada, San Benito, Sierra, Trinity and Tuolumne. The least affluent of these 16 is Alpine, which, with a total assessed valuation of two and one-half million dollars could raise only \$5,000 at a 20-cent tax rate.

extraordinary but must be anticipated as a normal risk.³⁹ Moreover, the hypothetical tax rate of 20 cents employed for the sake of illustration above is undoubtedly much higher than would be deemed politically tolerable in many communities, and if required to be levied would almost inevitably lead to a curtailing of other types of governmental services to keep the total tax rate from reflecting the full increase. Finally, an additional tax rate of this proportion would probably increase the total rate to an amount in excess of the entity's statutory tax rate maximum in many cases, while in others, the hypothetical 20-cent rate is already larger than the total rate which is permitted for *all* purposes of the entity.⁴⁰

In view of the financial facts of local government organization in California, as briefly assessed above, it seems evident that means must be developed for relieving small entities without adequate financial resources from the full burden of funding tort liability expense. In view of the general commitment of our law to the principle of fault as the basis of liability, however, a substantial share of the burden conceivably should continue to be borne by the entity through whose delict the injury was sustained; while the recognized tendency of the law to move in the direction of the risk principle of liability would seem to support an effort to impose whatever portion of the risk cannot be suitably financed through the entity's resources upon some other loss-distributing agency. Viewed in this way, the problem is not insurmountable.

A general form of suggested solution would incorporate two basic ideas: First, standards setting out the minimum level of protection against tort liability which public entities should reasonably be required to provide for through insurance (either commercial policies or self-insurance funds) should be developed; and second, standards to determine the maximum level of financial effort to which public entities should be expected to conform in an attempt to secure adequate protection should also be developed. Adherence to these standards (at least for entities of reduced financial capacity) could be achieved through a statewide administrative body; and inability to meet the minimum standard of protection even with maximum financial effort would result in a shifting of the burden of obtaining such protection to the state agency.

For example (this illustration is employed solely to assist in exploring the principles involved, and not as a concrete recommendation for legislative action), it might be provided by statute that every public entity having an assessed valuation of all taxable property within its boundaries of less than \$10,000,000 must establish annually to the satisfaction of a State Tort Liability Protection Board that it has in effect tort liability insurance coverage, either in the form of a self-insurance reserve fund or commercial insurance policies, or a combination of both, which is adequate as tested by statutory or administratively promulgated standards (*e.g.*, perhaps \$10,000 property damage and \$50,000 personal injuries coverage as a minimum where a commercial policy is in effect, with appropriate modifications for partial self-insurance) to provide for prospective and anticipated

³⁹ See 4 & 5 BELLI, *MODERN TRIALS* (1956).

⁴⁰ See the statutory tax rate maximums listed in the text at 212-13 *supra*.

liabilities in the ensuing fiscal year. Where this showing is not made because the entity lacks financial capacity to provide such protection, it would be authorized to pay to the State Board the maximum amount required by law to meet the standard of financial effort—a sum which, perhaps, could be defined in terms of a fixed percentage, such as one-fifth of one percent (*i.e.*, the equivalent of a 20-cent tax rate) of the total assessed valuation of taxable property within the entity or a similar percentage of the most recent annual budget of the entity, whichever is greater. The State Board then would be authorized and required to make provision for protection of that entity against tort liability, either by purchase of commercial insurance or by a program of self-insurance funded by the aggregate of like payments of all other entities similarly situated, or by a combination of both. Any insufficiency of funds in the hands of the State Board would be made up from appropriations in the state budget.⁴¹

This suggested system of protection, in addition, should impose sanctions upon those public entities which possess financial capability for assuming their own protection against tort liabilities in accordance with the stated standards but which fail to make the requisite showing to the State Board that they have done so. In such cases, the State Board might be empowered to provide the necessary additional protection and to charge the cost thereof to the delinquent entity. Moreover, by voluntarily paying to the State Board the maximum amount required by law to meet the standard of financial effort, any entity should be permitted to regard its obligation in this regard as satisfied, and the State Board would thereafter have the responsibility for providing the necessary minimum protection required by law. If by statute any pecuniary limitations upon tort liability are established, it would be prudent to correlate those limits with the standards of minimum insurance protection required under the proposed State Board scheme. If no such limitations on recovery are prescribed, presumably any liability awards in excess of the protection provided by the State Board would have to be regarded as a charge against the State (*i.e.*, in effect, the State would be providing excess coverage self-insurance).

The proposal just advanced by way of illustration is suggestive of the techniques which might be developed to solve the problem of protection of public entities without substantial financial resources.⁴² In effect, part of the fiscal burden should be shifted to a larger entity which is capable of distributing the risk over a larger base, and in the illustration the State was selected as the risk-distributing agency. Yet, the proposal retains the principle that the entity should be required to make a maximum effort to provide its own protection at the expense of the persons primarily benefited by its operations and activities before the excess burden is shifted. The State Board, more-

⁴¹ To the extent that the State itself may be partially liable for satisfaction of claims against impecunious local public entities under the proposed scheme, provision also should be made for participation by the State in the investigation, litigation and settlement of such claims; and, of course, special mechanisms would have to be developed to ensure the enforcement of judgments in such instances through payment from state funds.

⁴² A proposal somewhat similar to the one advanced in the text, *supra*, was made by Professor Edwin Borchard more than 25 years ago. Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A. J. 747, 751-52 (1934).

over, having the combined financial resources derived from a maximum financial effort by each of the small entities which have participated in the system, might very well be able to reduce the cost of protection substantially since insurance policies with uniform conditions could be written with a large number of entities united therein as named insureds, thereby diluting the risk of isolated and vagrant jury verdicts in extremely large sums, and providing a broader base of experience against which insurance carriers could fix the lowest feasible premium rates. The full development of a system such as that contemplated here would also, of course, have to take into consideration the allocation of responsibility for investigating, administering, litigating and settling claims, especially if self-insurance were incorporated as part of the program so that claims servicing would not be provided by insurance company personnel. The fundamental elements of the suggestion, however, especially where coupled with statutory provisions to implement the other policy considerations outlined above, would seem to offer promise of solving the most difficult of the problems arising out of the extreme heterogeneity of public entities in the California governmental structure.

Policy Considerations Relevant to Procedural Handling of Governmental Tort Liability Claims

In the development of a sound system of administration of governmental tort liability, consideration should be given to the procedural methods which will be utilized to handle and dispose of claims. The aim should be to ensure that the injured claimant is paid promptly and fairly where liability exists, and that unfounded claims are disposed of without delay or undue expense to the claimant or to the public entity. Several categories of problems require attention in this connection.

The Choice Between Assumption of Judgments and Direct Liability

The statutes cited in the forepart of the present study as embodying a legislative relaxation of governmental immunity generally were of two types. One imposes tort liability directly upon public entities under specified conditions.¹ The other retains a nominal immunity but requires the public entity to satisfy tort judgments entered against its employees, thereby in effect indemnifying the employee against loss.² In seeking to decide whether either or both of these techniques should be employed as a procedural framework for a system of governmental tort liability, their practical aspects should be first understood.

A requirement that a technically immune public entity satisfy tort judgments against its officers and employees often will have quite different consequences from a rule which holds the entity directly liable for the torts of the same officers and employees. One can only speculate whether the size of judgments would be any larger where the entity is the named defendant rather than the presumably less affluent officer or employee, for in either case juries (or judges sitting as triers of fact) are equally likely to assume that the judgment will probably be

¹ See, e.g., CAL. VEH. CODE § 17001, discussed *supra* at 36-40; CAL. EDUC. CODE § 903, discussed *supra* at 40-42; CAL. GOVT. CODE § 53051, discussed *supra* at 42-59.

² See the statutes collected in the text, *supra* at 65-72.

paid by an insurance company and not by the named defendant. Other differences, however, may be identified with more assurance.

For one thing, the injured plaintiff often may not be able to identify (or, perhaps more accurately put, may not be able to prove the identification of) the particular officer or employee whose tortious act or omission caused his injury; yet it may be possible, nonetheless, to prove a cause of action in tort against the employing entity. Cases arising under the Public Liability Act of 1923, for example, document the fact that persons injured as a result of defective public property often are in a position to prove a basis for statutory liability of the city, county or school district defendant, even though administrative responsibility for the maintenance of the particular source of the injury may be so diffused that it is extremely difficult to pinpoint the negligent public employee.³ Similarly, a patient injured as a result of negligence on the part of medical or nursing personnel in a public hospital may not have been conscious at the time of injury, and hence may be required to prove his claim within the ambit of the *res ipsa loquitur* doctrine, a task which may be easier when the entity is the defendant (since it may not be difficult under that doctrine to establish that at least *one* of its employees was negligent) than when suing the individual defendants. Again, even when identification of the culpable officer or employee is assured, a statutory requirement immunizing the entity but compelling it to satisfy the judgment against such employee may be of no avail to the claimant, for the individual defendant may be beyond the reach of civil process, or for some other reason may not be subject to suit and judgment.⁴ In short, if the injured plaintiff is required in every case to proceed initially to judgment against an individual officer or employee, there will undoubtedly be a number of cases in which the requirement amounts to a denial of any remedy and, in effect, to a reinstatement of governmental immunity.

On the other hand, a rule which places the liability solely upon the employing entity and immunizes the employee from suit also has inherent defects. Existing statutory policy, for example, permits injured persons to bring an action against public officers and employees in certain cases without previously presenting a claim, even though the same statutory policy requires a claim as a condition to suit against the employing entity.⁵ Under existing law, therefore, the plaintiff is sometimes given a remedy against the individual tortfeasor even though he may be barred from suit against that tortfeasor's governmental employer. To preclude suit against the individual employee in such cases, however, would in effect substitute an absolute barrier for the more moderate rule that presently ameliorates the harshness of the claims statutes. Again, there may be instances in which the injured plaintiff, acting in ignorance of the public employment status of the

³ *E.g.*, *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945). See also, to the same effect in a case not governed by the Public Liability Act, *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

⁴ Action against the employee may be barred for noncompliance with a claims presentation requirement, see CAL. GOVT. CODE §§ 801, 803; or the defendant employee may have died and the action may be barred by failure to file a claim in the probate proceedings, CAL. PROB. CODE § 707.

⁵ See Van Alstyne, *Claims Against Public Employees: More Chaos in California Law*, 8 U.C.L.A. L. Rev. 497 (1961).

individual who caused his injuries, proceeds solely against that individual only to learn too late, under the hypothetical rule here being examined, that his sole remedy was against the employing entity. Finally, there may be some advantage, however speculative, to the employing entity in having the liability action proceed in the name of the individual employee in view of the widely held suspicion that juries are inclined to amerce more heavily a defendant with vast financial resources at its disposal than an ordinary private individual of modest means who by appearance might be assumed to be covered at best only with minimum amounts of insurance.

On balance, it would seem appropriate to permit the injured person to have his alternative remedies against either the employee or the employing entity. The allocation of ultimate financial responsibility could be determined by other means, the most important being statutory requirements for the carrying of insurance and faithful performance bonds. Additional protection for the public treasury is adequately secured by provision that counsel for the public entity employer shall defend the personnel of the entity in actions for torts arising in the course of public employment.⁶

The Choice Between Administrative and Judicial Auditing of Tort Claims

It is not an indispensable attribute of a system of governmental tort liability that unsettled tort claims be always reduced to judgment before a court. Administrative agencies have been utilized in several states to adjudicate tort claims against the state and its agencies or departments.⁷ The State Board of Control, which has responsibility for passing upon most tort claims against the State of California, is an example of the successful use of such an agency.⁸ If governmental tort liability is enlarged in this State, consideration should be given to whether administrative bodies should be established for processing of claims at the local entity level comparable to their processing at the state level under existing law. In this connection, it is believed to be significant that with only one partial and minor exception administrative agencies in other states, like the California Board of Control, have no jurisdiction over claims against local entities.⁹

⁶ Comprehensive provisions requiring counsel for public entities to represent the officers and employees thereof in tort actions arising out of their service or employment are found in CAL. GOVT. CODE § 2001, as enacted by Cal. Stat. 1961, ch. 1692, p. 3669. See also, CAL. GOVT. CODE § 2002.5, relating to representation of state medical personnel in malpractice actions, and CAL. EDUC. CODE § 13007.1, defense of school district personnel.

⁷ *E.g.*, ALA. CODE § 55:334 *et seq.* (1958) (State Board of Adjustment); ARK. STAT. ANN. § 13-1402 *et seq.* (1956) (State Claims Commission); COLO. REV. STAT. ANN. § 3-3-1(17) (1953) (Division of Accounts and Control); CONN. GEN. STAT. ANN. § 4-141 *et seq.* (1960) (Commission on Claims); MINN. STAT. ANN. § 3.66 (Supp. 1961) (State Claims Commission); MONT. REV. CODE § 82-1101 *et seq.* (Supp. 1961) (State Board of Examiners); N.C. GEN. STAT. § 143-291 *et seq.* (1958) (Industrial Commission); OHIO REV. CODE ANN. § 127.11 (Baldwin Supp. 1961) (Sundry Claims Board); S.D. CODE § 33.4301 *et seq.* (Supp. 1952) (Claims Commissioner); TENN. CODE ANN. § 9-801 *et seq.* (1956) (Board of Claims); UTAH CODE ANN. § 63-6-1 (1961) (Board of Examiners). See generally Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242-253 (1942).

⁸ CAL. GOVT. CODE §§ 600-25. For a description of the procedures of the State Board of Control, see mimeographed syllabus prepared by Charles Barrett, Assistant Attorney General, in Panel Discussion on Claims and Actions Against California Agencies, Officers and Employees, 4-13 (Cal. State Bar Convention, Sept. 29, 1960).

⁹ See statutes cited in note 7 *supra*. The only possible exception appears to be in the Alabama provision, which vests authority in the State Board of Adjustment to consider and pass upon claims for injury or death to school children, but in other respects confines the administrative consideration to claims against the state and its agencies.

A major objection to the creation of a new administrative agency for handling of tort claims against local entities is that such a procedure would only tend to duplicate existing methods which are founded upon experience. In most instances, the investigation and determination of the merits of tort claims against local entities are the initial responsibility of the legal staff of the local entity, or, if insurance coverage is applicable, of the personnel of the insurance carrier.¹⁰ In effect, such claims are presently being processed by locally developed administrative machinery which reflects the actual loss and claims volume experience of the various entities.¹¹ Studies have indicated that the great majority of all such claims never go beyond this administrative level, and that the volume of rejected claims pressed to the point of court adjudication is modest.¹² Establishment of a new administrative tribunal (or tribunals) which would bypass the existing machinery, as a prerequisite to judicial reconsideration, would thus accomplish little and might disrupt much that is worthwhile. To go even further and make the determinations of such a tribunal final, thereby precluding judicial review by the courts of administratively rejected claims, would seem to be not only contrary to settled and accepted practice in California,¹³ but also unsupported by any substantial evidence that the judicial system, which has historically carried the load without difficulty despite the extensive waivers of governmental immunity documented earlier in the present study, is inadequate to the task. (Whether a special court of claims should be established within the judicial system to adjudicate tort claims against public entities is a different issue which is discussed below.¹⁴)

A second objection to any proposal for creating an administrative tribunal to audit tort claims against local public entities stems from the proliferation of such entities across the map of California, in sizes large and small.¹⁵ Under existing procedures, a tort claim is initially required to be presented to the governing body of the responsible entity within specified periods of time;¹⁶ and it is then subject to investigation and consideration by local representatives of the entity,

¹⁰ David & French, *Public Tort Liability Administration: Organization, Methods and Expense*, 9 LAW & CONTEMP. PROB. 348 (1942).

¹¹ See Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941). See also, David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 9-15 (1959).

¹² Experience over the four-year period 1954-57 in handling tort claims arising from the operation of motor vehicles by employees of the City of Los Angeles (there has long been a statutory waiver of governmental immunity in California, see CAL. VEH. CODE § 17001) disclosed that out of 1878 claims filed, payment was made as a result of administrative processing in 1013 instances (or 54 percent of the total claims), while only 230 actions were brought (representing only 12 percent of the total number of claims) on claims rejected in the administrative process. David, *supra* note 11, at 13. For comparable information on other cities, see David & French, *supra* note 10, at 354; WARP, MUNICIPAL TORT LIABILITY IN VIRGINIA 80 (Table IX) (1941).

¹³ The claims statutes in California, which have provided the basic framework within which local administrative processing of claims has been conducted in California, invariably contemplate that an action may be brought in the courts upon any claim rejected in whole or in part. See Van Alstyne, *Claims Against Public Entities: Chaos in California Law*, 6 U.C.L.A. L. REV. 205 *passim* (1959). Cf. CAL. GOVT. CODE §§ 641, 710. Some of the administrative procedures established for auditing of claims in other states, however, are accompanied by express provisions declaring the administrative determination to be not subject to judicial review. See, e.g., ARK. STAT. ANN. § 13-1406 (1956); CONN. GEN. STAT. ANN. § 4-164 (1960).

¹⁴ See text at 315-16 *infra*.

¹⁵ See the text at 289-91, 307-308 *supra*.

¹⁶ CAL. GOVT. CODE § 715 (100 days for claims against local public entities based on causes of action for death, or for physical injury to persons, personal property and growing crops; 1 year for all other claims).

who are likely to be familiar with the circumstances, environment and other conditions involved, and who are most strategically situated to adopt precautions against future injuries from a like source. In addition, since injuries are more likely to be sustained by local residents than by transients, the accident prevention function of tort law would seem to be maximized by a system which provides a local, somewhat informal, and inexpensive administrative consideration of such claims by persons politically responsible to the electorate of the locality. To be within the bounds of feasible costs, however, statewide administrative tribunals for handling local claims would probably have to be vested with geographical jurisdiction of such size as to lose many of these inherent advantages of the existing system of local control.

It is believed, on the basis of the factors here advanced, that a persuasive case for the general substitution of an administrative tribunal as a mandatory and exclusive forum for the processing of tort claims against local public agencies would be difficult to support. Two alternative suggestions, however, deserve consideration.

First, the large size of some local entities in California suggests that locally appointed administrative boards vested with power to consider tort claims and to recommend awards in appropriate cases might prove to be an efficient device in certain instances, particularly if a statutory enlargement of governmental tort liability resulted in a substantial increase in the volume of such claims and the local entity were pursuing a policy of self-insurance. Such local boards might profitably be modeled after the State Board of Control precedent, with authority to receive and consider evidence pertinent to tort claims and to recommend their payment, in whole or in part, to the governing board of the local entity. The principal advantage of this type of procedure would lie in the fact that the claimant would be accorded a form of adversary proceeding which would be less expensive and time consuming than court action, and would in many cases receive an award sufficiently satisfactory, or would be denied relief for reasons sufficiently persuasive, as to reduce or eliminate any incentive toward further litigation. Consistently with a suggestion made below, moreover, such boards could be authorized to recommend partial or compromise payment of a claim even where liability is deemed to be doubtful, provided they also determine that such payment will be in the best interests of the public entity.¹⁷ Whether tort claims boards of this type are feasible and appropriate for use in individual entities, however, is primarily a matter for local determination depending upon local circumstances and political and financial considerations. Hence, it is suggested that such agencies should not be mandatory; instead, general enabling legislation should be enacted to permit their establishment at the option of the local public entity.

Second, consideration should be given the question whether jurisdiction to adjudicate tort claims which have been administratively rejected should be vested in the regular courts or should be conferred exclusively upon a special court of claims. The principal arguments in favor of a special court are substantially the same as those which might be advanced in favor of an administrative board of claims vested with substantially the same functions—to wit, relieving the

¹⁷ See the text at 317-20 *infra*.

courts from the burden of governmental tort litigation, providing assurance that tort claims against governmental entities will be decided from a uniform point of view divorced from local prejudices and attitudes, and developing a degree of expertise in adjudicating such claims which may be expected to come through specialization.¹⁸ Only three states (Illinois, Michigan and New York) appear to have such courts of claims at the present time, and in each instance the court's jurisdiction is restricted to claims against the state.¹⁹ As to this class of claims, the need for a new court seems dubious, for the present California State Board of Control appears to be functioning without difficulty. In all states, including those with special courts of claims, it appears that tort claims against *local* governmental entities are adjudicated in the normal trial courts in the same general way as comparable litigation against private persons, although some form of local administrative processing and rejection is often prescribed.²⁰ This experience elsewhere, as verified by existing California practice, suggests that there is no obvious or pressing need at this time for setting up a special court of claims structure in this State. Careful studies have disclosed no basis for believing that, with minor procedural modifications, the judiciary would not be fully capable of handling the burden of whatever litigation an expansion of governmental tort liability might generate.²¹ If an unexpected volume of litigation, or the emergence of unique kinds of legal problems in governmental tort cases, ultimately are shown to require a court of claims apart from the regular trial courts, the advisability of such a development should then be evaluated and decided upon in the light of actual experience.

Reduction of Technical Difficulties and Resultant Expense in Handling of Claims

In contemplating the possible fiscal consequences of an enlargement of governmental tort liability, it must be remembered that one of the major elements of expense to the taxpayers arising from such enlargement will inevitably be the cost of supporting the judicial system which must process those claims that are not settled by agreement or administrative award. It has been estimated, for example, that the nonrecoverable costs to the taxpayers of an average jury trial in the supe-

¹⁸ Cf. Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242, 259 (1942); MacDonald, *The Administration of a Tort Liability Law in New York*, 9 LAW & CONTEMP. PROB. 262, 280 (1942).

¹⁹ The Illinois Court of Claims is established by ILL. ANN. STAT., ch. 37, § 439.1 *et seq.* (Smith-Hurd Supp. 1961). See, as to the limitation of the Illinois court to claims against the state, Comment, *Tort Claims Against the State of Illinois and Its Subdivisions*, 47 NW. U. L. REV. 914 (1953). The Michigan Court of Claims derives its existence from MICH. COMP. LAWS § 691.101 *et seq.* (1948). As to the limits of the Michigan Court's jurisdiction, see MICH. COMP. LAWS § 691.108; Taylor v. Auditor General, 360 Mich. 146, 103 N.W.2d 769 (1960). The New York Court of Claims established under the New York Court of Claims Act, is also restricted to claims against the state and has no jurisdiction over claims against local public entities. NEW YORK COURT OF CLAIMS ACT § 9; Sofka v. State of New York, 202 Misc. 235, 115 N.Y.S.2d 421 (1952); NEW YORK JOINT LEGISLATIVE COMMITTEE ON MUNICIPAL TORT LIABILITY, FIRST INTERIM REPORT 15 (Legis. Doc. No. 42, 1955) [hereinafter cited as NEW YORK COMMITTEE]. See generally Hon. Bernard Ryan, A Court Unique (1957) and The Court Thou Hast And Its Adoption Tried (1956), typewritten by the Presiding Judge of the New York Court of Claims, on file in the office of the California Law Revision Commission.

²⁰ See Leflar & Kantowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954).

²¹ See JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 49-68 (1961), analyzing at length the capabilities of the courts to process the ever-increasing volume of personal injury litigation, and ways of decreasing the congestion which presently exists in certain courts.

rior court upon a personal injury cause of action between private litigants is approximately \$1,000.¹ Where a public entity is the defendant, of course, additional expenses to the taxpayers are involved, including the compensation of defense counsel, salary and wages of public employees who are defense witnesses while testifying and away from their work, and the overhead costs involved in investigation and preparation for trial. Reduction of the need for litigation of tort claims, and of the potential cost of such litigation, may thus constitute avenues for substantial savings to the taxpayers which might offset to a considerable extent any enlarged burden of governmental tort liability. Adoption of techniques designed to discourage the litigation of unmeritorious claims would seem to play an analogous role. On the other hand, the demands of evenhanded justice would suggest that the availability to the public entity of purely technical defenses unrelated to the substantive merits of claims should be minimized. The following suggestions are offered in further elaboration of these policy considerations.

(a) There are indications that the administrative processing of tort claims by local governmental entities has been normally characterized by a technical "legalistic" approach as contrasted with the intensely pragmatic and "realistic" approach which marks the practices of liability insurance companies.² Hardheaded businesslike appraisals of the ways in which juries and judges behave in accident litigation, coupled with careful cost accounting as to the expense of litigation, have led to the development of insurance carrier business policies in which the techniques of negotiation and compromise in doubtful cases are utilized extensively in an effort to avoid ultimate legal warfare in court.³ At the local government level, however, an expression of "doubt" as to legal liability coming from the legal officer for the public entity often is translated into a rejection of the claim and denial of any relief by the governing body. Denial of relief on this basis in effect shifts the responsibility for the decision to the legal advisor, but permits the governing body to justify its action as being regrettable but necessary for "legal reasons" in order to protect the public treasury from any illegal expenditure of public funds.

It might be highly desirable, and indeed less expensive in the long run, for local governing bodies to be given enlarged authority to compromise claims where doubt as to liability exists, including authority to take into consideration the "nuisance value" and other expense elements of litigation. The suggestion is not that the doors be opened to the payment of compensation without regard to the merits of the claims being considered, but simply that greater flexibility be afforded

¹ JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 71 (1961), citing Burke, *Metropolitan Court*, 34 CAL. S. B. J. 928, 938 (1959). This estimate is based on a computation that the actual cost of operating a department of the Superior Court, including a reasonable charge for the use of the premises, is about \$300 per day, and the average personal injury trial lasts from 3 to 3½ days. The estimated costs in Massachusetts are considerably higher. See Reardon, *Civil Docket Congestion—A Massachusetts Answer*, 39 B.U. L. REV. 297, 302-03 (1959), indicating present jury trial costs at \$650-\$750 per day.

² See David, *Public Tort Liability Administration: Basic Conflicts and Problems*, 9 LAW & CONTEMP. PROB. 335, 343-44 (1942); David & French, *Public Tort Liability Administration: Organization, Methods, and Expense*, 9 LAW & CONTEMP. PROB. 348, 354 (1942); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 447-48 (1941).

³ See JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 19-21 (1961), and authorities there cited.

in the disposition of claims which have potential merit, however doubtful, without the need for litigation. As one experienced and competent student of the problem has observed, "a thoughtful policy upon settlements tends to save money in the long run. Prompt and thorough investigation and early settlement are the best defenses against substantial liabilities."⁴

The experience of the federal government in the administrative processing of small claims is especially instructive in this regard. The Federal Tort Claims Act contains a general authorization to the head of each department of the federal government, or his designee, to "consider, ascertain, adjust, determine and settle any claim for money damages of \$2,500 or less against the United States . . . for injury or loss of property or personal injury or death" caused by negligent or wrongful acts or omissions of federal personnel under circumstances where the government would otherwise be liable under the general provisions of that Act.⁵ In settling these small claims, the awarding authority may also fix attorney fees in connection with such awards, but such fees may not exceed 10 percent of the award if it is in the amount of \$500 or more, and must be paid out of the award but not in addition thereto.⁶ A similar procedure is authorized by the Military Claims Act for claims of \$5,000 or less arising from acts or omissions of military personnel which are not cognizable under the Federal Tort Claims Act.⁷ Since the latter statute embraces most negligent torts, the Military Claims Act procedure is available primarily for damages sustained from ultrahazardous activities engaged in by the armed forces⁸ and for claims founded on factual circumstances in which negligence or other wrongful acts cognizable under the Federal Tort Claims Act are not clearly present.⁹ Under the Military Claims Act, the military department head is authorized to make partial payment up to \$5,000 in amount on claims exceeding that figure which he deems to be meritorious, and to report the excess unpaid portion to the Congress for its consideration in a supplemental appropriation bill.¹⁰ The disposition of claims under \$1,000 may also be expedited under this statute by delegation of settlement authority from the department head to any military officer in the department.¹¹ Similar administrative authority to

⁴ David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. Rev. 1, 9 (1959).

⁵ Federal Tort Claims Act, 62 Stat. 933 (1948), as amended, 28 U.S.C.A. § 2672 (Supp. 1961). The authority thus conferred is subject, however, to the statutory exceptions which preclude liability of the United States in cases of claims arising out of the "execution or performance or the failure to exercise or perform a discretionary function or duty," *id.*, 28 U.S.C.A. § 2680 (a) (1950), as well as in the cases of most intentional torts, *id.*, 28 U.S.C.A. § 2680 (h) (1950).

⁶ *Ibid.*, 28 U.S.C.A. § 2673 (1950).

⁷ Military Claims Act, 70A Stat. 153 (1956), 10 U.S.C.A. § 2733 (1959).

⁸ See the Navy General Claims Regulations, 32 C.F.R. § 750.21 (Supp. 1961), interpreting the Military Claims Act procedures to be applicable to damages resulting from such nonnegligent hazards of military activities as the explosion of ammunition, firing of heavy guns, operation of missiles and aircraft, practice bombing, and practice maneuvers. See generally, McLeod, *Administrative Settlement of Claims*, JAG J. 5 (Feb. 1953); Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. Rev. 1325, 1351 (1954).

⁹ The regulations adopted pursuant to the Military Claims Act construe the availability of Federal Tort Claims Act procedures as exclusive only when negligence or other wrongful act adjudicable under the latter statute is clearly established as a "jurisdictional fact," thereby affording discretion to administratively process a claim in which such jurisdictional fact is questionable. See 32 C.F.R. § 750.4 (Supp. 1961), as discussed in Ward, *The Screaming Demon and the Military Claims Act*, JAG J. 15, 17 (Sept. 1959).

¹⁰ Military Claims Act, 70A Stat. 153 (1956), 10 U.S.C.A. § 2733 (d) (1959).

¹¹ *Id.*, 10 U.S.C.A. § 2733 (g) (1959). See Reese, *Navy Claims*, JAG J. 3 (April 1956).

settle certain types of claims has been given to other federal departments.¹²

Studies which have been made of these federal administrative tort claims procedures by competent scholars have emphasized their speed, simplicity of operation, inexpensiveness, and general fairness in results reached.¹³ One of the principal advantages of the administrative settlement of tort claims by federal agencies is that a very substantial reduction in litigation has resulted therefrom.¹⁴ The principal criticism of the statutory provisions referred to is that the maximum dollar limitations imposed on claims which may be settled administratively are too low and should be revised upwards.¹⁵

The foregoing considerations appear to support two suggestions for affirmative action: (1) The Legislature should by statute expressly confer discretionary authority upon public entities to administratively settle and compromise tort claims even when liability is doubtful or uncertain. Present statutory law appears to authorize such compromise settlements only by implication, and only when litigation has commenced.¹⁶ Admittedly, the suggested enlargement of authority to settle dubious claims might involve the occasional partial payment of claims which are unjustified in fact or unsupported in law. However, the only way to be certain that this is so is to require the claimant to litigate

¹² The Attorney General of the United States, for example, is authorized to consider, adjust and determine claims for personal injury or property damage resulting from acts of F.B.I. personnel in the scope of their employment, subject to a maximum dollar limitation of \$500, and to certify such claims to Congress for payment. 49 Stat. 1184 (1936), 31 U.S.C.A. § 224b (1954). The Postmaster General is authorized to adjust and settle in an amount not exceeding \$500 claims for personal injuries and property damage resulting from the operations of the Postal Service and not cognizable under the Federal Tort Claims Act. 74 Stat. 605 (1960), 39 U.S.C.A. § 2409 (Supp. 1960). The Department of the Interior has for many years been given authority, as part of the provisions of the annual appropriation bill for the Bureau of Reclamation, to settle claims for personal injury, death or property damage arising out of the activities of the Bureau. See, e.g., Public Law 86-700, Sept. 2, 1960, 74 Stat. 748 (1960). A detailed account of the practices of the Post Office and Interior Departments under the authorizations cited is contained in Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. Rev. 1325, 1344-49 (Interior), 1353-60 (Post Office) (1954).

¹³ See Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. Rev. 1325 (1954); Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROB. 311 (1942). Cf. Ward, *The Screaming Demon and the Military Claims Act*, JAG J. 15 (Sept. 1959); McLeod, *Administrative Settlement of Claims*, JAG J. 5 (Feb. 1953).

¹⁴ Gellhorn & Lauer, *supra* note 13, point out that "In sheer bulk of claims cases considered, the administrative agencies carry a heavier burden than do . . . the courts." *Id.* at 1342. This statement is documented by the fact that one agency alone, the Post Office, disposed of 8,505 damage claims administratively during the same period (1951-52 fiscal year) in which only 676 cases under the Federal Tort Claims Act were disposed of in the courts. The claims disposed of by other agencies, such as the military departments, undoubtedly greatly increases the actual difference in favor of the administrative process with respect to these small claims.

¹⁵ Gellhorn & Lauer, *supra* note 13, at 1361-62. See also Williams, *The \$2,500 Limitation on Administrative Settlements Under the Federal Tort Claims Act: Good or Bad?* in AMERICAN BAR ASSOCIATION, SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, PROCEEDINGS 65 (1960), reprinted in INS. L. J. 669 (1960).

¹⁶ Government Code Section 717 apparently authorizes a local governing body to allow claims only to the extent that the body finds the claim to be "a proper charge against the local public entity" and "for an amount justly due." This language would appear to authorize some negotiation as to amount, but little or none as to liability. Government Code Section 720, on the other hand, appears to contemplate that compromise settlements may be agreed upon, but does not expressly authorize them; instead, this section merely declares that nothing in the claims procedure "shall prohibit" the governing body from "compromising any suit" founded upon a rejected claim. A possible implication from this language might be that compromise settlements before suit has commenced are not authorized. On the other hand, there is authority for the view that the power to compromise disputed claims will be readily implied. See *Hamilton v. Oakland School Dist.*, 219 Cal. 322, 26 P.2d 296 (1933); *Smith v. Cloud*, 28 Cal. App. 453, 152 Pac. 950 (1915).

his claim to final judgment—but avoidance of costly litigation is one of the chief purposes for making compromise settlements. Moreover, experience suggests that local governing boards will not readily settle any claims unless they are satisfied that such settlement is in the best interest of the entity. Since specific advantages may be realized by the public treasury as well as the public in general when early payment is made of compensation for injuries sustained from governmental activities, statutory authority for administrative settlement of doubtful claims would seem to be a reasonable exercise of legislative power and not in violation of the “illegal gift” clause of the California Constitution.¹⁷ (2) The Legislature should provide general permissive authority for local public entities to delegate to specified officers discretion to administratively settle minor tort claims below a designated amount to be fixed by the local governing body. This authorization should be drafted in such terms as to make available to the larger local public entities in California, at their option, administrative procedures comparable to those which have been employed successfully in the federal structure.

(b) One of the technical difficulties which sometimes may lead to unnecessary litigation, as well as to disposition of tort claims on grounds unrelated to their merits, stems from a measure of uncertainty inherent in present law as to the identity of the employing entity of certain public employees. As preceding portions of the present study have indicated,¹⁸ the structure of state and local government in California is exceedingly complex and the allocation of duties and functions among various types of public officials has been marked more by pragmatic than by theoretical considerations. Clean-cut analogies to private employment situations are sometimes lacking, and it is not always a simple matter to identify the public entity which should be deemed liable for the torts of particular public officers and employees.¹⁹

¹⁷ It is clear that legislation authorizing settlement without litigation of disputed claims having at least arguable merit is valid. *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 Pac. 277 (1897); *People v. Supervisors of San Francisco*, 27 Cal. 655 (1865). See also *Hamilton v. Oakland School Dist.*, 219 Cal. 322, 26 P.2d 296 (1933); *Smith v. Cloud*, 28 Cal. App. 453, 152 Pac. 950 (1915). On the other hand, there is language in the case of *Rideout v. Eich*, 100 Cal. App. 135, 280 Pac. 140 (1929), to the effect that a local governing board cannot, “by way of compromise, give a legal status to a claim . . . which is otherwise void; that while [such board] may compromise contested claims and agree upon the amount legally due, no validity can be given in this manner to an illegal claim.” *Id.* at 142, 280 Pac. at 143. The compromise there being discussed, however, was one which, if given effect, would have frustrated the clear policy of the constitutional debt limitation and would have created an effective subterfuge by which that policy could easily be subverted in the future. The compromise settlement agreements discussed in the text, *supra*, would not frustrate any constitutional policy, but would tend to promote the statutory policy of the legislation dealing with governmental tort liability, would assist in reducing the costs to the taxpayers of such liability, and would promote the public welfare by relieving distress of injured persons and reducing the incentive to litigate tort claims. These objectives in terms of public benefit would seem to be ample to distinguish the proposal here advanced from the situation present in *Rideout v. Eich*, *supra*, and to bring such enlarged settlement authority within the doctrine of cases like *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959), and *Doctors General Hosp. v. County of Santa Clara*, 138 Cal. App.2d 280, 10 Cal. Rptr. 423 (1961), holding that an expenditure of funds is not an illegal gift if for a “public purpose.”

¹⁸ See text at 239-42 *supra*.

¹⁹ See, for example, *Villanazul v. City of Los Angeles*, 37 Cal.2d 718, 235 P.2d 16 (1951), in which litigation all the way to the Supreme Court was necessary to finally determine, for tort liability purposes, that a marshal of the municipal court was a county and not a city employee. Yet, the judges of municipal courts are deemed to be state officers for some purposes at least, see CAL. GOV. CODE § 68205 (declaring municipal court judges to be state officers for salary purposes specified in Government Code Section 11570); 27 OPS. CAL. ATTY. GEN. 333 (1956), while they are county officers for still other purposes, see CAL. GOV. CODE § 53200.3 (county officers for purposes of group insurance plan).

For the same reason, there may be difficulties, in the absence of clear statutory provisions, in determining which entity is responsible for the purchase of liability insurance coverage or the maintenance of self-insurance reserves as protection against the torts of certain classes of personnel.²⁰ To require the injured person in all cases to identify the employing entity by application of the ordinary tests of the master-servant relationship²¹ would be to impose a rule which is often neither precise enough nor simple enough to meet the need.

A possible starting point for resolution of the problem might be a statutory declaration that for the purposes of tort liability public officers, employees and agents will be conclusively presumed to be employed by the public entity against whose funds warrants are drawn for the payment of their compensation.

A general rule of this type would effectively resolve the question of employment status of most public servants, including the clerks, bailiffs, reporters and other attachés of courts whose status, as indicated previously,²² presented special problems along these lines. The compensation of all such officers and attachés of the trial courts is paid by the county in which the court is situated.²³ The proposed rule, however, would not fully resolve the problem of status of trial court judges. Judges of justice courts and of municipal courts are compensated out of the treasury of the county in which their courts are situated;²⁴ but judges of the superior court are compensated in part by the State and in part by the county,²⁵ as are lower court judges when sitting by assignment in the superior court.²⁶ Under some circumstances, judges assigned to serve in courts of other counties by the Chairman of the Judicial Council may receive compensation from the

²⁰ Cf. the legislative difficulties referred to and their recognition of the solution as reflected in the somewhat comparable problem of allocating responsibility for the fixing of the amounts of and paying the premiums on official bonds: CAL. GOVT. CODE § 24150 requires the county board of supervisors to fix the amount of the official bond of judges of justice courts; CAL. GOVT. CODE § 1651 requires the county to pay the premium on the official bonds of "county officers" and of "officers of a judicial district" within the county; and CAL. GOVT. CODE § 1481.1 expressly declares (thereby implying that the contrary would be the case in the absence of the statutory declaration) that for the purpose of the master bond provisions of Government Code Section 1481, the adult probation officer and his deputies and assistants "are deemed to be employees of the county in which they are appointed."

²¹ On the elements which are ordinarily deemed significant as indicating a master-servant relationship, see RESTATEMENT (SECOND), AGENCY § 220 (1958); CAL. LABOR CODE § 3000; *Courtell v. McEachen*, 51 Cal.2d 448, 334 P.2d 870 (1959); Comment, 32 CALIF. L. REV. 289 (1944). The principal element usually emphasized in these authorities is that of "control"; but since the duties and responsibilities of certain classes of public officers and employees are spelled out by statute law, this concept of "control" would require substantial modification in many instances to be meaningful as a test of entity tort responsibility for the acts and omissions of its personnel.

²² See text at 240-41 *supra*.

²³ See CAL. GOVT. CODE §§ 69890-70148 *passim* (compensation of superior court personnel other than judges); CAL. GOVT. CODE § 71220 (compensation of personnel of justice and municipal courts).

²⁴ CAL. GOVT. CODE § 71220. When sitting by assignment in the superior court, however, judges of justice and municipal courts are compensated, like superior court judges, in part by the county and in part by the State. CAL. GOVT. CODE § 68540(b).

²⁵ CAL. GOVT. CODE § 68206.

²⁶ CAL. GOVT. CODE § 68540(b).

funds of both counties.²⁷ Similarly, trial judges assigned to serve in the district courts of appeal or in the Supreme Court are paid in part by the county in which their regular court is situated and in part by the State.²⁸ In view of these complexities, the general rule suggested above, which postulates the identity of the employing entity upon the source of compensation, would seem to be inadequate. Instead, empiric rules would perhaps be more desirable, under which, regardless of the source of compensation, judges of the superior, municipal and justice courts would be declared for tort liability purposes to be officers of the county in which the judge is performing judicial service at the time of the alleged tortious act or omission, while justices of the appellate courts and judges assigned to serve as such would be deemed to be officers of the State.

A second modification of the proposed general rule would seem to be appropriate in the case of public officers and employees who serve *ex officio* as officers and employees of other entities. In some cases, these *ex officio* duties result in additional compensation from the entity for which the services are performed.²⁹ In other cases, *ex officio* service is expressly declared by statute to be noncompensable, and the sole compensation received by the officer or employee is his regular salary or wages from his principal employer.³⁰ The general principle of fault underlying the doctrine of *respondet superior* would seem to support the view that the responsible employer, for tort liability purposes,

²⁷ Under Government Code Sections 68540 and 68540.5, whenever judges of the superior or municipal courts are assigned to sit in superior or municipal courts, respectively, in other counties, the county to which they are assigned is required to pay any additional compensation to which the judge is entitled, as well as to reimburse the county from which the judge came for a pro rated share of his regular compensation. When a municipal or justice court judge, however, is assigned to sit in a superior court outside his regular county, he apparently continues to receive his regular salary from that latter county plus such additional compensation as he is entitled to from the county to which he is assigned, CAL. GOVT. CODE § 68540(b); while a judge of a justice court who is assigned to serve in either a municipal or justice court outside his regular county likewise receives compensation divided between the two counties, with only the additional compensation paid by the county to which he is assigned, CAL. GOVT. CODE § 68541. Since additional compensation is payable to an assigned judge only when he is "assigned to a court wherein a judge's compensation is greater than his own," CAL. CONST., Art. VI, § 1a, there may under the foregoing rules be numerous instances in which an assigned judge receives no additional compensation from the county to which he is assigned, although he will be entitled to expenses of travel, board and lodging from the latter county. See CAL. GOVT. CODE § 68542.

²⁸ CAL. GOVT. CODE § 68543.

²⁹ See, e.g., CAL. H. & S. CODE §§ 4730, 4733 (providing for additional compensation for members of county boards of supervisors and city councils who serve *ex officio* as directors of county sanitation districts); Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 8.1, p. 5072, CAL. GEN. LAWS ANN. Act 276, § 8.1 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-8.1 (West 1959) (authorizing water agency to compensate county surveyor for *ex officio* services rendered to agency); Fresno Metropolitan Transit District Act, Cal. Stat. 1961, ch. 1932, §§ 3.1, 3.5, 3.27, p. 4056, CAL. GEN. LAWS ANN. Act 2792, §§ 3.1, 3.5, 3.27 (Deering Supp. 1961), CAL. PUB. UTIL. CODE APP. 2, §§ 3.1, 3.5, 3.27 (West Supp. 1961) (authorizing additional compensation for supervisors and city councilmen who serve *ex officio* as board of directors of district); Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 31, p. 4000, CAL. GEN. LAWS ANN. Act 270, § 31 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-31 (West Supp. 1961) (authorizing additional compensation for county supervisors for *ex officio* duties as board of directors of agency).

³⁰ See, e.g., CAL. CONST., Art. VI, § 1b and CAL. GOVT. CODE § 68703 (superior and municipal court judges who serve on state Commission on Judicial Qualifications serve without compensation); CAL. STS. & HWYS. CODE § 19130 (county supervisors serve *ex officio* as board of directors of highway lighting districts without compensation); CAL. STS. & HWYS. CODE §§ 25027, 25030, 25071 (county supervisors who serve as directors of joint highway districts receive no compensation therefor); Amador County Water Agency Act, Cal. Stat. 1959, ch. 2137, § 8.1, p. 5072, CAL. GEN. LAWS ANN. Act 276, § 8.1 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 95-8.1 (West 1959) (all county officers and employees required to serve *ex officio* as officers and employees of agency, without compensation, except for county surveyor).

should be the particular public entity in whose service the officer or employee was acting at the time of the tortious act or omission, without regard for the source of his compensation. Hence, torts of *ex officio* personnel of public entities should be imputed to that entity. To be sure, this approach might in some cases give rise to difficult problems of proof; but it is believed that the broad scope of modern discovery techniques and the liberality with which alternative joinder of parties defendant is permitted today would afford the claimant adequate protection against surprise.

A third modification would take into consideration public personnel who serve without formal compensation, although they may be reimbursed for expenses.³¹ In the presumably rare instances in which these individuals commit a tort in the course and scope of their public service, the responsible public entity should be determined by reference to the source of reimbursement for expenses, if any, or in the alternative by reference to the identity of the appointing authority.

A fourth modification would attempt to remove uncertainties which may arise from the ever-growing use of joint powers agreements, under which numbers of public employees may occupy all or some of their working hours engaged in performing contractual services for entities other than their permanent employer.³² In some instances, indeed, an agency or commission separate and apart from either of the contracting parties may be established with power to employ its own personnel to carry out the objects of the joint powers agreement; and in such cases, the employee tortfeasor may not be classifiable as an employee of either contracting entity.³³ Experience indicates that the ultimate allocation of financial responsibility for tort liabilities arising under agreements of this type may readily be handled as a matter of contract negotiation, through the use of appropriate language in the agreement (*e.g.* save-harmless clauses).³⁴ Considerations of fairness, however, together with the general policy of avoiding the creation of "traps for the unwary," suggest that injured persons should be entitled to rely upon appearances and treat the employee of a particular public entity as such with-

³¹ Examples of such noncompensated personnel are numerous at all levels of government, particularly as represented in the form of membership on advisory boards and commissions. See, *e.g.*, CAL. CONST., Art. VI, § 1b (attorney and public members of Commission on Judicial Qualifications); CAL. AGRIC. CODE § 1300.15 (members of marketing order advisory boards); Mariposa County Water Agency Act Cal. Stat. 1959, ch. 2036, § 7(b), p. 4692, CAL. GEN. LAWS ANN. Act 4613, § 7(b) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 85-7(b) (West 1959) (water advisory board); Alpine County Water Agency Act, Cal. Stat. 1961, ch. 1896, § 34, p. 4000, CAL. GEN. LAWS ANN. Act 270, § 34 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 102-34 (West Supp. 1961) (advisory council); Chico City Charter, § 1004, Cal. Stat. 1961, res. ch. 9, p. 4659 (appointive boards and commissions). Some cities require their city councils to serve without compensation. See, *e.g.*, Watsonville City Charter, § 405, Cal. Stat. 1960, res. ch. 14, p. 223.

³² General authority for joint powers agreements is contained in CAL. GOVT. CODE §§ 6500-6578. The broad scope which such agreements may take is illustrated by such cases as Beckwith v. County of Stanislaus, 175 Cal. App.2d 40, 345 P.2d 363 (1959) (agreement for irrigation district to construct three bridges over irrigation district canals as part of county road system); City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168 (1940) (agreement between several contiguous cities for joint sewage disposal survey). Counties also have general authority to contract to perform municipal services for cities within their boundaries. CAL. GOVT. CODE §§ 51300-51800. Numerous additional sources of intergovernmental contractual cooperation exist, the full scope and prevalence of which is exemplified by data collected in a recent survey conducted by the League of California Cities. See American Bar Association, Section of Municipal Law, Local Government Law Service Letter 9-12 (Supp. Dec. 1961).

³³ CAL. GOVT. CODE § 6508.

³⁴ The experience of Los Angeles County in administering its "Lakewood Plan" agreements, which ordinarily include save-harmless clauses, is instructive in this connection. See Comment, 73 HARV. L. REV. 526, 548-550 (1960).

out regard to whether, at the moment of the injurious act or omission, he was acting for some other entity under some unknown contractual arrangement. Thus, it would seem appropriate to modify the proposed general rule by declaring that a person performing services pursuant to a contract between two or more public entities providing for the exercise of governmental powers shall, for purposes of tort liability, be deemed the servant of each of the contracting entities, and that those entities are jointly and severally liable for his torts (so far as liability exists at all). Under a rule of this type, the injured party could proceed against the most readily identifiable entity and recover everything to which he is entitled in that action without the danger that he may have selected the wrong party to sue. The actual incidence of the financial burden, either for the damages or for the insurance premiums to protect against the burden of such damages, would thus become simply a matter of agreement between the parties to the contract, or, in the absence of a contractual provision relating thereto, could be made subject to a right of contribution patterned after the contribution rights of private tortfeasors under Sections 875-880 of the Code of Civil Procedure.

(c) Another problem which appears to require legislative treatment to eliminate a technical impediment which may be productive of both injustice and unnecessary litigation stems from the existence of both independent and nonindependent subdivisions or agencies on the local government scene. This study already has pointed out that serious doubts exist as to whether certain kinds of districts, for example, are independent and hence financially responsible in their own capacity for torts of their personnel, or whether they legally constitute mere administrative or taxing subdivisions of a larger entity.³⁵ To be sure, an astute attorney would ordinarily seek to protect his client by presenting a claim to both entities in cases of doubt, and would presumably join both as defendants in the event of suit.³⁶ Unfamiliarity with the fine nuances of local government organization, however, may make the uncertainties here referred to a form of trap for litigants endowed with less than maximum awareness of the hazards. An adequate solution would be provided by a simple statutory provision to the effect that whenever a claimant has filed a claim or instituted an action against a public district, subdivision or agency which is determined not to be an independent political entity, but a subdivision of a larger public entity, the latter entity shall be deemed substituted by operation of law for the former for all purposes, without the necessity for amendment of the claim, complaint or other relevant documents.

(d) At an earlier point in the present study,³⁷ attention was directed to the fact that not all local public entities in California presently are declared to be subject to suit in the courts, and hence may possibly be immune from financial responsibility in tort by reason of the absence of a remedy even when substantive liability otherwise would exist. If it is determined that the enforcement of tort claims against local

³⁵ See text at 214-17 *supra*.

³⁶ Compare *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955), with *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940).

³⁷ See text at 30-32 *supra*.

public entities should continue to be vested in the present judicial system, following local administrative rejection in the context of the general claims presentation procedure, it would seem to be essential that general statutory authority be enacted for suit on rejected tort claims against any local public entity. Such authority may already exist by implication from the language of the general claims statute;³⁸ but an amendment to that statute to make the implication explicit would be a logical way to dispose of lingering doubts. The nonindependent entity problem discussed briefly in paragraph (c), immediately above, should be resolved at the same time, so as to avoid any inadvertent granting of authority to sue local districts which have no independent political existence.

(e) The appropriate role for claims presentation procedures should be reconsidered in connection with the general problem of enlarged governmental tort liability. Despite widespread publicity and efforts directed to dissemination of information about claims presentation requirements both before and after the adoption by the 1959 Legislature of the present general claims procedure governing claims against local public entities,³⁹ noncompliance with such requirements continues to provide a technical defense against determinations of tort liability on the merits.⁴⁰ To the extent that such technical defenses are not thoroughly justified by the objectives of the claims procedure—to wit, the need for early notification to the entity so that it has ample opportunity for investigation, taking of precautions, and settlement without litigation—their continued existence in the future will tend to frustrate the purposes of whatever rules are ultimately adopted providing for governmental tort liability. To the extent that the existing claims statutes do not effectively implement the accepted objectives of the claims procedures, on the other hand, they may expose public entities to the dangers of unwarranted tort liability. Three major reforms in the existing claims presentation procedures are regarded as particularly deserving of consideration.

First, the statutory time limits governing claims against the State are grossly inconsistent with those governing claims against local public entities. Claims against local entities for death or physical injury to persons, personal property or growing crops must be presented within 100 days;⁴¹ but similar claims against the State are timely if presented within two years, except for such claims arising out of motor vehicle torts, in which case the presentation period is reduced to a

³⁸ See discussion in the text at 31 *supra*.

³⁹ The pitfalls in the claims procedure were repeatedly called to the attention of the profession in legal journals. See, e.g., Ward, *Requirements for Filing Claims Against Governmental Units in California*, 33 CALIF. L. REV. 259 (1950); Comment, *California Claims Statutes—"Traps for the Unwary"*, 1 U.C.L.A. L. REV. 201 (1954). Following the adoption of the 1959 General Claims Statute, Cal. Stat. 1959, ch. 1715, p. 4115 and chs. 1724-1728, pp. 4133-4156, upon recommendation of the Law Revision Commission, see Cal. Law Revision Comm'n., *Recommendation and Study Relating to the Presentation of Claims Against Public Entities*, 2 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, Recommendation and Study at A-1 (1959), additional efforts at informing the bar of the problems inherent in such requirements continued. See McDonough, *The New Claims Statute*, 34 CAL. S. B. J. 964 (1959); Cal. State Bar Convention, Panel Discussion on Claims And Actions Against California Agencies, Officers and Employees (mimeo. Sept. 1960).

⁴⁰ See, e.g., *Chaves v. Sprague*, 209 Cal. App.2d —, 25 Cal. Rptr. 603 (1962); *Humphreys v. State*, 192 Cal. App.2d 476, 13 Cal. Rptr. 557 (1961); *Peck v. City of Modesto*, 181 Cal. App.2d 465, 5 Cal. Rptr. 482 (1960). See also *Johnson v. City of Oakland*, 188 Cal. App.2d 181, 10 Cal. Rptr. 409 (1961).

⁴¹ CAL. GOVT. CODE § 715.

maximum of one year.⁴² All other claims against local entities must be presented within one year; but if against the State they may be presented within two years, except, again, for motor vehicle torts where the limit is one year.⁴³ The necessity for presenting a claim against a local public entity does not toll or extend the statute of limitations which would apply if the cause of action existed against a private person;⁴⁴ but the procedure for presenting claims against the State expressly provides that the period of limitations is extended, in some instances for as much as two years beyond the expiration of the time which would otherwise be applicable.⁴⁵ Claims against local public entities by minors and incompetents may, with court permission, be presented beyond the ordinary statutory time limit, but only if a petition for such judicial authorization is filed with reasonable promptness, not to exceed one year, after the statutory expiration date.⁴⁶ The time for presentation of similar claims against the State, however, is tolled until two years after the minority or disability has ceased—a period which may be many years in length—and such claim may ultimately be presented without even the protection of a judicial determination that such late presentation will not be unduly prejudicial.⁴⁷

Since the need for prompt investigation and avoidance of litigation would seem to be fully present in the case of the State, just as in the case of local public entities, it is believed that consideration should be given to the following modifications in the State claims presentation procedures: (1) The time limits for presentation of claims against the State should be conformed to those governing claims against local public entities. (2) The presentation of a claim against the State should not toll the period of limitations which would apply if the claim were one against a private person; and in this regard, the statutes governing claims against the State should also be conformed to those governing claims against local public entities. (3) The provisions governing claims against the State by persons under a disability should not extend the claims presentation period for long periods without judicial control, and hence these provisions should likewise be conformed to the procedures applicable to similar claims against local public entities. If these reforms are adopted, it is believed that they will improve efficacy of the claims presentation procedures as a protection against unfounded tort litigation against the State and, accordingly, will serve to moderate the financial impact of any enlargement of substantive tort liability of the State.

Second, consideration should be given to the inflexibility of the claims presentation periods imposed by existing claims procedures. Under the

⁴² CAL. GOVT. CODE §§ 643, 644.

⁴³ See the code sections cited in notes 41 and 42 *supra*.

⁴⁴ CAL. GOVT. CODE § 719.

⁴⁵ See CAL. GOVT. CODE § 643 (authorizing suit to be brought on a rejected claim against the State *either* within the ordinary period of limitations or within 6 months after rejection); CAL. GOVT. CODE § 644 (authorizing suit on non-motor vehicle claims within 6 months after rejection). Under the latter section, a personal injury claim need not even be presented to the State until 2 years after the claim accrued (i.e., 1 year after it would ordinarily be barred by the statute of limitations, CAL. CODE CIV. PROC. § 340); it may conceivably be considered for a period of 6 months or more prior to final rejection; and then an action thereon need not be commenced until 6 months after such rejection. In some cases, therefore, it is not inconceivable that the state claims procedure may extend the period of limitations by as much as 2 years.

⁴⁶ CAL. GOVT. CODE § 716.

⁴⁷ CAL. GOVT. CODE § 646.

general claims statute governing claims against local public entities, the statutory time limits (100 days for some claims, and one year for all others) are applicable without regard for extenuating circumstances, or for whether the delay has frustrated the underlying purposes of the requirement, except in the relatively rare instances where such claims are made by persons who are minors, under a disability, or representatives of deceased claimants. In these three exceptional cases, a late claim may be presented after judicial authorization founded upon a finding that the local entity will not be "unduly prejudiced" thereby, but a petition for authority to present a late claim must be filed within a reasonable time, not to exceed one year.⁴⁸ Since permission to present a late claim is required to be predicated on a finding of lack of prejudice to the entity, which finding ordinarily presupposes substantial evidence that the entity in fact had received adequate and prompt notice of the injury which forms the basis for the claim or that more prompt notice would not have improved its ability to make its defenses, no good reason is apparent why the same procedure should not be made applicable to all claims. Since by hypothesis the entity will *not* be unduly prejudiced by late presentation where permitted, the continuation of the inflexible time limits in most cases will serve only to provide, as past history amply documents,⁴⁹ a trap for the unwary and ignorant claimant. It is thus believed that the present procedural "safety valve" for certain types of late claims founded upon a judicial finding of lack of prejudice, should be enlarged to include all claims. This modification, of course, should also be extended to claims against the State as suggested in the immediately preceding paragraph.

Third, consideration should be given to the repeal or overhauling of the existing statutory provisions requiring the presentation of a claim as a condition precedent to the maintenance of a tort action against public officers or employees. The Law Revision Commission recommended to the Legislature in 1961 that these provisions be repealed.⁵⁰ As the Commission's report to the Legislature pointed out, employee claims statutes provide an unfair technical defense available to public personnel but not to other citizens against otherwise meritorious actions; are not necessary for the protection of public personnel against personal liability, in view of alternative means for providing such protection; are not justified by any persuasive arguments founded on relevant distinctions between private persons and public personnel; and tend to create a procedural trap for the unwary plaintiff.⁵¹ These reasons would seem to be equally pertinent and persuasive in a context of enlarged governmental tort liability, particularly if public officers and employees are protected against personal financial loss arising out of their good faith torts in the course and scope of their authority. Where insurance policies cover the personal liability of the public employee, any speculative advantages which might be deemed to result from prompt filing of claims in the form of lowered insurance premiums charged to the employing entity would seem to be outweighed

⁴⁸ CAL. GOVT. CODE § 716.

⁴⁹ See Van Alstyne, *Claims Against Public Entities: Chaos in California Law*, 6 U.C.L.A. L. REV. 205 *passim* (1959).

⁵⁰ Cal. Law Revision Comm'n, *Recommendation and Study Relating to the Presentation of Claims Against Public Officers and Employees*, 3 CAL. LAW REVISION COMM'N REP., REC. & STUDIES, Recommendation and Study at H-1 (1961).

⁵¹ *Id.* at H-5 to H-7.

by the injustice to the claimant who loses his otherwise meritorious cause of action due to a technical procedural defect. To the extent that the public entity seeks to protect its employees against personal liability by satisfying judgments against them through a self-insurance system, it can enjoy substantial protection from unfounded claims through an internal administrative accident reporting procedure together with the entity claims statute. Where torts characterized by malice, fraud and corruption are concerned, moreover, a technical requirement that a claim be presented as a condition to suit against the miscreant official is particularly incompatible with the needs of justice, although admittedly other procedural devices may be essential to safeguard against claims which have no reasonably plausible factual basis.⁵²

The Commission in its report recognized that repeal of the personnel claims statutes might, to some extent, diminish the protection given the public entity by the general claims statute enacted in 1959, but concluded that this consequence was not a sufficient reason for retaining the employee claims requirements. However, it must be recognized that the elimination of the special claims presentation procedure as a prerequisite to suit against public officers and employees should not be permitted to frustrate the purposes of the statutory provisions requiring claims to be presented as a condition precedent to an action against a public entity. To the extent that a judgment against an employee is available as a basis of liability of the employer public entity, either through the doctrine of *respondet superior* or under a statutory duty to assume payment of the judgment, the public treasury needs the protection of the claims procedure. The problem is to devise a legislative solution which eliminates the specially favored position of the employee but preserves the advantages of claims procedures to the entity. A possible solution would be to simply require the plaintiff to comply with the entity claims presentation requirement as a condition to bringing an action against *either* the public entity *or* its officer or employee, at least in cases where the employment relationship is known to the plaintiff and he is unwilling to waive his rights against the employer by stipulating (or alleging) that the employee's tortious conduct did *not* occur in the course of that employment.

(f) One of the features of tort litigation which is often charged with responsibility for a substantial proportion of the time and expense of trying civil lawsuits is the use of the jury as the trier of fact.⁵³ The public entity defendant, of course, would ordinarily be entitled to recover jury fees as part of recoverable costs of litigation where it is the prevailing party; but a cost judgment does not cover all of the costs of operating the jury system,⁵⁴ and such a judgment is not always

⁵² See the suggestions offered earlier in the present study, pp. 258-60 *supra*.

⁵³ JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 50-53 (1961), and authorities there cited. See generally, ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT 71-109 (1959).

⁵⁴ See LOS ANGELES SUPERIOR COURT, EXECUTIVE OFFICER'S ANNUAL REPORT 11 (1959), indicating that in the 1959-60 budget for the Los Angeles Superior Court, an item of approximately \$650,000 is provided for payment of jurors' fees and mileage. A substantial portion of this amount undoubtedly related to criminal cases; but it must be remembered that the county alone pays the mileage and fees for jurors who attend court but are not used. HOLBROOK, A SURVEY OF THE METROPOLITAN TRIAL COURTS—LOS ANGELES AREA 115 (1956).

enforceable against the unsuccessful plaintiff who may well be impoverished as a result of his injuries. Where the plaintiff prevails against the public entity, on the other hand, his jury costs are ordinarily added to the judgment, thereby increasing the expense to the public treasury. Moreover, there is conflicting evidence that juries may be more liberal in awarding damages than judges.⁵⁵ And, in any event, the additional time consumed in a jury case in *voir dire* examination of prospective jurors and in jury deliberations on a verdict undoubtedly represent some additional burden to the taxpayers who finance the compensation of court personnel and the overhead costs of maintaining the courts.⁵⁶

For reasons similar to those here advanced, the abolition of jury trial as a concomitant of statutory waiver of governmental tort immunity has respectable precedents in the Federal Tort Claims Act⁵⁷ and in the statute law of several states.⁵⁸

Consideration should thus be accorded the question whether expansion of governmental tort liability should be conditioned upon a statutory requirement that any action founded upon a tort claim against a public entity shall be tried to the court without a jury.⁵⁹ Possibly, as an alternative, a statutory rule might be enacted which still permits

⁵⁵ See JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 52 (1961), citing Zeisel, *The Jury and the Court Delay*, 328 *Annals* 46 (1960), as indicating a disposition on the part of juries to render larger verdicts (averaging 20% higher) than the trial judge would have awarded in the same case. See also, ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* 72-73 (1959), to the same effect. On the other hand, other data suggests that in some localities, plaintiffs may fare better before judges, see HOLBROOK, *A SURVEY OF METROPOLITAN TRIAL COURTS—LOS ANGELES AREA* 124-25 (1956), or that the differences, if any, are negligible. See Sunderland, *Trial By Jury*, 11 *U. CINC. L. REV.* 119 (1937), dealing with Wayne County, Michigan.

⁵⁶ Studies of civil litigation in Los Angeles Superior Court revealed that a large proportion of personal injury trials were before a jury (76%) and that such trials required more than twice as much time as similar cases tried without a jury. HOLBROOK, *A SURVEY OF METROPOLITAN TRIAL COURTS—LOS ANGELES AREA* 297 (1956). See also, JUDICIAL COUNCIL OF CALIFORNIA, EIGHTEENTH BIENNIAL REPORT 50-52 (1961). The preponderance of demands for juries in such litigation is from defendants (i.e. insurance counsel). HOLBROOK, *op. cit. supra*, at 124.

⁵⁷ Federal Tort Claims Act, 62 Stat. 971 (1948), 28 U.S.C.A. § 2402 (Supp. 1961). The principal reason for the abolition of jury trial under the Act apparently was the belief that juries would be more likely to amerce the government by excessive verdicts motivated by undue sympathy. See *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 76th Cong., 3rd Sess. 20 (1940); 92 CONG. REC. 10092-93 (1946). Cf. Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 *GEO. L. J.* 1, 17-18 (1946).

⁵⁸ No jury is permitted in states which have established special courts of claims to adjudicate tort claims against governmental entities. See p. 316, note 19 *supra*. States which have set up administrative boards to process tort claims, see p. 313, note 7 *supra*, likewise deny jury trial, sometimes even when judicial review of an adverse administrative ruling is permitted. See, e.g., N.C. GEN. STAT. § 143-293 (1953). The recent Connecticut Tort Claims Act, which provides for a preliminary administrative screening of tort claims and permits suit against the state only when permission therefor has previously been given by the Commission on Claims, expressly declares that such suit shall be tried to the court without a jury. CONN. GEN. STAT. ANN. § 4-160(d) (1960). The Alaska and Hawaii Tort Claims Acts, modeled after the Federal Tort Claims Act, also expressly provide for trial without a jury. ALASKA COMP. LAWS ANN. § 56-7-9 (Supp. 1958); HAWAII REV. LAWS § 245A-5 (Supp. 1960).

⁵⁹ Such a provision would undoubtedly be constitutional as a condition attached to the State's waiver of immunity. See *United States v. Sherwood*, 312 U.S. 584 (1941); *McElrath v. United States*, 102 U.S. 426 (1880); *Artukovich v. Astendorf*, 21 Cal.2d 329, 131 P.2d 831 (1942); *Geimann v. Board of Police Comm'rs*, 153 Cal. 748, 112 Pac. 553 (1910); *Huffaker v. Decker*, 77 Cal. App.2d 383, 175 P.2d 254 (1946). Any difficulty which might arise in cases wherein both a governmental entity and another individual defendant are joined, stemming from the fact that one defendant would have a right to a jury trial while the other would not, should be within the power of the courts to handle without undue difficulty by permitting the trial judge to treat the jury as advisory only so far as the defendant public entity is concerned, or by ordering separate trials. See *Englehardt v. United States*, 69 F. Supp. 451 (D. Md. 1947); *Elkins v. Nobel*, 1 F.R.D. 357 (E.D.N.Y. 1940); *Notes*, 62 *HARV. L. REV.* 321, 323 (1948); 24 *TEMP. L. Q.* 348, 350 (1950); 56 *YALE L. J.* 534, 554 (1947).

either party to demand a jury in such cases, but which declares the jury fees to be not recoverable as costs.

(g) Other procedural devices which might be considered for adoption in connection with a comprehensive legislative program have been explored above in an effort to suggest ways for reducing unfounded and nonmeritorious litigation against public officers and employees in connection with a general elimination of the official immunity doctrine.⁶⁰ The proposals there made need not be repeated at this point. To the extent that they have merit, however, the advisability of extending their application to tort suits against public entities generally, as an additional safeguard against unnecessary and financially burdensome litigation, should be carefully considered.

Policy Considerations Relevant to Mechanisms for Orderly Evolution of Governmental Tort Law

The complexity of the entire problem of governmental tort liability, and the inherent difficulties involved in attempting to ascertain the possible consequences of various rules of law which may be offered for consideration by the Legislature, all suggest the advisability of establishing an advisory body charged with responsibility to make continuing studies in this field.

It can be confidently predicted that the practical resolution of the issues posed by the *Muskopf* and *Lipman* cases will not be finally nor satisfactorily resolved by even the most carefully investigated and thoroughly considered legislative program, for those issues are constantly changing with changing conditions of society. Risks which today are commonplace aspects of local government operations, such as the risks of automobile accidents in the course of public service, were practically unheard of fifty years ago. The possible risks of tomorrow—perhaps resulting from increased peaceful applications of atomic energy, more scientific controls of weather and precipitation, new and different means of communications, or the development of new techniques of public health and epidemic prevention—cannot be adequately foreseen today. Future evolving concepts of tort law as between private litigants, exemplified in the recent past by such developments as the acceptance of liability without impact for intentional infliction of emotional distress, the expansion of implied warranty as a basis of recovery in products liability cases, and the elaboration of the contours of the tort of invasion of privacy, may also be expected to have their impact upon governmental tort liability. And in the midst of the changing dimensions of the substantive legal problems, the financial and political impact of tort liability upon the capacity of government to meet the needs of the citizenry will also be changing.

In the State of New York, the effects of comprehensive waiver of governmental immunity were soon perceived to require a continuing and detailed study. Although the New York Legislature had enacted a general waiver of immunity as part of the Court of Claims Act in

⁶⁰ See the text at 258-60 *supra*.

1929,⁶¹ it was not until 1945 that the New York courts finally construed this provision as not applying merely to the state, but as in effect ending the tort immunity of all political subdivisions in the state.⁶² The new interpretation, which was comparable in its immediate effect to the *Muskopf* ruling in California in 1961, gave rise to many difficult problems with which the New York courts were compelled to grapple, although basic statistical and financial data were unavailable to guide solution along constructive lines. Mounting dissatisfaction with the situation, together with the apparent need for a careful and objective appraisal of the over-all problem, led to the creation in 1954 of the New York Joint Legislative Committee on Municipal Tort Liability.⁶³ This Committee, as an instrumentality of the Legislature, was charged with the duty "to investigate and make a thorough study of municipal liability in the State of New York, its extent, cost and administration to the end that adequate legislation may be enacted."⁶⁴ Authority and funds commensurate with this responsibility were also provided, and a staff of expert researchers was employed to further the Committee's work.

The work of the New York Committee has been characterized by its insistence upon detailed statistical and field research into the actual operation of tort liability with respect to the various classes of municipalities in that State. Significant legislation has been enacted, modifying the general rule of governmental liability, where adequate factual justification appeared to exist.⁶⁵ Perhaps even more importantly, the Committee has served as a focal point for continuing discussions between liability insurance industry spokesmen and representatives of municipalities looking toward the development of new types of insurance coverage and reduction of liability insurance costs.⁶⁶ In effect, this Committee has served the State of New York in a "watchdog" role, seeking to develop factual information, to ascertain where the existing legal rules of tort liability did not constitute an acceptable reconciliation between the needs of fiscal capacity for public entities and distributive justice for tort victims, and for formulating legislative proposals to modify the law to the extent found necessary as a result of its studies.

The actual consequences of any legislation which may emerge to resolve the governmental tort immunity problem in California should, it is submitted, be subjected to a similar continuing critical audit and analysis over the initial years of such legislation. The accumulation of data reflecting actual experience of various types of public entities

⁶¹ N.Y. CT. CL. ACT § 8, originally enacted as § 12-a by N.Y. Stat. 1929, ch. 467.

⁶² *Bernadine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945). The background of this decision is recited at length in NEW YORK COMMITTEE, FIRST INTERIM REPORT 11-15 (Legis. Doc. No. 42, 1955).

⁶³ See NEW YORK COMMITTEE, *op. cit. supra* note 62, at 15-23.

⁶⁴ *Id.* at 9, reprinting N.Y. Concurrent Resolution adopted March 20, 1954.

⁶⁵ *E.g.*, the Joint Committee sponsored an amendment to N.Y. VILLAGE LAW § 341-a (requiring written notice of street and sidewalk defects as a condition of liability therefor) and the enactment of N.Y. VILLAGE LAW § 82-a and N.Y. GENERAL MUNICIPAL LAW § 50-g (requiring the keeping of records of written notices of defects). Other legislation sponsored by the Committee, chiefly dealing with procedural matters relating to municipal tort liability, are summarized in NEW YORK COMMITTEE, SIXTH REPORT 12-16 (Legis. Doc. No. 14, 1960).

⁶⁶ See especially the substantial premium rate reductions secured through the efforts of the Joint Committee following enactment of the prior written notice of defect provision, cited in note 5 *supra*. NEW YORK COMMITTEE, FOURTH REPORT 14-16 (Legis. Doc. No. 42, 1958).

will go a long way toward the ultimate determination of how far the law of torts, as it has developed in private relationships, may be made applicable to government. Consideration should thus be given to the establishment of a commission or other appropriate body with powers and funds comparable to those of the New York Joint Legislative Committee. Since the nature of the studies to be made is not strictly legal in nature, but is deeply involved in statistical and financial analyses, and since the magnitude of the studies would appear to be beyond the scope of the duties presently vested in the California Law Revision Commission, it is believed that a separate agency for the purpose would be appropriate.

DIRECTIONS FOR LEGISLATIVE ACTION: POLICY RESOLUTION IN SPECIFIC TORT SITUATIONS

The forepart of the present study sets out the existing law and practice of governmental tort liability in California, together with an analysis of the potential impact upon that law and practice of the Supreme Court's 1961 decisions in *Muskopf* and *Lipman*. The study then attempts to identify and evaluate the basic underlying public policy considerations which are relevant to the development of a sound legislative solution to the over-all problem of governmental tort liability and immunity. In the present and concluding portions of the study, it is proposed to examine specific areas of possible governmental tort liability and to suggest avenues for appropriate legislative action consistent with the policy considerations previously discussed.

Dangerous and Defective Conditions of Public Property

Under settled law in California prior to 1961, as we have already seen, public entities were not liable for injuries resulting from a dangerous or defective condition of public property in use for a "governmental" purpose, unless some statutory waiver of immunity was applicable.¹ The principal statutory waiver² was found in the Public Liability Act of 1923, presently Section 53051 of the California Government Code.³ That section, it will be recalled, provides:

A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

(a) Had knowledge or notice of the defective or dangerous condition.

(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

The significance of this section is underscored by the fact that according to the available evidence the largest single source of tort

¹ *E.g.*, *Kambish v. Santa Clara Valley Water Conservation Dist.*, 185 Cal. App.2d 107, 8 Cal. Rptr. 215 (1960). See also *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962). Injuries sustained from defects in public property employed for "proprietary" purposes, of course, were actionable on common law principles irrespective of the Public Liability Act. *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958); *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951); *Sanders v. City of Long Beach*, 54 Cal. App.2d 651, 129 P.2d 511 (1942). In addition, the concept of "nuisance" was also frequently invoked as a basis for imposing liability in tort for defective conditions of public property, even where "governmental" activities were involved. See text at 225-30, *supra*.

² Other statutes waiving immunity may, upon occasion, be a basis for tort liability arising from defective public property. See, *e.g.*, CAL. EDUC. CODE § 903, discussed in the text at 40-42, *supra*; CAL. WATER CODE § 50152, discussed in the text at 59-63, *supra*. In addition, it should be borne in mind that there are a substantial number of statutes which expressly confer immunity from liability for injuries arising from defective conditions of public property. See text at 174-86, *supra*.

³ This statute is analyzed at length in the text at 42-59, *supra*.

claims against local public entities in California probably is dangerous and defective conditions of public property.⁴ Most of these claims arise from alleged defects on public streets and sidewalks.⁵ Similar experience has been reported in other states.⁶

Even in the State of New York, where for many years there has been a general statutory waiver of governmental immunity of all types of public entities, the problem of claims arising from street and sidewalk defects proved to be the principal focal point for much of the work of the Joint Legislative Committee on Municipal Tort Liability, because of what that Committee referred to as "its pressing nature" as a "highly specialized" aspect of the larger municipal tort liability picture.⁷ Statistical data collected from New York cities covering a five-year period (1949-1953), for example, disclosed that despite the fact that such entities were generally liable in tort, a preponderance of the total average costs (*i.e.*, including both tort claim payments and premium costs of liability insurance) attributable to tort liability in each year was directly related to sidewalk defects, and only a minority of such costs arose from nonsidewalk claims.⁸ Dangerous and defective condition claims thus, in all likelihood, may be deemed the single most important area of governmental tort liability.

The existence of a waiver of immunity in the Public Liability Act (Section 53051 of the Government Code, quoted above) does not mean that there is no cause for legislative concern in California in light of the *Muskopf* case. On the contrary, the judicial abolition of sovereign immunity by that decision has placed in sharp focus many significant issues of policy which had already emerged from the practical operation of Section 53051, and has created a number of new issues, all of which demand legislative solution. To these issues we now turn.

Entities Covered by Public Liability Act

Section 53051 is in terms applicable only to "local agencies," a term defined to mean cities, counties and schools districts.⁹ No other public entities are within the scope of the dangerous and defective condition

⁴ See David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1, 40 (1959), "By far the greatest municipal liability arises from sidewalk and street conditions." During the year 1950, a study of the accident records of 11 California cities disclosed that 46 percent of all reported tort claims consisted of "slips, trips and falls" on public streets, sidewalks, stairs and other places, while another 14 percent consisted of damage to motor vehicles resulting from bumps or other obstructions on public streets and highways. The data as reported suggests that additional claims were also based on defective property conditions (*e.g.*, 60 claims were founded on injuries sustained in connection with "parks, playgrounds, golf, swimming pools, lakes"—all prolific breeders of dangerous and defective condition litigation), although the exact percentage of claims so based is impossible to determine. CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMI-FINAL REPORT (Section No. 1) MUNICIPAL LIABILITY INSURANCE 47 (1953). See also, *id.* at 48. Compare the remarks of Mr. Lewis Keller, then assistant legal counsel of the League of California Cities: "First and foremost and most fearful of the liabilities of cities, is the liability for so-called dangerous and defective condition of public works." *Id.* at 54.

⁵ See note 4 *supra*.

⁶ See, *e.g.*, WARE, MUNICIPAL TORT LIABILITY IN VIRGINIA 67 (1941); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437, 454 (1941); Schroeder, *Administration of Municipal Tort Liability in Cleveland*, 9 OHIO ST. L. J. 412, 414 (1948).

⁷ NEW YORK COMMITTEE, THIRD REPORT 13 (Legis. Doc. No. 23, 1957); *Id.*, FOURTH REPORT 55 (Legis. Doc. No. 42, 1958).

⁸ NEW YORK COMMITTEE, FOURTH REPORT 55 (Legis. Doc. No. 42, 1958).

⁹ CAL. GOVT. CODE § 53050(c).

statute, although several notable but unsuccessful attempts have been made to obtain a judicial interpretation to the contrary.¹⁰ Consideration should thus be given to the question whether the State, as well as other types of local entities such as flood control districts, water districts, irrigation districts and the like, should be brought within the ambit of the statutory rule. If the abolition of the archaic sovereign immunity doctrine is accepted as a generally salutary development, the desirability of bringing all public entities under a statutory rule of liability for defects in their property is at once apparent. The courts have already taken the position—notwithstanding persuasive arguments which could be advanced to the contrary¹¹—that the Public Liability Act is the exclusive measure of liability for defective property conditions arising from the governmental functions of cities, counties and school districts, and that the abolition of governmental immunity by *Muskopf* has not altered the situation in any appreciable manner.¹² Public entities which were not previously within the scope of the Public Liability Act, however, and hence were immune from liability for similar defective property conditions, are now held to be liable in such cases under the rules of the common law as newly made applicable to such entities by the *Muskopf* decision.¹³ These developments have made it urgent that the legislature enact a uniform rule of liability applicable to all public entities. Not to do so would leave public entities other than cities, counties and school districts liable in such cases under common law principles bereft of the protection of the statutory standards, and would lead to unnecessary lack of uniformity of law. On the other hand, to simply restore the law to its pre-*Muskopf* status would perpetuate the injustice and discriminatory features of a rule of law which holds a few designated public entities responsible for property defects but exonerates all others however similarly situated.

In practically every state of the Union today, there is some measure of tort liability either by common law rule or by statute for injuries sustained as a result of dangerous or defective conditions of public property under the control and maintenance of *local* entities, especially in connection with streets, sidewalks, bridges and highways.¹⁴ To be sure, there are often significant differences in the conditions of liability or in the standards of care which are imposed,¹⁵ but the general rule of liability is nearly universal.

The situation is not as clear at the state level. The following jurisdictions, for example, recognize judicially enforceable tort liability of the *state* for at least some types of defective conditions of "govern-

¹⁰ See *Kambish v. Santa Clara Valley Water Conservation Dist.*, 185 Cal. App.2d 107, 8 Cal. Rptr. 215 (1960); *Gillespie v. City of Los Angeles*, 114 Cal. App.2d 513, 250 P.2d 717 (1952); *Barlow v. Los Angeles County Flood Control Dist.*, 96 Cal. App.2d 979, 216 P.2d 903 (1950).

¹¹ See text at 57-59, *supra*.

¹² *Kotronakis v. City & County of San Francisco*, 192 Cal. App.2d 624, 13 Cal. Rptr. 709 (1961); *Ngim v. City & County of San Francisco*, 193 Cal. App.2d 138, 13 Cal. Rptr. 849 (1961). See also *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962); *Akers v. City of Palo Alto*, 194 Cal. App.2d 109, 14 Cal. Rptr. 767 (1961).

¹³ *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

¹⁴ See 19 McQUILLIN, MUNICIPAL CORPORATIONS §§ 54.01-54.08 (3rd ed. 1950).

¹⁵ See the discussion in the text, *infra*.

mental" property, such as state highways: Alaska,¹⁶ Connecticut,¹⁷ Georgia,¹⁸ Hawaii,¹⁹ Illinois,²⁰ Kansas,²¹ Maine,²² Massachusetts,²³ New York,²⁴ and South Carolina.²⁵ In addition, a measure of state responsibility in tort, including injuries arising from defective property, is apparently recognized in the following states, but is administered through procedures other than the courts:²⁶ Alabama,²⁷ Arkansas,²⁸ Iowa,²⁹ Kentucky,³⁰ Minnesota,³¹ Montana,³² North Carolina,³³

¹⁶ Alaska has adopted the Federal Tort Claims Act in principle. ALASKA COMP. LAWS ANN. § 56-7-1 *et seq.* (Supp. 1958).

¹⁷ CONN. GEN. STAT. ANN. § 13-87 (1960) (authorizing suit against the state highway commissioner, with judgment payable out of appropriations for highway repairs, for injuries resulting from defects on state roads, bridges or sidewalks (with certain limited exceptions)).

¹⁸ GA. CODE ANN. §§ 95-1001, 95-1710 (1958) authorize a county being sued for injuries resulting from a defective bridge or bridge approach under state control to implead the State Highway Department and hold it liable for the damages by way of indemnification. See *State Highway Department v. Parker*, 75 Ga. App. 237, 43 S.E.2d 172 (1947).

¹⁹ Hawaii, like Alaska, see note 16 *supra*, has enacted a statute based upon the Federal Tort Claims Act. HAWAII REV. LAWS § 245A-1 *et seq.* (Supp. 1960).

²⁰ ILL. ANN. STAT. ch. 37, § 439.1 *et seq.* (Smith-Hurd Supp. 1961), the Illinois Court of Claims Act, is deemed a complete waiver of governmental immunity within the \$25,000 maximum set by the act. See *Caudle v. Illinois*, 19 Ill. Ct. Cl. 35 (1949) (defect in state highway).

²¹ KAN. GEN. STAT. ANN. § 63-419 (Supp. 1961) authorizes suit against the state for damage sustained "by reason of any defective bridge or culvert on, or defect in a state highway" where prior notice of the defect was had by responsible highway personnel at least five days before the injury. For analysis and discussion of this provision and the cases construing it, see Comment, 1 WASHBURN L. J. 232 (1961).

²² ME. REV. STAT., ch. 23, § 35 (1954) makes the state liable, under specified circumstances, to counties and towns for judgments recovered against the latter on account of defects in state or state-aid highways.

²³ MASS. ANN. LAWS, ch. 81, § 18 (1953) declares the state liable for "injuries sustained by persons" and caused by defects on state highways within the limits of the "constructed traveled roadway," under specified conditions and subject to certain exceptions.

²⁴ Under the New York Court of Claims Act, Section 8, there is general state liability for defects on state highways. See, e.g., *Canepa v. New York*, 306 N.Y. 272, 117 N.E.2d 550 (1954) (inadequate warning signs at dangerous curve); *Cook v. New York*, 301 N.Y. 780, 96 N.E.2d 90 (1950) (motorcycle thrown by wide crack in pavement); *Hughes v. New York*, 14 App. Div.2d 449, 215 N.Y.S.2d 565 (1961) (loose gravel on newly surfaced highway caused skid); *D'Agostino v. New York*, 12 App. Div.2d 986, 210 N.Y.S.2d 313 (1961) (defectively constructed and maintained shoulder on highway).

²⁵ S.C. CODE OF LAWS § 33-229 (Supp. 1960) authorizes suit and recovery of damages against the State Highway Department for injuries resulting from "a defect in any State Highway" or "the negligent repair of any State Highway," with a maximum recovery of \$3,000 allowed for property damage and \$8,000 for personal injury or death. The department is authorized to settle any claim in an amount not over \$1,000 without the necessity for litigation. S.C. CODE OF LAWS § 33-231.

²⁶ In addition to the formal procedures referred to in the text, some states compensate tort victims by private legislative act. See Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942).

²⁷ ALA. CODE ANN. § 55-333 *et seq.* (Recomp. 1958) (providing for administrative handling of claims against the State by a Board of Adjustment). See Copeland & Screws, *Governmental Responsibility for Tort in Alabama*, 13 ALA. L. REV. 296, 338-340 (1961). See also, Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1367 (1954). This article contains a detailed survey of state tort liability, as of 1954, with respect to all 48 states.

²⁸ ARK. STAT. ANN. § 13-1402 *et seq.* (1956) (State Claims Commission). See Leflar & Kantrowitz, *supra* note 27, at 1368-69.

²⁹ IOWA CODE § 25.1 *et seq.* (1958) (State Appeal Board). See Leflar & Kantrowitz, *supra* note 27, at 1377-78.

³⁰ KY. REV. STAT. § 44.070 *et seq.* (1960) (Board of Claims). See Leflar & Kantrowitz, *supra* note 27, at 1379-80.

³¹ MINN. STAT. ANN. § 3.66 (Supp. 1961) (State Claims Commission). See Leflar & Kantrowitz, *supra* note 27, at 1384-85.

³² MONT. REV. CODE § 82-1101 *et seq.* (Supp. 1961) (Board of Examiners). See Leflar & Kantrowitz, *supra* note 27, at 1387.

³³ N.C. GEN. STAT. § 143-291 *et seq.* (1958) (Industrial Commission). See Leflar & Kantrowitz, *supra* note 27, at 1392.

Ohio,³⁴ Oregon,³⁵ Rhode Island,³⁶ South Dakota,³⁷ Tennessee,³⁸ Virginia,³⁹ and West Virginia.⁴⁰ The liability of the state for property defects is presently uncertain for a variety of reasons in the following jurisdictions, although in most instances current indications suggest that the law is evolving in the direction of expansion of liability: Florida,⁴¹ Indiana,⁴² Michigan,⁴³ Washington,⁴⁴ and Wisconsin.⁴⁵ Finally, it is clear under the Federal Tort Claims Act that the federal government is subject to a wide measure of tort liability for property

³⁴ OHIO REV. CODE ANN. § 127.11 (Baldwin Supp. 1961) (Sundry Claims Board). See Walsh, *The Sundry Claims Board*, 9 OHIO ST. L. J. 437 (1948).

³⁵ ORE. REV. STAT. § 366-430 (1959) (State Highway Commission authorized to pay claims for personal injury or property damage arising out of construction, maintenance and operation of state highways, in amount not to exceed \$500 per claim). See Leflar & Kantrowitz, *supra* note 27, at 1395-96.

³⁶ R.I. GEN. LAWS § 22-7-1 *et seq.* (1957) (Joint Committee on Accounts and Claims). See Leflar & Kantrowitz, *supra* note 27, at 1397.

³⁷ S.D. CODE § 33.4301 *et seq.* (Supp. 1952) (Commission on Claims). See Leflar & Kantrowitz, *supra* note 27, at 1398-99.

³⁸ TENN. CODE ANN. § 9-801 *et seq.* (1956) (Board of Claims). See Leflar & Kantrowitz, *supra* note 27, at 1399-1400.

³⁹ VA. CODE § 33-117.1 (1953) (authorizing State Highway Commission to settle certain personal property damage claims arising out of "work projects or the operation of state owned or operated equipment" in connection with state highway construction and maintenance). See Leflar & Kantrowitz, *supra* note 27, at 1403.

⁴⁰ W.VA. CODE ANN. § 1143 *et seq.* (1961) (administrative consideration of claims by attorney general's office). See Leflar & Kantrowitz, *supra* note 27, at 1404-05.

⁴¹ The Florida Supreme Court judicially abrogated the doctrine of sovereign immunity insofar as it protected municipalities from tort liability, in the significant case of *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 60 A.L.R.2d 1193 (Fla. 1957). Whether this decision presages abolition of immunity as to the state is, however, still in doubt. See *Spangler v. Florida State Turnpike Authority*, 106 So.2d 421 (Fla. 1958); *Moreno v. Aldrich*, 113 So.2d 406 (Fla. 1959).

⁴² The recent decision of the Indiana Supreme Court in *Flowers v. Board of Commissioners*, 163 N.E.2d 224 (Ind. 1960), overruling *Hummer v. School City of Hartford City*, 124 Ind. App. 30, 112 N.E.2d 891 (1953), casts considerable doubt upon the continued strength of sovereign immunity in that state, especially where the entity defendant is expressly authorized by law to purchase and has purchased insurance against the liability sought to be enforced. See Comment, *The Decline of Sovereign Immunity in Indiana*, 36 IND. L. J. 223 (1961).

⁴³ The Supreme Court of Michigan, in the recent case of *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961), citing the *Muskopf* decision as persuasive precedent, abolished the doctrine of sovereign immunity prospectively as to municipal corporations. The court, however, appears to be divided as to whether immunity should not be retained as to the state. Indecision on this point may stem, in part, from the fact that Michigan, in 1943, waived the state's tort immunity by a short-lived statutory enactment which was promptly repealed in 1945. See Leflar & Kantrowitz, *supra* note 27, at 1333-34.

⁴⁴ The Washington Legislature recently enacted a provision declaring: "The State of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Wash. Stat. 1961, ch. 136 (adding chapter 4.92 to the Revised Code of Washington). In the light of previous Washington decisions construing statutory consents to suit as not constituting a waiver of immunity from liability but only as providing a remedy where liability exists, see *Billings v. State of Washington*, 27 Wash. 288, 67 Pac. 583 (1902), it is not entirely clear whether this statute will be judicially interpreted as a consent to liability. Published commentary on the measure, however, indicates that in view of the internal structure and language of the bill, there is a strong possibility that it may have worked a substantive abolition of the immunity defense. See, e.g., *Washington State Bar Association, Tort Claims Against the State of Washington* (Sept. 1961); Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312 (1961). One justice of the Washington Supreme Court has already expressed his opinion that the 1961 statute was intended to abrogate sovereign immunity. See *Lightner v. Balow*, — Wash.2d —, 370 P.2d 982 (1962) (Foster, J., concurring); and *Macy v. Town of Chelan*, — Wash.2d —, 369 P.2d 508 (1962) (Foster, J., dissenting).

⁴⁵ The Supreme Court of Wisconsin has recently declared the doctrine of governmental immunity abolished by judicial decision, as applied to a defective property condition case involving a municipality. *Holytz v. City of Milwaukee*, 16 Wis.2d —, 115 N.W.2d 618 (1962). It is, however, uncertain whether the same result would obtain as against the State.

defects when, were it a private person, it would be liable under the law of the jurisdiction where the defect existed.⁴⁶

In summary, one may discern a rather broad consensus among the states in favor of compensating members of the public who are injured as a result of dangerous or defective conditions of public property, subject, however, to some divergences of opinion with respect to details, extent of liability, and procedural mechanics. Although acceptance of liability is nearly universal at the level of the municipal corporation, it is significant that approximately half of the states are now liable to some extent, and that the traditional distinction⁴⁷ between municipal corporations, and counties, townships or other types of local entities (often referred to as "quasi-municipal corporations"), which extended tort immunity in such cases to the latter but not to the former entities, has all but disappeared.⁴⁸ The trend of the law in other states thus tends to reinforce the validity of a simple logical conclusion: if tort liability for injuries caused by defective public property is sound in principle as applied to some California public entities, it would seem in the absence of compelling reasons to the contrary to be equally sound as to *all*. Accordingly, consideration should be given to the following.

Recommendation. It is recommended that the scope of the Public Liability Act be expanded to make all public entities, state and local, liable on the same basis. Suggestions are offered below as to possible legislative changes in the rules which establish the legal basis for such liability. The present recommendation is simply founded on the belief that no justification exists for limiting the Public Liability Act to cities, counties and school districts.

Standard of Care Imposed Upon the Public Entity

The Public Liability Act predicates liability upon negligence in failing to repair or take other action to protect the public within a reasonable time after notice or knowledge of a dangerous or defective condition of public property is brought home to responsible officials having authority to remedy the condition.¹ As is probably true in every other jurisdiction² except West Virginia,³ the public entity under this Act is not deemed in law to be an insurer of the safety of its streets,

⁴⁶ Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U.S.C. § 1346 (1952). See, e.g., *American Exchange Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (defective entranceway to post office building); *Big Head v. United States*, 166 F. Supp. 510 (D. Mont. 1958) (defective government road on Indian reservation); *Deane v. United States*, 244 F.2d 776 (D.C. Cir. 1957) (slack electric cord lying on floor of government office, thereby creating hazardous condition). See generally Comment, *Federal Government Liability "As a Private Person"* *Under The Tort Claims Act*, 33 IND. L. J. 339 (1958).

⁴⁷ See generally 19 MCQUILLIN, *MUNICIPAL CORPORATIONS* 7-8 (3rd ed. 1950), and cases there cited.

⁴⁸ *Id.* at 8, pointing out that "even as to quasi-corporations liability is now generally imposed by statute on counties and towns." See, to the same effect, *Copeland & Screws, Governmental Responsibility For Tort in Alabama*, 13 ALA. L. REV. 296, 309-318 (1961); Comment, *Governmental Tort Liability and Immunity in Wisconsin*, 1961 WIS. L. REV. 486; 489-92; Note, *The Decline of Sovereign Immunity in Indiana*, 36 IND. L. J. 223, 224-231 (1961); Annot., 16 A.L.R.2d 1079 (1951). Cf. Comment, Respondent Superior: *An Inroad Upon Governmental Immunity*, 15 RUTGERS L. REV. 98, 105-06, 112-14 (1960).

¹ *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953); *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334, P.2d 37 (1959). See text at 42-56 *supra*.

² See 19 MCQUILLIN, *MUNICIPAL CORPORATIONS* § 54.11 (3rd ed. 1950); RHYNE, *MUNICIPAL LAW* § 30-14 (1957).

³ West Virginia imposes an "absolute" tort liability upon local entities for defective streets and sidewalks even in the absence of notice thereof. See *Burcham v. City of Mullens*, 139 W. Va. 399, 83 S.E.2d 505 (1954); *Burdick v. City of Huntington*, 133 W. Va. 724, 57 S.E.2d 885 (1950).

sidewalks and other property.⁴ It is simply under a statutory duty to employ reasonable care in the construction, maintenance, supervision and repair of its facilities. Since this standard of care appears on the surface to correspond generally with that which governs the liability of private persons and corporations in the management of their property, its application to public entities has undeniable intellectual appeal.

The principal difficulty with the present statutory standard of care is that in actual practice it has failed to adequately take into account the marked differences between private owners of property and public entities. Many cities and counties measure the total length of the streets and sidewalks under their jurisdiction in the hundreds of miles, while the state highway system stretches into thousands of miles. No private property owner has responsibilities of this magnitude. The channels, ditches, conduits and pipelines operated by flood control, water, sewer, irrigation, drainage and reclamation districts likewise exceed, in most instances, any comparable privately managed facilities. Parks, playgrounds, swimming pools, picnic and camping areas, and other recreational facilities are by necessity chiefly in the hands of public agencies, and analogies to private tort situations are thus scarce and possibly misleading. Garbage collection and disposal, sanitation, health administration, pest eradication, air pollution control, and a multitude of other specialized services essential to a complex and highly integrated society are primarily the responsibility of government rather than private enterprise.

The sheer vastness of the total governmental enterprise counsels the need for a realistic and workable standard of care.⁵ Public officials desire to do their duty, to successfully assume and discharge the responsibility of care imposed upon them; but there are practical limits to the funds and resources available to them to do the job. The standard of care should thus ideally be established at a point which provides the maximum possible protection against injuries to the public, but which is reasonably within the capacity of governmental entities to meet. Defining such a standard, however, is not merely an exercise in legislative semantics, but requires a discriminating analysis of the numerous substantive, procedural and pragmatic considerations which cluster about the problem.

(a) **The status of the plaintiff.** One of the rather remarkable aspects of the law as it has developed under the Public Liability Act is that no distinction is recognized between injured persons who, at the time of injury, were trespassers or bare licensees and those who were invitees. These traditional distinctions in the area of private tort law, which determine the degree of care which meets the standard of reasonableness, are deemed inapplicable since they have been replaced, say the courts, by the statutory standard declared in Section 53051 of the Government Code. In *Gallipo v. City of Long Beach*,⁶ for example, an eight-year-old boy fell and was injured while crossing a bridge not

⁴ *Reel v. City of South Gate*, 171 Cal. App.2d 49, 340 P.2d 276 (1959); *Belcher v. City & County of San Francisco*, 69 Cal. App.2d 457, 158 P.2d 996 (1945).

⁵ See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 14-19 (1959). Cf. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 809-13 (1956).

⁶ 164 Cal. App.2d 70, 330 P.2d 91 (1958).

on the roadway but on a pipeline suspended along one side of the bridge and not designed for use as a walkway. Part way across the pipeline, passage had even been deliberately obstructed by the city by means of a wooden barrier and barbed wire, but the obstructions were apparently not sufficient to prevent youngsters from using the pipeline to cross the bridge. Since there was some evidence that the pipeline was not a safe method of passage, although it was evidently safe as a pipeline, a jury verdict in favor of plaintiff was affirmed under the Public Liability Act. It was deemed immaterial that the plaintiff was possibly a trespasser or at best a bare licensee. Similarly, a woman injured by stepping into a hole in a plot of public ground intended for planting of trees and lawns, while crossing said plot at night after leaving the sidewalk, was held entitled to recover under the Act without regard for whether she was in the status of licensee or trespasser.⁷ As the Supreme Court stated in a decision affirming a judgment for a plaintiff under circumstances where there would have been no liability as between private persons:

[T]he rules with respect to the measure of care to be exercised by owners of private property toward invitees and licensees have no application to the duty imposed by the statute on a county, municipality or school district to maintain public property in a safe condition.⁸

In a very recent decision founded on this view, nine-year-old Thomas Acosta, while riding a bicycle on a public sidewalk in violation of an ordinance forbidding such conduct, was held, despite his wrongful use of the property, to be within the protection of the Public Liability Act.⁹

The principal significance of the cited cases is not in their individual results, but in their potential impact upon the duty of care which must be undertaken by the public entity. The explicit rejection of the usual distinctions between trespassers, licensees and invitees suggests that public entities are required to maintain public property in a condition which will be reasonably safe for all who may use it, whether such use is authorized or not, legal or illegal, provided only that it is "neither extraordinary nor unusual."¹⁰ As the District Court of Appeal for the Fourth District recently explained, the use to which public property is put is a factor pertinent to the determination whether that property is in a dangerous condition under the Public Liability Act; but "the use factor to be considered in making such determination includes not only its designed or originally intended use, but every other reasonably anticipated use and also any use actually being made of it, conditioned always upon the fact that the owning agency has knowledge of its

⁷ *Castro v. Sutter Creek Union High School Dist.*, 25 Cal. App.2d 372, 77 P.2d 509 (1938).

⁸ *Gibson v. County of Mendocino*, 16 Cal.2d 80, 84, 105 P.2d 105, 107 (1940). See also *Torkelson v. City of Redlands*, 198 Cal. App.2d 354, 17 Cal. Rptr. 899 (1961).

⁹ *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961).

¹⁰ *Gallipo v. City of Long Beach*, 164 Cal. App.2d 70, 75, 330 P.2d 91, (1958), distinguishing *Demmer v. City of Eureka*, 78 Cal. App.2d 708, 178 P.2d 472 (1947), where a child had climbed on a log floating in a pond in the street caused by storm waters and the court had held that there was no liability for his resulting death under the Public Liability Act, as an example of a highly unusual use of a street.

actual use, and conditioned further upon the fact that such use is not a mere casual one but a customary use."¹¹

The logical implications of a rule of this sort conceivably might impose upon public entities a duty of care which would be more stringent than the most onerous duty imposed upon private property owners, that is, the duty to take precautions against injuries to trespassing children under the "attractive nuisance" doctrine. The latter doctrine, as applied in California, is predicated upon the notion that a young child may not be capable of discovering the defect or realizing the danger involved in trespassing upon the dangerous instrumentality, and as a condition of liability requires a determination that the utility to the defendant of maintaining the condition is slight as compared to the risk to young children involved therein.¹² Although it is doubtful that the "attractive nuisance" doctrine was applicable to "governmental" activities of public entities prior to *Muskopf*,¹³ elimination of the distinction between trespassers and invitees clearly goes a long way toward recognition of a comparable rule with respect to children under the Public Liability Act. The rule that the Public Liability Act makes no such distinction, moreover, is not limited to children; for when it appears that the unauthorized use of the premises was "neither extraordinary nor unusual," liability for the defective condition thereof apparently may obtain under the statute without regard for the status of the plaintiff, or the wrongful nature of his entry, or the reasonableness of the defendant's failure to take precautions against such injury.

A duty of care of this magnitude, it is submitted, is unduly onerous. At least three basic elements deemed relevant to possible legislative modifications upon the rule may be suggested.

First, it would seem to be reasonable, as a starting point, to require public agencies to simply construct and maintain their property and facilities in a way which is reasonably safe in light of the intended purpose and the normal and foreseeable use of such property. A number of well-reasoned California cases support this interpretation. Thus, a spillway used to conduct water into a reservoir need not be made safe

¹¹ *Torkelson v. City of Redlands*, 198 Cal. App.2d 354, 361, 17 Cal. Rptr. 899, 903 (1961). But compare the statement of the Supreme Court in the recent case of *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961): "It is manifest that the instant case is properly distinguishable from those cases wherein recovery under the Public Liability Act has been denied where a child was injured by a defective or dangerous condition when he went onto public property not generally open to any member of the public, or for a purpose not connected with the normal use of the property, and recovery in such instances was deemed to be beyond the legislative intent." *Id.* at 213, 14 Cal. Rptr. at 436, 363 P.2d at 476.

¹² RESTATEMENT, TORTS § 339 (1934), adopted as the law in California in *King v. Lennen*, 53 Cal.2d 340, 1 Cal. Rptr. 665, 348 P.2d 98 (1959); *Garcia v. Soogian*, 52 Cal.2d 107, 338 P.2d 433 (1959); *Courtell v. McEachen*, 51 Cal.2d 448, 334 P.2d 870 (1959); *Reynolds v. Willson*, 51 Cal.2d 94, 331 P.2d 48 (1958).

¹³ A few cases have intimated that the doctrine of attractive nuisance might be applicable against public entities, apart from the Public Liability Act, but have found the doctrine inapplicable on the facts. See, e.g., *Van Winkle v. City of King*, 149 Cal. App.2d 500, 308 P.2d 512 (1957); *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952); *Demmer v. City of Eureka*, 78 Cal. App.2d 708, 178 P.2d 472 (1947); *Beeson v. City of Los Angeles*, 115 Cal. App. 122, 300 Pac. 993 (1931). On the other hand, some of the decisions have strongly intimated that where "governmental" activities are concerned, at least, the exclusive measure of tort liability for defective conditions of property is the Public Liability Act. See, e.g., *McKinney v. City & County of San Francisco*, 109 Cal. App.2d 844, 241 P.2d 1060 (1952); *Loewen v. City of Burbank*, 124 Cal. App.2d 551, 269 P.2d 121 (1954). No case has been found in which a tort judgment against a public entity has been sustained solely on the attractive nuisance doctrine.

for use as a footpath;¹⁴ a secluded trashpile well separated from a children's playground by trees and vegetation need not be maintained in safe condition for use as a play area;¹⁵ and a storm drain need not be maintained safe for use for totally unintended and unanticipated purposes.¹⁶ By the same token, for example, it has been held that a dip in a public street, designed to help drain storm water cannot be deemed an actionable defect when the uncontradicted evidence showed that the condition was reasonably safe for a motorist traveling at a lawful rate of speed and that it became a hazard only when crossed at an excessive rate.¹⁷

As we have seen, the California cases reject any interpretation of the Public Liability Act to the effect that public property need only be made reasonably safe for its intended *purpose* and require that it also be safe for unintended uses which are known to, or are reasonably to be anticipated by, the entity.¹⁸ This view undoubtedly has considerable merit, for safety for the intended *purpose* of the property may not, standing alone, be a realistic limitation upon the entity's duty, in light of the multiple uses to which various types of public property may be put. If the purpose for which the property is intended to be used by the public is made the sole criterion of duty of care, the traditional and troublesome distinctions between trespassers, licensees and invitees will be indirectly made at least partially applicable to cases arising under the Public Liability Act. Those distinctions, however, are not always fully applicable to public facilities, many of which are fully open to all members of the public although intended primarily for uses of a more limited nature. A person strolling through a public building in the capacity of a mere licensee would seem to deserve a safe passageway as much as a business visitor.¹⁹ Moreover, it should be recognized that public officials cannot under all circumstances practically prevent the use of some types of public facilities for purposes for which they are not intended, or for purposes which may even be contrary to established policy and hence forbidden. The fact that bicycling was forbidden by ordinance on the sidewalks involved in the *Acosta* case, *supra*, was realistically treated as not a sufficient reason for denying liability, for, as the court pointed out, "in spite of the ordinance, the very nature of a sidewalk is one which invites entry of the nature

¹⁴ See *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952). *Cf. Van Winkle v. City of King*, 149 Cal. App.2d 500, 308 P.2d 512 (1957).

¹⁵ *Howard v. City of Fresno*, 22 Cal. App.2d 41, 70 P.2d 502 (1937).

¹⁶ *Beeson v. City of Los Angeles*, 115 Cal. App. 122, 300 Pac. 993 (1931). *But cf. Torkelson v. City of Redlands*, 193 Cal. App.2d 354, 17 Cal. Rptr. 899 (1961).

¹⁷ *Rodkey v. City of Escondido*, 8 Cal.2d 685, 67 P.2d 1053 (1937).

¹⁸ See cases cited *supra*, notes 6-11, and related text. *Cf. Loewen v. City of Burbank*, 124 Cal. App.2d 551, 553, 269 P.2d 121, 122 (1954) (holding that there is no liability under the Public Liability Act "unless the accident happens in the ordinary, usual and customary use" of the public property involved). See also, *Howard v. City of Fresno*, 22 Cal. App.2d 41, 45, 70 P.2d 502, 503-04 (1937) (holding that "the question of the dangerous character of a defective condition depends largely on the intended lawful use of the property," hence there could be no liability under the Act where the injury occurred when a rubbish dump owned by the city was put to an "unauthorized and not contemplated and not to be reasonably anticipated use" as a play place by children).

¹⁹ See *Gibson v. County of Mendocino*, 16 Cal.2d 80, 105 P.2d 105 (1940). Under common law principles, users of public streets and sidewalks would probably be regarded as "licensees" rather than as "invitees" for the purposes of tort liability, absent a statute in point. See, e.g., *Obrien v. Fong Wan*, 185 Cal. App.2d 112, 8 Cal. Rptr. 124 (1960) (pedestrian on private sidewalk open to public deemed a licensee and not an invitee); *Flick v. Ducey & Attwood Rock Co.*, 70 Cal. App.2d 70, 160 P.2d 569 (1945) (motorist on private road).

here involved, and particularly entry of children, in the lack of affirmative enforcement action on the part of the county."²⁰ A standard of care commensurate with normal and foreseeable use would clearly include the concept of intended purpose, but would go beyond that concept. It would thus seem to be consonant with the needs of public safety, and yet would avoid the difficulties inherent in the use of the traditional classifications of plaintiff's status.

Second, the "normal and foreseeable use" concept may not strike a fair balance between the public and private interests in cases where the use, although perhaps foreseeable and not totally abnormal, is nonetheless one which increases the risk of harm to the user in undue proportion to the cost of taking precautions against such harm. The patron of the zoo who voluntarily thrusts his hand within reach of a wild animal's jaws should not be in a position to claim that the fence or barrier maintained by the zoo authorities was inadequate, when it is shown to be a sufficient distance from the cage to prevent injury in the ordinary situation.²¹ Children who are repeatedly warned of the dangers of palm thorns and instructed to stay away from trees exposing them to such hazards should not be in a position to complain that such thorns constituted a dangerous condition.²² A plaintiff who climbs over a fence to use public property for an unintended purpose may well be deemed to have assumed the risk of his wrongful conduct, at least if he is of a sufficient age to realize that it was wrongful.²³

The point is that use by a person who knows or has reason to know that his use of the property is unlawful or forbidden ordinarily should not be deemed "normal and foreseeable," thereby requiring the taking of safety precautions by the public entity. A requirement that plaintiff prove that he did not know, or could not reasonably have been expected to know, that his entry was wrongful would also provide the public entity with a means to minimize its liability with respect to property or facilities creating possible risks which the entity is not prepared, and should not be required, to fully guard against. Signs warning persons to stay out of restricted areas, or fences to exclude unauthorized persons from entering, would serve in most instances to place the plaintiff upon notice sufficient to preclude liability of the entity.

Third, the applicability of the "attractive nuisance" doctrine to public entities should be carefully evaluated with respect to the standard of care which it would entail. That doctrine, as between private litigants, requires that plaintiff prove four elements of liability:²⁴ (1) That the defendant placed or maintained a structure or artificial condition at a place where he knew or should have known that young children were likely to trespass. (2) That the condition was one which the defendant knew or should have known involved an unreasonable risk of death or serious bodily harm to such children. (3) That the plaintiff child because of his youth did not discover the condition or

²⁰ *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 209, 14 Cal. Rptr. 433, 434, 363 P.2d 473, 474 (1961).

²¹ *McKinney v. City & County of San Francisco*, 109 Cal. App.2d 844, 241 P.2d 1060 (1952).

²² *Ford v. Riverside City School Dist.*, 121 Cal. App.2d 554, 263 P.2d 626 (1953).

²³ *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952).

See also, *Campbell v. City of Santa Monica*, 51 Cal. App.2d 626, 125 P.2d 561 (1942) (motorist who violated detour signs).

²⁴ See RESTATEMENT, TORTS § 339 (1934) and cases cited in note 12 *supra*.

realize the risk involved in intermeddling in it or in coming within the area made dangerous by it. (4) That the utility to the defendant of maintaining the condition was slight as compared to the risk to young children involved therein.

For purposes of the Public Liability Act, the first of these elements would appear to be subsumed under the suggested requirement that the plaintiff must establish that his use of the property was a "normal and foreseeable" one. Given the likelihood of trespassing children being known to the public entity, an actual trespass could reasonably be deemed to be normal and foreseeable. The second requisite appears to be already embraced in substance within the statutory requirement of the Public Liability Act that the defendant entity must have had knowledge or notice of the defect. The third element is substantially a reflection of the principle of contributory negligence as modified by the circumstance that the injured plaintiff was too young to appreciate or discover the danger; and, in this sense, it would seem to be already a requirement in substance under the Public Liability Act, coupled perhaps with the suggested additional factor of inability to realize that the use or entry itself was wrongful.²⁵ The final element, which requires a form of judicial balancing of utility of the condition against magnitude of the risk to children, is the only one which appears to be not already embraced by the Public Liability Act. This element, however, appears to be particularly inappropriate as a basis for determining liability of a public entity, since a determination that the maintenance of the condition was of substantial utility and in the public interest will have already been made by the legislative or executive branch on the basis of considerations unsuitable for judicial review. Moreover, if the entity's duty is defined, as above suggested, in terms of protecting against normal and foreseeable dangers, an appraisal of the magnitude of the risk to trespassing children will already have been necessarily made by the entity, and a balance struck. If, on balance, the entity decided to assume the risk from trespassing children, it would not be unreasonable to hold it to its decision. The general standards of liability under the Act would thus seem to be sufficient to satisfy the basic humanitarian policies served by the "attractive nuisance" doctrine, and it is submitted that clarity and certainty would be promoted by expressly providing that the statutory liability supersedes the operation of that doctrine.

Recommendation. On the basis of the foregoing considerations, it is suggested that the Public Liability Act be amended to provide:

1. That plaintiff must plead and prove, as a condition of recovery thereunder, that the use made by him of the allegedly defective public property (where injury was sustained while plaintiff was using said property) was of a kind which was normal and reasonably foreseeable by the responsible officers of the defendant entity.

2. That plaintiff must plead and prove, as a condition of recovery thereunder, that he did not have notice or knowledge that his use or entry upon the allegedly defective property was wrongful or unauthorized.

²⁵ *Torkelson v. City of Redlands*, 198 Cal. App.2d 354, 17 Cal. Rptr. 899 (1961). With respect to the problem of contributory negligence under the Public Liability Act, and the burden of proof thereon, see the text at 364-69 *infra*.

3. That the doctrine of "attractive nuisance" shall not be applicable, as such, in actions against public entities, but that liability of public entities for dangerous and defective conditions of public property shall be based solely upon the terms of the Act.

(b) **What constitutes an actionable defect?** The statutory terms, "dangerous or defective condition," as employed in the Public Liability Act have proven to be highly elastic. Since liability is expressly conditioned upon knowledge or notice of such condition, one might expect that these terms would be defined judicially (for want of any statutory definition) by reference to foreseeability of risk based on probability of harm. As Judge David points out,¹ with the vast amount of public property which must be supervised, foreseeability of risk alone is not a realistic or feasible test; "there should be some consideration given to the probability of harm from any foreseeable condition." The Connecticut courts, for example, have recognized that a relatively minor defect in a busy city sidewalk frequented by hundreds of people daily may increase the likelihood of injury to a point which should motivate the making of repairs promptly;² but a like defect in a rural community accustomed to a more leisurely pace of life may be an entirely different matter.³ In short, if it is assumed that the public entity is not an insurer whose duty it is to make its property absolutely safe, but has only the responsibility to employ ordinary care to make such property reasonably safe for its anticipated use in light of all the circumstances, surely circumstances relevant to the probability of injury should be deemed to affect the adequacy of the discharge of the duty.

The California cases, however, often seem unusually insensitive to the matter of improbability of injury. A clump of ice plant growing through a boundary fence onto a residential area sidewalk would seem to present little or no probability of serious harm in view of the not uncommon existence of such encroaching vegetation upon sidewalks outside of business districts; yet one who slipped on such ice plant recovered.⁴ Where hundreds of people use a revolving door without hazard daily, it would seem somewhat improbable that injury would result therefrom; yet recovery based on such a situation was affirmed.⁵ It may be foreseeable that the spraying of oil on an unimproved dirt sidepath would create a surface condition impervious to water, but the probability of injury resulting therefrom is surely *de minimis*; here again, however, the Public Liability Act permits recovery.⁶ Similarly, one may conjecture as to the improbability of injury to a pedestrian from being struck by a lamp post which, being tilted slightly into the street, thereby is exposed to the possibility of being struck and knocked over by an outside vehicle;⁷ or the like improbability that a youngster on roller skates will receive an electrical shock from a metal junction

¹ David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. Rev. 1, 16 (1959).

² See *Alston v. City of New Haven*, 134 Conn. 686, 60 A.2d 502 (1948).

³ *Older v. Town of Old Lyme*, 124 Conn. 283, 199 Atl. 434 (1938), as explained in *Alston v. City of New Haven*, *supra* note 2.

⁴ *Rodriguez v. City of Los Angeles*, 171 Cal. App.2d 761, 341 P.2d 410 (1959).

⁵ *Gibson v. County of Mendocino*, 16 Cal.2d 80, 105 P.2d 105 (1940).

⁶ *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625, 158 A.L.R. 773 (1945).

⁷ *Jones v. City of Los Angeles*, 104 Cal. App.2d 212, 231 P.2d 167 (1951).

box imbedded, like so many other similar utility facilities are, in the sidewalk.⁸ Recovery was affirmed in both cases.

The key to the problem suggested by cases like those just cited, it is believed, lies in the allocation of responsibility for decision-making as between the judge and jury. Under the existing broad and indefinite statutory language of the Public Liability Act, almost every issue whether a given condition is "dangerous or defective" is regarded, and almost inevitably so, as a question of fact for the jury.⁹ Indeed, there is even authority in California for the view that the mere happening of the accident which caused plaintiff's injury is in itself *some* evidence that the condition was actionable under the Act.¹⁰ On the other hand, evidence as to lack of previous injuries is apparently deemed admissible as having some bearing on the same issue.¹¹ However, to the extent that the issue is automatically deemed one for the jury to determine, its decision may in practical effect make the public entity an insurer despite the best efforts of responsible officials to eliminate every known condition posing a reasonable probability of injury.¹²

Apart from a limited number of decisions which have taken the issue from the jury as a matter of statutory interpretation,¹³ the only

⁸ *Aguirre v. City of Los Angeles*, 46 Cal.2d 841, 299 P.2d 862 (1956).

⁹ *Palmer v. City of Long Beach*, 33 Cal.2d 134, 199 P.2d 952 (1948); *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947); *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945); *Newman v. County of San Mateo*, 121 Cal. App.2d 825, 264 P.2d 594 (1953).

¹⁰ *Johnson v. City of Palo Alto*, 199 Cal. App.2d 148, 18 Cal. Rptr. 484 (1962) (trip and fall on raised portion of sidewalk held to be some evidence that expansion joint was dangerous); *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958) (fall on broken place in sidewalk held to be some evidence that condition was dangerous and defective, hence an issue for jury); *Balkwill v. City of Stockton*, 50 Cal. App.2d 661, 123 P.2d 596 (1942) (referring to evidence that hole in sidewalk had caught heel of plaintiff's shoe as tending to prove the hole was dangerous and defective under Public Liability Act); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940) (happening of accident to plaintiff in schoolyard while playing in sandbox held to be some evidence of defective condition of yard); *Hook v. City of Sacramento*, 118 Cal. App. 547, 5 P.2d 643 (1931) (fact that plaintiff's foot slipped and caused fall held some evidence of dangerous condition). See also, to same effect, *Adams v. Southern Pac. Co.*, 4 Cal.2d 731, 53 P.2d 121 (1935).

¹¹ See *Rodkey v. City of Escondido*, 8 Cal.2d 685, 67 P.2d 1053 (1937); *Adams v. Southern Pac. Co.*, 4 Cal.2d 731, 53 P.2d 121 (1935). Compare *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937) (evidence of no claims of injuries from alleged condition over 5-year period). But note *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953), where the trial court refused to admit evidence of lack of prior accidents, but the Supreme Court did not find it necessary to review the claim of error in this regard.

¹² Cf. *David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 13 (1959): "The fact might well be, that ten thousand vehicles a day have passed over the spot without incident. To a public administrator, this would be convincing proof that the condition was reasonably safe. The jury will be instructed that a city is not an insurer. By its verdict, the jury may make it such."

¹³ See, e.g., *Jones v. Czaplak*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960) (failure of county health officials to quarantine tubercular patient and prevent him from using streets and sidewalks does not make such streets and sidewalks "dangerous or defective" within meaning of Public Liability Act); *Mercado v. City of Pasadena*, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959) (location of boulevard stop sign at intersection point where crosstraffic not completely visible does not make intersection "dangerous or defective" within meaning of Act); *Ziegler v. Santa Cruz City High School Dist.*, 168 Cal. App.2d 277, 335 P.2d 709 (1959) (stair railing held not defective within meaning of Act merely by reason of fact students sometimes sat on it, thereby exposing themselves to possibility of fall); *Durst v. County of Colusa*, 166 Cal. App.2d 623, 333 P.2d 789 (1959) (negligent employment by county of incompetent laboratory technician in county hospital does not make hospital dangerous or defective); *Sinclair v. City of Pasadena*, 21 Cal. App.2d 720, 70 P.2d 241 (1937) (notice to crew foreman on road construction job was not notice required by Act to be given to board or officer with authority to remedy defect); *Whiteford v. Yuba City Union High School Dist.*, 117 Cal. App. 462, 4 P.2d 266 (1931) (injury sustained by motorist when orange was thrown through windshield by student on school grounds held not a result of any dangerous or defective property condition within meaning of Public Liability Act).

significant area in which there has been any firm judicial control over the determination whether a given condition was defective or not relates to surface deviations on streets and sidewalks. The California courts have developed a rule which regards "minor" or "trivial" defects as not actionable under the Public Liability Act, as a matter of law.¹⁴ The rationale for the rule was set out in the leading case of *Whiting v. City of National City* in these words:

It is a matter of common knowledge that it is impossible to maintain a sidewalk in perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect.¹⁵

In the *Whiting* case, a surface deviation at the expansion joint between two sidewalk blocks which was not more than three-quarters of an inch at its highest point was held, as a matter of law, to be trivial and hence nonactionable. Other cases following the lead of *Whiting* have similar results with respect to defects of $\frac{1}{2}$ inch,¹⁶ $\frac{3}{8}$ of an inch,¹⁷ 1 inch,¹⁸ 1 $\frac{1}{2}$ inches,¹⁹ and 1 $\frac{3}{4}$ inches,²⁰ respectively. The decisions, however, have repeatedly emphasized that mere measurements alone are not conclusive on the question, and that surrounding circumstances may create an issue of fact as to the actionability of even a relatively small deviation from perfection.²¹ In the words of Mr. Justice Peters in a recent decision²² holding a deviation only 1 $\frac{1}{4}$ inches in height to present a jury question in view of the surrounding circumstances (*i.e.*, broken piece of heavily used sidewalk was in middle where maximum use occurred; broken piece was loose and tilted, with jagged edges; condition had existed for six months):

¹⁴ Most of the cases are collected in *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953) (applying the rule to hold that a $\frac{1}{2}$ inch protrusion of asphaltum above sidewalk level was "trivial" as a matter of law). See notes 15-20 *infra*.

¹⁵ 9 Cal.2d 163, 165, 69 P.2d 990, 991 (1937).

¹⁶ *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953).

¹⁷ *Ness v. City of San Diego*, 144 Cal. App.2d 668, 301 P.2d 410 (1956). See also *Sischo v. City of Los Banos*, 37 Cal. App. 2d 717, 100 P.2d 305 (1940) (slope in sidewalk panel of 58/100 inch per foot).

¹⁸ *Balmer v. City of Beverly Hills*, 22 Cal. App.2d 529, 71 P.2d 854 (1937); *Dunn v. Wagner*, 22 Cal. App.2d 51, 70 P.2d 498 (1937).

¹⁹ *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936). See also, *Meyer v. City of San Rafael*, 22 Cal. App.2d 46, 70 P.2d 533 (1937) (adjoining sidewalk panels out of line to extent of $\frac{3}{8}$ to 1 $\frac{1}{8}$ inches).

²⁰ *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957).

²¹ *Johnson v. City of Palo Alto*, 199 Cal. App.2d 148, 18 Cal. Rptr. 484 (1962) (height difference of $\frac{3}{8}$ to $\frac{7}{8}$ inch held question of fact); *Johnson v. City of San Leandro*, 179 Cal. App.2d 794, 4 Cal. Rptr. 404 (1960) (deviation of 1 1/16 to 1 $\frac{1}{2}$ inch, held question of fact); *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958) (depression 1 $\frac{1}{2}$ inch deep in generally broken area of sidewalk, held question of fact); *Aitkenhead v. City & County of San Francisco*, 150 Cal. App.2d 49, 309 P.2d 57 (1957) (defect only $\frac{3}{8}$ inch deep held to present a question of fact in light of all circumstances); *Clark v. City of Berkeley*, 143 Cal. App.2d 11, 299 P.2d 296 (1956) ($\frac{3}{8}$ inch variance held question of fact in view of generally dilapidated condition of sidewalk); *Balkwill v. City of Stockton*, 50 Cal. App.2d 661, 123 P.2d 596 (1942) (sidewalk hole $\frac{3}{8}$ to 2 inches deep held question of fact in view of 2-inch width and 4- to 5-inch length). See also, *Adams v. City of San Jose*, 164 Cal. App.2d 665, 330 P.2d 840 (1957) (defect described by witness as a "little eruption" in sidewalk held a question of fact).

²² *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958).

It is obvious that a tape measure cannot be used to determine these questions. The question is not solely one of height or depth. The nature of the defect, that is, whether it is a constructional one, one caused by natural causes such as normal wear or tear, the elements, or tree roots, etc., or whether it is an artificial break in the sidewalk, and how long it existed are all important. The condition of the sidewalk surrounding the defect is important, as is its location on the sidewalk. . . . But no California case has expressly adopted the tape measure test. Obviously, such a rigid test is unsound. The size of the defect is a factor, an important factor, that must be considered, but it is not the only factor. The cases all declare that all of the conditions surrounding the defect must be considered in the light of the facts of the particular case, before the issue can be determined.²³

Thus, it is not surprising to find cases holding that relatively slight defects, so far as measurements alone are involved, may be reasonably held by a jury to be dangerous and defective under the Act, where other surrounding circumstances persuade the court that reasonable minds could differ on the point.²⁴

The courts in other states have, on the whole, treated the question of whether the sidewalk was defective much like the California courts have done, holding that a jury question is presented in all cases except where the defect is so minor as to be nonactionable as a matter of law.²⁵ In a few jurisdictions, judicial efforts to establish fixed "rules of thumb" as to the height of a surface deviation were pressed for a time, but ultimately a flexible rule which treats each case as one to be determined on its own facts has supplanted the more rigid test. In Colorado, for example, judicial language intimating that defects less than two inches in height would be deemed trivial as a matter of law has been disapproved.²⁶ A similar rule which once obtained in New York, but which fixed the dividing point at four inches, has likewise been supplanted by an *ad hoc* approach which vests far more discretion in the jury.²⁷ In a few jurisdictions, it appears that the question is invariably viewed as a question of fact for the jury;²⁸ and a recent survey concludes that on the whole the courts of the various states appear to be

²³ *Id.* at 698-99, 329 P.2d at 949.

²⁴ See cases cited in note 21 *supra*.

²⁵ See 19 McQUILLIN, MUNICIPAL CORPORATIONS §§ 54.202-54.207 (3rd ed. 1950); Annots., 37 A.L.R.2d 1187 (1954); 119 A.L.R. 161 (1939).

²⁶ *Parker v. Denver*, 128 Colo. 355, 262 P.2d 553, 37 A.L.R. 2d 1177 (1953), overruling *Denver v. Burrows*, 76 Colo. 17, 227 Pac. 840 (1924) and *Colorado Springs v. Phillips*, 76 Colo. 257, 230 Pac. 617 (1924).

²⁷ In applying New York's "trivial defect" rule as established in *Beltz v. City of Yonkers*, 148 N.Y. 67, 42 N.E. 401 (1895), the courts gradually developed a rule of thumb that defects less than four inches in depth or height were not actionable as a matter of law unless some element of a "trap" was present. See *Eger v. City of New York*, 206 App. Div. 718, 200 N.Y. Supp. 921 (1923), *aff'd mem.*, 239 N.Y. 561, 147 N.E. 195 (1924); *Lalor v. City of New York*, 208 N.Y. 431, 102 N.E. 558 (1913). *Cf.*, *Hayes v. City of New York*, 267 App. Div. 535, 47 N.Y.S.2d 324 (1944). The so-called Four Inch Rule, however, finally was expressly repudiated in *Loughran v. City of New York*, 298 N.Y. 320, 83 N.E.2d 136 (1948). A full discussion of the history of the Four Inch Rule is contained in NEW YORK COMMITTEE, SECOND REPORT 23-32 (Legis. Doc. No. 41, 1956). Since the *Loughran* decision in 1948, the New York courts generally treat the question whether a particular defect is dangerous or not as an issue for the jury, *Id.* at 28.

²⁸ States in this category appear to include Georgia, Minnesota, Utah and possibly Missouri. The District of Columbia also regards the issue as one of fact. See cases cited and discussed in Annot., 37 A.L.R.2d 1177, 1196-98 (1954).

tending to be more liberal in treating the actionability of sidewalk conditions as a question of fact rather than of law.²⁹

The unpredictable variety of situations which may occur verifies the soundness of the prevailing judicial attitude. Legislatures have also uniformly refrained from attempting to specify exact linear dimensions of actionable defects in public facilities, but have relegated that issue to the process of litigation. In other states where the liability, like that in California, is regarded as exclusively one created by statute, the wording of the applicable legislation is likewise very broad and flexible. The Connecticut statute, for example, simply allows an action for damages to any person injured "by means of a defective road or bridge."³⁰ Maine predicates such an action upon injuries sustained as the result of "any defect or want of repair or sufficient railing" on any highway or bridge.³¹ Massachusetts likewise speaks of "a defect or a want of repair or a want of a sufficient railing" on any public way.³² Michigan authorizes an action for damages resulting from neglect of a city, village or township to keep its streets and sidewalks "in reasonable repair, and in condition reasonably safe and fit for travel."³³ New Hampshire imposes liability upon towns for damages sustained by reason of "any obstruction, defect, insufficiency, or want or repair" of highway structures.³⁴ Oregon authorizes recovery of damage sustained "in consequence of the defective and dangerous character of the highway or bridge."³⁵ Rhode Island predicates liability on "neglect" to keep highways and bridges in good repair.³⁶ South Carolina employs the simple expression "defect in any street, causeway, bridge or public way."³⁷ Comparable breadth of language is found in the statutes which have simply codified a common law rule of liability for street and sidewalk defects, such as those enacted in Alabama,³⁸ Kansas,³⁹ West Virginia⁴⁰ and Wisconsin.⁴¹

²⁹ NEW YORK COMMITTEE, SECOND REPORT 31 (Legis. Doc. No. 41, 1956), concluding after a careful survey of many states other than New York that: "The general tendency is to increase rather than diminish liability. The late cases are less and less inclined to dismiss as a matter of law on a finding of trivial defect, more and more inclined to find sufficient evidence to go to the jury on the question of negligence." See also, in accord, Annot. 37 A.L.R.2d 1177, 1198 (1954).

³⁰ CONN. GEN. STAT. ANN. § 13-11 (1960) (applicable to towns, cities, boroughs and municipal corporations). See also CONN. GEN. STAT. ANN. § 13-87 (applicable to the state).

³¹ ME. REV. STAT., ch. 96, § 89 (Supp. 1961) (applicable to counties and towns).

³² MASS. LAWS ANN. ch. 84, § 15 (1954) (applicable to counties, cities and towns). See also the somewhat modified provisions governing defects in state highways, MASS. LAWS ANN., ch. 81, § 18 (1953).

³³ MICH. COMP. LAWS § 242.1 (1948).

³⁴ N.H. REV. STAT. ANN. § 247:17 (1955).

³⁵ ORE. REV. STAT. § 368.935 (1953) (applicable to counties). See also, ORE. REV. STAT. § 382.320 (imposing liability on Multnomah County for injuries resulting from negligent maintenance of bridges over the Willamette River in the City of Portland).

³⁶ R.I. GEN. LAWS § 24-5-13 (1956) (applicable to towns). See also R.I. GEN. LAWS §§ 45-15-3, 45-15-12 (imposing procedural rules).

³⁷ S.C. CODE OF LAWS § 47-70 (Supp. 1960) (applicable to cities and towns). See also S.C. CODE OF LAWS 33-229 (Supp. 1960) (applicable to injuries sustained by reason of defects or negligent repair of state highways) and S.C. CODE OF LAWS § 33-921 (1952) (defects in county highways).

³⁸ ALA. CODE ANN. § 37-502 (Recomp. 1958) (applicable to cities and towns). See Copeland & Screws, *Governmental Responsibility For Tort in Alabama*, 13 ALA. L. REV. 296, 318-329 (1961).

³⁹ KAN. GEN. STAT. ANN. § 68-419 (Supp. 1961) ("by reason of any defective bridge or culvert on, or defect in a state highway"); KAN. GEN. STAT. ANN. § 68-301 (1949) ("by reason of any defective bridge, culvert or highway" maintained by county or township). See Note, 1 WASHBURN L. J. 232 (1961).

⁴⁰ W.VA. CODE § 1597(9) (1961) ("by reason of any road or bridge . . . or any street or sidewalk or alley . . . being out of repair," where county, city, town or village has duty of maintenance).

⁴¹ WIS. STAT. § 81-15 (1959) (declaring municipalities liable for "insufficiency or want of repair" of highways and bridges). See Note, 1956 Wis. L. Rev. 19.

The consensus of experience elsewhere thus tends to caution against any attempt to define an actionable defect in precise terms. It might be possible, however, to focus attention more clearly upon the factors which are deemed generally relevant to the imposition of liability, by means of a carefully worded statutory definition of the crucial phrase in the Public Liability Act, "dangerous or defective." The Wisconsin "safe place" statute (which applies to all public buildings, except those operated by the state itself),⁴² for example, suggests the type of language which might be employed, although from the viewpoint of defining the terms "safe" and "safety." Those words, states the Wisconsin statute, mean "such freedom from danger to the life, health, safety or welfare of . . . the public . . . as the nature of the . . . public building will reasonably permit."⁴³

The policy which supports California's judicially developed "minor defect" rule is the need to free public entities from the danger that they will be insurers against injuries sustained as the result of every conceivable defect in streets and sidewalks, which need flows from the obvious and realistic consideration that it would be impossible for any public entity to keep its facilities in perfect condition or even to marshal financial resources sufficient to repair all of the minor and insignificant, yet potentially injury-producing, defects therein.⁴⁴ All that should be demanded is the exercise of reasonable care to keep public property reasonably safe for its normal and foreseeable use by members of the public who are not knowingly engaging in wrongdoing. The minor defect rule is a salutary means for controlling any possible disposition, possibly caused by undue sympathy or misunderstanding, of juries to impose a higher standard than this. In order to provide assurance that the courts will continue to exercise their responsibilities in this connection, consideration should be given to the possible codification of the "minor defect" rule as part of the Public Liability Act. Such codification might also serve to direct the attention of the courts to the applicability of the "minor defect" test to alleged deficiencies in public property other than streets and sidewalks—an area which has been generally characterized by judicial reluctance to treat the issue of defectiveness as anything but a question of fact.⁴⁵ In principle, however, the standard of care upon the public entity should be no greater with respect to one type of property than another.

⁴² WIS. STAT. §§ 101.01-101.06 (1959) constitutes the Wisconsin "safe place" statute. Although the statute in terms applies to any "owner," defined by Section 101.01 to include "state, county, town, city, village, school district, sewer district, drainage district and other public and quasi-public corporations," the Wisconsin courts have held that the state is not liable thereunder. *Holzworth v. State*, 238 Wis. 63, 298 N.W. 163 (1941).

⁴³ WIS. STAT. § 101.01(11) (1959).

⁴⁴ See *Barrett v. City of Claremont*, 41 Cal.2d 70, 256 P.2d 977 (1953); *Whiting v. City of National City*, 9 Cal.2d 163, 69 P.2d 990 (1937); *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936); *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957).

⁴⁵ *Anderson v. County of Santa Cruz*, 174 Cal. App.2d 151, 344 P.2d 421 (1959) (issue whether weed abatement fire constituted dangerous condition under circumstances held a jury question); *Ellis v. City of Los Angeles*, 167 Cal. App. 2d 180, 334 P.2d 37 (1959) ("Ordinarily, the question whether a condition was dangerous is one of fact, not one of law for a reviewing court," *id.* at 185, 334 P.2d 37); *Teillet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957); *Sandstoe v. Atchison, T. & S. F. Ry.*, 28 Cal. App.2d 215, 82 P.2d 216 (1938). In *Ellis, supra*, however, the court analogized the defect in question (underground abandoned sewer line which provided no basis for anticipation of cave-in) to the minor defect rule, and held it nonactionable as a matter of law.

A final suggestion relates to evidentiary matters. Earlier California cases⁴⁶ intimating that evidence was inadmissible, in an action under the Public Liability Act, for the purpose of proving that there had been no previous reported or known accidents or injuries resulting from the allegedly defective condition are apparently no longer authoritative.⁴⁷ Such evidence is now admissible, and rightly so, in view of the fact that, as one authority has vigorously explained:

From a practical standpoint, the best test of safety of a given condition is the absence of injury extending over a long period of time during its existence. Any reasonable person, building or maintaining a structure or a street certainly would weight this heavily in relation to safety, and foreseeability of harm. . . . Liability [should be] based not upon possible consequences, but only for those that are probable according to ordinary and usual experience.⁴⁸

On the other hand, there seems to be little merit to the rule, which also obtains in California, under which evidence that injury to the plaintiff happened is permitted to be regarded by the jury as some evidence that the public property in question was defective.⁴⁹ If this rule were applied consistently, it would mean that the issue of defectiveness of the property would always be a jury question, and the minor defect rule would be abrogated. Moreover, it would seem equally appropriate to infer from the happening of the accident to plaintiff that he was contributorily negligent, or that the injury was an unavoidable accident, or that it may have resulted from an unfortunate but nevertheless fortuitous chain of events not attributable to any neglect on the part of either the public entity or the plaintiff. To permit the jury to postulate liability upon such evidence, as the rule apparently does, is to invite decisions supported by little more than speculation. This rule, it is submitted, should be eliminated.

Recommendation. The preceding discussion is believed to support the following suggested amendments to the Public Liability Act:

1. The phrase "dangerous or defective condition," as used in Section 53051 of the Government Code, should be defined in terms which indicate, so far as possible, the standard of care required of public entities. A tentative proposal for such language is suggested in these words:

"Dangerous or defective condition" means a condition of public property which, viewed in the light of its nature, use, location, and

⁴⁶ See, e.g., *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340 (1905). Cf. *Wilkerson v. City of El Monte*, 17 Cal. App.2d 615, 62 P.2d 790 (1936). The courts of the other states are in conflict as to the admissibility of evidence of lack of previous accidents. See 19 MCQUILLIN, MUNICIPAL CORPORATIONS § 54.193 (3rd ed. 1950).

⁴⁷ See cases cited in note 11 *supra*.

⁴⁸ *David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. Rev. 1, 16 n.33 (1959).

⁴⁹ Cases cited in note 10 *supra*. The New York Court of Appeals early invoked a sound common sense attitude toward the problem in *Hubbell v. City of Yonkers*, 104 N.Y. 434, 439, 10 N.E. 858, 860 (1887): "That which never happened before and which in its character is such as not to naturally occur to prudent men to guard against its happening at all, cannot when in the course of years it does happen, furnish good ground for a charge of negligence, in not foreseeing its possible happening and guarding against that remote contingency." On the other hand, evidence that prior accidents have occurred as a result of the same defect is ordinarily deemed some evidence that it is a dangerous condition. See *Warren v. City of Los Angeles*, 91 Cal. App.2d 678, 205 P.2d 719 (1949); *Rowland v. City of Pomona*, 82 Cal. App.2d 622, 186 P.2d 447 (1947); *Barker v. City of Los Angeles*, 57 Cal. App.2d 742, 135 P.2d 573 (1943); *Bigelow v. City of Ontario*, 37 Cal. App.2d 198, 99 P.2d 298 (1940).

other surrounding circumstances, unreasonably exposes persons or property to probable injury.

The adoption of a statutory definition of this type should prove to be helpful in directing attention to the relevant elements of liability, and particularly to the issue of whether injury from the condition was not merely a remote possibility but one which should have been guarded against.

2. The "minor defect" rule should be codified as part of the Public Liability Act, and thereby made applicable to all cases coming within the Act. Possible language which might be appropriate for this purpose is here suggested:

The issue whether a condition of public property is "dangerous or defective" within the meaning of this act shall not be treated as a question of fact if the trial or appellate court is satisfied upon all the evidence, viewed most favorably to the plaintiff, that the condition is of such a minor, trivial or insignificant nature in view of the surrounding circumstances that a reasonable person would not conclude that it unreasonably exposes persons or property to probable injury.

3. The existing rule which permits the happening of the accident which injured the plaintiff to be regarded as some evidence that the property was in a dangerous or defective condition should be abrogated by statute. Possibly the legislation should also require that the jury, in case of trial by jury, be so instructed, in order to prevent misunderstanding on the point.

(c) **The requirement of prior knowledge or notice.** Liability under the Public Liability Act attaches only when the defendant public entity "had knowledge or notice of the defective or dangerous condition" and failed to remedy it or take protective measures within a reasonable time. Much of the litigation under the Act has concerned itself with this prior notice requirement. The California courts have construed the statutory language as authorizing recovery based upon either actual or constructive notice.¹ Actual notice, of course, can seldom be proven, although occasionally evidence may be adduced showing an actual inspection of the premises within a short time prior to the injury.² In addition, the courts have developed a rule which apparently presumes actual notice whenever it is established that employees of the public entity created the defect with the knowledge or consent of responsible officials.³ Most of the cases, however, have been litigated upon the premise of constructive notice. In the words of Mr. Justice Peters:

¹ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953); *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950).

² See *White v. Cox Bros. Constr. Co.*, 162 Cal. App.2d 491, 329 P.2d 14 (1958); *Barker v. City of Los Angeles*, 57 Cal. App.2d 742, 135 P.2d 573 (1943). Compare *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Hoel v. City of Los Angeles*, 136 Cal. App.2d 295.

³ *Fackrell v. City of San Diego*, 26 Cal.2d 196, 157 P.2d 625 (1945); *Pritchard v. Sully-Miller Contracting Co.*, 178 Cal. App.2d 246, 2 Cal. Rptr. 830 (1960); *Selby v. County of Sacramento*, 139 Cal. App.2d 94, 294 P.2d 508 (1956); *Wood v. County of Santa Cruz*, 133 Cal. App.2d 713, 284 P.2d 923 (1955). Some of the cited cases do not speak of the rule as one of a "presumption" of notice, but rather state more generally that "no notice to the city is necessary where a dangerous condition has been deliberately created by it." *Pritchard v. Sully-Miller Contracting Co.*, *supra* at 255, 2 Cal. Rptr. at 835. To justify the same result by reference to a conclusive presumption of notice would be better statutory construction and conceptually more esthetic.

But actual notice of the dangerous or defective condition is not required. The finder of the fact may find that the city has constructive knowledge, if the condition has existed long enough that it may be inferred that a reasonable inspection would have ascertained its existence. . . . A city will be charged with constructive notice of substantial defects which have existed for some time, and which are so conspicuous that a reasonable inspection would have disclosed them.⁴

Under this rule, it is not enough in theory that the entity have constructive notice of the mere existence of the defect as such, for "in order to hold the city because of such defect there must also be notice of the dangerous character of such defect before the duty imposed by the statute is created."⁵ Accordingly, the courts have applied a "minor defect" test here too: if the defect is so minor or trivial that a reasonable inspection would not have disclosed its existence and dangerous character to the entity, there can be no liability.⁶

The fundamental problem posed by this statutory rule of notice, with its judicial gloss, is whether it imposes a feasible and realistic duty of inspection. Los Angeles, one may note in this connection, has roughly 6000 miles of streets, which would more than reach to New York and back if laid end to end, and sidewalks in connection therewith that in total mileage equal the distance from San Francisco to Cape Town.⁷ Is it appropriate to hold the city to notice of potentially injurious defects on all of these streets and sidewalks by reference to what a reasonable inspection would have disclosed? The cost and personnel necessary to satisfy such a standard might well be exorbitant in proportion to the other numerous demands upon municipal government. As an alternative, of course, the city may in effect become an insurer to the extent that it finds itself unable to make the inspections and repairs necessary to protect against tort liability; but this alternative too may be exceedingly costly.⁸

Problems of this same sort have been encountered in other states, particularly in connection with injuries resulting from defective streets and sidewalks. Five different legislative solutions may be identified.

1. West Virginia appears to be unique among the states in that it recognizes liability of counties, cities, towns and villages for injuries resulting from streets and sidewalks which are out of repair, without regard to the question of notice.⁹ The statutory duty to keep public ways in good repair is, in a sense, absolute, since "no want of notice

⁴ *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 697, 329 P.2d 943, 949 (1958).

⁵ *Whiting v. City of National City*, 9 Cal.2d 163, 166, 69 P.2d 990, 991 (1937). See also, *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936); *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959); *Loewen v. City of Burbank*, 124 Cal. App.2d 551, 269 P.2d 121 (1954).

⁶ The cases are collected in *Gentekos v. City & County of San Francisco*, 163 Cal. App.2d 691, 329 P.2d 943 (1958). See also, *Adams v. City of San Jose*, 164 Cal. App.2d 665, 330 P.2d 840 (1957); *Beck v. City of Palo Alto*, 150 Cal. App.2d 39, 309 P.2d 125 (1957).

⁷ *David, Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 16 (1959).

⁸ See CALIFORNIA LEGISLATIVE ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT, MUNICIPAL LIABILITY INSURANCE *passim* (1953).

⁹ W.VA. CODE § 1597(9) (1961). See *Burcham v. City of Mullens*, 139 W.Va. 399, 83 S.E.2d 505 (1954).

or other excuse for the defect will exonerate the town."¹⁰ Contributory negligence on the part of the plaintiff, however, does constitute a defense.¹¹

2. Most states follow a rule which approximates that of California, accepting either actual or constructive notice.¹² The rule to this effect is often statutory. The Alabama statute, for example, imposes liability upon cities and towns for failure to remedy defects in public property only "after the same has been called to the attention of the council, or after such has existed for such unreasonable length of time as to raise a presumption of knowledge of such defect on the part of the council."¹³ Massachusetts imposes liability in highway, street and sidewalk cases only where the state, county, city or town "had or, by the exercise of proper care and diligence, might have had reasonable notice" of the defect.¹⁴ Minnesota has a statutory requirement which simply speaks in terms of "actual or constructive notice of such defect" a sufficient time in advance of the accident so that it might have remedied the same or have taken precautions against injury.¹⁵ Rhode Island grants a right of action against a town for bridge and highway defects only "if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part."¹⁶ Where the statutory provisions are silent on the subject of notice, as in Connecticut, Ohio and Utah, a requirement of reasonable notice, either actual or constructive, is generally implied by judicial decision.¹⁷ A similar principle characterizes the law of those states which recognize municipal liability for street and sidewalk defects as a rule of common law.¹⁸ The present California rule, it seems clear, is consistent with the acceptance of either actual or constructive notice in a majority of states. However, it must be borne in mind that the range of situations which may give rise to liability under California's Public Liability Act is extremely broad—extending to all types of public property—while in most of the other states admitting construc-

¹⁰ *Burdick v. City of Huntington*, 133 W. Va. 724, 727-28, 57 S.E.2d 885, 888 (1950), quoting from *Yeager v. City of Bluefield*, 40 W. Va. 484, 21 S.E. 752 (1895).

¹¹ *Burcham v. City of Mullens*, 139 W. Va. 399, 83 S.E.2d 505 (1954).

¹² 19 MCQUILLIN, MUNICIPAL CORPORATIONS § 54.102 (3rd ed. 1950).

¹³ ALA. CODE ANN. § 37-502 (Recomp. 1958).

¹⁴ MASS. LAWS ANN., ch. 84, § 15 (1953) (applicable to claims against counties, cities and towns; but incorporated by reference and made applicable also to claims arising out of state highway defects by MASS. LAWS ANN., ch. 81, § 18 (1953)).

¹⁵ MINN. STATS. ANN. § 465.121(2) (Supp. 1961).

¹⁶ R.I. GEN. LAWS § 24-5-14 (1956).

¹⁷ See, e.g., *Tirendi v. City of Waterbury*, 128 Conn. 464, 23 A.2d 919 (1942); *Falkowski v. MacDonald*, 116 Conn. 241, 164 Atl. 650 (1933); *Griffin v. City of Cincinnati*, 162 Ohio St. 232, 123 N.E.2d 11 (1954); *Reeves v. City of Springfield*, 111 Ohio App. 387, 171 N.E.2d 178 (1960); *Keech v. City of Elyria*, 85 Ohio App. 503, 89 N.E.2d 174 (1949); *Maloney v. Salt Lake City*, 1 Utah 2d 72, 262 P.2d 281 (1953); *Jensen v. Logan City*, 89 Utah 347, 57 P.2d 708 (1936).

¹⁸ See, e.g., *Saye, The Tort Liability of Municipalities in Georgia*, 17 GA. B. J. 456 (1955); *Fordham and Pegues, Local Government Responsibility In Tort In Louisiana*, 3 LA. L. REV. 720 (1941); *Clarke, Municipal Responsibility In Tort In Maryland*, 3 MD. L. REV. 159 (1939); *Freedman, Liability In Tort of Municipal Corporations In Missouri*, 3 MO. L. REV. 275 (1938); *Bailey, The Basis of Tort Liability of Municipal Corporations in the State of Oklahoma*, 7 OKLA. L. REV. 1 (1954); *Schulz, The Liability of Municipal Corporations For Torts In Pennsylvania*, 40 DICK. L. REV. 137 (1936); *Note, Governmental Tort Liability in Indiana*, 23 IND. L. J. 468 (1948).

tive notice as a basis of liability, the liability only extends to defective conditions on streets and sidewalks.¹⁹

3. The State of Michigan has a somewhat unusual statutory provision²⁰ under which a general principle of either actual or constructive notice of street and sidewalk defects is modified by two corollary rules: (a) if the defect was in the original construction, notice need not be proven, and (b) if the defect was due to a failure of repair, "it shall be conclusively presumed that the township, village or city had notice thereof and a reasonable time in which to repair the same, provided said defect has existed for a period of thirty (30) days or longer." Although the former of these two modifying rules is not worded in the form of a conclusive presumption, it is clear that it has the same effect.²¹ Under the latter rule, it is a question of fact whether the defect existed more than thirty days;²² but in the absence of evidence thereof, or of actual notice, the plaintiff is required to establish constructive notice by proof that the defect is open and notorious and of such a character as would naturally arrest the attention of persons passing by.²³ In Minnesota, prior to the adoption of a recent statewide statute which occupied the field,²⁴ a number of city charters contained provisions comparable to the Michigan statute, under which proof that the defect had existed for a fixed period of time was sufficient showing of notice.²⁵

A provision of this sort may serve to reduce the plaintiff's burden of proof in some cases; but it also would seem to set a definite standard of care, with respect to frequency of inspection, which might be administratively more desirable than the rather vague contours of the judicially formulated constructive notice doctrine. Under that doctrine, notice has been predicated upon the existence of an actionable defect for very short periods of time, often far less than the thirty days fixed in the Michigan act;²⁶ and since the standard of care must necessarily

¹⁹ Of the statutory provisions cited above, notes 13-16 *supra*, only that of Alabama includes defective conditions in property other than streets and sidewalks, its language being inclusive of "streets, alleys, public ways, or buildings." ALA. CODE ANN. § 37-502 (Recomp. 1953). The Wisconsin "safe place" statute is likewise limited to buildings. WIS. STAT. § 101.01 (1959); *Weiss v. Milwaukee*, 268 Wis. 377, 68 N.W.2d 13 (1954); *Herrick v. Luberts*, 230 Wis. 387, 284 N.W. 27 (1939), and the street defect statute in Wisconsin is limited to insufficiency or want of repair of highways or bridges. WIS. STAT. § 81.15 (1959). Manifestly the breadth of coverage of the Public Liability Act far exceeds these statutory provisions.

²⁰ MICH. COMP. LAWS §§ 242.6-242.7 (1948).

²¹ See *Hanshaw v. City of Port Huron*, 265 Mich. 84, 251 N.W. 330 (1933) (1½ inch slot in bridge as originally constructed, which would catch heels of 70% of women in area, held actionable without evidence of notice of defect or of its dangerous character).

²² *Pearo v. City of Mackinac Island*, 307 Mich. 290, 11 N.W.2d 893 (1943) (held a question of fact whether hole in sidewalk had existed over 30 days).

²³ *Overton v. City of Detroit*, 339 Mich. 650, 64 N.W. 2d 572 (1954). See also, *McGrail v. City of Kalamazoo*, 94 Mich. 52, 53 N.W. 955 (1892). The issue of constructive notice is generally one of fact in Michigan. See *Burgdorf v. Holme-Shaw*, 356 Mich. 45, 96 N.W.2d 164, 75 A.L.R.2d 561 (1959).

²⁴ MINN. STATS. ANN. § 465.121, subd. 1 (Supp. 1961). That state laws may supersede municipal charter provisions in this area, see *Johnson v. City of Duluth*, 133 Minn. 405, 158 N.W. 616 (1916); *Nicol v. City of St. Paul*, 30 Minn. 415, 83 N.W. 375 (1900); *Doyle v. City of Duluth*, 74 Minn. 157, 76 N.W. 1029 (1898). The new Minnesota statute provides for either "actual or constructive notice."

²⁵ *Peterson, Governmental Responsibility For Torts in Minnesota*, 26 MINN. L. REV. 854, 861 (1942), citing twelve city charters of this type. Such charter provisions are deemed valid in Minnesota in the absence of superseding legislation. *Stevens v. Lycan & Co.*, 259 Minn. 106, 105 N.W.2d 889 (1960); *Fuller v. City of Mankato*, 248 Minn. 342, 80 N.W.2d 9 (1957).

²⁶ See, e.g., *Wood v. County of Santa Cruz*, 133 Cal. App.2d 713, 284 P.2d 923 (1955) (two weeks); *Alvarez v. County of Los Angeles*, 132 Cal. App.2d 525, 282 P.2d 531 (1955) (one day); *Bridges v. County of Los Angeles*, 131 Cal. App.2d 151, 280 P.2d 76 (1955) (one day). See also, 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.110 (3rd ed. 1950). *But compare* *Kotronakis v. City & County of San Francisco*, 192 Cal. App.2d 624, 13 Cal. Rptr. 709 (1961) (overnight existence of dangerous condition deemed too short).

be judged from the most rigorous of the cases, the duty of inspection may be almost a constant one, and hence impossible to conform to, in the absence of such a statutory rule.

4. A substantial number of jurisdictions have rejected constructive notice as an appropriate condition of liability for defective property conditions, and insist upon *actual* previous notice of the defect. Kansas, for example, requires with respect to both state and local highway defects that the responsible officials of the defendant state, county or township must have had actual notice of such defect five days prior to the time the injury was sustained.²⁷ Such notice need not be in writing, however, but may be established by circumstantial evidence.²⁸ Maine's requirement specifies an even shorter period of time, declaring that the responsible authorities must have had "24 hours' actual notice of the defect or want of repair."²⁹ Although such notice may be either written or oral in Maine,³⁰ or may be established by proof that the responsible authorities themselves created the defect and hence knew about its existence,³¹ it is clear that constructive notice is inadequate as a basis of liability.³² It may be significant to point out that at an earlier time, Maine simply required "reasonable notice," and that this considerably less rigorous standard was replaced by the present requirement of 24-hours' actual notice about 80 years ago.³³ Other states which require previous actual notice of defect as a condition of liability include Maryland,³⁴ Montana,³⁵ New Hampshire,³⁶ Oregon,³⁷ and South Dakota.³⁸ Such a requirement manifestly greatly increases the plaintiff's burden of proof and often will preclude recovery entirely. On the other hand, it fixes with some degree of certainty the duty of the entity to repair or take precautions against injury, and may thus have a salutary effect upon the speed and efficiency with which known defects are repaired, thereby improving safety materially. In addition, an actual previous notice rule undoubtedly tends to eliminate spurious and unfounded claims which conceivably might survive (or even be encouraged by) a constructive notice requirement.

5. A requirement of "actual notice," as discussed in the preceding paragraph, may be satisfied by circumstantial evidence indicating

²⁷ KAN. GEN. STAT. ANN. § 68-301 (1949) (defects in roads, culverts and bridges maintained by counties and townships); KAN. GEN. STAT. ANN. § 68-419 (1949) (state highways). A similar requirement of five days prior actual notice is found in WYO. COMP. STAT. ANN., ch. 29, § 348 (1957).

²⁸ See *Watkins v. County of Harper*, 95 Kan. 166, 147 Pac. 822 (1915); *Abbott v. County of Wyandotte*, 94 Kan. 553, 146 Pac. 998 (1915).

²⁹ ME. REV. STAT., ch. 96, § 89 (Supp. 1961).

³⁰ *Spencer v. Kingsbury*, 120 Me. 174, 113 Atl. 33 (1921); *Ham v. Lewiston*, 94 Me. 265, 47 Atl. 548 (1900).

³¹ *Morneault v. Hampden*, 145 Me. 212, 74 A.2d 455 (1950); *Buck v. Bliddeford*, 82 Me. 433, 19 Atl. 912 (1890).

³² *Radcliffe v. City of Lewiston*, 109 Me. 368, 84 Atl. 639 (1912); *Hurley v. Bowdoinham*, 88 Me. 293, 34 Atl. 72 (1896).

³³ See ME. REV. STAT., ch. 18, § 65 (1871); *Bartlett v. Kittery*, 68 Me. 358 (1878); *Springer v. Bowdoinham*, 7 Me. 442 (1831). By 1884, the requirement had been changed to one of 24-hours notice. See ME. REV. STAT., ch. 18, § 80 (1884).

³⁴ See *Engle v. Cumberland*, 130 Md. 465, 25 A.2d 446 (1942) (sustaining validity of city charter requiring "actual notice" of defect).

³⁵ MONT. REV. CODE ANN. § 11-1305 (1957). See also, *Ratliff v. City of Great Falls*, 132 Mont. 89, 314 P.2d 880 (1957).

³⁶ See N.H. REV. STAT. ANN. §§ 247:9-247:10 (1955) (towns are liable for all accidents on class IV or class V highways after notice of defect is given town authorities by any three citizens).

³⁷ See *Platt v. Newberg*, 104 Ore. 148, 205 Pac. 296 (1922) and *Pullen v. City of Eugene*, 77 Ore. 320, 146 Pac. 822, 147 Pac. 768 (1915), sustaining the validity of "actual notice" provisions of municipal charters.

³⁸ S.D. CODE § 28.0913 (1959), as construed in *Williams v. Wessington Township*, 70 S.D. 75, 14 N.W.2d 493 (1944).

that responsible officials knew of the defect.³⁹ Some jurisdictions go even beyond this point, and insist upon prior *written* notice of defect. Nebraska, for example, has a statutory immunity from liability for local entities for street and sidewalk injuries unless five-days' written notice of defect was had in advance.⁴⁰ A number of municipal charters in Minnesota have historically required written notice of defect to be given the city a stated number of days, often 10 days, previous to the happening of the accident;⁴¹ although these charter provisions appear to have been recently superseded by a general state law authorizing either actual or constructive notice.⁴² Oregon likewise recognizes the validity of prior written notice requirements in municipal charters.⁴³

On the other hand, in a few states where efforts have been made to require prior written notice of defect as a condition of liability, the courts have found such provisions to be either grossly unreasonable or in violation of state policy, and hence void.⁴⁴ In an effort to avoid the rigors of actual notice and yet preserve its advantages as a spur to preventive maintenance, an interesting deviation in South Carolina provides that, while constructive notice is the general rule, the burden of proof is altered when it is shown that the responsible officers of the county actually received prior written notice of defect, and the county then has the burden of proving that the defect did not exist, or had been properly repaired, or that a sufficient time to make repairs had not elapsed since receipt of the written notice.⁴⁵

The most illuminating experience with respect to written notice is that of New York State.⁴⁶ Prior to 1948, the courts of New York had followed what was known as the "Four Inch Rule," under which street and sidewalk defects of less than four inches' elevation or depth were regarded as a matter of law as trivial and not actionable save in exceptional circumstances.⁴⁷ During this period, less than one-half of all the cities in the State had adopted charter provisions or ordinances requiring prior written notice of defect as a condition of liability, thereby altering the general rule observed in New York that either actual or constructive notice was sufficient.⁴⁸ The validity of these city charter provisions was sustained by the courts in 1942 under the doc-

³⁹ See *Abbott v. Rockland*, 105 Me. 147, 73 Atl. 865 (1909); *Ratliff v. City of Great Falls*, 132 Mont. 89, 314 P.2d 880 (1957); *Ledbetter v. City of Great Falls*, 123 Mont. 270, 213 P.2d 246 (1949); cases cited in note 28 *supra*.

⁴⁰ NEB. REV. STAT. § 14-801 (1954). See also NEB. REV. STAT. § 15-843 (1954). *Cf. Connolly v. City of Omaha*, 159 Neb. 380, 66 N.W.2d 916 (1954).

⁴¹ See Peterson, *Governmental Responsibility For Torts in Minnesota*, 26 MINN. L. REV. 854, 860-861 (1942). Such charter provisions were sustained as reasonable local legislation. See *Fuller v. City of Mankato*, 248 Minn. 342, 80 N.W.2d 9 (1957); *Schigley v. City of Waseca*, 106 Minn. 94, 118 N.W. 259 (1908).

⁴² MINN. STAT. ANN. § 465.121 (Supp. 1961). That state laws may supersede inconsistent charter provisions in Minnesota, see *Johnson v. City of Duluth*, 133 Minn. 405, 158 N.W. 616 (1916); *Nicol v. City of St. Paul*, 80 Minn. 415, 83 N.W. 375 (1900).

⁴³ See *Pomeroy v. City of Independence*, 209 Ore. 537, 307 P.2d 760 (1957).

⁴⁴ See *City of Phoenix v. Williams*, 89 Ariz. 299, 361 P.2d 651 (1961); *City of Tulsa v. Wells*, 79 Okla. 39, 191 Pac. 186 (1920); *Hanks v. City of Port Arthur*, 121 Tex. 202, 48 S.W.2d 944 (1932); *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386 (1902).

⁴⁵ S.C. CODE OF LAWS, § 33-925 (1952).

⁴⁶ A detailed historical study of the New York experience is set forth in NEW YORK COMMITTEE, SECOND REPORT 45-48 (Legis. Doc. No. 41, 1956).

⁴⁷ See *Lalor v. City of New York*, 208 N.Y. 431, 102 N.E. 558 (1913); *Hayes v. City of New York*, 267 App. Div. 535, 47 N.Y.S.2d 324 (1944); *Eger v. City of New York*, 206 App. Div. 718, 200 N.Y. Supp. 921 (1923), *aff'd mem.*, 239 N.Y. 561, 147 N.E. 195 (1924).

⁴⁸ The New York Joint Legislative Committee on Municipal Tort Liability reports that 45% of the cities of that state had prior notice provisions in effect prior to 1948. NEW YORK COMMITTEE, *op. cit. supra* note 46, at 47.

trine of "home rule."⁴⁹ The abolition of the "Four Inch Rule" by the New York courts in 1948⁵⁰ resulted in an immediate substantial increase in the number of cities adopting a prior written notice requirement.⁵¹ Second Class Cities, however, had been held in 1937 not to have home rule authority to adopt prior notice requirements;⁵² and these municipalities embarked upon a campaign, ultimately successful in 1955,⁵³ to secure the same authority to do so which was enjoyed by other cities. As soon as such authority was realized, over half the Second Class Cities immediately adopted such requirements.⁵⁴ First Class Villages (*i.e.*, those over 5000 population) pressed for like authority to deviate from the general state rule, and secured legislation in 1953 granting them power to adopt local provisions requiring prior written notice of defect.⁵⁵ Shortly thereafter, the great majority of the First Class Villages of the state had enacted such requirements.⁵⁶

The New York Joint Legislative Committee on Municipal Tort Liability, after surveying the foregoing historical development, concluded, in its 1956 report:

The sharp increase in the number of sidewalk claims since the [abandonment of the Four Inch Rule in the] *Loughran* case, resulting in mounting costs, a steady increase of insurance premiums, and increasing frequency of cancellation of insurance coverage, has stimulated the municipalities to which such action is available to protect themselves by local action through enactment of local prior notice laws. There is every indication that the present trend will continue.¹

In 1957, after further consideration of the problem, and noting that prior notice requirements were authorized to be adopted by all local entities except Second, Third and Fourth Class Villages, the Joint Committee recommended and secured enactment by the New York Legislature of measures which granted the same privilege to all villages.² The policy reasons advanced in support of this legislation were five in number:

(1) The Committee stressed the safety prevention factor, as disclosed by its investigations into the way in which the prior notice laws had operated where they were in effect. In the Committee's words:

The committee's investigations have determined that the prior notice rule has worked well in practice in the villages. . . . It has

⁴⁹ *Ellis v. City of Geneva*, 259 App. Div. 502, 20 N.Y.S.2d 21 (1940), *aff'd*, 288 N.Y. 478, 41 N.E.2d 174 (1942).

⁵⁰ *Loughran v. City of New York*, 298 N.Y. 320, 83 N.E.2d 136 (1948).

⁵¹ In the seven years following the abandonment of the Four Inch Rule in New York, the number of cities adopting prior notice requirements increased from 47 percent to 75 percent of the total number of cities in the state. NEW YORK COMMITTEE, SECOND REPORT 47 (Legis. Doc. No. 41, 1956).

⁵² *Id.* at 46, citing *Hayward v. City of Schenectady*, 251 App. Div. 607, 297 N.Y.S. 736 (1937).

⁵³ *Id.* at 46, pointing out that the *Hayward* case, *supra* note 52, was overruled in *Fullerton v. City of Schenectady*, 285 App. Div. 545, 138 N.Y.S.2d 916 (1955), *aff'd*, 309 N.Y. 701, 128 N.E.2d 413 (1955).

⁵⁴ *Id.* at 46, reporting that by the end of 1955, 62.5 percent of all Second Class Cities had adopted prior notice requirements.

⁵⁵ N.Y. VILLAGE LAW § 341-a, as amended by N.Y. Laws 1953, ch. 744.

⁵⁶ By the end of 1955, a total of 51 First Class Villages in New York out of 61 such entities in all had adopted prior notice requirements. NEW YORK COMMITTEE, SECOND REPORT 47 (Legis. Doc. No. 41, 1956).

¹ *Id.* at 47-48.

² N.Y. VILLAGE LAW § 341-a, as amended by N.Y. Laws 1957, ch. 837, pursuant to recommendation contained in NEW YORK COMMITTEE, THIRD REPORT 17-21 (Legis. Doc. No. 23, 1957).

necessarily tended to improve village programs of sidewalk inspection and repair by making liability certain unless defects of which notice is given are repaired promptly. Information obtained from both cities and villages which have adopted the rule shows that its adoption is uniformly followed by a more active repair program. Existing repair programs have been expanded. Repair programs have been initiated where previously none had existed. The Committee feels that this increase in the safety of travel upon village sidewalks is of primary importance to the extent that the prevention rather than the compensation of injuries is to be preferred.³

The Committee's report does not discuss the extent, if any, to which the prior written notice of defect rule may have diminished the safety of sidewalks for pedestrians because of the elimination of any effective duty to *inspect* and repair any defects discovered thereby.

(2) The Committee emphasized the practical operation of the prior notice rule as contrasted to the nebulous notion of constructive notice founded upon the existence of a "defect":

The prior notice provision has relieved the municipalities with respect to the administrative dilemma created by the elimination of any standard of what constitutes a 'defect' in the repudiation of the Four Inch Rule.⁴

The point here apparently is that an entity protected by a prior written notice of defect rule may shield itself from tort liability by simply repairing all reported defects, thereby being relieved of the difficult problem of inspecting its streets and sidewalks and of vesting in someone administrative authority to decide when a discovered defect is sufficiently substantial to support a finding of constructive notice. Such decision-making may often be an administrative dilemma not only because it involves an effort to predict the results of hypothetical future litigation, but also because the funds and resources available to make repairs are usually limited and must be allocated among a large number of potentially injury-producing conditions without any possible assurance that the administrative priorities decided upon will have any correspondence with risk exposure.

(3) The Committee tersely referred to the problem of financial impact:

The prior notice provision tends to reduce the ever present possibility of a 'catastrophe judgment' resulting from unnoticed defects.⁵

A program of repair of all reported defects, in other words, is the best possible way to prevent untoward fiscal repercussions, in the Joint Committee's view.⁶ The report does not discuss the problem of the

³ NEW YORK COMMITTEE, THIRD REPORT, *supra* note 2, at 19.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ The New York Joint Committee's interest in the financial aspects of the problem was undoubtedly intensified by realization that the increasing cost of tort liability and of liability insurance, following the abandonment of the Four Inch Rule, was one of the principal motivating factors which led to the creation of the Committee. See NEW YORK COMMITTEE, FIRST INTERIM REPORT 9, 22-23 (Legis. Doc. No. 42, 1955).

distribution of the losses sustained by the private person injured through a defect in a street or sidewalk, which losses would be non-recoverable in the absence of prior written notice.

(4) The Joint Committee also relied upon intensely pragmatic grounds, turning chiefly upon the cost experience of local entities in securing realistic insurance protection:

The insurance records of the villages from the repudiation of the Four Inch Rule in 1948 to the adoption of local prior notice laws by the first class villages pursuant to [the 1953 legislation] demonstrate an increasing difficulty in obtaining liability insurance, an increasing number of cancellations of existing policies, and a continuing sharp rise in insurance premiums during that period. Communications in the files of the Committee indicate that because of the factors stated [in the preceding three policy reasons for prior notice laws] this trend has been reversed in the first class villages which have adopted a prior notice law. The insurance situation has been markedly improved.⁷

The Committee further pointed out that the insurance situation, so far as Second, Third and Fourth Class Villages were concerned, had shown continued deterioration; and that adoption of authority for these villages to enact prior written notice requirements could be expected to relieve the difficulty.⁸

(5) The Joint Committee concluded its statement of policy considerations by a declaration of belief that "the rule provides the stated benefits without injustice to the individual."⁹ In support of this position, statistical information was adduced indicating that during a five-year period (1949-53) prior to their adoption of prior notice requirements, from 58 percent to 74 percent of all sidewalk claims paid (which ranged from a numerical low of 105 to a high of 200 in different years) by all villages in New York were for less than \$500.¹⁰ From this somewhat meager information, a rather sweeping conclusion was drawn in these words:

But the total number of claims paid, in relation to the number of villages involved, and the high percentage of claims of less than \$500, in the absence of a prior notice rule, demonstrate that even assuming a reduction in the number of claims paid there is little likelihood of injustice being done as a consequence of an unnoticed sidewalk defect.¹¹

The Committee's own data, however, suggest that in certain specific cases, the prior notice rule may result in severe personal hardship. Not only were from 26 percent to 42 percent of the total sidewalk claims for amounts in excess of \$500 during the same five-year period, but a number of them exceeded \$5,000, one at least amounting to \$15,000.¹² Were the latter situations to arise under a prior notice rule (and it will be noted, they are situations in which liability was either conceded

⁷ NEW YORK COMMITTEE, THIRD REPORT, *supra* note 2, at 19.

⁸ *Ibid.*

⁹ *Id.* at 20.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Id.* at 31-35.

or adjudicated, for the claims in question were actually paid), a determination of lack of liability solely for want of prior written notice might well be regarded by an objective observer as not completely consistent with the ends of justice.

A subsequent report by the New York Joint Committee,¹³ based upon its continuing investigation of the problems of financing liability insurance, disclosed that the adoption of prior written notice of defect requirements generally had resulted in a decrease in the number of claims arising from defects in streets and sidewalks: for the cities, a decrease of 30 percent; and for the villages, a decrease of 20 percent. Such provisions also had resulted in a decrease in the cost of claims: for the cities, a decrease of 46 percent; and for the villages, a decrease of 28 percent. As a result, substantial reductions in municipal liability insurance premiums were effected through action of the insurance rating bureaus. The Joint Committee, in commenting upon the savings which these reductions entailed, concluded:

It should be made clear that the savings to the municipalities has been accomplished without sacrifice of the rights of the public. The public has benefited by the enactment of prior notice laws to the extent that it is preferable to prevent injuries rather than compensate for them. Such laws have necessarily tended to improve municipal programs of sidewalk inspection and repair by making liability certain unless defects of which notice is given are repaired promptly. Information obtained from cities and villages which operate under the prior notice rule shows that its adoption is uniformly followed by an active repair and maintenance program. . . . The Committee feels that this increase in the safety of travel is as important to the individual as a traveller as is the reduction of insurance premiums to him as a taxpayer.¹⁴

The New York system of prior written notice of defect, it should be pointed out, does not require that the notice must have been given by the claimant but only that it must have been given by somebody. In order to implement the rule, the Joint Committee also sponsored and obtained enactment of statutory provisions requiring the keeping by designated officials of a public record of every notice of defect received by any entity operating under such a requirement, thereby making available to an injured party the evidence essential to his recovery of damages.¹⁵

The experience in New York and other states strongly tends to suggest that a requirement of previous *actual* notice of defects in public property has substantial merit and deserves consideration for adoption in California. The existing constructive notice rule is unduly vague and imposes, in many cases, a standard of care which is impossible to conform to, since even the most diligent and conscientious inspection and maintenance program may well overlook or treat as insignificant various types of conditions which a jury subsequently may

¹³ NEW YORK COMMITTEE, FOURTH REPORT 14-16 (Legis. Doc. No. 42, 1958).

¹⁴ *Id.* at 16.

¹⁵ N.Y. GENERAL MUNICIPAL LAW § 50-g, as enacted by N.Y. LAWS 1957, ch. 783, pursuant to recommendation contained in NEW YORK COMMITTEE, THIRD REPORT *supra* note 2, at 22-24; N.Y. VILLAGE LAW § 82-a, as enacted by N.Y. LAWS 1957, ch. 838, pursuant to recommendation contained in NEW YORK COMMITTEE, THIRD REPORT, *supra*, at 21-22.

determine to have been sufficiently substantial to put the entity on notice and to be deemed "dangerous or defective." Public entities should not, so long as fault is accepted as the theoretical basis of tort liability, be burdened with the liabilities of an insurer. What is needed more than anything else, it is believed, is a workable and relatively definite standard of care. A requirement that the injured party establish actual prior notice of the defect, and failure to remedy or take precautions thereafter would go far to establish such a standard of care. Such a rule could thus be expected, with some degree of confidence, to exert a moderating influence upon the cost of adequate liability insurance protection.¹⁶ Moreover, to the extent that the citizenry in general assumed the task of reporting defective conditions which came to their attention, the safety prevention function of the law would also presumably be advanced.¹⁷

On the other hand, no sufficiently strong reason is perceived why the notice of defect should necessarily be in writing, as required by the New York practice. Where actual knowledge is had by a responsible public officer, whether obtained through personal observation, oral reports, or by written notice, it would seem appropriate to treat his duty of making repairs or taking precautions to prevent injuries as identical. Jurisdictions discussed above¹⁸ in which "actual notice" is required do not appear to have experienced any undue difficulties in administering such a rule, although admittedly there are some additional dangers of perjury where the requisite fact may be established by parol testimony. Dangers of this nature, however, are not unique to the field of governmental tort liability and, it is submitted, should not affect the determination of policy relevant thereto. The common sense rule, which is generally accepted in most jurisdictions whether under the constructive or actual notice rule,¹⁹ that a defect attributable to work done by a responsible official or under his direction is presumed to be known to him, should, however, be expressly written into the Public Liability Act, patterned, perhaps, upon existing language to this effect in Section 1953 of the Government Code. Making this qualification explicit would avoid possible judicial interpretations unduly narrowing the meaning of "actual notice."

¹⁶ See NEW YORK COMMITTEE, FOURTH REPORT 15-16 (Legis. Doc. No. 42, 1958). Compare CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMIFINAL REPORT, MUNICIPAL LIABILITY INSURANCE 17, 80 (1953).

¹⁷ See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 41-42 (1959): "The receipt of actual notice actually leads to investigation and repair of dangers, and lessens the public risk, to the benefit of all; and the requirement of precedent notice tends to cut fraudulent claims. Knowing that if they are injured by such defects, a recovery will depend upon notice, many citizens are impelled to report conditions thought hazardous, and who can say that their own awareness will not produce more care upon their own part?"

¹⁸ See text at 356-57 *supra*.

¹⁹ See 19 MCQUELLIN, MUNICIPAL CORPORATIONS § 54.104 (3rd ed. 1950). This rule has been applied in cases arising under the Public Liability Act as a matter of judicial interpretation. See, e.g., *Fritchard v. Sully-Miller Contracting Co.*, 178 Cal. App.2d 246, 2 Cal. Rptr. 830 (1960) (dangerous condition of automatic traffic signals when set according to plan authorized by governing body); *McAtee v. City of Marysville*, 111 Cal. App.2d 507, 244 P.2d 936 (1952) (defective sewerage system constructed by city according to approved plan); *Cameron v. City of Gilroy*, 104 Cal. App.2d 76, 230 P.2d 838 (1951) (dangerous condition created by curved pedestrian ramp constructed by city).

Recommendation. It is accordingly believed that the Public Liability Act should be amended in the following respects:

1. The term "actual notice" should be substituted for the term "knowledge or notice" as employed in Section 53051 of the Government Code, and should be defined by the statute.²⁰ Possible wording for the definition might be:

"Actual notice" means express information, whether derived from written or oral communication to, personal observation by, or the doing of work or the performance of an act either in person or under the direction or supervision of, an officer or employee of the public entity to be charged with such notice.

2. A provision should be added to the Public Liability Act requiring public entities to keep public records of all written notices or reports of defects in public property. Evidence derived from such records would be admissible to prove "actual notice" of the condition, although the question whether the particular condition was actually dangerous or defective would still be open. The New York statutes²¹ providing for the keeping of such records might serve as an appropriate precedent for the drafting of such a provision, despite the fact that the New York policy is to insist upon written notice. It would probably not be feasible to require a record of defects coming to the attention of the entity by other means, such as telephone calls or personal observation of employees, in view of the fugitive nature of such reports and the possible difficulties which might be encountered in verifying their timeliness and authenticity.²² To the extent that letters or other written reports of defects, whether by citizens or by public personnel carrying out the duty of inspection, are brought to the attention of the governing body, however, any person injured should have the benefit of the evidence.²³ The absence of such a report from the records, of course, would not preclude recovery under the present proposal, for actual notice may also be proved by oral testimony or circumstantial evidence. In order to provide sanctions to enforce the duty to keep the required record of such notices of defect, provision might be made for excluding any evidence offered by the entity that written notice of defect was not received, whenever it is shown that the duty of keeping such records has not been carried out. In addition, the plaintiff who proves such notice was actually given might be vested with a possible action against the clerk of the entity for statutory damages.

²⁰ See CAL. CIV. CODE § 18: "Notice is: 1. Actual—which consists in express information of a fact; or, 2. Constructive—which is imputed by law."

²¹ N.Y. GENERAL MUNICIPAL LAW § 50-g; N.Y. VILLAGE LAW § 82-a.

²² In Montana, a record of all notices of defects, whether written or oral, is required to be kept, but notice may be proved from evidence not so recorded. See *Ledbetter v. City of Great Falls*, 123 Mont. 270, 213 P.2d 246, 13 A.L.R.2d 903 (1949).

²³ Compare the policy statement included in the recommendation of the New York Joint Legislative Committee on Municipal Tort Liability that notices of defects be filed as a public record: "The Committee strongly feels that wherever such a rule [requiring prior written notice of defect] is in effect, fairness requires that the city maintain a record of written notices of defect received, open to the inspection of an injured party or his attorney, so that it may be readily ascertained and established whether the city has received such notice with respect to a particular defect. If it has received notice of the defect and has neglected to repair it within a reasonable time it should be liable. And a person injured as a result of the defect should not be put to the uncertainty and difficulty of discovering whether the city has received written notice of the particular defect" NEW YORK COMMITTEE, THIRD REPORT, *supra* note 2, at 24.

Suggested language to implement these suggestions might read:

The clerk or secretary of the governing body of every public entity subject to the provisions of this act shall keep an indexed record, in a separate book, of all written notices which said entity or any of its officers or employees shall receive of the existence of any allegedly dangerous or defective condition of public property. The record shall state the time and date or receipt of the notice, the nature and location of the condition claimed to exist, and the name and address of the person from whom the notice is received, so far as such information is known. The record shall be a public record open to inspection by any member of the public, and the record of each notice shall be kept and preserved therein for a period of five years after the date it is received. Every officer and employee of the entity who receives a written notice of an allegedly dangerous or defective condition of public property shall cause the notice or an exact copy thereof to be delivered to the clerk or secretary for entry in the record. Upon proof in any action brought under the terms of this act that the clerk or secretary has failed or refused to keep the record required by this section, the entity shall not be permitted to introduce evidence for the purpose of proving that written notice of the condition involved in said action was not received; and if the plaintiff therein successfully establishes that written notice of said condition was in fact received by said entity prior to the incurring of the injury sued upon, said plaintiff may recover from said clerk or secretary, and upon his official bond, the costs and expenses, including a reasonable attorney's fee, incurred by him in making proof thereof.

Contributory Negligence as a Basis for Denial of Recovery

Under the Public Liability Act, contributory negligence on the part of the plaintiff will bar recovery,¹ as in other California tort cases generally.² The burden of proving contributory negligence, moreover, is upon the defendant public entity.³ It is believed that consideration should be given to whether the magnitude and special nature of the administrative and management problems facing public entities, where dangerous and defective conditions of public property are concerned, might not justify a shifting of the burden of proof on this issue to the plaintiff.

Attention has already been directed at an earlier point in the present study⁴ to the fact that in an action against a public officer for injuries sustained as a result of a dangerous or defective condition of public property,⁵ the burden of proof of freedom from contributory negligence is *by statute* imposed upon the plaintiff.⁶ In this respect, the

¹ See, e.g., *Torkelson v. City of Redlands*, 198 Cal. App.2d 354, 17 Cal. Rptr. 899 (1961); *Cheyney v. City of Los Angeles*, 119 Cal. App.2d 75, 258 P.2d 1099 (1953); *Dalzell v. County of Los Angeles*, 88 Cal. App.2d 271, 198 P.2d 554 (1948).

² See 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1521-42 (7th ed. 1960), and cases there cited.

³ *Lowe v. City of San Diego*, 8 Cal. App.2d 440, 47 P.2d 1083 (1935).

⁴ See text at 122 *supra*.

⁵ See CAL. GOV'T. CODE § 1953 (e).

⁶ *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928). The presumption of due care is, moreover, not available to assist the plaintiff in satisfying this burden. See *Osborne v. Imperial Irr. Dist.*, *supra*; *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931); *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 Pac. 462 (1920).

liability of a local entity in such case is, in practical effect, considerably broader than the personal liability of its official whose neglect may be responsible for the defect. The problem to be faced here, then, is whether the extent of the entity's liability should not also be circumscribed by a comparable rule with regard to burden of proof.

In evaluating this issue, it should be remembered that street and sidewalk defects are the single largest source of liability under the Public Liability Act.⁷ Yet, it is manifestly impossible for the public entity to station its personnel in such a position that they will be able to observe every injury, or even most injuries sustained on the streets and sidewalks; and experience suggests that there often will be no witnesses of such accidents. An informed judge highly conversant with the problems of municipal tort liability has pointed out, from a wealth of experience, that:

The municipal official frequently is confronted with the assertion of a plaintiff that, unobserved by anyone, he—or usually she—has sustained an injury from a slip, trip or fall due to a dangerous condition of public works. The busiest intersections, where police officers are near at hand, seem to produce very few of such claims, though their physical condition is not one whit better than the most.⁸

The Chairman of an American Bar Association Committee considering the same problem echoes a similar concern:

It is only in rare instances in suits for sidewalk injuries that the defendant city is able to produce a witness to the accident. Unlike in cases of active negligence, the city is frequently unable to refute the testimony of plaintiff's witnesses as to how the accident happened. This situation naturally is conducive to the prosecution of fraudulent claims and invites perjured testimony.⁹

In a majority of American jurisdictions, the burden of proof on the issue of contributory negligence is upon the defendant,¹⁰ although there are a number of states which follow the contrary rule.¹¹ New York, for example, which presently has the most expansive statutory waiver of governmental immunity of any state of the Union, requires the plaintiff to plead and prove freedom from contributory negligence as part of the proof necessary to sustain a recovery,¹² except only in wrongful death cases where a statutory provision alters the rule.¹³

⁷ See the text, *supra* p. 334 and note 4.

⁸ David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 15-16 (1959).

⁹ H. B. Curtis, Chairman of the Committee on Municipal Tort Liability, American Bar Ass'n Section of Municipal Law, in *Municipal Law Service Letter* 60 (Supp. Nov. 1960).

¹⁰ See 2 HARPER & JAMES § 22.11, and cases there cited.

¹¹ The principal states retaining the minority rule, often abolished elsewhere in favor of placing the burden on the defendant, are Illinois, Michigan, and Rhode Island, while Maine and New York retain the older rule in all actions except those for wrongful death. See *id.* at n. 11.

¹² See *Hansen v. City of New York*, 274 App. Div. 196, 80 N.Y.S.2d 249 (1948), *aff'd*, 299 N.Y. 136, 85 N.E.2d 905 (1949); *Walheim v. City of Batavia*, 257 App. Div. 904, 12 N.Y.S.2d 228 (1939). This rule, placing the burden of negating contributory negligence upon the plaintiff, is not confined to actions against public entities but is general. *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112, 63 A.L.R. 801 (1929).

¹³ N.Y. DECEDENT'S ESTATE LAW § 131. See *Lyons v. State of New York*, 274 App. Div. 1036, 86 N.Y.S.2d 264 (1949), *appeal dismissed*, 299 N.Y. 593, 86 N.E.2d 110 (1949); *Frate v. State of New York*, 245 App. Div. 442, 233 N.Y. Supp. 686 (1935); *Harford v. State*, 19 Misc.2d 7, 191 N.Y.S.2d 742 (Ct. Cl. 1959); *Malvaso v. State*, 15 Misc.2d 535, 182 N.Y.S.2d 62 (Ct. Cl. 1959), *aff'd*, 10 App. Div.2d 663, 197 N.Y.S.2d 452 (1960).

In a few jurisdictions which generally recognize the burden as one for the defendant, however, considerations peculiar to governmental tort liability have led to the development of a contrary rule in actions against public entities based on allegedly defective public property. In Connecticut, for example, the burden of proving contributory negligence is squarely placed by statute upon the defendant as a general rule;¹⁴ but the courts have nevertheless held that in statutory actions for injuries resulting from defective streets or highways, the plaintiff must plead and prove that he was acting in the exercise of due care, and must do so by evidence sufficiently probative to "remove the matter from the realm of speculation and conjecture."¹⁵

The Connecticut case of *Porpora v. City of New Haven*¹⁶ is revealing as to the operation and policy underlying this rule. Plaintiff's decedent, while driving a truck on a city street, had veered off the road and crashed through a bridge, ending in his death in the waters beneath. In the absence of witnesses, plaintiff relied upon the rule placing the burden of proving contributory negligence upon the defendant, together with a statutory presumption that the decedent in a death case was acting with due care. Had the plaintiff's reliance been well-placed, the presumption would have been enough to support a determination favorable to the plaintiff on the contributory negligence issue, as several California cases in comparable circumstances attest.¹⁷ The trial court, however, charged the jury that the plaintiff had the burden of proving by competent evidence that the decedent was free of negligence and that the statutory presumption was not available to aid in satisfying that burden. This ruling was affirmed on appeal, following a verdict for the defendant. The court held that the liability of the defendant city was purely statutory in origin, and hence that plaintiff could recover only by proving that the defect in the bridge or highway was the sole cause of the accident, excluding any other causative factor including plaintiff's own negligence. The presumption of due care by the decedent, the court readily conceded, was necessary to do justice in ordinary cases, for a contrary rule would give an undue advantage to the defendant in a death case where "the lips of the plaintiff's decedent were stilled by death."¹⁸ In actions founded on the statutory liability for defective streets and bridges, however, this policy was not deemed to be essential to fairness:

Usually no representative of the defendant municipality is present at the time of the accident; and the death of the plaintiff's decedent would ordinarily create no unfair situation with reference to the possibility of producing evidence as to his conduct, which might be claimed to constitute contributory negligence.¹⁹

Other states have adopted a similar rule to that of Connecticut. In the state of South Carolina, for example, it is a settled rule of practice

¹⁴ CONN. GEN. STAT. § 52-114 (1958).

¹⁵ *Burke v. Town of West Hartford*, 147 Conn. 149, 151, 157 A.2d 757, 758 (1960). See also, *Jacen v. Town of East Hartford*, 133 Conn. 243, 50 A.2d 61 (1946).

¹⁶ 119 Conn. 476, 177 Atl. 531 (1935).

¹⁷ See, e.g., *Anderson v. County of San Joaquin*, 110 Cal. App.2d 703, 244 P.2d 75 (1952); *Gorman v. County of Sacramento*, 92 Cal. App. 656, 268 Pac. 1083 (1928).

¹⁸ *Porpora v. City of New Haven*, 119 Conn. 476, 479, 177 Atl. 531, 532 (1935).

¹⁹ *Id.* at 480, 177 Atl. at 532.

that contributory negligence ordinarily must be proved by the defendant as a defense.²⁰ The statute which authorizes suit against that state for injuries resulting from a "defect in" or "negligent repair of" any state highway, however, expressly declares that the plaintiff "must allege and prove that he did not bring about the injury by his own negligence, nor negligently contribute thereto."²¹ Similar South Carolina statutory provisions authorizing damage suits against South Carolina counties and municipalities are not as explicit as this, but have also been construed as imposing the burden on the plaintiff.²² Oregon likewise follows the usual rule which places the burden with respect to contributory negligence on the defendant;²³ but, again, its statutory waiver of immunity for injuries sustained as a consequence of defective county roads specifies that plaintiff must establish that he sustained his injuries "without contributory negligence and without knowledge of the defect or danger."²⁴

The allocation of the burden of proof on the issue is, of course, not a mere technicality. It often may affect the outcome of the litigation in a most material way. Unless the plaintiff produces *some* evidence tending to establish that the allegedly defective public works were being used by him with ordinary care, the defendant (where the burden is on the plaintiff) may obtain a nonsuit.²⁵ When the burden is on the defendant, however, the plaintiff is entitled to have his action submitted to the jury even where there is no evidence as to the degree of care being employed by him;²⁶ and, as indicated above, the nature of defective condition cases is such that the defendant very seldom can produce any evidence on that issue. Yet, by hypothesis, the duty of the defendant public entity is only to make its streets, walks, buildings, and other public property reasonably safe for ordinary and reasonably foreseeable use by the public. Such duty presupposes that such use will be "ordinary" in the sense that "ordinary care" is employed by the user. It would be intolerable, except on the theory that public agencies are good risk distributors and hence should be insurers of the safety of their property, to insist that the duty is to make such property safe even for the careless user who is heedless of consequences. To the extent that contributory negligence is practicably unavailable as a defense, however, the entity's duty may approach that extreme.

Since, in the usual defective condition case, the plaintiff's own testimony is available, together with the statutory presumption of due care,²⁷ to assist in proving lack of contributory negligence, there would seem to be no injustice in placing the burden on the plaintiff. Indeed,

²⁰ *Butler v. Temples*, 227 S.C. 496, 88 S.E.2d 586 (1955).

²¹ S.C. CODE OF LAWS § 33-232 (Supp. 1960). See *Sanders v. State Highway Dept.*, 212 S.C. 224, 47 S.E.2d 306 (1948).

²² See S.C. CODE OF LAWS § 33-921 (1952), as construed in *Duncan v. Greenville County*, 73 S.C. 254, 53 S.E. 367 (1905); S.C. CODE OF LAWS § 47-70 (Supp. 1960), as construed in *Floyd v. Town of Lake City*, 231 S.C. 516, 99 S.E.2d 181 (1957).

²³ *Lemons v. Holland*, 205 Ore.163, 286 P.2d 656 (1955).

²⁴ ORE. REV. STAT. § 368.935 (1953). See *Gigoux v. Yamhill County*, 73 Ore. 212, 144 Pac. 437 (1914).

²⁵ See *Shannon v. Fleishhacker*, 116 Cal. App. 258, 2 P.2d 835 (1931). Cf. *Barsoom v. City of Reedley*, 38 Cal. App.2d 413, 101 P.2d 743 (1940).

²⁶ See *Farcher v. City of Los Angeles*, 106 Cal. App.2d 421, 235 P.2d 220 (1951); *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.2d 30 (1931). Cf. *Anderson v. County of San Joaquin*, 110 Cal. App.2d 703, 244 P.2d 75 (1952).

²⁷ See CAL. CODE CIV. PROC. § 1963(4), discussed at length in *Weinstock & Chase, The "Presumption of Due Care" in California*, 4 HASTINGS L. J. 124 (1953). Cf. *Farcher v. City of Los Angeles*, 106 Cal. App.2d 421, 235 P.2d 220 (1951).

to do so would effectively expose the principal evidence on the issue to the ordinary tests of credibility and probativeness. These tests—such as cross-examination, showing of prior inconsistent statements, revelation of internal contradictions and discrepancies, and argument predicated upon inconsistency between oral testimony and physical phenomenon—are often tactically of little value unless the plaintiff is charged with the task of persuading the jury of the authenticity of his self-serving declaration that due care was employed. In short, a shifting of the burden to the plaintiff would in all likelihood not preclude recovery by deserving plaintiffs, but would provide a reasonably effective weapon, at least as reasonably effective as the historical evolution of procedural law has been able to develop, for defeating, and hence discouraging the prosecution of, spurious claims.

Only in the death case where, as the Connecticut court pointed out, the lips of the injured party are "stilled by death,"²⁸ would the shifting of the burden of proof appear to have potentially unjust consequences. There, perhaps, the probabilities of acquiring evidence as to the decedent's use of ordinary care just prior to the accident are somewhat more evenly balanced as between the parties. Undoubtedly for this reason, it may be noted, the New York Legislature saw fit to alter its general rule and impose the burden of proof of contributory negligence of the decedent upon the defendant.²⁹ Since the presumption of due care has been held insufficient in California to satisfy the burden of proof of absence of contributory negligence where by statute that burden is upon the plaintiff,³⁰ it would seem to follow that serious injustice would sometimes attend death cases since there often will be no evidence available on the issue to a plaintiff having that burden. On the other hand, the presumption of due care has been held sufficient to sustain a judgment for a plaintiff in a death case, even as against countervailing evidence, where the burden of proof was on the defendant.³¹ The danger of injustice to the defendant from the latter rule, however, is mitigated somewhat by the fact that in a death case the likelihood of finding *some* evidence of *lack* of care by the decedent is probably greater than the likelihood of finding evidence of due care. Death is not the usual consequence of a trip or fall on the sidewalk or in the corridor of a public building. It generally entails a substantial element of force and violence, a crushing blow or a severe impact. The most common situation perhaps is that of the automobile which, after allegedly striking a hole in the highway, goes out of control into a tree or other obstacle. But here, there is a reasonable likelihood that skid or tire marks left at the scene, the degree to which the glass was shattered, the crumpled condition of the metallic structure of the car, or other like physical evidence, may be available to support a scientific estimate that the decedent was driving at an unsafe speed at the time

²⁸ *Porpora v. City of New Haven*, 119 Conn. 476, 479, 177 Atl. 531, 532 (1935).

²⁹ N.Y. DECEDENT'S ESTATE LAW § 131; *Lyons v. State of New York*, 274 App. Div. 1086, 86 N.Y.S.2d 264 (1949), *appeal dismissed*, 299 N.Y. 593, 86 N.E.2d 110 (1949); *Frate v. State of New York*, 245 App. Div.442, 283 N.Y. Supp. 686 (1935).

³⁰ *Osborne v. Imperial Irr. Dist.*, 8 Cal. App.2d 622, 47 P.2d 798 (1935); *Shannon v. Fleishacker*, 116 Cal. App. 258, 2 P.2d 835 (1931); *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 Pac. 462 (1920).

³¹ See cases cited in note 26 *supra*. For a comparative discussion, see CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMI-FINAL REPORT, MUNICIPAL LIABILITY INSURANCE 13-16 (1953).

of the injury. Where decedent was driving carefully, evidence to prove such care is less likely to be found. A reasonable balancing of the interests at stake and of the practicalities of the situation appears to support the soundness of the New York rule.

Recommendation. It is suggested that the Public Liability Act be amended to impose the burden of proof of lack of contributory negligence upon the plaintiff in all cases thereunder except those for wrongful death. The presently existing rule placing the burden on the defendant should be retained in death cases.

Assumption of Risk as a Basis for Denial of Recovery

Like the defense of contributory negligence, discussed above, assumption of the risk also is recognized under existing law as a defense to tort actions founded upon dangerous or defective conditions of public property.³² This defense is the subject of a more thorough analysis made in a later part of the present study,³³ where policy considerations relevant to park and recreational uses of public property indicate that some modification of the present rules implementing this defense may be desirable.³⁴ The suggestions there made may appropriately be considered for incorporation in a general rule applicable to dangerous or defective conditions of all types of public property.

Limitations Upon and Exceptions to Liability for Defective Property

In most jurisdictions where liability is recognized for defective property of public entities, certain limitations and exceptions are also recognized. The possible merits of such restrictions upon the general rules contained in the Public Liability Act would seem to be worthy of examination.

(a) **Third party negligence.** Under the law of California, it is clear from many decisions that negligence of a third party which operates concurrently with an actionable defect of public property to cause injury does not exonerate the public entity from liability.¹ More than twenty-five years ago, when this question was first presented in an action under the Public Liability Act, the Supreme Court, after examining the conflict of decisions on the point in other states, and considering whether strict construction of the Act would require a result favorable to local public entities, concluded:

In our opinion, where the thing exists which is denounced by the statute, namely, the neglect to remedy a dangerous or defective condition after knowledge thereof, and it proximately causes the injury, the City is liable under the clear meaning of the law despite the existence of another and concurring cause.²

³² See, e.g., *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956).

³³ See the text at 496-502 *infra*.

³⁴ See the text at 500-502 *infra*.

¹ *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547 (1935), followed approvingly in *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947). *Accord*: *Rodriguez v. City of Los Angeles*, 171 Cal. App.2d 761, 341 P.2d 410 (1959); *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959); *Bady v. Detwiler*, 127 Cal. App.2d 321, 273 P.2d 941 (1954); *Irvin v. Padleford*, 127 Cal. App.2d 135, 273 P.2d 539 (1954).

² *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 764, 43 P.2d 547, 555 (1935).

These remarks were made in a case in which a fatal accident had resulted from the defective condition of the curbing on a viaduct which crossed over a railroad line, where both the railroad company, under an order of the Railroad Commission, and the city under the Public Liability Act had the duty to maintain the viaduct in reasonably safe condition for use by motorists.

In a relatively recent case,³ a dangerous condition was created upon a public sidewalk by the abutting property owner for his own private benefit. Pointing out that the duty of the abutting property owner was to use due care to refrain from creating a dangerous condition on the sidewalk for the benefit of his property apart from ordinary sidewalk use, while that of the city was to use due care to discover and remedy defective conditions thereon, the court ruled that both could be held liable for the resulting injuries sustained by plaintiff. The negligence of the private property owner did not relieve the city of its responsibility for failing to correct the defect:

With regard to persons who are injured by such a condition, the city and the landowner are joint or concurrent tortfeasors; each is directly liable for his own wrong and each may be held liable for the entire damage suffered.⁴

Accordingly, public entities may be held liable for defective conditions of public works even where it is reasonably certain that the particular injury would not have occurred had not a third party's negligence concurred with that of the entity. A highway intersection, for example, may be in a defective condition, possibly because the traffic signals are not operating properly or for any one of a number of possible causes, and yet be unlikely to cause harm to motorists exercising due care; but if a negligent motorist enters the intersection and collides with plaintiff, the public entity may be held liable for the full amount of the damages.⁵ A dip in the pavement at a street intersection may not be unduly risky for persons using the street at reasonable speeds, but a guest in an automobile driven over the defect at an unsafe and negligent speed may obtain a jury verdict holding the city responsible for all ensuing injuries notwithstanding the driver's negligence and the statutory nonrecoverability of such damages from him.⁶ The negligent failure of a contractor engaged in construction work on a public highway to safeguard against accidents may result in liability of the contractor, but the public entity with the duty of maintenance of the highway may also be jointly liable.⁷

³ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953). See also, *City & County of San Francisco v. Ho Sing*, 51 Cal.2d 127, 330 P.2d 802 (1958).

⁴ *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 429, 260 P.2d 55, 61-62 (1953).

⁵ See *Bady v. Detwiler*, 127 Cal. App.2d 321, 273 P.2d 941 (1954) (collision between two motor vehicles at intersection where traffic signals were out of order and indicated "Go" in both directions); *Irvin v. Padleford*, 127 Cal. App.2d 135, 273 P.2d 539 (1954) (collision between motor vehicles at intersection where traffic stop sign had been taken down for purpose of repairing wiring on lighting pole to which sign was attached).

⁶ See David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 17-18 (1959), and cases cited. See also, *Bigelow v. City of Ontario*, 37 Cal. App.2d 198, 99 P.2d 298 (1940).

⁷ *Ellis v. City of Los Angeles*, 167 Cal. App.2d 180, 334 P.2d 37 (1959); *White v. Cox Brothers Constr. Co.*, 162 Cal. App.2d 491, 329 P.2d 14 (1958); *Paxton v. County of Alameda*, 119 Cal. App.2d 393, 259 P.2d 934 (1953).

The California rule, as exemplified in the situations just summarized, is in sharp contrast to the rule which obtains in some other states, notably Maine,⁸ Massachusetts⁹ and Connecticut.¹⁰ In these jurisdictions, the statutory requirement that the plaintiff's injury be shown to have resulted from a defect or want of repair of a street, sidewalk or bridge has been generally construed to mean that such defect or want of repair was the *sole* operative cause of the injury. The negligence of the abutting property owner in maintaining a dangerous condition on the sidewalk,¹¹ or of the operator of the vehicle in which the plaintiff was riding as a guest,¹² will thus preclude recovery against the public entity notwithstanding its own concurrent fault; for, as the Connecticut court said in a recent case, "if the wrongful conduct of another, whatever its nature, so concurs, the municipality is not liable" under the statute.¹³ Plaintiff's recourse in these states is solely against the concurrently negligent third party.

A few other states, including Alabama and Wisconsin, seek to resolve the problem of third-party negligence as a matter of primary and secondary liability. The Wisconsin statute,¹⁴ for example, declares that when a third party's negligence acted concurrently with that of the municipality in causing the injury on a defective highway, the third person "shall be primarily liable therefor," but that plaintiff may bring an action against the defendants jointly and secure a judgment against both of them. The judgment, however, so far as it runs against the entity, "shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part; and on such return being made the defendant town, city, village or county shall be bound by the judgment." The Alabama statute¹⁵ is generally similar in its operation, while comparable provisions have been found in a number of city charters in Minnesota.¹⁶

The desirability of incorporating into the California law procedures of the foregoing types is deemed questionable. It should be noted, preliminarily, that the California courts have recognized a broad area within which a public entity held liable for a defective condition of public property may obtain a complete indemnification from the third party whose concurrent negligence also was a proximate cause

⁸ *Barnes v. Rumford*, 96 Me. 315, 52 Atl. 844 (1902); *Mosher v. Smithfield*, 84 Me. 334, 24 Atl. 876 (1892).

⁹ *Scholl v. New England Power Service Co.*, 340 Mass. 267, 163 N.E.2d 279 (1960); *Carroll v. City of Lowell*, 321 Mass. 98, 71 N.E.2d 763 (1947); *Kidder v. Dunstable*, 73 Mass. (7 Gray) 104 (1856).

¹⁰ *Veits v. City of Hartford*, 134 Conn. 428, 58 A.2d 389 (1948); *Roth v. MacDonald*, 124 Conn. 461, 200 Atl. 725 (1938); *Bartram v. Town of Sharon*, 71 Conn. 686, 43 Atl. 143 (1893).

¹¹ See, e.g., *Veits v. City of Hartford*, 134 Conn. 428, 58 A.2d 389 (1948) (holding that city and abutting owner may be joined in the alternative, but not as joint tortfeasors, in action founded on slippery condition of sidewalk); *Fabrizi v. Golub*, 134 Conn. 89, 55 A.2d 625 (1947) (reversing judgment against city but favorable to abutting owner shown to have negligently maintained defective stairwell in sidewalk).

¹² See, e.g., *Roth v. MacDonald*, 124 Conn. 461, 200 Atl. 725 (1938); *Gustafson v. City of Meriden*, 103 Conn. 598, 131 Atl. 437 (1925); *Barnes v. Rumford*, 96 Me. 315, 52 Atl. 844 (1902).

¹³ *Fabrizi v. Golub*, 134 Conn. 89, 55 A.2d 625, 628 (1947).

¹⁴ WIS. STAT. § 81.17 (1959).

¹⁵ ALA. CODE ANN. § 37-503 (Recomp. 1958) (providing for compulsory joinder of third party, but excusing such joinder if after ten days written notice to city, the latter fails to furnish names of such third parties). See *City of Bessemer v. Brantley*, 258 Ala. 675, 65 So.2d 160 (1953).

¹⁶ See *Peterson, Governmental Responsibility for Torts in Minnesota*, 26 MINN. L. REV. 854, 865 (1942).

of the injury.¹⁷ In view of the licensor-licensee relationship which exists between a city and an abutting property owner who maintains a dangerous condition in the public sidewalk for his own benefit, for example, the city when "compelled to pay compensation in damages to a member of the public injured thereby . . . has a right to recover the amount so paid from the property owner by way of indemnity" although its liability is still both "joint" and "direct."¹⁸ In applying this principle in support of a decision that a sanitary district had a right of indemnity against engineers whose negligent design and supervision of construction work had resulted in a large inverse condemnation judgment against the district, the District Court of Appeal for the First Appellate District recently pointed out that indemnity, as distinguished from contribution between joint tortfeasors, is founded on the theory that as between the two tortfeasors, ". . . the liability may be shifted to the tortfeasor who has breached a duty which he owes to the other where the injury which resulted to the third person arose from a violation or breach of that duty."¹⁹ It should also be kept in mind that in appropriate cases, even where indemnity may not be obtained from the negligent third party, a right of contribution may exist under the provisions of Section 875 of the Code of Civil Procedure.²⁰

The Connecticut approach, under which third-party negligence bars recovery against the public entity, appears to be unduly restrictive, and is contrary to the rule in the great majority of states.²¹ If the injured plaintiff is relegated solely to his remedy against the third person, he may often find such remedy to be unavailing either because the third person is judgment proof or cannot be served with process. Such a rule, moreover, grants to the public entity what is, in effect, a windfall exonerated from liability for what, by hypothesis, would otherwise be its actionable negligence. The only significant California precedent for such a rule is found in the requirement of Section 1953 of the Government Code, which governs the liability of public officers for dangerous and defective conditions of public property, to the effect that the plaintiff must prove *inter alia*, as a condition of recovery, that the plaintiff's injury was "sustained while such public property was being carefully used, and due care was being exercised to avoid the danger due to such condition." This requirement, which requires the plaintiff to sustain the burden of proving absence of negligence not only by himself but also by any third person, undoubtedly has served to protect public officers against personal liability to a considerable

¹⁷ See Note, 32 So. CAL. L. REV. 293 (1959), and authorities there cited. The Public Liability Act, however, creates no right of indemnity against local public entities in favor of joint tortfeasors. See *American Can Co. v. City & County of San Francisco*, 202 Cal. App.2d —, 21 Cal. Rptr. 33 (1962).

¹⁸ *City & County of San Francisco v. Ho Sing*, 51 Cal.2d 127, 138, 330 P.2d 802, 808 (1958). See also, *Peters v. City & County of San Francisco*, 41 Cal.2d 419, 260 P.2d 55 (1953).

¹⁹ *Alisal Sanitary District v. Kennedy*, 180 Cal. App.2d 69, 79, 4 Cal. Rptr. 379, 386 (1960).

²⁰ For a discussion of the possible interpretation of the new contribution provisions of CAL. CODE CIV. PROC. § 875 *et seq.*, see *Selected 1957 Code Legislation*, 32 CAL. S. B. J. 501, 552-555 (1957).

²¹ See 19 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 54.43-54.47 (3rd ed. 1950).

extent.²² However, it was originally enacted for that very purpose—to reduce the danger of *personal* liability²³—and hence would seem to be amenable to different policy criteria than would be applicable in determining the proper limits of liability of public entities. Protection against personal liability serves the valuable function of encouraging capable men to take public office; while protection against otherwise appropriate entity liability may only serve the cause of injustice. Under existing California law, moreover, the disadvantage to a public entity which is held liable notwithstanding the concurrent negligence of another is ameliorated somewhat by the rights of indemnity and contribution.

It is also believed that the Wisconsin rules of required joinder of the third party tortfeasor, and of primary and secondary enforcement of the judgment, are not necessary here. The existing rules governing joinder of conditionally necessary parties would appear to be adequate to protect the public entity's interest in securing joinder of a cotortfeasor in appropriate cases;²⁴ while the California rules of indemnity and contribution would seem to eliminate any compelling reason to insist that the judgment first be executed against the third person to its maximum possible extent before recourse can be had against the entity.

Recommendation. It is suggested that no strong and compelling reasons appear for any alteration in the existing rules of law pertaining to third-party negligence under the Public Liability Act, and that no change be made therein.

(b) *Reasonableness of entity action after receiving notice of defect.* Under the Public Liability Act, a public agency may be held liable only when its reaction to notice of a defect was unreasonably delayed or inadequate.²⁵ Ordinarily the sufficiency of the entity's actions are regarded as a question of fact.²⁶ It is not entirely clear, however, from the California cases what type of evidence is admissible and appropriate to tend to prove or disprove the reasonableness of the entity's conduct.

At least one California case contains a suggestion that plaintiff should plead and prove that the defendant public entity had sufficient funds available to it with which to repair the defective condition.²⁷ In Section 1953 of the Government Code, such a requirement is ex-

²² Compare the statement of Fred Hutchinson, City Attorney of the City of Berkeley, referring to the provision quoted in the text, *i.e.*, CAL. GOVT. CODE § 1953 (e), and opining that: "I believe you will find that there are very few cases brought against officials under this section because of subdivision (e)." CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, SEMI-ANNUAL REPORT, MUNICIPAL LIABILITY INSURANCE 13 (1953).

²³ See text at 120-22 *supra*; *Douglass v. City of Los Angeles*, 5 Cal.2d 123, 53 P.2d 353 (1935).

²⁴ See CAL. CODE CIV. PROC. § 389, as construed in *De Stackelberg v. Lamb Transportation Co.*, 168 Cal. App.2d 174, 335 P.2d 522 (1959). *Cf. Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570 (1942). In addition, recent decisions have indicated that the defendant may, in effect, obtain a joinder of a cotortfeasor or third party claimed to be ultimately liable by means of a cross-complaint for third party relief. *Roylance v. Doelger*, 57 Cal.2d 255, 19 Cal. Rptr. 7, 368 P.2d 535 (1962); *B.F.G. Builders v. Weisner & Coover Co.*, 206 Cal. App.2d —, 23 Cal. Rptr. 815 (1962); *Simon Hardware Co. v. Pacific Tire & Rubber Co.*, 199 Cal. App.2d 616, 19 Cal. Rptr. 12 (1962).

²⁵ See, *e.g.*, *Teihet v. County of Santa Clara*, 149 Cal. App.2d 305, 308 P.2d 356 (1957).

²⁶ *Van Dorn v. City & County of San Francisco*, 103 Cal. App.2d 714, 230 P.2d 393 (1951); *Bigelow v. City of Ontario*, 37 Cal. App.2d 198, 99 P.2d 298 (1940); *Sandstoe v. Atchison, T. & S.F. Ry.*, 28 Cal. App.2d 215, 82 P.2d 216 (1938).

²⁷ *Adams v. Southern Pac. Co.*, 109 Cal. App. 728, 293 Pac. 681 (1930).

explicitly imposed upon plaintiffs who sue public officers for injuries sustained as a result of defective public property,²⁸ but the absence of any language on the matter in the Public Liability Act would seem to negative any such requirement when action is brought against a public agency. In one case, moreover, it was squarely held that a city is not relieved of liability under the Public Liability Act by reason of its inability to employ adequate personnel with which to repair defects in its property.²⁹ The general rule in most states is that insufficiency of funds is not a sufficient defense.³⁰ This rule, at first glance, appears to be harsh and to impose an intolerable duty upon public entities to always have adequate funds on hand—a duty which may be wholly impracticable in view of debt and tax limits, as well as political factors which inevitably affect budget appropriations. In fact, however, it can be seen to be not wholly unjustified; for the entity's duty under the Act is not to repair all dangerous defects of which it has notice, but to either repair them or "take action reasonably necessary to protect the public against the condition." Action sufficient to protect against liability may simply consist of warning signs, flares, or barricades³¹—that is, steps which are ordinarily not costly and do not involve any large commitment of funds, time or personnel.

Accordingly, it is believed that unavailability of funds is only one circumstance which should enter into the determination whether the entity's action was consistent with reasonable care. Other elements also relevant to the issue would include the number of personnel available for assignment to the task, the total magnitude of the problem faced by the entity and its officers, the manner in which it attempted to meet its responsibilities, the problems of orderly administration and supervision of the work, and other circumstances arising from the peculiar facts of the case.³² What would be deemed a sufficient showing of care to remove fallen tree limbs from a street might well be quite different in the context of an extremely high wind which had wreaked havoc with trees in the whole area, from what it would be if only one isolated decayed branch had fallen and was known to the entity.³³ The danger of washouts and undermining of roads during a heavy rain requires unusual efforts by a public agency to prevent injuries as a result, but even the most heroic efforts might not be equal to the task in the midst of a torrential downpour or severe flood.³⁴ Evidence bearing upon the reasonableness of the entity's conduct, in the light of its financial capability, personnel management problems, and other circumstances is almost always far more accessible to the defendant entity than to the plaintiff. Hence, such evidence should be

²⁸ CAL. GOVT. CODE § 1953 requires that the plaintiff show, in an action thereunder, that the defendant officer had the duty to remedy the condition and "that funds for that purpose were immediately available to him."

²⁹ Rowland v. City of Pomona, 82 Cal. App.2d 622, 186 P.2d 447 (1947).

³⁰ 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.181 (3rd ed. 1950). *But cf.* David, *Tort Liability of Local Government: Alternatives to Immunity From Liability or Suit*, 6 U.C.L.A. L. REV. 1, 15 n.27 (1959).

³¹ See *Electrical Prods. Corp. v. County of Tulare*, 116 Cal. App.2d 147, 253 P.2d 111 (1953).

³² See *Bazinte v. Hartford*, 135 Conn. 484, 66 A.2d 117 (1949); *Ritter v. Shelton*, 105 Conn. 447, 135 Atl. 535 (1927); *Hayes v. City of Cambridge*, 136 Mass. 402 (1884); *Rooney v. Randolph*, 128 Mass. 580 (1880). Compare *Nicholson v. City of Los Angeles*, 5 Cal.2d 361, 54 P.2d 725 (1936).

³³ See McQUILLIN, MUNICIPAL CORPORATIONS § 54.182 (3rd ed. 1950), and cases there cited.

³⁴ Compare *Marino v. County of Tuolumne*, 118 Cal. App.2d 675, 253 P.2d 540 (1953).

deemed available by way of defense, and should not be made a part of the plaintiff's burden of proof.

Recommendation. The Public Liability Act should be amended to provide expressly that evidence relating to lack of funds, insufficient numbers of employees or equipment, the magnitude of the problem and of administrative difficulties arising therefrom, and the general reasonableness of the defendant entity's conduct after receiving notice of the dangerous or defective condition complained of, shall be admissible by way of defense, provided the plaintiff has introduced evidence tending to prove that notice was received by the entity a sufficiently long time prior to the occurrence of the injury to create an issue of fact as to the sufficiency of the entity's conduct taken with respect thereto.

(c) **Exceptions to general rule of liability for defective property.** In other states, there are often statutory exceptions which preclude recovery of damages for injuries resulting from defective property in specified types of cases.¹ California is consistent with this pattern. As the study has already shown,² there are several statutes which grant public entities immunity from liability in connection with certain kinds of property defects, such as defective conditions upon roads not officially accepted for public maintenance,³ stock trails,⁴ bridle paths,⁵ civil defense shelters and aid stations,⁶ and flood control facilities of the Sacramento and San Joaquin Drainage District.⁷ The propriety of additional exceptions would appear to deserve consideration in connection with the enlargement of the scope of the Public Liability Act here proposed.

An exception which is rather frequently found in the statute law of other states relates to injuries arising from accumulations of snow and ice on streets and sidewalks. Some states flatly declare that there shall be no liability from this source.⁸ Others attempt to restrict liability by imposing a less rigorous standard of care.⁹ Wisconsin, for example, declares that no action may be maintained against municipalities for injuries resulting from accumulations of snow and ice "unless such accumulation existed for 3 weeks."¹⁰ In certain parts of California, and particularly in mountainous regions, the problem of snow and ice may become a difficult one, particularly so with respect to the maintenance of state highways. In other parts of the state, snowfalls and freezing conditions are so very rare, although not entirely unknown,

¹ *E.g.*, CONN. GEN. STAT. ANN. § 13-87 (1960) (excepting from general rule of liability for highway defects, abandoned highways and unimproved roads); ILL. ANN. STAT., ch. 105, § 333.2a (Smith-Hurd Supp. 1961) (granting complete tort immunity to Chicago Park District); MASS. LAWS ANN., ch. 81, § 18 (1953) (immunizing state from highway defects consisting of want of a railing, conditions on sidewalks, and conditions arising during construction and repair work on highways); N.H. REV. STAT. ANN. §§ 247:21 (1955) 247:23-a (Supp. 1961) (granting immunity from liability for bridge defects where vehicle overloaded or exceeded posted speed limit).

² See text at 174-86 *supra*.

³ CAL. STS. & HWYS. CODE §§ 941, 1806.

⁴ CAL. STS. & HWYS. CODE §§ 943, 954.

⁵ CAL. GOVT. CODE § 54002.

⁶ CAL. CIV. CODE § 1714.5.

⁷ CAL. WATER CODE § 8535.

⁸ See MASS. LAWS ANN., ch. 84, § 17 (1953); ME. REV. STAT., ch. 96, § 92 (1954).

⁹ *E.g.*, R.I. GEN. LAWS § 24-5-14 (1956) (imposing liability on towns for snow and ice only where written notice was given at least 24 hours before the injury occurred, and the town "shall not thereupon within said time have commenced the removal of such obstruction, or caused any sidewalk which may have been obstructed by ice to be rendered passable, by spreading ashes or other like substances thereon").

¹⁰ WIS. STAT. § 81.15 (1959).

that financial appropriations often are not made for the purpose of providing equipment and personnel to clear streets and highways of snow and ice, for such contingencies are deemed extremely remote; yet, if the unusual occurs, a threat of possible liability might well arise under the Act. In view of the fact that the snow and ice problem is caused by natural conditions beyond the control of governmental entities, it would not seem to be unreasonable to create an exception to the general rule of liability in such cases.

Certain other statutory exceptions appear in the legislation of other states. In Maine, for example, towns are given an absolute and unqualified immunity from liability for damage sustained by any pedestrian because of "the slippery condition of any sidewalk."¹¹ A slippery condition, however, is one which may reasonably be deemed to expose the users of the sidewalk to a probability of injury against which relatively inexpensive measures will ordinarily constitute adequate protection, and California cases have recognized liability in such situations.¹² With the limitations already suggested to be placed upon liability under the Public Liability Act, there seems to be no compelling reason to change existing law with respect to slippery conditions (assuming such slipperiness not to involve accumulated ice and snow).

Massachusetts imposes general liability upon the state for defects in state highways, but expressly excepts therefrom injuries sustained during "construction, reconstruction or repair" work on such highways.¹³ To be sure, the vicissitudes of highway maintenance and construction work suggest that many potential injury-producing conditions are likely to be created in the course of such work, especially where the highway is permitted to remain open for use by motorists. However, it would seem under existing California law that ample protection against liability may be secured by the erection or posting of signs, flares, barricades and the like to warn motorists of the danger,¹⁴ and, where deemed necessary, by the closing of the highway.¹⁵ Failure to take reasonable precautions of this type would not appear to be an arbitrary or unduly burdensome basis for liability.

Finally, several states, including New Hampshire, have statutory exceptions to defective condition liability in connection with streets and bridges where the plaintiff's vehicle, at the time of the injury,

¹¹ ME. REV. STAT., ch. 96, § 92 (1954). See *Verreault v. City of Lewiston*, 150 Me. 67, 104 A.2d 538 (1954).

¹² See e.g., *Sale v. County of San Diego*, 184 Cal. App.2d 785, 7 Cal. Rptr. 756 (1960) (plank placed to allow pedestrians to cross water-filled dip at edge of highway, made slippery by growth of algae and moss); *Duran v. Gibson*, 180 Cal. App.2d 753, 4 Cal. Rptr. 803 (1960) (wet and slippery debris left in street by flushing operation along center divider strip); *Rodriguez v. City of Los Angeles*, 171 Cal. App.2d 761, 341 P.2d 410 (1959) (slippery ice plant allowed to grow over sidewalk area).

¹³ MASS. LAWS ANN., ch. 81, § 18 (1953).

¹⁴ *Electrical Prods. Corp. v. County of Tulare*, 116 Cal. App.2d 147, 253 P.2d 111 (1953). Compare *White v. Cox Bros. Constr. Co.*, 162 Cal. App.2d 491, 329 P.2d 14 (1958).

¹⁵ Authority to close highways is given to the state under specified circumstances by CAL. STS. & HWYS. CODE § 124, and to counties by CAL. STS. & HWYS. CODE § 942.5. Whether mere posting of signs closing a highway pursuant to these sections will result in immunity from liability for defective conditions thereon causing injury to traffic permitted to use the "closed" road is apparently still an open question in California. See *Tankersley v. Low & Watson Construction Co.*, 166 Cal. App.2d 815, 333 P.2d 765 (1959). Compare *Acosta v. County of Los Angeles*, 56 Cal.2d 208, 14 Cal. Rptr. 433, 363 P.2d 473 (1961).

exceeded the posted weight or speed limits.¹⁶ Although there would seem to be merit to the general policy of precluding recovery by one who brings about his own injury by violating applicable standards for which the bridge or highway was designed, the fact that the plaintiff's truck was overweight or that his car was exceeding the speed limit would neither necessarily nor automatically mean that his fault contributed to the injury. The issue would be one of fact, in most cases, and under California law as it now exists would be so treated as part of the contributory negligence issue. If the suggestion is adopted, as advanced above, that the burden of proving absence of contributory negligence be imposed upon the plaintiff,¹⁷ violations of load and speed limits may well prove to be an insurmountable obstacle to recovery in certain cases. It is believed, however, that a flat prohibition upon liability in such cases would be unwarranted as well as inconsistent with the principle that fault by the plaintiff only prevents recovery when such fault was a contributing proximate cause of his injuries.

Recommendation. It is suggested that the Public Liability Act be amended to provide:

A public entity shall not be liable for damage sustained by reason of natural accumulations of snow and ice upon public streets, sidewalks or other public property, if the property was at the time of the sustaining of the damage otherwise reasonably free from any dangerous or defective condition which contributed thereto.

Since no compelling or persuasive reasons have been discerned for establishing statutory exceptions to governmental liability in connection with slippery conditions of sidewalks, defects caused by construction and repair work on roads, streets and highways, or violations by the plaintiff motorist of weight and speed limitations, it is suggested that no action be taken with respect to these matters.

(d) *Statutory limitations upon recoverable damages.* A number of states which have adopted statutory waivers of immunity for defective conditions of public property have limited the damages recoverable by the plaintiff. The maximum liability of a Maine town for defective roads, for example, is set at \$4000 by statute;¹⁸ while the Massachusetts law provides a sliding scale which limits recovery in such cases to not more than "one fifth of one percent of [the defendant entity's] state valuation last preceding the commencement of the action nor more than four thousand dollars."¹⁹ In Massachusetts it appears that a plaintiff would do well to see to it that his accident occurs within the jurisdiction of a county, city or town with at least two million dollars in assessed valuation, in order to ensure a maximum \$4000 recovery. A similar limitation in California, it may be noted, would restrict the injured party to a recovery of less than \$4000 in literally

¹⁶ N.H. REV. STAT. ANN. §§ 247:21 (1955), 247:23-a (Supp. 1961). Compare N.Y. HIGHWAY LAW § 216.

¹⁷ See text at 369 *supra*.

¹⁸ ME. REV. STAT., ch. 96, § 89 (Supp. 1961).

¹⁹ MASS. LAWS ANN., ch. 84, § 15 (1953). See also MASS. LAWS ANN., ch. 81, § 18 (1953).

scores of cities²⁰ and special districts,²¹ in some to less than \$500.²² The latter figure, however, is precisely the maximum authorized to be paid by the Oregon Highway Commission for injuries arising out of construction or maintenance of state highways,²³ although counties in Oregon are liable for defective county roads and bridges up to a maximum of \$2000.²⁴ Presumably the potentially greater aggregate of claims arising from the more extensive state highway system was deemed to justify a maximum on state liability in Oregon which is only one-fourth that of counties in the same state. Rhode Island has a more discriminating limitation upon damages, authorizing a maximum recovery of \$7000 for personal injuries but declaring no restriction on property damages.²⁵ South Carolina, however, distinguishes carefully between both the nature of the damages and the identity of the public defendant: the State Highway Department of that state is liable up to \$3000 for property damage and up to \$8000 for personal injuries,²⁶ while for counties²⁷ the comparable limits are \$1000 and \$5000 and for cities and towns²⁸ are \$2000 and \$8000.

Any fixed statutory limitation upon the amount of damages which may be recovered in a tort action will inevitably operate in a more or less arbitrary fashion, depending upon the circumstances of particular cases. The desirability of such limitations is surely not enhanced by the fact that their principal impact is not necessarily borne by the person whose injuries are the most severe and who thus ordinarily is least well situated to absorb the cost and expense. The good common sense of the law has left the determination of the damage award almost entirely to the trier of fact, and the history of litigation under the Public Liability Act has not disclosed any convincing evidence that the same policy is not reasonably appropriate in actions against public entities. Occasional large judgments arising from defective public property conditions would seem to be a reflection of rising costs of living, including costs of medical and hospital care, and possibly of more liberal jury standards as to what constitutes an adequate award, which appear to characterize recent tort litigation as a whole. The problem of financial administration of large awards assessing damages for personal injuries in six figures or better should be approached, it is believed, by establishing procedural means whereby public entities may secure maximum advance protection against liability with a maximum of flexibility of choice as to the means to be pursued. Suggestions along these lines are advanced at an earlier point in the present study.²⁹

Recommendation. It is submitted that statutory limitations upon the amount of damages recoverable against public entities in actions

²⁰ See CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA, FISCAL YEAR 1959-60 258-71 (1960), listing many cities with a total assessed valuation of taxable property less than \$2 million. See p. 308, note 37 *supra*.

²¹ See CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS, FISCAL YEAR 1958-59 129-238 (1959), and data set forth at 308, note 36 *supra*.

²² A total assessed valuation of \$250,000 subject to a tax rate of .002 (as prescribed by the Massachusetts limitation, note 19 *supra*) would produce only \$500 in revenue. A number of special districts are of smaller fiscal capacity than even this meager figure. See p. 308, note 36 *supra*.

²³ ORE. REV. STAT. § 366.430 (1953).

²⁴ ORE. REV. STAT. § 368.935 (1953).

²⁵ R.I. GEN. LAWS § 45-15-12 (Supp. 1961).

²⁶ S.C. CODE OF LAWS § 33-229 (Supp. 1960).

²⁷ S.C. CODE OF LAWS § 33-926 (1952).

²⁸ S.C. CODE OF LAWS § 47-70 (Supp. 1960).

²⁹ See text at 306-11 *supra*.

under the Public Liability Act should not be enacted. Procedural devices along lines previously suggested should, however, be enacted to provide public entities with flexible means for insuring against and funding liabilities under the Act.

Medical Treatment and Hospital Care

Introduction

Prior to the decision in *Muskopf v. Corning Hospital District* (January 1961),¹ the case law of California had firmly established the principle that public entities were not liable for injuries sustained as a consequence of negligence by medical and hospital personnel in their employ. Indeed, one of the earliest cases in California's legal history in which the tort immunity of public entities was recognized dealt with a claim for damages arising out of alleged negligence by public employees attached to the Yuba County Hospital.²

The main line of authorities, however, may be traced to the 1924 decision in *Davie v. Board of Regents*,³ in which a student at the University of California was denied relief in an action stemming from alleged medical malpractice by a physician employed at the university infirmary in performing a tonsillectomy. The court concluded that the infirmary was maintained to protect the health and welfare of students, and hence was necessarily classified as a "governmental" function to which sovereign immunity extended. Allegations that the plaintiff had paid a regular student health fee, that he had agreed to pay an additional fee for the operation, and that the infirmary actually was operated at a profit, were deemed not to alter the result. Although one may readily agree with the court that the result in *Davie* was "indeed unfortunate," it is manifest that the court was being less than candid when it attempted to explain its decision by invoking the rule that it was "bound to take the law as we find it."⁴ The opinion admits that the issue whether the operation of the infirmary was "governmental" or "proprietary" was one of first impression, since the only California case even remotely relevant was clearly distinguishable;⁵ and the court concedes that the decisions in other states only "generally" (*i.e.*, not necessarily uniformly) classified public hospital operations as "governmental."⁶ In short, there were no binding precedents which would preclude rational evaluation of and choice between the opposing alternatives. It thus seems clear that the ultimate result was motivated less by law than by a basic policy determination—one which the court took pains to articulate in no uncertain terms: "The reason for the rule that the policy of the law denies liability of a state or municipality for negligence of its . . . physicians is that . . . to permit such liability would result in enormous public burdens."⁷

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

² *Sherbourne v. Yuba County*, 21 Cal. 113 (1862).

³ 66 Cal. App. 693, 227 Pac. 243 (1924).

⁴ *Id.* at 702-03, 227 Pac. at 246.

⁵ *Sherbourne v. Yuba County*, 21 Cal. 113 (1862), distinguished in *Davie* on the ground that the court had there regarded a county as a quasi-corporation exercising a portion of the sovereign power of the state for purely public benefit, and hence as being legally capable of exercising only "governmental" functions.

⁶ See generally, Annot., 25 A.L.R.2d 203 (1952), citing cases which indicate that a few states recognized public hospital operations to be a source of tort liability prior to 1924, *e.g.*, *City of Shawnee v. Roush*, 101 Okla. 60, 223 Pac.354 (1923), although the bulk of the decisions to that effect are later in time.

⁷ *Davie v. Board of Regents*, 66 Cal. App. 693, 700, 227 Pac. 243, 245 (1924).

The *Davie* case, however, related only to an infirmary maintained for university students. The question was still possibly open whether a public hospital operated, like a private one, for the benefit of the public generally would also be within the protection of the sovereign immunity doctrine. In 1939, this issue was tested in a suit brought by one admitted to the Siskiyou County hospital as a paying patient, who, as a consequence of negligence of county medical personnel, ultimately sustained the loss of a leg.⁸ His complaint alleged that the county general hospital was the only one in the community and that the majority of patients treated there were paying patients. In addition, he flatly alleged that the hospital was operated at a profit. Under these circumstances, plaintiff contended, the county should be treated as having shed its mantle of sovereign immunity and entered the field of hospital operation as a business venture, subject to the same liabilities as private hospitals. The court disagreed. It ruled that the plaintiff, in effect, was caught on the horns of a legal dilemma. On the one hand, the county was only authorized to operate its hospital for "governmental" purposes, which purposes were not inconsistent with the rendering of charges not exceeding the actual cost of service given to those patients who were able to pay. Hence, if the county was operating within its authority, it was immune from tort liability. On the other hand, if it had exceeded its authority, and was charging patients more than the cost of services given and was thereby operating at a profit, the county's activities would be *ultra vires* and for that reason would impose no liability upon the public treasury.⁹

As to county hospitals, the doctrine of immunity was uniformly followed in all subsequent cases. Colusa County was held not liable for injuries sustained when an unconscious patient, while in a delirium, fell out of bed due to lack of adequate nursing care.¹⁰ Santa Clara County was ruled to be immune notwithstanding it charged hospital fees proportioned to the patient's ability to pay.¹¹ The negligent failure of Kern County hospital personnel to give proper treatment to a child who had swallowed poison, thereby bringing about the child's death, was found to be not actionable.¹² A paying patient in the Los Angeles County general hospital was held to be without remedy against the county for a broken leg and infection caused by negligence of hospital employees.¹³ Similarly, the doctrine of immunity was held to shield against liability of Colusa County for negligent blood typing by an incompetent county hospital laboratory technician,¹⁴ against liability of Glenn County for lewd and indecent acts committed upon a patient by an intruder who gained access to her room because of negligent failure of county hospital personnel to provide adequate

⁸ *Calkins v. Newton*, 36 Cal. App.2d 262, 97 P.2d 523 (1939).

⁹ The impact of the *ultra vires* doctrine on the development of California law relating to governmental tort immunity is discussed in the text at 242-46 *supra*. The use of the *ultra vires* doctrine to reinforce sovereign immunity, where a public hospital was operated for profit and accepted paying patients on a basis similar to private hospitals, has not been confined to California. See, e.g., *Laney v. County of Jefferson*, 249 Ala. 612, 32 So.2d 542 (1947); *Tollefson v. City of Ottawa*, 228 Ill. 134, 81 N.E. 823 (1907).

¹⁰ *Griffin v. County of Colusa*, 44 Cal. App.2d 915, 113 P.2d 270 (1941).

¹¹ *Latham v. Santa Clara County Hosp.*, 104 Cal. App.2d 336, 231 P.2d 513 (1951).

¹² See *Pike v. Archibald*, 118 Cal. App.2d 114, 257 P.2d 480 (1953).

¹³ *Waterman v. Los Angeles County General Hosp.*, 123 Cal. App.2d 143, 266 P.2d 221 (1954).

¹⁴ *Durst v. County of Colusa*, 166 Cal. App.2d 623, 333 P.2d 789 (1958).

protection,¹⁵ and against liability of Butte County for a death resulting from negligent failure to maintain an adequate oxygen tent in the county hospital's equipment inventory.¹⁶

Some of the cases¹⁷ relating to county hospitals, however, emphasized the theory that counties, as subdivisions of the state, exercised *only* "governmental" functions—a theory which was not eradicated from the law until 1953.¹⁸ Thus, it was possible in strict legal theory that public hospitals operated by cities or hospital districts might be deemed "proprietary" under some circumstances. This possibility emerged as a reality in *Beard v. City & County of San Francisco*,¹⁹ decided in 1947. Holding that the defendant, which exercised both county and municipal powers under its charter, had general authority to operate a hospital in either a "governmental" or a "proprietary" capacity, the court reversed an order dismissing the action on demurrer. The reversal was based upon allegations in the complaint that the hospital was being operated in a "proprietary" capacity and that the plaintiff's child, who had died as a result of negligent care in the hospital, had been a paying patient therein. These allegations, said the court, were sufficient to create an issue of fact requiring the reception of evidence, thereby making the complaint sufficient as against a demurrer. When the status of the same hospital was raised in a later case decided only a few years after *Beard*, however, a different division of the same court held *on the evidence* that the San Francisco General Hospital was in fact authorized by the city charter and applicable ordinances to be operated solely in a "governmental" capacity.²⁰ Accordingly, even if plaintiff's wife, who had died as a result of the negligence of hospital personnel, had been admitted as a paying patient for profit, such action of the hospital officials would have been *ultra vires* and would not have bound the defendant. The jury's verdict in favor of the plaintiff thus could not stand. An otherwise deserving plaintiff had again been caught between the millstones of the sovereign immunity and *ultra vires* doctrines.

A last possibility of breaking down the barrier of immunity remained. Local hospital districts, created pursuant to general statutory enabling provisions, were expressly authorized by the legislature to operate hospitals on a basis comparable to private hospitals—that is, there were no restrictions upon the district's right to admit any and all persons to its hospital facilities and to charge fees sufficient to keep the hospital on a self-supporting basis.²¹ Since county hospitals were maintained

¹⁵ *Ingram v. County of Glenn*, 177 Cal. App.2d 649, 2 Cal. Rptr. 304 (1960).

¹⁶ *Butte County v. Superior Court*, 178 Cal. App.2d 310, 2 Cal. Rptr. 913 (1960).

¹⁷ See *Griffin v. County of Colusa*, 44 Cal. App.2d 915, 920, 113 P.2d 270, 273 (1941) (distinguishing municipal corporations from counties, with respect to tort liability, on the ground that counties "are state agencies which exercise within their boundaries the sovereignty of the state, and in the absence of a specific statute imposing liability upon them they are no more liable than the state itself"). In support of this position, the court cites *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35 (1919). See note 18 *infra*.

¹⁸ The notion that the state was always immune from tort liability in the absence of a specific statute, as expounded in *Griffin*, *supra* note 17, was dispelled by *People v. Superior Court*, 29 Cal.2d 754, 178 P.2d 1, 40 A.L.R.2d 919 (1947) (holding the state to be liable in tort when acting in a "proprietary" capacity). This rule was expressly extended to counties and other political subdivisions in *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953), overruling *Dillwood v. Riecks*, 42 Cal. App. 602, 184 Pac. 35 (1919), the case chiefly relied upon in *Griffin* to support the contrary view.

¹⁹ 79 Cal. App.2d 753, 180 P.2d 744 (1947).

²⁰ *Madison v. City & County of San Francisco*, 106 Cal. App.2d 232, 234 P.2d 995 (1951).

²¹ See CAL. H. & S. CODE § 32125.

primarily for the purpose of administering medical care to the poor and indigent, and were open on a fee basis to others only where like private facilities were unavailable,²² it was arguable that hospital districts were in a distinguishable situation and might be classed as "proprietary." This last possibility, however, was dashed in 1953, when the Supreme Court held that hospital districts were fully entitled to the protection of the sovereign immunity doctrine.²³ The matter of profit or nonprofit, said the court, is not determinative. "The test is whether the particular activity in which the governmental agency is engaged at the time of the injury is of a public or private nature."²⁴ Without pausing to explain what criteria (if any) existed for distinguishing between these two classifications, the court went on to hold that hospital districts were not authorized to operate their hospitals as a "private business" (although such hospitals were functionally almost identical to private hospitals in all material respects) but only for the purpose of "protecting the public health and welfare." The transparent suggestion here made that public health and welfare would be promoted only by operation of the hospital as a public institution, but not if it were operated as a "private business" comparable to other privately operated hospitals, serves to emphasize the specious nature of the "governmental"-"proprietary" distinction underlying the sovereign immunity doctrine. The hospital district case, however, reinforced and perpetuated that distinction, albeit against a vehement dissent by the late Mr. Justice Carter arguing that the rule observed by the majority was an outmoded and unjust anachronism. The substance of this dissent became the law in *Muskopf*, some seven and one-half years later, where another hospital district was before the court.²⁵

It is not without significance that the judicial abolition of the sovereign immunity doctrine occurred in the context of a case dealing with a public hospital. As the cases just surveyed amply testify, the chief area within which the legal battle against the immunity doctrine has been waged in California is that of medical malpractice by public personnel. The persistence of the immunity doctrine, where "governmental" hospitals were concerned, was documented by a stream of cases denying relief in instances of extremely serious and tragic loss—the very type of case most likely to arise from the environment of medical and hospital care. The judicial abolition of the charitable immunity doctrine²⁶ had placed all private hospitals on a common footing without observable detriment to the public welfare, and both logic and compassion argued that public medical facilities should be similarly treated. The court finally acted in *Muskopf* only after a series of judicial

²² *Compare* Goodall v. Brite, 11 Cal. App.2d 540, 54 P.2d 510 (1936), with *Calkins v. Newton*, 36 Cal. App.2d 262, 97 P.2d 523 (1939).

²³ *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953).

²⁴ *Id.* at 39-40, 257 P.2d at 26.

²⁵ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961). The majority in *Muskopf* consisted of one justice (Traynor, J.) who did not participate in *Talley*, and one justice (Gibson, C.J.) who changed the position he had taken in that case, joined by three justices (Peters, White and Dooling, JJ.) appointed in the interim period. Only Justice Schauer of the *Talley* majority remained to dissent, joined by newly appointed Justice McComb.

²⁶ See *Silva v. Providence Hosp.*, 14 Cal.2d 762, 97 P.2d 798 (1939); and *compare Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241 (1951).

suggestions²⁷ as to the need for legislative relaxation of the immunity rule had gone unheeded.

It may be noted that the California Legislature has not been completely silent with respect to the matter of torts arising from medical and hospital care administered by public entities. At the state level, the most significant of these statutes is Section 2002.5 of the Government Code, which requires the State to pay any judgment or settlement (provided the settlement is approved by the department head and the Attorney General) arising out of a malpractice suit brought against a state officer or employee licensed in one of the healing arts for acts done in the performance of duty or in rendering emergency aid. The State has thus already assumed financial responsibility for the medical malpractice torts of its personnel, although impliedly retaining its technical immunity from direct liability.

While no similar mandatory assumption of liability has been enacted at the local governmental entity level, permissive authority is granted by Section 1231 of the Government Code for any local public entity to purchase "malpractice insurance policies to protect all of its medical and dental personnel employees against liability for any claims or actions for malpractice that may be filed or brought against such employees."²⁸ In addition, there are statutory provisions granting a substantial measure of immunity from tort liability to medical personnel who render emergency assistance at the scene of an accident,²⁹ or who provide medical services at the request of civil defense officials during a state of extreme emergency or disaster.³⁰ Finally, a series of provisions confer immunity upon public officers and employees for authorized actions taken by them in connection with the detention, commitment and treatment of persons who are mentally ill.³¹ The cited statutory provisions, however, are limited to the personal liabilities of public officers and employees, and do not directly affect the possible liabilities of the public entities by which they are employed.

In order to more adequately evaluate the potential impact of the elimination of the sovereign immunity doctrine with respect to medical and hospital care, experience in other jurisdictions may be helpful in identifying the types of situations which may give rise to tort claims. The most useful experience, because it is the most extensive and has the greatest variety, is found in cases arising under the Federal Tort Claims Act and in New York State under the general statutory waiver of sovereign immunity which obtains there.

It should not be assumed, however, that public hospitals and medical personnel are uniformly within the ambit of the immunity doctrine in other jurisdictions. Recent developments, for example, indicate that there is no longer any common law immunity for public entities in

²⁷ *E.g.*, *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 41, 257 P.2d 22, 27 (1953): "Whether the doctrine of sovereign immunity should be modified in this state is a legislative question." See also, *Madison v. City & County of San Francisco*, 106 Cal. App.2d 232, 234 P.2d 995 (1951).

²⁸ See the discussion of liability insurance authorization statutes in the text, *supra* at 293-97 *et seq.*

²⁹ See CAL. BUS. & PROF. CODE § 2144, discussed in the text at 150-51 *supra*.

³⁰ See CAL. MIL. & VET. CODE § 1587, par. 2, discussed in the text at 161-62 *supra*.

³¹ See CAL. WEL. & INST. CODE §§ 6005, 6610.3, 6610.9, 6624, discussed in the text at 168-72 *supra*.

Michigan, Illinois, and Wisconsin,³² while the doctrine has been eliminated at least on the municipal level in Florida.³³ Both Alaska and Hawaii have adopted the Federal Tort Claims Act approach to the problem,³⁴ and it is possible (though by no means yet certain) that Washington may have abolished the immunity of its public entities by a recent and somewhat ambiguous statute.³⁵ In addition, while many states cling to the doctrine of sovereign immunity as applied to public hospitals and medical services,³⁶ well-considered decisions have reached the opposite conclusion in Florida,³⁷ Georgia,³⁸ Idaho³⁹ and New Hampshire.⁴⁰ Moreover, several states, including Arizona,⁴¹ Iowa,⁴² Kansas,⁴³ Maine,⁴⁴ Minnesota,⁴⁵ Ohio,⁴⁶ Oklahoma,⁴⁷ Tennessee⁴⁸ and Wisconsin,⁴⁹ have adopted an intermediate position under which public agencies are classified as engaging in a "proprietary" function when providing hospital and medical care for a fee or charge to paying patients. In two instances, state legislatures have entered the picture, providing for im-

³² See *Williams v. City of Detroit*, 346 Mich. 231, 111 N.W.2d 1 (1961) (declaring sovereign immunity abolished prospectively at least so far as municipalities are concerned); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), discussed at length in Hickman, *Municipal Tort Liability in Illinois*, 1961 U. ILL. L. F. 475; *Holytz v. City of Milwaukee*, 16 Wis.2d —, 115 N.W.2d 618 (1962). The judicial abrogation of sovereign immunity in *Molitor* was followed by legislative restoration of such immunity for counties, forest preserve districts and park districts, and a limitation of liability of school districts to \$10,000. See ILL. ANN. STAT., ch. 34, § 22.1, ch. 57½, § 3a, ch. 105, § 491, ch. 122, § 821-31 (Smith-Hurd 1961), discussed in Comment, 54 N. W. U. L. REV. 588 (1959).

³³ See *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 60 A.L.R.2d 1193 (Fla. 1957). This case has been followed only in the case of cities. See *Smith v. Duval County Welfare Bd.*, 118 So.2d 93 (Fla. App. 1960); *Buck v. McLean*, 115 So.2d 764 (Fla. App. 1959).

³⁴ ALASKA COMP. LAWS ANN. § 56-7-1 *et seq.* (Supp. 1958); HAWAII REV. LAWS § 245A-1 *et seq.* (Supp. 1960).

³⁵ Wash. Laws 1961, ch. 136, expressly consents to the maintaining of an action for damages against the state for damages arising out of its tortious conduct "to the same extent as if it were a private person or corporation," and without regard for whether it was acting in a governmental or proprietary capacity. However, in the light of past Washington cases construing a statutory consent to suit as waiving only the procedural barrier and not the state's substantive immunity, it is somewhat doubtful if this provision will be given its apparent intended effect. See Comment, 36 WASH. L. REV. 312 (1961). *But cf.* *Lightner v. Balow*, — Wash.2d —, 370 P.2d 982 (1962) (concurring opinion by Foster, J.).

³⁶ See, e.g., *Bondurant v. Board of Trustees of Memorial Hospital*, — Wyo. —, 354 P.2d 219 (1960); *Denver v. Madison*, 142 Colo. 1, 351 P.2d 826 (1960); *Schroeder v. City of St. Louis*, 360 Mo. 293, 228 S.W.2d 677, 25 A.L.R.2d 200 (1950); *Moore v. County of Walker*, 236 Ala. 688, 185 So. 175 (1938). Additional citations are collected in Annot., 25 A.L.R.2d 203 (1952).

³⁷ *City of Miami v. Oates*, 152 Fla. 21, 10 So.2d 721 (1942). See also, *Marsh v. City of St. Petersburg*, 106 So.2d 567 (Fla. App. 1958) (rule recognized but no liability on facts). Recovery is also permitted in Florida on a contractual theory. See *City of Miami v. Williams*, 40 So.2d 205 (Fla. 1949). However, county hospitals are not liable for injuries sustained by charity or indigent patients therein. See *Smith v. Duval County Welfare Bd.*, 118 So.2d 98 (Fla. App. 1960); *Suwannee County Hosp. Corp. v. Golden*, 56 So.2d 911 (Fla. 1952).

³⁸ As to tort liability of municipal corporations operating hospitals in Georgia, see *City of Brunswick v. Barrett*, 58 Ga. App. 792, 199 S.E. 901 (1938); *Barrett v. City of Brunswick*, 56 Ga. App. 575, 193 S.E. 450 (1937). As to liability of hospital authorities, see *Hospital Authority v. Misfeldt*, 99 Ga. App. 702, 109 S.E.2d 816 (1959); *Hospital Authority v. Shubert*, 96 Ga. App. 222, 99 S.E.2d 708 (1957).

³⁹ *Henderson v. County of Twin Falls*, 56 Idaho 124, 50 P.2d 597 (1935).

⁴⁰ *Kardulas v. City of Dover*, 99 N.H. 359, 111 A.2d 327 (1955).

⁴¹ *Hernandez v. County of Yuma*, — Ariz. —, 369 P.2d 271 (1962).

⁴² *Wittmer v. Letts*, 248 Iowa 648, 80 N.W.2d 561 (1957).

⁴³ *Stolp v. City of Arkansas City*, 190 Kan. 197, 303 P.2d 123 (1956).

⁴⁴ *Anderson v. City of Portland*, 130 Me. 214, 154 Atl. 672 (1931).

⁴⁵ *Borwege v. City of Owatonna*, 190 Minn. 394, 251 N.W. 915 (1933). See also,

⁴⁶ *Gillies v. City of Minneapolis*, 66 F.Supp. 467 (D. Minn. 1946).

⁴⁷ See *Hyde v. City of Lakewood*, 17 Ohio Ops.2d 61, 175 N.E.2d 323 (1961). *But cf.*

⁴⁸ *Board of Educ. v. McHenry*, 106 Ohio 357, 140 N.E. 169 (1922).

⁴⁹ *City of Okmulgee v. Carlton*, 180 Okla. 605, 71 P.2d 722 (1937); *City of Shawnee*

v. Roush, 101 Okla. 60, 223 Pac. 354 (1923).

⁵⁰ See *McMahon v. Baroness Erlanger Hosp.* 306 S.W.2d 41 (Tenn. App. 1957).

⁵¹ *Carlson v. County of Marinette*, 264 Wis. 423, 59 N.W.2d 486 (1953).

munity of hospital districts in Washington⁵⁰ and for liability of hospital authorities in Georgia.⁵¹

The fact that twenty-one other jurisdictions appear to admit public liability for medical and hospital activities, under some circumstances at least, argues persuasively that such liabilities may not be unduly extensive or burdensome in practice. Confirming evidence to the same effect appears to be inferable from the uniform rule, long settled in both England⁵² and Canada,⁵³ that governmental bodies operating hospitals are liable for the torts of their employees in exactly the same way as private individuals would be liable under similar circumstances.

A more detailed examination of the cases from other jurisdictions discloses at least ten different types of hospital-medical tort situations which have arisen, most notably in New York and under the Federal Tort Claims Act. To these specific situations we now turn.

Medical Malpractice

Cases involving negligent conduct of physicians and nurses, internes or other personnel of public hospitals involve a remarkable array of factual circumstances. Leading cases from New York, for example, sustain recovery of damages resulting from negligent diagnosis and treatment for an accidental injury,¹ negligent application of a diathermy machine,² negligent administration of a heating lamp,³ negligent administering of the wrong drug,⁴ negligently leaving a drill point in the patient's bone after surgery,⁵ negligent use of decomposed morphine,⁶ and negligent injection of dye for X-ray examination purposes.⁷ Cases arising under the Federal Tort Claims Act similarly support liability involving federally operated hospitals and arising from negligent diagnosis and treatment,⁸ negligent pouring of acid in patient's ear,⁹ negligent injection of concentrated solution without previously diluting it,¹⁰ negligent failure to promptly treat postoperative infection,¹¹ negligent administration of spinal anesthesia,¹² and

⁵⁰ See *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash.2d 774, 296 P.2d 662 (1956), construing WASH. REV. CODE § 70.44.060(8) (1962).

⁵¹ See *Hospital Authority v. Misfeldt*, 99 Ga. App. 702, 109 S.E.2d 816 (1959); *Hospital Authority v. Shubert*, 96 Ga. App. 222, 99 S.E.2d 708 (1957).

⁵² See, e.g., *Hillyer v. St. Bartholomew's Hosp.*, [1909] 2 K.B. 820 (Ct. App.). Compare *Cassidy v. Ministry of Health*, [1951] 2 K.B. 343 (Ct. App.); *Gold v. Essex County Council*, [1942] 2 K.B. 293, 2 All E.R. 237 (Ct. App.)

⁵³ See *Nyberg v. Provost Municipal Hosp. Bd.*, [1927] Can. Sup. Ct. 226, 1 D.L.R. 969, reversing [1926] 2 D.L.R. 563, 22 Alta. L.R. 1. Compare *Lavere v. Smith's Falls Pub. Hosp.*, 35 Ont. L.R. 98, 26 D.L.R. 346 (1915).

¹ *McCrain v. City of New York*, 12 App. Div.2d 482, 207 N.Y.S.2d 685 (1960); *Robison v. State of New York*, 263 App. Div. 240, 32 N.Y.S.2d 388 (1942), 266 App. Div. 1054, 45 N.Y.S.2d 725 (1943), *aff'd*, 292 N.Y. 631, 55 N.E.2d 506 (1944).

² *Turack v. State of New York*, 285 N.Y. 737, 34 N.E.2d 899 (1941), *affirming* 259 App. Div. 1105, 21 N.Y.S.2d 385 (1940).

³ *Cadicamo v. Long Island College Hosp.*, 308 N.Y. 196, 124 N.E.2d 279 (1954).

⁴ *Liubowsky v. State*, 260 App. Div. 416, 23 N.Y.S.2d 633 (1940), *aff'd*, 285 N.Y. 701, 34 N.E.2d 385 (1941).

⁵ *Kaplan v. State of New York*, 277 App. Div. 1065, 100 N.Y.S.2d 693 (1950), *affirming* 198 Misc. 62, 95 N.Y.S.2d 890 (Ct. Cl. 1950).

⁶ *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940).

⁷ *Becker v. City of New York*, 2 N.Y.2d 226, 159 N.Y.S.2d 174, 140 N.E.2d 262 (1957).

⁸ *United States v. Reid*, 251 F.2d 691 (5th Cir. 1958).

⁹ *Dishman v. United States*, 93 F. Supp. 567 (D. Md. 1957).

¹⁰ *Grigalaukas v. United States*, 103 F. Supp. 543 (D. Mass. 1950).

¹¹ *United States v. Canon*, 217 F.2d 70 (9th Cir. 1954).

¹² *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Messer v. United States*, 95 F. Supp. 512 (N.D. Fla. 1951).

negligent care and treatment.¹³ Illustrations of typical cases from other jurisdictions are set forth in the appended note.¹⁴

The cases just cited are all examples of torts involving negligent conduct, or of negligent omissions where a duty to act was clear. In each of these cases, the plaintiff (or in death cases, the plaintiff's decedent) had previously established a relationship with the defendant public agency as a patient or inmate in its hospital. The injuries were sustained as a consequence of negligence in the actual rendition of medical treatment or in the failure to render such treatment notwithstanding knowledge of symptoms or other circumstances showing the need therefor. In such cases, the courts of New York and the federal courts have applied the same rules of law which govern negligence actions between private persons. In view of the fact that private hospitals appear to be able to function without impairment of effectiveness due to tort responsibility, it would seem to be sound policy to place public hospitals upon the same legal footing.

Public hospitals, however, are usually not required, and often are actually not authorized, to accept all persons who seek admission as patients.¹⁵ County hospitals, for example, are restricted in California to rendering aid to indigents, expectant mothers who are unable to pay for necessary care, emergency cases, and persons otherwise unable to obtain adequate hospital care in the community.¹⁶ The determination of eligibility for admission often involves a delicate exercise of judgment in the evaluation of complicated factual circumstances. Hence, the question arises whether a public entity should be held liable in tort for a negligent or otherwise tortious failure or refusal to admit an individual to the public hospital or render medical aid. A closely comparable problem has arisen under the Federal Tort Claims Act, involving the failure of U.S. Army medical officers, through negligence, to provide prompt ambulance and medical care to the pregnant wife of an Army officer, when she commenced labor, with the result that the infant was born dead.¹⁷ Finding that the applicable statutory provisions and ad-

¹³ Herring v. United States, 98 F. Supp. 69 (D. Colo. 1951).

¹⁴ See Moore v. County of Walker, 236 Ala. 688, 185 So. 175 (1938) (county immune for wrongful death sustained as result of negligent supervision of patient under anesthesia who fell from bed); Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960) (city not liable for serious burns sustained by infant as result of negligent use by nurse of steam vaporizer to treat pneumonia); City of Miami v. Oates, 152 Fla. 21, 10 So.2d 721 (1942) (city held liable for burns sustained by patient due to negligent use by interne of electric needle); Williams v. City of Indianapolis, 26 Ind. App. 628, 60 N.E. 367 (1901) (city not liable for negligent treatment of broken arm); Stolp v. City of Arkansas City, 190 Kan. 197, 303 P.2d 123 (1956) (city held liable for burns sustained through negligent application of overheated hot water bottles); McKay v. Washoe Gen. Hosp., 55 Nev. 336, 33 P.2d 755, 36 P.2d 78 (1934) (county not liable for loss of eyesight through negligent application of wrong medication therein); Board of Educ. v. McHenry, 106 Ohio 357, 140 N.E. 169 (1922) (school district not liable for broken jaw sustained by pupil as result of negligent extraction of tooth by school dentist); McMahon v. Baroness Erlanger Hosp., 306 S.W.2d 41 (Tenn. App. 1957) (county immune from liability for stillbirth of baby resulting from negligent injection of drug into prospective mother); Gile v. Kennewick Public Hosp. Dist., 43 Wash.2d 774, 296 P.2d 662 (1956) (hospital district immune from liability for negligent transfusion with erroneously typed blood).

¹⁵ See discussion of authority of the San Francisco General Hospital in this regard in Madison v. City & County of San Francisco, 106 Cal. App.2d 232, 234 P.2d 995 (1951). Compare Calkins v. Newton, 36 Cal. App.2d 262, 97 P.2d 523 (1939).

¹⁶ See CAL. H. & S. CODE §§ 1440-1475; Latham v. Santa Clara County Hosp., 104 Cal. App.2d 336, 231 P.2d 513 (1951); Calkins v. Newton, 36 Cal. App.2d 262, 97 P.2d 523 (1939); Goodall v. Britte, 11 Cal. App.2d 540, 54 P.2d 510 (1936).

¹⁷ Denny v. United States, 171 F.2d 365 (5th Cir. 1948).

ministrative regulations only required such care to be given "whenever practicable," the court ruled that the alleged negligence had been committed in the course of a discretionary function, and hence was within the express statutory provision¹⁸ exempting the Government from tort liability based upon "the exercise or performance or the failure to exercise or perform a discretionary function." The federal courts have epitomized the line of demarcation by characterizing the decision whether to extend medical care at all as a "discretionary" matter, and the duty to use due care in the actual rendition of whatever aid is extended as a "nondiscretionary" matter.¹⁹

The extent to which publicly operated hospitals and medical personnel should provide medical services to the general public is a question which necessarily may find different answers in different parts of the State and under different circumstances. In a sparsely settled rural county, conditions may militate in favor of a liberal admissions policy in view of the scarcity of alternative private facilities open to paying patients.²⁰ In a large metropolitan center, however, a more rigorous policy may well be justified.²¹ The ultimate decision must be made by administrative personnel carrying out general policies which ordinarily will entail a considerable degree of flexibility and adaptability to changing circumstances. Such decisions should not be influenced by concern for possible liabilities with which the entity might be saddled if a refusal to extend service is later shown to have proximately caused harm, for such concern might well frustrate and impede the execution of sound public policy determinations to limit admission to the public hospital to designated classes of individuals. The solution developed in the federal courts is thus deemed to be a desirable one which should be incorporated into any legislative treatment of the general problem in California.

Inadequate Supervision of the Mentally Ill: Self-Inflicted Harm

A number of cases arising in New York have dealt with the liability of governmental entities for injuries inflicted upon themselves by mentally ill inmates of public hospitals or treatment facilities. Where it is shown that the individual was known to responsible medical personnel to be unstable emotionally, to display suicidal tendencies, or to otherwise be particularly exposed to the possibility of seriously injuring himself, liability has been imposed on the basis of evidence indicating a negligent failure to adequately supervise the patient's activities and

¹⁸ Federal Tort Claims Act, 28 U.S.C. § 2680 (a).

¹⁹ See *United States v. Gray*, 199 F.2d 239, 241-42 (10th Cir. 1952): "While it was within the discretion of the managerial authorities at the hospital to determine in the first instance whether suitable facilities were available for the care and treatment of plaintiff, having decided that such facilities were available and having admitted her, the Government was not authorized to exercise in an unbridled manner and without due regard for the known facts and circumstances a plain and clear duty or function in respect to her care and treatment, with complete immunity under the Act from liability for negligence in connection therewith proximately resulting in personal injury to plaintiff." To the same effect, *Rufino v. United States*, 126 F. Supp. 132 (S.D.N.Y. 1954).

²⁰ See, e.g., *Calkins v. Newton*, 36 Cal. App.2d 262, 97 P.2d 523 (1939) (sustaining validity of Siskiyou County policy of admitting paying and nonindigent patients to county hospital where other hospital facilities were unavailable).

²¹ See *Madison v. City & County of San Francisco*, 106 Cal. App.2d 232, 234 P.2d 995 (1951).

safeguard against foreseeable harm.²² On the other hand, where there was no reasonable basis for anticipating that the patient would injure himself, and thus, no reasonable basis for supposing that unusual precautions were necessary, liability has been denied. A mental patient who had apparently been making excellent progress toward recovery and was nearly well, for example, could not have been reasonably expected to develop a suicidal impulse which caused him to take his own life.²³ Similarly, the fact that a patient may occasionally be taken with an epileptic seizure does not make the state liable where, in such a seizure, he unforeseeably falls into a water trough and drowns.²⁴ On the other hand, a patient in deep despondency who is known to contemplate suicide cannot safely be left unrestrained and unattended in a room with an open and unbarred window on an upper floor of the public hospital, for the possibility of self-inflicted injury is then reasonably foreseeable.²⁵

Similar results have been approved in the federal courts under the Federal Tort Claims Act.²⁶ As the court stated in *United States v. Gray*,²⁷ while affirming the imposition of liability upon the government for serious injuries sustained in a suicide attempt by a mental patient:

It is the general rule that while a hospital . . . is not an insurer of the safety of its patients against personal injuries, whether self-inflicted or otherwise, it is required to exercise ordinary care for their welfare and safety against such injuries. . . . In determining what constitutes ordinary care, the condition of the patient should be taken into consideration. And in the case of a mental patient, the care must be reasonably adapted and proportioned to his known suicidal, homicidal, or other like destructive tendencies.²⁸

These cases appear to impose a standard of care which is not unreasonable nor unduly burdensome, but which is consistent with the needs of humanitarian medical care. Since liability thereunder is predicated upon knowledge of a condition which foreseeably may lead to self-inflicted harm, the public entity ordinarily would be in the best position to produce evidence showing the extent of its clinical knowledge of the patient's condition, as well as evidence that its conduct was in keeping with accepted standards of hospital administration and supervision. Moreover, the preventive policy which underlies much of the law of torts would seem to be at a premium in this situation, for the pos-

²² See *Herold v. State*, 15 App. Div.2d 835, 224 N.Y.S.2d 369 (1962) (suicide); *Apicella v. State*, 207 Misc. 743, 140 N.Y.S.2d 634 (Ct. Cl. 1955) (suicide); *Daley v. State of New York*, 273 App. Div. 552, 78 N.Y.S.2d 584 (1948), *aff'd*, 298 N.Y. 880, 84 N.E.2d 801 (1949) (mental patient fatally injured when he leaped into vat of boiling soap); *Dow v. State of New York*, 183 Misc. 674, 50 N.Y.S.2d 342 (Ct. Cl. 1944) (suicide); *Callahan v. State of New York*, 179 Misc. 781, 40 N.Y.S.2d 109 (Ct. Cl. 1943), *aff'd*, 266 App. Div. 1054, 46 N.Y.S.2d 104 (1943) (amputation required as aftermath of frostbite suffered by mental patient who escaped from hospital in winter).

²³ *Fowler v. State of New York*, 192 Misc. 15, 78 N.Y.S.2d 860 (Ct. Cl. 1948).

²⁴ *McPartland v. State*, 277 App. Div. 103, 98 N.Y.S.2d 665 (1950).

²⁵ *Compare Hospital Authority v. Misfeldt*, 99 Ga. App. 702, 109 S.E.2d 816 (1959), with *Apicella v. State*, 207 Misc. 743, 140 N.Y.S.2d 634 (Ct. Cl. 1955) and *Dow v. State of New York*, 183 Misc. 674, 50 N.Y.S.2d 342 (Ct. Cl. 1944).

²⁶ *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952) (serious and permanently disabling injuries sustained when veteran's wife, negligently supervised although known to be in a depressed and suicidal state of mind, jumped from upper floor window). See also, *Gooze v. United States*, 101 F. Supp. 830 (E.D.N.Y. 1951) (injuries self-inflicted by alcoholic).

²⁷ 199 F.2d 239 (10th Cir. 1952).

²⁸ *Id.* at 242.

sibility of tort liability in all likelihood would provide a strong inducement to the use of reasonable care in safeguarding mental patients—especially where the possibility of serious injury or death is foreseeable. Private hospitals and sanitariums have long been held liable for their negligence which enables patients to inflict injury or death upon themselves.^{28a} Adoption of a rule of law for California which would impose a comparable liability upon public entities for self-inflicted injuries under the circumstances recognized in the New York and federal cases would seem to be a modest improvement in the law of this state.

Inadequate Supervision of the Mentally Ill: Accidental Injury

Mentally defective persons under treatment in public institutions may, in varying circumstances, be permitted to walk at large on the institutional grounds, or may be given therapeutic work projects in which they can occupy themselves. While so engaged, however, such persons may foreseeably be exposed to risks of injury from different sources and to a greater extent than would be true with respect to similarly situated persons in full possession of their mental faculties, for due to mental illness, they may not be capable of realizing and taking steps to avoid even the most obvious risks. In an illustrative New York case in point,²⁹ for example, mental patients had been instructed to assist in the removal of a tree which had been blown down on the asylum grounds by a strong wind. The plaintiff, a patient unable to comprehend that he was in a position of danger, was injured as a result of the negligent failure of the supervising attendants of the hospital to warn him and see that he moved to a safer place. Such negligence was held to be actionable. Liability in such circumstances appears to be thoroughly justified, for reasons similar to those advanced in support of liability for self-inflicted injuries, mentioned above.

Inadequate Supervision of the Mentally Ill: Injury Inflicted Upon Fellow Inmate

The duty to employ reasonable care in the supervision of mental patients undoubtedly requires a differentiation between the way in which docile and harmless individuals are cared for as contrasted with those who are violent and dangerous to themselves and to others. Closer restraint and more adequate precautions rationally should be exacted where the latter class of patients is concerned. In an important New York case, for example, a dangerous and violent mental patient managed to escape from physical restraints in which he was bound and committed a savage assault upon another patient under restraint, putting out both of the latter's eyes.³⁰ Finding that the hospital authorities had not exercised adequate precautions to inspect the patients at frequent intervals and to prevent such an occurrence, although being possessed of full knowledge of the violent proclivities of the aggressor,

^{28a} See *Wood v. Samaritan Institution, Inc.*, 26 Cal.2d 847, 161 P.2d 556 (1945); Annot., 11 A.L.R.2d 776 (1950).

²⁹ *Danna v. State of New York*, 207 Misc. 505, 139 N.Y.S.2d 585 (Ct. Cl. 1955).

³⁰ *Scolavino v. State of New York*, 297 N.Y. 460, 74 N.E.2d 174 (1947), *affirming* 271 App. Div. 618, 67 N.Y.S.2d 202 (Ct. Cl. 1946).

the court approved imposition of liability.³¹ On the other hand, when patients known to be aggressive were under close and constant supervision of an attendant, the state was held not to be liable for injuries sustained in a sudden and unprovoked assault which occurred too quickly to be prevented, for the conduct of the hospital officials was thoroughly reasonable under the circumstances.³²

The federal cases appear to be generally in accord with the New York position. In *Panella v. United States*,³³ the Court of Appeals for the Second Circuit, speaking through Judge (now Mr. Justice) Harlan, held that an inmate at a Public Health Service Hospital was entitled to recover under the Federal Tort Claims Act for injuries sustained as a result of an assault by another inmate, where hospital attendants had failed to provide adequate supervision and guard against such attacks. The statutory exception in the Federal Tort Claims Act,³⁴ which precludes liability for a "claim arising out of assault," was held not to bar relief, since that exemption was construed to apply only to cases in which the alleged assault was committed by a government employee. As in the New York cases, however, no liability arises from an injury inflicted by a fellow inmate where the evidence establishes the use of reasonable care commensurate with the foreseeable risk. In *Dugan v. United States*,³⁵ for example, the government was held not liable for the death of an inmate of a federal mental hospital as the result of a blow struck by another inmate who, having undergone a pre-frontal lobotomy, appeared to be a "very peaceful, accommodating, obedient and helpful inmate." There was no evidence of any prior need for special precautions, and the fatal assault in question was "a complete surprise." In holding that there was no liability of the government, the court pointed out that the event causing death "was one of those unforeseen and unexpected events which life is subject to and for which the hospital authorities in this case cannot be blamed."³⁶

It appears that the New York and federal rules here discussed strike a reasonable and appropriate balance between the interest in protecting patients against injury from fellow inmates, and the interest of the state in not being unduly burdened with intolerable duties of care or with excessive liabilities. In view of the obvious need for special precautions in the treatment and supervision of mental patients with a record of violence, the imposition of tort liability for conduct which falls below the standard of reasonableness in this regard would seem to be justifiable.

Inadequate Supervision of the Mentally Ill: Torts of Escaped Patients

In the management and supervision of hospitals for mental illness, inmates committed for treatment occasionally may escape from confinement and cause injury to persons or property. Under the general waiver of sovereign immunity in New York, instances of this type have been recognized to give rise to tort liability of the state where the

³¹ To the same effect, see *Doty v. State of New York*, 33 Misc.2d 330, 226 N.Y.S.2d 901 (Ct. Cl. 1961); *Poster v. State of New York*, 26 Misc.2d 426, 210 N.Y.S.2d 956 (Ct. Cl. 1961); *Pope v. State of New York*, 233 App. Div. 853, 129 N.Y.S.2d 224 (1954), *aff'd* 308 N.Y. 813, 125 N.E.2d 870 (1955); *Tabor v. State of New York*, 186 Misc. 736, 62 N.Y.S.2d 380 (1946).

³² *DiFlore v. State of New York*, 275 App. Div. 885, 88 N.Y.S.2d 815 (1949).

³³ 216 F.2d 622 (2d Cir. 1954).

³⁴ Federal Tort Claims Act, 28 U.S.C. § 2680(h).

³⁵ 147 F. Supp. 674 (D.D.C. 1956).

³⁶ *Id.* at 675.

escape is shown to have been the result of negligence in failing to maintain adequate precautions, after notice of the patient's propensity for violence and for seeking to escape.³⁷

A significant difficulty with this type of case lies in the fact that a determination of liability may follow too easily, indeed almost automatically, from the happening of the injury to the plaintiff at the hands of the escapee. When a person known to be psychotic and dangerous escapes from a mental institution and assaults a citizen, the normal inference likely to be drawn is that the injury would not have occurred unless the attendants at the hospital had been negligent in permitting the escape to take place. Such a result, however, may well interfere with the discretion of the responsible authorities in devising the most effective program of care and treatment for patients under their care. A regimen of absolute physical restraint and imprisonment may well, in certain cases, be positively harmful to the patient from a medical standpoint, and a program allowing for moderate freedom of movement may be indicated by accepted psychiatric practice. Yet, the latter course of action may well entail a calculated risk of escape—a risk which hospital authorities may regard as minimal in the light of experience and the possibly low order of probability that injury to others would result even if such an escape should take place. Viewed in advance, the degree of supervision and safeguard actually practiced may be deemed quite reasonable to the responsible public officials; but viewed in retrospect by the trier of fact in a damage suit, such precautions may well be found to have been grossly inadequate and hence negligent.

On the other hand, the potential risk to persons in the vicinity of mental hospitals involved in the treatment of dangerously demented persons is unduly large unless thoroughly adequate safeguards are taken to prevent escapes. Since the injured persons ordinarily have little or no opportunity to prevent such injury to themselves, while the means of such prevention are entirely in the hands of the state, it would seem on balance that imposition of liability is justified in such cases. The suggested difficulties arise chiefly from the employment of the fault rationale as the basis for imposing liability, as has been the practice in New York. If this rationale were to be adopted as the basis of liability in California, it would appear to be desirable to circumscribe it with a requirement that the plaintiff establish affirmatively that the responsible hospital authorities knew or had reason to know that the patient in question was dangerous to others or to their property, and that the precautions taken to prevent his escape from the institution were not reasonably consistent with accepted standards of mental care and supervision of persons afflicted with the particular form of mental illness. A rigorous burden of proof on these issues might mitigate the previously suggested adverse consequences of imposing liability.

An alternative approach, however, might recognize that the mental hospital tends to expose persons in the vicinity to a sufficiently great risk of harm that absolute liability should be imposed without regard to

³⁷ See *Benson v. State of New York*, 52 N.Y.S.2d 239 (Ct. Cl. 1944); *Weiss v. State of New York*, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943); *Jones v. State of New York*, 267 App. Div. 254, 45 N.Y.S.2d 404 (1943). See also, *Joachim v. State of New York*, 130 Misc. 963, 43 N.Y.S.2d 167 (Ct. Cl. 1943).

fault. An obvious analogy is to the cases holding the keeper of a dangerous animal liable for injuries inflicted when the animal has escaped from custody, where the keeper had knowledge or the means of knowledge of the animal's vicious propensity.³⁸ In such cases, as an eminent authority has put it: ³⁹ "Liability is not imposed because of a breach of duty. It is imposed as an allocation of loss which fairness and common sense suggest should not be left where it has fallen." Like the keeper of dangerous animals, the state, having introduced into the community persons who by reason of mental illness are dangerous to others, may reasonably be held to have engaged in this ultrahazardous activity at its own risk.

Torts of Mentally Ill Persons Discharged From Hospital

Persons released from mental hospitals upon the basis of a determination by responsible officials therein that the patient has responded to treatment to a sufficient degree that further hospitalization is neither indicated nor required may, in fact, still be mentally ill and dangerous, or may have intervals in which reason is superseded by irrationality of behavior which exposes others to a risk of harm. If responsible medical men make an erroneous diagnosis and discharge a patient who is dangerous to the welfare of others, it can be argued with some force that the state should assume liability for any injuries which ensue. On the other hand, as a leading New York decision points out:

The diagnosis of mental cases is not an exact science. As yet the mind cannot be x-rayed like a bone fracture. Diagnosis with absolute precision and certainty is impossible. . . . It has been recognized that insanity is difficult of detection, and frequently is cunningly concealed. [Citation omitted.] Of necessity it must be a matter of judgment by those qualified to pass judgment.¹

This passage appears in an opinion holding the State of New York not liable for damages resulting when a former patient at a state hospital for the criminally insane, who had been released as sufficiently recovered, went amok with a bread knife, stabbing seven people, four of them fatally. Expert evidence established that the hospital staff diagnosis of "psychosis with psychopathic personality" (a relatively harmless form of illness) was erroneous, and that the correct diagnosis would have been "schizophrenia, paranoid type" (a potentially violent and dangerous form of illness). There was no evidence that the state's medical personnel were not fully qualified and competent, nor that they were anything but completely sincere and conscientious in making their diagnosis. The issue was whether the state should be held liable for the consequences, however tragic, of an honest error of professional judgment made by capable professional personnel. In the words of the court:

We think this question must be answered in the negative. . . .
Future human behaviour is unpredictable, and it would place an

³⁸ See 2 HARPER & JAMES § 14.11; RESTATEMENT, TORTS, §§ 507-510 (1934). The California cases are generally in accord; see Hillman v. Garcia-Ruby, 44 Cal.2d 625, 283 P.2d 1033 (1955); Tallzin v. Oak Creek Riding Club, 176 Cal. App.2d 429, 1 Cal. Rptr. 514 (1959); Baugh v. Beatty, 91 Cal. App.2d 786, 205 P.2d 671 (1949).

³⁹ 2 HARPER & JAMES 834 (1956).

¹ St. George v. State of New York, 283 App. Div. 245, 248, 127 N.Y.S.2d 147, 150 (1954), *aff'd*, 308 N.Y. 681, 124 N.E.2d 320 (1954).

unreasonable burden upon the State if it were to be held responsible in damages for everything that a person does after he had been discharged or release was through an error of judgment. . . . To sustain this judgment . . . would mean that the State could release no one from any State mental institution without being under the risk of liability for whatever he did thereafter, and the result would necessarily be reluctance to release and the unnecessary confinement of persons who would benefit by release.²

Other New York cases have taken the same position.³ It is to be noted, however, that the rule of nonliability in that state is expressly postulated upon a factual determination that the release was an honest, good faith, error of medical judgment—that is, that it was not negligent. There is reason to believe (although no cases directly in point have been found) that liability would obtain in New York on proof of negligence in the making of the diagnosis.⁴

Cases arising under the Federal Tort Claims Act are divided on the issue of liability for torts of discharged mental patients. The Tenth Circuit,⁵ supported by two district court decisions,⁶ has taken the position that the determination whether to release a mental patient or not is one which entails a high degree of professional judgment and discretion, and hence, even if negligently arrived at, is within the statutory exemption from liability for "discretionary functions." The Fifth Circuit,⁷ however, reinforced by dictum in a district court opinion,⁸ has concluded in a persuasive and carefully written opinion by Judge Ben Cameron that recent decisions of the United States Supreme Court have tended to expand the reach of the Federal Tort Claims Act and contract its exceptions, especially the "discretionary function" exception.⁹ Apprehending that the present interpretation imposes liability for negligence at the "operational level," and only excludes decisions responsibly made at the "planning level" involving policy judgments, the Court concluded that the discretion vested in the Air Force medical staff personnel whether or not to release a mental patient "was a discretion at the operational level and that the doctors were on their own and that the defendant [United States] was liable for what they did or failed to do under established legal standards."¹⁰

² *Id.* at 248, 127 N.Y.S.2d at 150-51.

³ See *Schwenk v. State of New York*, 205 Misc. 407, 129 N.Y.S.2d 92 (Ct. Cl. 1953); *Statini v. State of New York*, 202 Misc. 689, 112 N.Y.S.2d 20 (Ct. Cl. 1952).

⁴ See cases cited at 391, note 37 *supra*.

⁵ *Smart v. United States*, 207 F.2d 841 (10th Cir. 1953).

⁶ *White v. United States*, 205 F. Supp. 662 (E.D. Va. 1962); *Kendrick v. United States*, 82 F. Supp. 430 (N.D. Ala. 1949).

⁷ *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956).

⁸ See *Isabel v. United States*, 148 F. Supp. 544 (S.D. Tex. 1956).

⁹ The recent decisions referred to are *Williams v. United States*, 350 U.S. 857 (1955); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); and *United States v. Union Trust Co.*, 350 U.S. 907 (1955). Prior to the time of these decisions, the principal case construing the "discretionary function" exception under the Federal Tort Claims Act had been *Dalehite v. United States*, 346 U.S. 15 (1953). Comparing *Indian Towing* with *Dalehite*, Judge Cameron (after observing that it was his own court which had been reversed in *Indian Towing*, notwithstanding its effort to follow the *Dalehite* case) pointed out: "It is further worthy of note that the minority in *Dalehite*, whose dissent was indicative of the desire to give broad extension to the Tort Claims Act, had become the majority in *Indian Towing Co.* A reading of the opinions and the dissents in the two cases leads to the conclusion that *Indian Towing Co.* represents a definite change in attitude on the part of the Supreme Court." *Fair v. United States*, 234 F.2d 288, 292 (5th Cir. 1956).

¹⁰ *Fair v. United States*, 234 F.2d 288, 293 (5th Cir. 1956).

The complaint, which alleged that a mentally ill officer had been released after only a cursory and negligently conducted examination, was thus held to be sufficient against a motion to dismiss.

The New York view, which appears to be consistent with that of the Fifth Circuit, appears to be worthy of acceptance. It is consistent with the already prevailing view in malpractice litigation:¹¹ if the medical personnel act in good faith and according to the standard of competency accepted by the profession in the community, liability is denied; but if they act negligently as tested by the same standards, liability obtains. This view seems to make adequate allowance for the present, somewhat tentative state of the art of psychiatry and other behavioral sciences, since any departures from exactness of diagnosis and reliability of prognosis will ordinarily be sufficiently accounted for in the evidence introduced to establish the prevailing medical standard.¹²

Wrongful Arrest or Restraint of Persons Suspected of Being Mentally Ill or Afflicted With Contagious Disease

Under legal procedures prescribed by statutes in most states, persons who are mentally ill or who have a contagious disease which is dangerous to others may be committed to public hospitals or other institutions for treatment. Public officials engaged in carrying out these functions may, on occasion, mistakenly arrest or restrain someone who is actually free of illness or disease, and in so doing may expose themselves and the employing public entity to the possibility of a tort action. It is generally recognized, of course, that the commitment of dangerously sick persons is a "governmental" function for which no liability will attach to the public entity.¹³ Similarly, the public officials involved, who ordinarily must exercise a considerable measure of discretion and judgment in such commitment proceedings, generally are personally immune from liability under the doctrine of official immunity.¹⁴

In New York State, however, the governmental entity may be liable for malicious prosecution or for false imprisonment in these cases. The courts of that state recognize the common law rule which permits a summary arrest and detention of a diseased person only when the circumstances reasonably show that such summary action is necessary to prevent immediate injury to the person or to others in the community.¹⁵ In other cases, the arrest and detention is justified only if the statutory procedures are followed. The state, for example, is not liable when its officers detain a well person in reliance upon a commitment order of a court which is valid on its face and shows compliance with the appli-

¹¹ Compare the statement of the court in *St. George v. State of New York*, 283 App. Div. 245, 248, 127 N.Y.S.2d 147, 150 (1954), *aff'd*, 308 N.Y. 681, 124 N.E.2d 320 (1954): "Are the doctors, or is the State which employs them, legally responsible in damages for an honest error of professional judgment made by qualified and competent persons? We think this question must be answered in the negative. It has been so held in malpractice cases of all types for years."

¹² See, e.g., *Isabel v. United States*, 148 F. Supp. 544 (S.D. Tex. 1956) (no liability in absence of evidence showing departure from accepted medical standards).

¹³ See 18 *MCQUILLIN, MUNICIPAL CORPORATIONS* 374 (3rd ed. 1950), and cases there cited. Compare *Jones v. Czapka*, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

¹⁴ See *Linder v. Foster*, 209 Minn. 43, 295 N.W. 299 (1940). See also *Dyer v. Dyer*, 178 Tenn. 234, 156 S.W.2d 445 (1941); *Brandt v. Brandt*, 286 Ill. App. 151, 3 N.E.2d 96 (1936).

¹⁵ See *Warner v. State of New York*, 297 N.Y.395, 79 N.E.2d 459 (1948), and cases therein cited; *Annotts.*, 45 A.L.R. 1464 (1926); 10 A.L.R. 488 (1921).

cable procedures.¹⁶ If the commitment papers, however, show on their face that the procedures have not been complied with (*e.g.*, that the person committed never received notice of the proceedings where such notice was required by statute, or that the certifying physicians actually never personally examined the person being committed but made their certification of mental illness on the basis of hearsay), the state may be held liable for the ensuing damages.¹⁷ This result admittedly represents a conscious policy evaluation between the need for effective enforcement of public health laws and the need for protection of personal rights; for, as the New York Court of Appeals stated in a leading case in point:

Where personal freedom is at stake, insistence upon strict and literal compliance with statutory provisions is not only reasonable but essential. The State has a legitimate and vital interest in protecting its citizens from harm at the hands of potentially dangerous mental cases, but that is not the only interest to be served. The liberty of an individual, not yet adjudged insane, is too precious to allow it to be invaded in any fashion, by any procedure, other than that explicitly prescribed by law.¹⁸

When the arrest or restraint was based upon an erroneous diagnosis of the patient's condition by a physician, his personal liability ordinarily depends upon whether the circumstances provided reasonable cause for a good faith belief that the person was afflicted with a disease which would justify the action taken.¹⁹ This principle has been applied in actions brought against public health officers in jurisdictions which do not recognize the applicability of the official immunity doctrine to such cases.²⁰ The standard of care is thus consistent with the general standard that obtains in malpractice actions, and would seem to be not inappropriate as the basis of liability of the public entity.

Injury to Patient or Inmate From Assault Committed by Hospital Employee

Under the general principle that the operation of a hospital is a "governmental" function, most states hold public entities free from liability for intentional torts, such as assaults and batteries, committed by public hospital personnel upon patients therein.²¹ In New York, however, the opposite result obtains, and the state has, for example, been held liable for the use of unnecessary violence in subduing a mental patient,²² the use of excessive force to compel a mental patient to accept medication,²³ and the performance of an abortion upon a

¹⁶ *Beitch v. State of New York*, 280 App. Div. 855, 113 N.Y.S.2d 439 (1952); *Douglas v. State of New York*, 269 App. Div. 521, 56 N.Y.S.2d 245 (1945), *aff'd*, 296 N.Y. 530, 68 N.E.2d 605 (1946).

¹⁷ *Warner v. State of New York*, 297 N.Y. 395, 79 N.E.2d 459 (1948) (certificate of health officer showed on its face that he had not personally examined plaintiff, as required by law); *Troutman v. State of New York*, 273 App. Div. 619, 79 N.Y.S.2d 709 (1948) (commitment papers showed on their face that no notice had been given plaintiff, as required by law).

¹⁸ *Warner v. State of New York*, 297 N.Y. 395, 404, 79 N.E.2d 459, 464 (1948).

¹⁹ See Annot., 145 A.L.R. 711 (1943).

²⁰ See *e.g.*, *McGuttre v. Anyx*, 317 Mo. 1061, 297 S.W.968 (1927) (erroneous but good faith diagnosis of smallpox by city health officers). Cf. *Whaley v. Jansen*, 208 Cal. App.2d —, 25 Cal. Rptr. 184 (1962).

²¹ See, *e.g.*, *Gillies v. City of Minneapolis*, 66 F. Supp. 467 (D. Minn. 1946); *Ketterer v. State Board of Control*, 131 Ky. 287, 115 S.W.200 (1909); 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.86 (3rd ed. 1950).

²² *St. Pierre v. State of New York*, 33 N.Y.S.2d 151 (Ct. Cl. 1942).

²³ *Temple v. State of New York*, 187 Misc. 878, 65 N.Y.S.2d 50 (Ct. Cl. 1946), *aff'd*, 274 App. Div. 1089, 86 N.Y.S.2d 658 (1949).

mentally defective girl without her consent or that of her parents.²⁴ In each of these cases, the courts applied the same general principles of tort liability which would obtain as between private persons similarly situated, with recognition of the rule that the state employees were entitled to employ a reasonable degree of force in treating violent mental patients. Under the Federal Tort Claims Act, however, the express statutory exceptions for various types of intentional torts, such as assault,²⁵ has precluded liability of the United States in instances comparable to the cited New York cases.²⁶

Patients in public hospitals are in a position of relative helplessness in most cases and are almost completely subject to the control and ministrations of hospital employees and attendants. The duty to use reasonable care in the treatment and supervision of such patients and inmates manifestly is grossly breached when an intentional assault or excessive violence is directed against the patient by those charged with the duty to protect and preserve his health and welfare. Imposition of liability upon the employing entity would thus appear to be a particularly salutary way to ensure that hospital personnel are selected with care, are thereafter properly instructed and supervised, and are promptly disciplined or dismissed when they intentionally violate this duty. Justification for liability in such cases would appear to be even more persuasive than in the case of ordinary medical malpractice characterized by mere negligence.

Wrongful Interference With Patient's Legal Rights

Patients in public hospitals, especially in mental institutions, often have no resources for the pursuit of their legal rights except through the cooperation of hospital personnel, or the willingness of such personnel to accord to them all of the rights recognized under the law. In a significant New York decision,²⁷ liability of the state was affirmed where the superintendent of a state mental hospital had, apparently in good faith, intercepted the outgoing mail of an inmate and transmitted it to his wife. One of the letters thus diverted was a sworn petition for habeas corpus addressed to the patient's attorney and prepared in an effort to test the legality of the petitioner's confinement. Because of this wrongful interference with the patient's efforts to prosecute his legal rights (the wife had suppressed the petition, and the patient was not released until some time later on a subsequent habeas corpus petition), the state was held to be responsible for the plaintiff's damages sustained by reason of the prolongation of his detention in the hospital. In view of the almost helpless position of the plaintiff in this case, imposition of liability seems to be thoroughly justified under the circumstances.

²⁴ *McCandless v. State of New York*, 3 App. Div.2d 600, 162 N.Y.S.2d 570 (1957), *aff'd*, 4 N.Y.2d 797, 149 N.E.2d 530 (1958).

²⁵ Federal Tort Claims Act, 28 U.S.C. § 2680(h).

²⁶ See *Rufino v. United States*, 126 F. Supp. 132 (S.D.N.Y. 1954); *Moos v. United States*, 118 F. Supp. 275 (D. Minn. 1954). Note, however, that the United States may be liable for negligent failure to prevent an assault by persons under government control and supervision. See *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954).

²⁷ *Hoff v. State of New York*, 279 N.Y. 490, 18 N.E.2d 671 (1939).

Injuries Sustained by Reason of Administration of Public Health Functions

Governmental health officers are charged with extensive responsibilities involving interference with private property and individuals where necessary to eliminate sources of disease and prevent its spread. As a "governmental" or public function, however, most states deny public liability for injuries ensuing therefrom,²⁸ as, for example, in a case of a negligently imposed or enforced quarantine,²⁹ or a negligently administered vaccination.³⁰ On this ground, the recent California decision in *Jones v. Czapkay*³¹ refused (prior to the *Muskopf* case) to impose tort liability for injuries allegedly received as a result of the negligent failure of public officials to impose and enforce a quarantine or at least give proper warning that a known individual was afflicted with tuberculosis. The defendant city and defendant county were there found to be immune in the exercise of a "governmental" function,³² while the defendant public health officers were likewise immune from personal liability since their duties with respect to quarantine matters were discretionary within the meaning of the official immunity doctrine.

The public health cases, it will be noted, relate to two different types of problems. One, illustrated by *Jones v. Czapkay*,³³ is the question of liability for the injurious consequences of the health officer's decision to take, or not to take, preventive health measures in a given situation; while the other relates to liability for negligence or other wrongful conduct in the execution of whatever precautions have been decided upon. The extensive statutory pattern reviewed in the *Czapkay* case persuasively discloses a legislative policy vesting the ultimate decision-making function in such matters in the hands of the expert medical personnel charged with public health responsibilities. A high degree of discretion and informed judgment obviously must be brought to bear upon such questions of disease, sanitation, and quarantine, for measures deemed indispensable under some circumstances may be wholly unnecessary or even positively harmful in others. Moreover, the health officer, as a responsible public official, should be free to evaluate not only purely medical considerations but also the potential economic and psychological impact on the community of various alternative courses of action. Viewed realistically, the health officer's decision involves such a congeries of policy imponderables that it has many of the characteristics of legislative action. A policy conclusion of this order should, it is believed, be insulated from the chilling effect of apprehension as to potential tort liabilities.

The New York cases appear to support the view that there should be no tort liability in such situations, although no decisions squarely in point have been found. The courts of that state, however, have ruled

²⁸ See 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.85 (3rd ed. 1950).

²⁹ See *Beeks v. County of Dickinson*, 131 Iowa 244, 108 N.W. 311 (1906); *White v. City of San Antonio*, 94 Tex. 313, 60 S.W. 426 (1901) affirming 57 S.W. 858 (Tex. Civ. App. 1900). Compare *Webb v. Detroit Bd. of Health*, 116 Mich. 516, 74 N.W.734 (1898).

³⁰ *Howard v. City of Philadelphia*, 250 Pa. 184, 95 Atl. 388 (1915); *Wyatt v. City of Rome*, 105 Ga. 312, 31 S.E. 188 (1898).

³¹ 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

³² *Accord*, generally, *Brown v. Vinalhaven*, 65 Me., 402, 20 Am. Rep. 709 (1876). See also *Gilboy v. City of Detroit*, 115 Mich. 121, 73 N.W. 128 (1897). Note that the Federal Tort Claims Act expressly exempts from liability thereunder "any claim for damages caused by the imposition or establishment of a quarantine by the United States." Federal Tort Claims Act, 28 U.S.C. § 2680(f).

³³ 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960).

that public entities are immune from liability for the injurious consequences of legislative policy decisions³⁴ as well as injuries resulting from a failure to take action which, had it been taken, might have prevented injury to the plaintiff from a third party, but which constituted a governmental duty owed to the general public rather than to the particular plaintiff.³⁵ Decision-making of this sort, such as the determination whether to provide more than usual police protection,³⁶ or to abate a nuisance known to exist,³⁷ or to enforce the law in a given situation,³⁸ has been held in New York not to provide a basis of tort liability against government. By analogy, it would seem that the decisions of the public health officer would likewise be regarded as non-actionable in New York.³⁹ The same result almost certainly would be reached also under the Federal Tort Claims Act in view of its express statutory exception for "discretionary" conduct.⁴⁰

When the policy determination to take specified action has been taken, however, it would seem not inappropriate to hold the health officer to the usual standard of ordinary care and impose liability upon the governmental entity for departures therefrom. Notice has already been taken of the cases under the Federal Tort Claims Act which have articulated precisely this distinction with respect to federal hospital care—holding the decision whether to admit a patient or not to be nonactionable, but imposing liability for negligent treatment once the

³⁴ *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99 (1917) (holding state not liable for legislative policy decision to prohibit hunting and killing of beaver, which allegedly resulted in destruction of valuable trees owned by plaintiff). That this case appears to still be recognized as sound law, despite its age, is attested by more recent decisions in accord. See *Aber v. State of New York*, 202 Misc. 809, 109 N.Y.S.2d 815 (Ct. Cl. 1952), *appeal dismissed*, 283 App. Div. 916, 129 N.Y.S.2d 922 (1954); *Newladony v. State of New York*, 276 App. Div. 59, 93 N.Y.S.2d 24 (1949).

³⁵ See cases cited in notes 36-38 *infra*. Cases of this type underscore the fact that despite the broad legislative waiver of sovereign immunity in New York, the courts of that state have fashioned a body of judicially formulated rules which, in effect, have reestablished a measure of tort immunity. See *NEW YORK COMMITTEE, FIRST INTERIM REPORT 15-19* (Legis. Doc. No. 42, 1955); *Herzog, Liability of the State of New York For 'Purely Governmental' Functions*, 10 SYRACUSE L. REV. 30 (1958). On the other hand, where the court has found the existence of a specific duty toward the injured plaintiff as distinguished from a general duty to the public at large, liability has been imposed for breach of that duty. See, e.g., *Schuster v. City of New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (duty to give police protection to witness who identified wanted criminal and who had received retaliatory death threats); *Metildi v. State of New York*, 177 Misc. 179, 30 N.Y.S.2d 168 (Ct. Cl. 1941) (statutory duty to inspect scaffolding for specific protection of employees working thereon). *But cf. Trzeciecki v. State*, 4 Misc.2d 182, 158 N.Y.S.2d 277 (Ct. Cl. 1956) (statutory inspection of cattle for presence of contagious disease held a duty to public generally, hence nonactionable even though negligent).

³⁶ See *Murray v. Wilson Line*, 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

³⁷ See *Reid v. City of Niagara Falls*, 216 N.Y.S.2d 850 (Sup. Ct. 1961) (failure of city to require correction of illegal building construction which shut off required fire exit door); *Stoddard v. City of New York*, 212 N.Y.S.2d 886 (Sup. Ct. 1961) (failure of city to abate trash fire nuisance).

³⁸ See *Granger v. State of New York*, 14 App. Div.2d 645, 218 N.Y.S.2d 742 (1961) (failure to revoke automobile registration when insurance had been cancelled); *Rivera v. City of Amsterdam*, 5 App. Div.2d 637, 174 N.Y.S.2d 530 (1953) (city's failure to require correction of, or to prevent use of, defective oil heater in apartment); *Libertella v. Maenza*, 21 Misc.2d 317, 191 N.Y.S.2d 191 (Sup. Ct. 1959) (police officer's decision not to arrest driver of car carrying excessive number of passengers).

³⁹ See cases cited in note 44 *infra*.

⁴⁰ Federal Tort Claims Act, 28 U.S.C. § 2680(a). See *Denny v. United States*, 171 F.2d 365 (5th Cir. 1948). Note also the express exemption from liability for injury resulting from imposition of a quarantine. 28 U.S.C. § 2680(f).

patient has been admitted for care.⁴¹ Similarly, in New York State personal liability of the health officer in exercising his powers is recognized where he takes "unreasonable and arbitrary action or malicious or partial action, or action in excess of his authority," but he is not liable for good faith errors of judgment which are reasonably consistent with an apparent need to act for the protection of the public health.⁴² The state, also, is liable in New York for its negligence in administering a public health program, as where, in a recent case, a descriptive circular accompanying tetanus antitoxin prepared by the Department of Health and distributed to physicians advised its use in a manner contrary to accepted professional standards of safe usage.⁴³ On the other hand, if the methods of proper use had been well known to all physicians and dangers in deviations therefrom widely publicized in professional literature, other cases indicate that there would in all likelihood have been no liability on the part of the state for failure to warn of such known dangers.⁴⁴

Protection of the public health would appear to require that public health officials be free from fear of personal liability in the performance of their duties, so that such duties will be marked by vigor in their execution. The doctrine of official immunity applied in the *Lipman* case would seem to adequately fulfill this purpose.

A more difficult problem, however, is whether the public entity employer should be liable in tort for the consequence of a negligent or wilfully wrongful exercise of such public health responsibilities, notwithstanding the officer's personal immunity. In this connection, it may be noted that when injuries have been sustained by reason of a negligently imposed quarantine, for example, the public policy considerations identified in *Lipman*⁴⁵ as tending to support a conclusion of entity immunity are largely absent. To be sure, the "importance to the public of the function involved" is fairly evident, but countered to some extent by the equally vital importance to the public that the function be performed with reasonable care in view of the possibly disastrous consequences if the contrary were the case. Since health officers are not directly responsible, as were the school trustees in *Lipman*, for the financial well-being of the entity or for the raising of revenue, but rather are concerned primarily with the protection of the public health, imposition of liability upon the entity is probably unlikely to "impair the free exercise of the function" of public health service to any marked degree. Finally, adequate alternative remedies "other than tort suits for damages" are not ordinarily available to redress physical injuries. On the other hand, since the citizen has little choice but to yield to

⁴¹ See cases cited at 385-87, notes 8-13, 17-19 *supra*. Compare *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1950), where the Court held the United States liable for negligence on the part of the Coast Guard in permitting a lighthouse light to become extinguished, saying: "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . it was obligated to use due care to make certain that the light was kept in good working order."

⁴² *Crayton v. Larabee*, 220 N.Y. 493, 503, 116 N.E. 355, 358 (1917). As to the extent of the public health officer's personal liability, see generally Annot., 24 A.L.R. 798 (1923).

⁴³ *Gielski v. State of New York*, 3 Misc.2d 578, 155 N.Y.S.2d 863 (Ct. Cl. 1956).

⁴⁴ *Hidy v. State of New York*, 207 Misc. 207, 137 N.Y.S.2d 334 (Ct. Cl. 1955), *aff'd*, 2 App. Div.2d 644, 151 N.Y.S.2d 621 (1956), *aff'd*, 3 N.Y.2d 756, 143 N.E.2d 528 (1957); *Parker v. State of New York*, 201 Misc. 416, 105 N.Y.S.2d 735 (Ct. Cl. 1951), *aff'd*, 230 App. Div. 157, 112 N.Y.S.2d 695 (1952).

⁴⁵ *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

the demands of the health officer, the risk of harm is one which can most feasibly be avoided only by an exercise of care by the health officers involved. In general, the policy considerations in favor of entity liability appear to preponderate, although it is manifest that such liability should not be imposed where the action or omission was founded upon circumstances indicating, under all of the conditions with which the health officers were faced at the time, that such action or omission was reasonably appropriate for, and not inconsistent with, the protection of the public health and welfare. Insofar as injuries to property are the inevitable consequence of a reasonable and properly administered quarantine or other health protection program, the determination whether compensation should be paid to the individuals sustaining such loss for the benefit of the community might well be left to local political discretion. A legislative policy to this effect is presently incorporated in Section 3114 of the California Health and Safety Code, which, after authorizing the destruction of property where necessary to protect against an imminent menace to public health, provides:

When the property is destroyed pursuant to this section, the governing body of the locality in which the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

Summary

The ten categories of cases summarized in the preceding paragraphs appear to represent the most commonly recurring tort situations involving public hospitals and medical or public health service programs. It is significant to observe that the general principles of liability which have developed in New York State and in cases arising under the Federal Tort Claims Act (where by statute⁴⁶ the courts are required to apply the tort law of the jurisdiction where the injury was sustained) are remarkably similar to the principles which already obtain in California with respect to torts arising in the course of private hospital and medical care. The owner or operator of a private hospital, for example, is liable for medical malpractice by staff personnel in accordance with normal principles of negligence law, being held financially responsible for the failure of such personnel to adhere to accepted professional standards of care,⁴⁷ but not responsible for injuries resulting from medically approved treatment administered in the exercise of due care where such injuries are a calculated risk and reasonable precautions are taken to prevent their occurrence.⁴⁸ Many of the private hospital cases in which liability has been imposed, as is the case with public hospitals elsewhere, involve negligent nursing care and supervision of patients.⁴⁹ Exactly as in the New York and federal cases previously

⁴⁶ Federal Tort Claims Act, 28 U.S.C. § 2674. See also, 28 U.S.C. § 1346(b). These provisions and their interpretation are discussed in Comment, 33 IND. L. J. 339 (1953).

⁴⁷ Hedlund v. Sutter Medical Service Co., 51 Cal. App.2d 327, 124 P.2d 878 (1942). See also, Silva v. Providence Hosp., 14 Cal.2d 762, 97 P.2d 798 (1939).

⁴⁸ Farber v. Olkon, 40 Cal.2d 503, 254 P.2d 520 (1953) (no liability for injuries sustained as result of electrical shock treatment given mental patient in exercise of due care, with consent of patient's parents).

⁴⁹ See Rice v. California Lutheran Hosp., 27 Cal.2d 296, 163 P.2d 860 (1945); McDonald v. Foster Memorial Hosp., 170 Cal. App.2d 85, 338 P.2d 607 (1959); Goff v. Doctors General Hosp., 166 Cal. App.2d 314, 333 P.2d 29 (1958); Stevenson v. Alta Bates, Inc., 20 Cal. App.2d 303, 66 P.2d 1265 (1937); Longuy v. La Societe Francaise de Bienfaisance Mutuelle, 52 Cal. App. 370, 198 Pac. 1011 (1921).

reviewed, the California cases recognize liability of a private hospital for negligent failure to take adequate precautions to prevent self-inflicted injury by a patient known to be mentally disturbed and likely to hurt himself.⁵⁰ The general rule in other jurisdictions where no principle of immunity precludes liability is likewise in accord with this view.⁵¹ On the other hand, where there has been no basis for notice that a mental patient is dangerous to others or to himself, it is clear that liability will not be imposed simply because unusual precautions were not taken.⁵² Again, as in the case of public hospitals elsewhere, private hospitals in California are liable for unjustified assaults and trespasses to the person of the patient.⁵³ Finally, just as in the case of public hospitals in New York, private mental institutions in California are liable for false imprisonment where an individual is involuntarily hospitalized for an alleged mental illness and the statutory procedures designed for the patient's protection are not complied with;⁵⁴ while cases not directly involving tort liability suggest that the legality in other respects of an arrest, restraint, or quarantine for health reasons will be adjudged by the standard of reasonable and probable cause to believe that the mental or physical illness actually existed and thereby justified the action taken.⁵⁵

Although, due principally to the sovereign immunity doctrine and subsidiarily to the comparatively recent date of the demise of the charitable immunity doctrine,⁵⁶ the California cases are fewer in number and in range of factual circumstances than the New York and federal cases, no substantial observable difference in underlying legal principles has been found between the private defendant cases in this State and the public defendant cases in the other two principal jurisdictions studied. In short, it would seem that an extension of public tort responsibility to publicly operated hospitals and medical and health service programs in California would simply make applicable to public entities a settled body of tort law, with readily discernible guideposts to liability and nonliability, and an already well-developed context of actual private experience which would be available as a reference point for administrative planning to meet such additional liability. The probability is that many, if not most, public entities engaged in this type of service function already carry liability insurance coverage for their officers and employees,⁵⁷ just as most private hospitals and physicians undoubtedly carry similar protection. Moreover, the State has already assumed financial responsibility for the medical malpractice torts of its personnel who are "licensed in one of the healing arts," since Section 2002.5 of the Government Code makes it the duty of the State to pay any judgments or settlements in suits

⁵⁰ *Wood v. Samaritan Institution, Inc.*, 26 Cal.2d 847, 161 P.2d 556 (1945).

⁵¹ See Annot., 70 A.L.R.2d 347 (1960).

⁵² See *Atkinson v. Clark*, 132 Cal. 476, 64 Pac. 769 (1901).

⁵³ See *Inderbitzen v. Lane Hosp.*, 124 Cal. App. 462, 12 P.2d 744, 13 P.2d 905 (1932).

⁵⁴ See *Maben v. Rankin*, 55 Cal.2d 139, 10 Cal. Rptr. 353, 358 P.2d 681 (1961), citing, *inter alia*, *Warner v. State of New York*, 297 N.Y. 395, 79 N.E.2d 459 (1948), discussed in the text accompanying note 17 *supra*.

⁵⁵ See *In re Martin*, 83 Cal. App.2d 164, 188 P.2d 287 (1948); *In re King*, 128 Cal. App. 27, 16 P.2d 694 (1932).

⁵⁶ The charitable immunity doctrine was eliminated so far as paying patients in charitable hospitals were concerned by the decision in *Silva v. Providence Hosp.*, 14 Cal.2d 762, 97 P.2d 798 (1939); and the distinction between paying recipients and nonpaying recipients of the charitable activity was abolished by *Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241 (1951).

⁵⁷ See discussion in the text at 293-97 *supra*.

founded on such malpractice occurring in the performance of duty. Expansion of tort liability to include the public entity would thus not greatly alter the existing pattern of financial administration in all likelihood; although it must be admitted that such expansion might possibly enlarge the number of cases in which tort claims are asserted, for in some instances it may be possible to more readily prove a case against the public entity, as employer, than against a specifically identified physician, nurse or other employee.

In developing the details of a legislative program in this area, attention also should be directed to the existing hospital licensing program administered by the California Department of Public Health.⁵⁸ This program presently includes not only most private hospitals, sanitarium, nursing homes and maternity homes,⁵⁹ but also all city, county, local hospital district or other public medical institutions of this type (but does not extend to the hospitals operated by the University of California).⁶⁰ One of the principal purposes of the licensing and inspection program is to ensure that all hospitals under the jurisdiction of the State Department of Public Health comply with its rules and regulations "prescribing minimum standards of safety and sanitation in the physical plant, of diagnostic, therapeutic and laboratory facilities and equipment for each class of hospitals."⁶¹ Thus, the standards prescribed in the State Department of Public Health rules and regulations may (as "minimum" standards) reasonably be regarded as an appropriate point of reference for determining when hospital personnel, equipment and facilities fall below the legal standard of reasonable care, insofar as deficiencies of this order are the alleged basis of liability in particular cases.

Some of the rules and regulations promulgated by the Department of Public Health are quite specific in content and could easily be employed as objective standards of reasonable care. A patient burned in a fire in a public hospital, for example, might be able to prove that he was housed in an area not approved by the State Fire Marshal and hence in violation of applicable regulations.⁶² Similar illustrations can readily be hypothesized under regulations requiring that qualified nursing care be available both night and day;⁶³ forbidding the dispensing

⁵⁸ See CAL. H. & S. CODE §§ 1400-1422. The applicable regulations are set forth in Title 17 of the California Administrative Code.

⁵⁹ Although Health and Safety Code Section 1405 prohibits any person from operating or maintaining a hospital without complying with the licensing requirements, a later provision (Section 1415) expressly excepts certain institutions, including hospitals conducted by religious denominations which depend upon prayer or spiritual means of healing the sick and hospitals for the care of the mentally ill (which are under the jurisdiction of the State Department of Mental Hygiene).

⁶⁰ Health and Safety Code Section 1415 exempts from the licensing program, *inter alia*, hospitals operated by the State and by the University of California, and county hospitals, but explicitly declares that city and local hospital district hospitals are not exempt. Health and Safety Code Section 1422, however, partially abrogates the exemptions thus declared by providing that when the federal government requires state standards to be maintained for the purpose of receiving federal aid in public assistance cases, the state department "shall prescribe, promulgate and enforce minimum standards of safety and sanitation in the physical plant, and of diagnostic, therapeutic and laboratory facilities for public medical institutions" with the exception of hospitals operated by the University of California and mental institutions. Under Section 1422, the State presently licenses all services in city, district and county hospitals except for psychiatric and custodial facilities.

⁶¹ CAL. H. & S. CODE § 1411. Violation of departmental regulations, where applicable, constitutes a misdemeanor. CAL. H. & S. CODE § 1417.

⁶² CAL. ADMIN. CODE, Tit. 17, §§ 257, 270.

⁶³ *Id.* §§ 293, 294.

of medication without authorization in writing from a physician;⁶⁴ forbidding the storage of drugs or poisons in the kitchen;⁶⁵ requiring compliance with detailed methods for cleaning and sterilizing of dishes and eating utensils;⁶⁶ prescribing detailed technical requirements for the storage and handling of medical gases;⁶⁷ and prescribing specific equipment to be maintained in delivery rooms and infant nurseries.⁶⁸ On the other hand, many of the existing regulations are somewhat general in wording, and might present somewhat difficult questions of fact if utilized as a claimed basis for liability. Illustrations include regulations requiring, *inter alia*, that hospital kitchens be "clean and free of litter and rubbish . . . [and] protected from rodents, roaches, flies, or other insects";⁶⁹ that the institution shall "be clean, sanitary, and in good repair at all times";⁷⁰ that garbage shall "be stored and disposed of in a manner that will not permit the transmission of a communicable disease";⁷¹ and that hospitals must make provision "for proper sterilization of dressings, utensils, instruments and solutions which are routinely used."⁷² Some of these broadly worded requirements have been amplified by "guides" issued by the Department of Public Health, containing detailed and specific recommendations for standardized procedures, but which expressly are *not* promulgated as standards having the force and effect of law.⁷³ Despite the generality of language employed in many of the regulations, however, it is believed that it would be a useful aid to defining the duty of care required of public hospitals if such regulations were expressly made the base point for liability, to the extent that such regulations are applicable. Public institutions which fall below the minimums prescribed by the Department of Public Health surely should not be in a position to claim that they have satisfied the duty of reasonable care. By the same reasoning, any standards and regulations promulgated by local medical or hospital authorities also may appropriately be utilized as a reference point for determining whether a breach of duty has occurred.⁷⁴

The considerations already discussed, together with the fact that the degree of risk as well as the gravity of the harm attached to negligence or intentional misconduct in connection with medical and hospital

⁶⁴ *Id.* § 287.

⁶⁵ *Id.* § 300.

⁶⁶ *Id.* § 302.

⁶⁷ *Id.* § 317.

⁶⁸ *Id.* §§ 369, 370.

⁶⁹ *Id.* § 299. See also *id.* § 300.

⁷⁰ *Id.* § 310.

⁷¹ *Id.* § 313.

⁷² *Id.* § 333. See also *id.* § 352.

⁷³ See, *e.g.*, STATE DEPARTMENT OF PUBLIC HEALTH, BUREAU OF HOSPITALS, CLEANING, DISINFECTATION AND STERILIZATION—A GUIDE FOR HOSPITALS AND RELATED FACILITIES (1962).

⁷⁴ Some of the existing regulations appear to contemplate that hospital administrators or other responsible local officials will promulgate local rules and procedures to make specific in actual operational contexts the generalized language of the regulations. See, *e.g.*, the general requirement that hospitals "make provisions within the hospital for proper sterilization" of equipment and utensils. CAL. ADMIN. CODE, Tit. 17, § 333. The "guide," cited *supra* note 73, was promulgated as a series of specific recommendations to be employed in developing actual local procedures appropriate to the particular needs of different hospitals of varying sizes with differing services and organizational structures. *Op. cit. supra* note 73, at p. 5. It should be noted that local rules and standards may be particularly important in the case of mental institutions operated by public entities, since, with the exception of a limited number of rules relating to community mental health services for which state reimbursement is claimed (CAL. ADMIN. CODE, Tit. 9, §§ 500-643), there do not appear to be any general statewide regulations applicable to public mental hospitals. See CAL. ADMIN. CODE, Tit. 9, § 2. Power to promulgate such regulations appears to be vested in the Department of Mental Hygiene. CAL. WEL. & INST. CODE § 7503.

services are relatively great, would seem to support the soundness of public tort liability in this area. In the present state of medical knowledge, it should be recognized that some mistakes are bound to occur, often through human failings to employ what a trier of fact later concludes would have been ordinary care. The only apparently practical way to distribute the resulting losses as part of the cost of the valuable public service being rendered is through the medium of tort liability; and such liability may well serve as a useful deterrent against less than the optimum possible standard of care.

Recommendation

It is suggested that legislation be enacted which makes applicable to public entities engaged in providing medical, hospital and health services the same general principles of tort liability which are presently applicable in California to private persons similarly engaged; and that existing standards for personnel, facilities and operations of hospitals, as promulgated by authorized public officials, be incorporated by reference as standards of duty for violation of which tort liability may ensue. Collateral aspects of this general rule should also be considered, with a possible view to providing: (a) that there shall be no liability upon any public entity for a refusal or failure to admit any person to a public medical facility for purpose of care or treatment, unless such failure or refusal constituted a breach of an affirmative duty imposed by statute; (b) that there shall be liability upon public entities for injuries to person or property sustained at the hands of any mentally ill person who has escaped from a public institution charged with the duty to keep said person in its custody and control for purposes of care and treatment for said mental illness; (c) that public entities shall not be liable for wrongful arrest, detention or restraint of persons alleged to be mentally ill or afflicted with an isolable disease where such arrest, detention or restraint is undertaken by public personnel in reliance upon a warrant, commitment or other legal process which appears to be valid upon its face; (d) that public entities shall not be liable for decisions made by public health authorities in exercising their discretionary responsibilities to decide whether to take or not to take measures designed to prevent the spread of disease or otherwise to protect and promote the public health. Legislation along these lines would, in effect, incorporate the substance of the policy suggestions advanced in connection with the preceding analysis.

Police Protection and Law Enforcement

In the application of the traditional dichotomy between "governmental" and "proprietary" functions, it is settled with almost complete unanimity in California¹ as elsewhere² that the activities of peace officers in the enforcement of the criminal law, and in the custodial care of persons convicted of crimes, are "governmental" and hence within the doctrine of sovereign immunity. The full logical

¹ See, e.g., *Chappelle v. City of Concord*, 144 Cal. App.2d 822, 301 P.2d 968 (1956); *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). Compare CAL. GOVT. CODE § 1408, discussed in the text at 191 *supra*.

² HARPER & JAMES § 29.6; 18 McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.79, 53.80 (3rd ed. 1950).

impact of that doctrine, however, has been modified by statute with respect to various aspects of police and law enforcement activities in California. Here, for example, police officers driving emergency vehicles in response to emergency calls are personally immune from liability for ensuing automobile accidents, but the employing public entity is answerable in tort.³ Police stations, jails, honor farms and other physical properties employed in law enforcement and detention activities would seem clearly to be included in the statutory description of "public property" for which cities and counties, in the event of injuries caused by dangerous or defective conditions thereof, may be sued.⁴ Persons erroneously convicted and imprisoned for crime may, on stated statutory conditions, recover a limited indemnity from the State.⁵ Inmates of state prisons and other correctional institutions may, in effect, recover from the State for injuries sustained as the result of medical or dental malpractice by state employees, in view of a statute requiring the State to satisfy any malpractice judgment against its officers and employees in such cases.⁶ Finally, cities and counties are made liable, without fault, for property damage caused by mob or riot—a form of liability which undoubtedly stems from a policy of insisting that such local agencies prevent mob violence at all costs.⁷

The statutory modifications just reviewed manifestly have touched only upon peripheral aspects of the larger problem of tort liability for injuries sustained as the result of law enforcement activities of government. The potential contrariety of policy considerations which are here relevant, it should be observed, is greatly intensified by the nature of the policing function. Nightsticks, handcuffs, jail cells, pistols, riot guns, tear gas bombs, and the gas chamber all are reminders of the awesome powers to take both liberty and life which are vested in law enforcement officers as necessary weapons in the relentless war against crime. The possibilities of injury to the person and to that most precious of intangible interests, personal freedom, are at their maximum in this area of governmental operations. To be sure, the risk is one which society has accepted as indispensable to the preservation of peace and good order. On the whole, however, society has been willing to accept the benefits of the system of police protection but has not (at least in California) been willing to assume all of the burdens flowing therefrom. Injuries to life, limb or liberty, occasioned by negligent or deliberately wrongful police action, are still required to be borne primarily by the injured individual except in the presumably somewhat rare case in which a financially responsible police officer can be held liable.

The temptation is attractive to jump to the humanitarian conclusion that all injuries sustained from torts of police officers in the line of their duty should be a basis for action against the employing public entity. A moment's reflection, however, suggests that the problem cannot be resolved in such simplistic terms, for agreement must first be

³ CAL. VEH. CODE § 17001, discussed in the text at 36-40 *supra*, and CAL. VEH. CODE § 17004, discussed in the text at 166 *supra*.

⁴ CAL. GOVT. CODE § 53051, discussed in the text at 42-59 *supra*.

⁵ CAL. PEN. CODE §§ 4900-4906, discussed in the text at 74-75 *supra*.

⁶ CAL. GOVT. CODE § 2002.5, discussed in the text at 68-69 *supra*.

⁷ CAL. GOVT. CODE § 50140, discussed in the text at 72-73 *supra*.

reached as to what constitutes a "tort"—that is, an actionable breach of a duty to a plaintiff within the ambit of foreseeable risk. Police and law enforcement activities do not always lend themselves to easy analysis in these terms, for police functions frequently have no readily discernible private counterparts upon which might be erected a body of tort law by analogy. The function of investigation and apprehension of persons suspected of criminal activity, and their detention in penal servitude after conviction, are functions solely vested in government and not in private persons. A discriminating analysis of the policy considerations inherent in any proposal to extend tort liability to the law enforcement and police activities of government, therefore, should commence with an attempt to identify the principal types of injury-producing situations characteristic of such activities. Cases arising both in California and in the other states of the Union are here surveyed for this purpose.

False Arrest and Imprisonment

The usual (but not necessarily the only) circumstances in which a peace officer may in California make a lawful arrest are defined in Section 836 of the California Penal Code as follows:

A peace officer may make an arrest in obedience to a warrant, or may without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony whether or not a felony has in fact been committed.

Nearly 80 years ago, the Supreme Court ruled unanimously that an arrest which did not conform to these statutory standards, although unlawful, could not be the basis for tort liability of the public entity employing the culpable arresting officer.⁸ This ruling is still the law of California today,⁹ except insofar as it may have been altered by *Muskopf*. The cited cases all classify the power to arrest for crime as a "governmental" function for which public entities are not liable in tort.

The arresting police officer, however, is personally liable as a rule for the false arrest or imprisonment, if the statutory standards are not satisfied. There is no liability if the officer, making the arrest on a felony charge without a warrant, had "reasonable cause" to believe the person arrested had committed a felony,¹⁰ or if the arrest on a misdemeanor charge, absent a warrant, was accompanied by "reasonable cause" to believe such misdemeanor was being committed in the

⁸ *Stedman v. City & County of San Francisco*, 63 Cal. 193 (1883).

⁹ *Chappelle 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).

¹⁰ *Cole v. Johnson*, 197 Cal. App.2d 788, 17 Cal. Rptr. 664 (1961) (arrest for robbery); *Murphy v. Murray*, 74 Cal. App. 726, 241 Pac. 933 (1925) (suspected burglar). See also *Whaley v. Jansen*, 208 Cal. App.2d —, 25 Cal. Rptr. 184 (1962) (probable cause to arrest for psychiatric examination).

officer's presence.¹¹ Unless reasonable cause is established, however—and the burden of showing it is on the defendant police officer once the plaintiff has established the fact of an arrest without a warrant¹²—the officer is personally liable.¹³ The crucial term, "reasonable cause" (sometimes referred to in nonstatutory language as "probable cause"), is judicially defined to mean that "a man of ordinary care and prudence knowing what the officer knows, would be led to believe or conscientiously entertain a strong suspicion that the arrested person is guilty of a crime, even if there is room for doubt."¹⁴ Where the evidence relevant to reasonable cause is without substantial conflict, moreover, the issue is treated as one of law for the court to decide rather than for the trier of fact.¹⁵

An important statutory limitation upon the police officer's personal liability for false arrest is set forth in Section 847 of the Penal Code in the following words:

There shall be no civil liability on the part of and no cause of action shall arise against any peace officer, acting within the scope of his authority, for false arrest or false imprisonment arising out of any arrest when:

(a) Such arrest was lawful or when such peace officer, at the time of such arrest had reasonable cause to believe such arrest was lawful; or

(b) When such arrest was made pursuant to a charge made, upon reasonable cause, of the commission of a felony by the person to be arrested; or

(c) When such arrest was made pursuant to the requirements of Penal Code Sections 142 [making it a crime for a peace officer to wilfully refuse to arrest a person charged with a criminal offense], 838 [authorizing any magistrate to orally order a peace officer to arrest anyone committing or attempting to commit a public offense in the presence of such magistrate] or 839 [authorizing a person making an arrest to orally summon as many persons as he deems necessary to aid him therein].

The quoted section, it will be observed, confers personal immunity upon peace officers for some arrests which otherwise would appear to be actionable. For example, under clause (a) it is clear that there would be no liability for a misdemeanor arrest without a warrant if the officer *in fact* had reasonable cause to believe the offense was being committed in his presence, for then the arrest would be lawful under

¹¹ Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876 (1952); Farnsworth v. Cote, 199 Cal. App.2d 762, 19 Cal. Rptr. 45 (1962).

¹² See Dragna v. White, 45 Cal.2d 469, 289 P.2d 428 (1955); Onick v. Long, 154 Cal. App.2d 381, 316 P.2d 427 (1957).

¹³ Dragna v. White, 45 Cal.2d 469, 289 P.2d 428 (1955) (felony charge without probable cause); Miller v. Glass, 44 Cal.2d 359, 282 P.2d 501 (1955) (misdemeanor not committed in presence of arresting game warden); Onick v. Long, 154 Cal. App.2d 381, 316 P.2d 427 (1957) (vagrancy charges growing out of mass raid on night club); Oppenheimer v. City of Los Angeles, 104 Cal. App.2d 545, 232 P.2d 26 (1951) (misdemeanor not committed in officer's presence).

¹⁴ Cole v. Johnson, 197 Cal. App.2d 788, 789, 17 Cal. Rptr. 664, 667 (1961). See also Coverstone v. Davies, 38 Cal.2d 315, 239 P.2d 876 (1952).

¹⁵ Cole v. Johnson, *supra* note 14, and cases there cited. See also, Hughes v. Oreb, 36 Cal.2d 854, 228 P.2d 550 (1951); Michel v. Smith, 188 Cal. 199, 205 Pac. 113 (1922); Whaley v. Jansen, 208 Cal. App. —, 25 Cal. Rptr. 184 (1962); Allen v. McCoy, 135 Cal. App. 500, 27 P.2d 423 (1933).

Section 836, *supra*. On the other hand, the absence of such reasonable cause would make the arrest unlawful *in fact*. But the *fact* that it is unlawful would not necessarily make it actionable, for clause (a) of Section 847 appears to grant immunity if the officer had reasonable cause to *believe* it was lawful (*i.e.*, had reasonable cause to believe that the statutory requisite of "reasonable cause" did in fact exist), even though it was in fact unlawful.

Moreover, it will be noted that the test of immunity from personal liability declared in clause (b) of Section 847 is apparently whether the person making the *charge* of commission of a felony did so "upon reasonable cause," and not whether the police officer making the *arrest* pursuant to such charge had reasonable cause to believe a felony had been committed. As written, at least, it would seem that the arresting officer, although possessed of information which leads him to believe the charge of felony to be untrue, may make an unlawful arrest without incurring liability therefor if the person asserting the charge (who may not be possessed of the exonerating information which the officer has) has reasonable cause to believe a felony has been committed.

Finally, under clause (c) of Section 847, it appears that a peace officer who makes an arrest pursuant to an oral order of a magistrate may be personally immune from liability, even though such arrest would otherwise be unlawful under Section 836 because of absence of the requisite "reasonable cause" in the mind of the arresting officer. That these extensions of immunity from personal liability were not inadvertent is persuasively indicated by the fact that the immunity granted by Section 847 would have been exactly coterminous with the statutory definition of a lawful arrest as given in Section 836 if Section 847 had simply ended with the words found in clause (a), "such arrest was lawful." The additional language in Section 847 was evidently added for the express purpose of conferring civil immunity in cases of *unlawful* arrests.

Although most cases involving false arrest also involve a claim for damages for the ensuing false imprisonment as well, the latter basis of liability sometimes is factually separable from the former. Recent decisions,¹⁶ for example, hold that a separate and distinct cause of action for false imprisonment may be asserted against a police officer when, following an arrest (whether lawful or not), the police wrongfully fail to bring the arrested person before a magistrate for arraignment without unnecessary delay pursuant to their statutory duty to do so.

In most of the states of the Union, public entities are immune from tort liability for false arrest and false imprisonment, since the making of an arrest is uniformly regarded as the performance of a governmental duty to the public in general and not a function which principally concerns the proprietary interests of the corporate entity.¹⁷

¹⁶ *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428 (1955) (unlawful imprisonment commencing at expiration of reasonable delay in taking prisoner before magistrate pursuant to Penal Code Section 849). See also, *Gorlack v. Ferrari*, 134 Cal. App.2d 702, 7 Cal. Rptr. 699 (1960).

¹⁷ See *Wilson v. Eberle*, 15 Alaska 260 (1954); *Gray v. City of Griffin*, 111 Ga. 361, 36 S.E. 792 (1900); *Womack v. Lesh*, 180 Kan. 548, 305 P.2d 854 (1957); *Shepherd v. City of Richmond*, 306 Ky. 595, 208 S.W.2d 744 (1948); *Gullikson v. McDonald*, 62 Minn. 273, 64 N.W. 812 (1895); *City of Lawton v. Harkins*, 34 Okla. 545, 126 Pac. 727 (1912); *McKenzie v. City of Florence*, 234 S.C. 423, 103 S.E.2d 825 (1959). On the legality of arrests generally, see Note, 23 U. CINC. L. REV. 488 (1959).

(Occasional intimations may be found, however, to the effect that when the arrest is in connection with the policing of an admittedly proprietary activity of the public agency, liability might attach if tortious elements are present.)¹⁸ False arrest and imprisonment are also expressly excepted from the consent by the United States to liability for the acts of its personnel under the Federal Tort Claims Act.¹⁹ The general acceptance of entity immunity is matched in other states, as in California, by an equally general acceptance of personal liability of the arresting officer.²⁰ The potentially chilling effect which a rule of personal liability of this type is likely to have upon vigorous law enforcement is apparent; and it is believed probable that the rule has been regarded as tolerable only by reason of the fact that many, if not most, law enforcement officers are presumably insured against such liability.²¹

The rule of immunity is not, however, completely unanimous. In Florida, following the recent judicial abolition of sovereign immunity of municipal corporations,²² it appears that cities are now liable for false arrest and imprisonment by their police officers in the performance of duty.²³ Illinois has provided for the matter by statute, requiring its municipalities to indemnify their police officers for judgments recovered against them for personal injury or property damage caused in the performance of police duties, save only in cases where the injury results from the wilful misconduct of the policeman.²⁴ In holding this statutory indemnity provision applicable to a false arrest situation, the Illinois Supreme Court underscored the legislative policy of the statute by remarking that under it a police officer "will not be deterred or restrained in the performance of his duty by the knowledge that, if he makes a mistake, he may be called upon to pay a substantial judgment."²⁵ Wisconsin has gone even further than Illinois in

¹⁸ See, e.g., *City of Lawton v. Harkins*, 34 Okla. 545, 126 Pac. 727 (1912) (suggesting that a wrongful arrest made by a police officer while guarding the city waterworks (a "proprietary" activity of the city) might be actionable). Compare *Hillman v. City of Anniston*, 214 Ala. 522, 108 So. 539 (1926).

¹⁹ Federal Tort Claims Act, 28 U.S.C. § 2680(h), precluding liability in cases of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." (Emphasis added.) See, applying this exception to false arrest and imprisonment claims, *Klein v. United States*, 268 F.2d 63 (2d Cir. 1959); *Jones v. Federal Bureau of Investigation*, 139 F. Supp. 38 (D. Md. 1956); *Duenges v. United States*, 114 F. Supp. 751 (S.D.N.Y. 1953); *Denahey v. Isbrandtsen Co.*, 80 F. Supp. 180 (S.D.N.Y. 1948).

²⁰ See Annot., 10 A.L.R.2d 750 (1950); Note, 11 HASTINGS L. J. 75 (1959); Note, 28 U. CINC. L. REV. 488 (1959).

²¹ See CAL. GOVT. CODE § 1956, expressly authorizing public entities to purchase insurance against liability of their officers and employees for false arrest and false imprisonment. Compare CAL. EDUC. CODE § 1044; Cal. Ass'n of Insurance Agents, Liability Insurance Manual 22 (undated). The author is informed that most deputy sheriffs in the County of Los Angeles carry personal liability insurance coverage against false arrest and imprisonment claims, obtained at moderate cost through their professional peace officer's association.

²² *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

²³ *City of Miami v. Albro*, 120 So.2d 23 (Fla. App. 1960) (holding city liable for false arrest made without a warrant if policemen did not have "substantial reason to believe" misdemeanor was being committed in his presence, but reversing for new trial due to erroneous instructions). See also, *City of Coral Gables v. Giblin*, 127 So.2d 914 (Fla. App. 1961) (conceding that city may be liable for false arrest and imprisonment, but finding no such liability on facts since officers acted *ultra vires* in making arrest outside city limits). But compare *Middleton v. Fort Walton Beach*, 113 So.2d 431 (Fla. App. 1959) (holding no liability for arrest made pursuant to warrant valid on its face irrespective of officer's alleged knowledge that said warrant was in fact void).

²⁴ ILL. ANN. STAT., ch. 24 § 1-4-5 (Smith-Hurd 1962) (indemnity without limit as to personnel of cities over 500,000 in population); ILL. ANN. STAT., ch. 24 § 1-4-6 (Smith-Hurd 1962) (indemnity subject to maximum of \$50,000 for cities under 500,000 population).

²⁵ *Gaca v. City of Chicago*, 411 Ill. 146, 155, 103 N.E.2d 617, 622 (1952).

the legislative adoption of a similar policy. The Wisconsin statute applies not just to municipalities (as in Illinois) but to the state and all political subdivisions therein, and requires the employing public entity to pay any judgment against its officers when sued in their official capacity provided the judge or jury finds the defendant acted in good faith.²⁶ In addition, in false arrest cases, the political subdivision is also required to pay reasonable attorney's fees where the entity did not provide legal counsel to the defendant.²⁷ In New York, the general legislative waiver of sovereign immunity has supported the conclusion that public entities in that state are directly liable in tort for false arrest and imprisonment by their police officers, as, for example, where an arrest is made without probable cause to believe that an offense has been committed,²⁸ or is made without a warrant for a misdemeanor not committed in the presence of the arresting officer,²⁹ or is based upon a warrant or commitment which is void upon its face.³⁰ On the other hand, New York law holds the police officer's actions to be non-tortious when supported by a court order which is valid on its face.³¹

Cogent considerations of public policy appear to preponderate in favor of public liability for false arrest and imprisonment in California, provided the definition of the tort remains unaltered in its present narrow confines. The strong public interest in vigorous law enforcement lends support to the present rules³² under which, in this State, an arrest is not a basis for civil liability of the arresting officer if (a) it was made pursuant to a valid warrant, (b) the person arrested had in fact committed a felony, (c) the arresting officer had reasonable cause to believe that the person arrested had committed a felony, whether he had done so in fact or not, (d) the arresting officer had reasonable cause to believe that a misdemeanor had been committed in his presence, (e) the police officer had reasonable cause to believe the arrest was lawful, (f) the arrest was made pursuant to a charge made, upon reasonable cause, that the person to be arrested had committed a felony, or (g) the arrest was made pursuant to the oral order of a magistrate directing the arrest on the ground that an offense was being committed or attempted in his presence. This list of nonactionable arrests would seem to protect the public entity, as it now serves to protect the individual officer, against liability in cases in which apparent danger to the public welfare justifies immediate action to

²⁶ WIS. STAT. § 270.58 (1957), as amended by Wis. Laws 1961, ch. 499. With respect to torts of deputy sheriffs, the indemnity provisions are applicable only to counties in which the deputy is employed on a civil service basis, and are expressly declared to be "discretionary and not mandatory" with respect to payment of the judgment, thereby impliedly making payment by other entities clearly mandatory.

²⁷ WIS. STAT. § 270.58 (1957). This provision, added by Wis. Laws 1959, ch. 438, apparently is mandatory even in the case of deputy sheriffs employed under civil service, even though it is clear under the 1961 amendment that the county has discretion whether to satisfy the judgment in such cases. See note 26 *supra*.

²⁸ *Koepp v. Hudson*, 276 App. Div. 443, 95 N.Y.S.2d 700 (1950).

²⁹ *Roher v. State of New York*, 279 App. Div. 1116, 112 N.Y.S.2d 603 (1952), *affirming* 200 Misc. 669, 106 N.Y.S.2d 360 (Ct. Cl. 1951); *Bonnau v. State of New York*, 303 N.Y. 721, 103 N.E.2d 340 (1951), *affirming* 278 App. Div. 181, 104 N.Y.S.2d 364 (1951).

³⁰ *Schildhaus v. City of New York*, 7 Misc.2d 859, 163 N.Y.S.2d 201 (1957), *rev'd on damages issue only*, 10 App. Div.2d 566, 195 N.Y.S.2d 402 (1960), *aff'd*, 8 N.Y.2d 1108, 209 N.Y.S.2d 787, 171 N.E.2d 874 (1960). See also, to the same effect, *Dalley v. State of New York*, 190 Misc. 542, 75 N.Y.S.2d 40 (Ct. Cl. 1947).

³¹ *Houghtaling v. State of New York*, 11 Misc.2d 1049, 175 N.Y.S.2d 659 (Ct. Cl. 1958); *Berger v. Village of Seneca Falls*, 3 Misc.2d 647, 151 N.Y.S.2d 133 (1956). See RESTATEMENT, TORTS §§ 122, 123, 124 (1934).

³² See CAL. PEN. CODE §§ 836, 847, discussed in the text at 406-408 *supra*.

place some person under restraint. The officer often must act on appearances, and cannot, consistently with the fullest possible protection for public safety, take the time to assure himself that the propriety of his actions will be vindicated by a jury if subsequently brought into question. Indeed, the nature of a false arrest action is such that even the strongest justification, as it appeared to the officer at the time, may be deemed inadequate in a tort action many months thereafter. Obviously, the police officer should not be required at his peril to outguess what a later jury might decide, for any substantial deterrent to vigorous law enforcement might well have dangerous or even tragic consequences.

On the other hand, even under the rather extensive limitations upon liability for false arrest which presently protect California peace officers, *some* danger of liability still exists, even where the officer acts with the utmost of good faith. The deterrent effect of prospective personal liability, it would seem, could be removed most effectively by the acceptance by California public entities of full financial responsibility for false arrest and false imprisonment, at least where the officer acted in good faith. The Wisconsin and Illinois statutes referred to above suggest the wisdom, in the interest of preventing abuses of public authority, of retaining personal liability of the officer where he is proven to have acted with malice or to have engaged in wilful misconduct.

Malicious Prosecution

A search of the authorities discloses the fact that very few actions appear to have been brought against public entities for malicious prosecution, although as we have seen the kindred action for false arrest is relatively common. The explanation, perhaps, lies partly in the considerably more rigorous proof exacted of the plaintiff in malicious prosecution actions.¹

The plaintiff must establish that the proceeding complained of was instituted against him without probable cause and from malicious motives, and that it had successfully terminated in his favor.² The burden on proof of these issues is on the plaintiff.³ In false arrest cases, on the other hand, it is not necessary to prove malice, and the burden of showing probable cause is upon the defendant.⁴ In addition, the institution and prosecution of criminal proceedings by public officials (*e.g.*, district attorneys, grand juries, magistrates) are obviously "governmental" functions to which sovereign immunity attaches in most states⁵

¹ For a comparison of the torts of malicious prosecution and false arrest, and the underlying policy considerations which have led to differences in the plaintiff's burden of proof therein, see 1 HARPER & JAMES § 4.11.

² RESTATEMENT, TORTS § 653 (1934). The California cases are in accord. *Clary v. Hale*, 175 Cal. App.2d 880, 1 Cal. Rptr. 91 (1959); *Oppenheimer v. Tamblin*, 167 Cal. App.2d 158, 334 P.2d 152 (1959).

³ *Starkweather v. Eddy*, 210 Cal. 483, 292 Pac. 467 (1930); *Griswold v. Griswold*, 143 Cal. 617, 77 Pac. 672 (1904); *Clary v. Hale*, 175 Cal. App.2d 880, 1 Cal. Rptr. 91 (1959); *Metzenbaum v. Metzenbaum*, 121 Cal. App.2d 64, 262 P.2d 596 (1953). The New York rule is to the same effect. *Peers v. State of New York*, 6 Misc.2d 779, 165 N.Y.S.2d 171 (Ct. Cl. 1957); *Ranke v. State of New York*, 206 Misc. 569, 134 N.Y.S.2d 83 (Ct. Cl. 1954), *aff'd*, 285 App. Div. 1113, 141 N.Y.S.2d 516 (1955).

⁴ See *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428 (1955); *Coverstone v. Davies*, 38 Cal.2d 315, 239 P.2d 876 (1952).

⁵ *Adams v. Home Owners' Loan Corp.*, 107 F.2d 139 (8th Cir. 1939); *McCarter v. City of Florence*, 216 Ala. 72, 112 So. 335 (1927); *Annot.*, 103 A.L.R. 1512 (1936).

including California.⁶ The tort of malicious prosecution is, moreover, expressly excepted from the scope of the Federal Tort Claims Act.⁷ And even in Florida, where the state Supreme Court helped spark the recent trend toward abolition of sovereign immunity,⁸ it appears that public entities are still immune from liability for malicious prosecution, for the reason that such cases are deemed to involve "quasi-judicial" functions.⁹

Only in the state of New York does there appear to be any substantial body of law which recognizes liability of public entities for malicious prosecution by public officers and employees.¹⁰ Even so, the burden of proving lack of probable cause is often insurmountable to the plaintiff,¹¹ particularly in light of the rule that an order of a magistrate holding a suspect to trial on a criminal charge, or an indictment by a grand jury on such charge, are prima facie evidence that the officer making the charge had probable cause to believe the suspect guilty.¹² In addition, the issue of probable cause—that is, whether on the facts as they appeared to the officer a reasonably discreet and prudent person would have been led to the belief that the accused was guilty of the crime charged¹³—is apparently treated in New York as an issue of law for the court,¹⁴ thereby withdrawing it from the jury's possibly more lenient or less well-informed evaluation. Finally, the requisite element of malice has evidently been difficult to prove.¹⁵

It is a safe generalization that governmental entities in the United States have been held liable for malicious prosecution only in very rare instances. The law has left the injured plaintiff almost entirely to his remedies against the public officer in his personal capacity. Yet, here too, the law seldom permits recovery. The California Supreme Court's decision in *White v. Towers*,¹⁶ decided in 1951, is one of the leading cases in the country sustaining the application of the doctrine of offi-

⁶ *Dawson v. Martin*, 150 Cal. App.2d 379, 309 P.2d 915 (1957) (county held absolutely immune from liability for malicious prosecution).

⁷ Federal Tort Claims Act, 28 U.S.C. 2680(h) (1959); *Jones v. Federal Bureau of Investigation*, 139 F. Supp. 33 (D. Md. 1956).

⁸ *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

⁹ *Calbeck v. Town of South Pasadena*, 128 So.2d 133 (Fla. App. 1961). *But cf. Gordon v. City of Belle Glade*, 132 So.2d 449 (Fla. App. 1961) (suggesting the question may not be entirely closed).

¹⁰ See *Peers v. State of New York*, 6 Misc.2d 779, 165 N.Y.S.2d 171 (Ct. Cl. 1957), and cases cited in the notes immediately following.

¹¹ *Isquith v. New York State Thruway Authority*, 27 Misc.2d 539, 215 N.Y.S.2d 393 (Ct. Cl. 1961); *Saunders v. State of New York*, 14 Misc.2d 881, 181 N.Y.S.2d 138 (Ct. Cl. 1958); *Houghtaling v. State of New York*, 11 Misc.2d 1049, 175 N.Y.S.2d 659 (Ct. Cl. 1958); *Feller v. State of New York*, 207 Misc. 966, 141 N.Y.S.2d 656 (Ct. Cl. 1955); *Ranke v. State of New York*, 206 Misc. 569, 134 N.Y.S.2d 83 (Ct. Cl. 1954), *aff'd*, 235 App. Div. 1113, 141 N.Y.S.2d 516 (1955).

¹² See *Houghtaling v. State of New York*, 11 Misc.2d 1049, 175 N.Y.S.2d 659 (Ct. Cl. 1958). This appears to be the generally accepted view, 1 HARPER & JAMES § 317-19; RESTATEMENT, TORTS §§ 663, 664 (1934), and is accepted in California. See *Fairchild v. Adams*, 170 Cal. App.2d 10, 338 P.2d 191 (1959); *Johnson v. Southern Pac. Co.*, 157 Cal. 333, 107 Pac. 611 (1910).

¹³ See 1 HARPER & JAMES § 4.5, and cases there cited; *Clary v. Hale*, 175 Cal. App.2d 880, 1 Cal. Rptr. 91 (1959); *Masterson v. Pig'n Whistle Corp.*, 161 Cal. App.2d 323, 326 P.2d 918 (1958). Probable cause may be a good defense even though the appearances relied upon to support the criminal charge ultimately turn out to be false or mistaken. See *Fry v. Bank of America*, 142 Cal. App.2d 150, 298 P.2d 34 (1956).

¹⁴ See *Peers v. State*, 6 Misc.2d 779, 165 N.Y.S.2d 171 (Ct. Cl. 1957). In California, the issue is ordinarily one for the jury except where there is no substantial conflict in the evidence. *Masterson v. Pig'n Whistle Corp.*, 161 Cal. App.2d 323, 326 P.2d 918 (1958); *Verdier v. Verdier*, 152 Cal. App.2d 348, 313 P.2d 123 (1957).

¹⁵ See, e.g., *Stearns v. New York City Transit Authority*, 24 Misc.2d 216, 200 N.Y.S.2d 272 (1960), *aff'd*, 12 App. Div.2d 451, 209 N.Y.S.2d 264 (1960); *Isquith v. New York State Thruway Authority*, 27 Misc.2d 539, 215 N.Y.S.2d 393 (Ct. Cl. 1961).

¹⁶ 37 Cal.2d 727, 235 P.2d 209 (1951).

cial immunity to law enforcement officials who institute criminal prosecutions. An investigator for the California Fish and Game Commission was there held personally immune from liability for malicious prosecution arising out of his instigation of two criminal proceedings against the plaintiff, both of which were allegedly without probable cause and motivated by malice. This result was declared to be supported by public policy:

When the duty to investigate crime and to institute criminal proceedings is lodged with any public officer, it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty. The efficient functioning of our system of law enforcement is dependent largely upon the investigation of crime and the accusation of offenders by properly trained officers. A breakdown of this system at the investigative or accusatory level would wreak untold harm. . . . To rule otherwise would place every honest law enforcement officer under an unbearable handicap and would redound to the detriment of the body politic.¹⁷

Although a few jurisdictions take a contrary position, the majority view appears to accept the applicability of the official immunity doctrine to public officers, including not only judges and public prosecutors but also policemen and other law enforcement personnel.¹⁸ Thus, under the pre-*Muskopf* law of California, a person wrongfully prosecuted for a criminal charge which was groundless, where the prosecution was instituted maliciously and without probable cause by a public officer or employee, was without any effective remedy.¹⁹

There are undeniably weighty policy considerations in favor of protecting police officers, public prosecutors, investigators and other law enforcement officials against personal liability for their official conduct. The doctrine of official immunity, however, postulates the need to confer immunity from malicious prosecution actions, even where the criminal proceeding was instituted and prosecuted in bad faith, so that fear of litigation will not deter the officer in the full performance of his duty.²⁰ On the other hand, however, is the interest in protecting an innocent citizen against the expense, inconvenience and disgrace of being forced to defend against unjustified and maliciously interposed charges of crime. Official immunity, coupled with sovereign immunity, results in almost a complete absence of effective protection to the latter interest although admittedly serving the former.

A more equitable resolution of these conflicting interests would not seem to be beyond the capacity of the law. Although legislators and

¹⁷ *Id.* at 729-30, 235 P.2d at 211.

¹⁸ See the cases discussed in Annot., 28 A.L.R.2d 646 (1953).

¹⁹ Official immunity from liability for malicious prosecution has been recognized in California in cases involving school officials, *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957); building inspectors, *Dawson v. Rash*, 160 Cal. App.2d 154, 324 P.2d 959 (1958); county supervisors, *Dawson v. Martin*, 150 Cal. App.2d 379, 309 P.2d 915 (1957); public prosecutors, *Norton v. Hoffman*, 34 Cal. App.2d 189, 93 P.2d 250 (1939) and *White v. Brinkman*, 23 Cal. App.2d 307, 73 P.2d 254 (1937); judges, *Rogers v. Marion*, 11 Cal. App.2d 750, 54 P.2d 760 (1936); game wardens, *White v. Towers*, 37 Cal.2d 727, 235 P.2d 209 (1951); and peace officers, *Coverstone v. Davies*, 38 Cal.2d 315, 239 P.2d 876 (1952) and *Farnsworth v. Cote*, 199 Cal. App.2d 762, 19 Cal. Rptr. 45 (1962).

²⁰ See *Hardy v. Vial*, 48 Cal.2d 577, 582-83, 311 P.2d 494, 496-97 (1957), quoting with approval from the opinion of Learned Hand, J., in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

judges acting as such should be continued in a position of complete immunity from judicial reexamination of their official conduct, the police officer, investigator, inspector, game warden and prosecutor do not exercise powers on a comparably high policy-making level, and might reasonably be made amenable to suit for malicious prosecution without unduly impairing the independence and vigor of the executive branch. Attention has previously been directed to the resources of procedural law and to how a significant degree of protection to the individual officer might well be obtained by imposition of more rigorous procedural requirements upon the plaintiff who is challenging the *bona fides* of an exercise of official discretion.²¹

It is thus believed that consideration should be given to a statutory solution applicable to malicious prosecution cases which (a) would permit suit against peace officers and public prosecutors, but in order to protect against unfounded litigation and possible reduction in official incentives to vigorous law enforcement, (b) would include strict procedural requirements designed to discourage and weed out in the preliminary stages of litigation all but the most meritorious cases, (c) would provide for the fullest possible protection of the officer against harassment by requiring legal representation and payment of costs of litigation at public expense, (d) would limit the recovery to actual damages, by precluding recovery of exemplary or punitive damages, and (e) would require the employing public entity to pay any judgment (or any settlement arrived at with the consent of the governing body of the entity and its counsel) entered against the officer or employee unless the governing body (after notice and hearing) determines, independently of the decision reached in the malicious prosecution action itself, that the officer or employee acted through motives of actual malice. When such determination is made, the individual should be personally liable for the plaintiff's damages as well as for the cost and expense to the entity of providing him with counsel in defense of the action.

The term, "actual malice," in the last suggested provision is intended to distinguish between the type of "malice" which is characterized by personal hostility and wrongful intent, and the type which is ordinarily sufficient to support a plaintiff's judgment in a malicious prosecution action—that is, a finding of malice inferred from evidence other than the officer's own statements and conduct, and which finding, although legally sufficient, is not necessarily the equivalent of a conclusive showing of actual animosity, hatred, ill-will or wrongful purpose to cause harm.²² The judgment in a malicious prosecution action may only represent a barely permissible resolution of conflicting evidence by the trier of fact on the issue of malice. Accordingly, it is believed that such judgment should not be

²¹ See text at 258-60 *supra*.

²² See *Grove v. Purity Stores, Ltd.*, 153 Cal. App.2d 234, 241, 314 P.2d 543, 548 (1957), quoting from *Singleton v. Singleton*, 63 Cal. App.2d 681, 157 P.2d 886 (1945). "In a malicious prosecution case the plaintiff is not required in order to receive compensatory damages to show that the prosecution was inspired by personal hostility, a grudge or ill-will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances. . . . Malice on the part of defendant . . . may be inferred from the want of probable cause." *Accord*: *Albertson v. Raboff*, 46 Cal.2d 375, 295 P.2d 405 (1956); *Fleischhauer v. Fabens*, 8 Cal. App. 30, 96 Pac. 17 (1908).

conclusive on the question whether the officer or employee in fact acted through personal malevolence as distinguished from gross imprudence or excessive zeal. The present proposal is founded on the view that actual malice, as here defined, is intolerable and dangerous to the well-being of a self-governing society, and hence should result in imposition of full personal financial responsibility upon the culpable officer or employee. Malice deemed sufficient in law to support recovery, but falling short of actual malice as here defined, is not necessarily inconsistent with honest governmental administration nor with the general public welfare, and hence the governing entity should assume financial responsibility for judgments founded thereon, looking to internal supervisory and in-service training techniques to prevent and thereby minimize the actual costs involved.

Infliction of Physical Injuries Upon Suspect or Prisoner

Law enforcement officers ordinarily are armed with deadly weapons, and hence have it within their power to inflict serious injury or even death upon members of the public. The general rule in much of the United States is that such officers are personally liable for negligent or wrongful acts causing personal injury or death.²³ At the same time, most jurisdictions, proceeding from the premise that law enforcement is a strictly "governmental" function, also hold the employing governmental entity immune from liability for injuries sustained as a consequence of wrongful conduct of police officers, such as an unnecessary physical assault upon a suspect in the course of arresting him,²⁴ or the unnecessary or negligent use by a police officer of his gun.²⁵ Similarly, there is generally no liability of the entity for injuries or death suffered as the result of the use of reasonable force to prevent an escape by one in custody,²⁶ nor for the use of force to control or discipline a prisoner.²⁷ Under the Federal Tort Claims Act, the United States is also exonerated from liability by virtue of the express statutory exception

²³ See Annot., 60 A.L.R.2d 873 (1958), and cases there collected; Note, *The Civil Liability of Peace Officers for Wounding or Killing*, 28 U. CINC. L. REV. 483 (1959); Note, *The Use of Deadly Force By a Peace Officer in the Apprehension of a Person in Flight*, 21 U. PITT. L. REV. 132 (1959).

²⁴ See, e.g., *McSheridan v. City of Talladega*, 243 Ala. 162, 8 So.2d 831 (1942) (assault by traffic policeman); *City of Nampa v. Kibler*, 62 Idaho 511, 113 P.2d 411 (1941) (assault and battery); *Hagedorn v. Schrum*, 226 Iowa 128, 233 N.W. 876 (1939) (officer maliciously fired tear gas gun at suspect); *Simpson v. Poin-dexter*, 241 Miss. 854, 133 So.2d 286 (1961) (prisoner beaten by police); *Grimes v. Henryetta*, 208 Okla. 217, 254 P.2d 980 (1953) (assault during arrest); *Gonzalez v. City of El Paso*, 316 S.W.2d 176 (Tex. Civ. App. 1958) (trespasser shot and killed by police guard); *Archer v. Cisco*, 211 S.W.2d 955 (Tex. Civ. App. 1948) (assault during arrest).

²⁵ See, e.g., *Wardlow v. City of Detroit*, 364 Mich. 291, 111 N.W.2d 44 (1961); *King-fisher v. City of Forsyth*, 132 Mont. 39, 314 P.2d 876 (1957); *Gonzalez v. City of El Paso*, 316 S.W.2d 176 (Tex. Civ. App. 1958).

²⁶ *City of Birmingham v. Brock*, 242 Ala. 382, 6 So.2d 499 (1942) (suggesting that a contrary rule would encourage prisoners to attempt to escape, for even if one failed to obtain his freedom, he would be able to hold the public entity liable in damages for injuries incurred through wrongful use of force by the police in seeking his recapture, and would "thus profit by his own initial wrong." *Id.* at 384, 6 So.2d at 501). The court fails to point out why compensatory damages should be deemed a form of "profit."

²⁷ *Brownlee v. City of Orlando*, 157 Fla. 524, 26 So.2d 504 (1946) (prisoner killed by blow from police blackjack); *City of Miami v. Bethel*, 65 So.2d 34 (Fla. 1953) (prisoner beaten by police); *Kennedy v. City of Daytona Beach*, 132 Fla. 675, 132 So. 228 (1938) (*semble*). Although these cases illustrate the operation of the sovereign immunity doctrine, they may not be fully authoritative today in view of the partial abolition of that doctrine in *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

for assault and battery.²⁸ Both the rule of sovereign immunity and the rule of personal liability, as applied in the present category of cases, characterize the pre-*Muskopf* law in California.²⁹

The general rule of nonliability, however, has been breached in several jurisdictions. In Alabama, for example, a partial relaxation of sovereign immunity is permitted when the wrongful act of the police officer takes place in connection with the performance of a "proprietary" activity, such as the repair and maintenance of the public streets by prisoners from the city jail.³⁰ Under the Federal Tort Claims Act, the statutory immunity from liability for assault has been held not applicable where the injury or death is alleged to have resulted from a negligent firing of the officer's gun rather than an intentional use of force.³¹ The recent judicial abolition of sovereign immunity of municipalities in Florida has made such entities liable for wrongful use of force by police officers.³² A recent Louisiana case affirms the liability of a city for death resulting from a brutal beating by police officers, where the legislature expressly waived immunity for the purpose of the particular litigation.³³ The New Jersey Supreme Court also has recently discarded the peculiar "active wrongdoing" rule which formerly was the test of municipal liability in that state where "governmental" functions were concerned, and has held a municipality liable for personal injuries negligently inflicted by a reserve policeman's shooting of the plaintiff with his gun in the course of duty.³⁴ A recent Oregon decision holds a city liable for injuries inflicted upon a suspect under arrest where use of an "iron claw" was deemed to be excessive force.³⁵ Finally, the legislatures of both Illinois and Wisconsin have, by statute, required public entities therein to pay judgments

²⁸ Federal Tort Claims Act, 28 U.S.C. 2680(h) (1959); *Morton v. United States*, 228 F.2d 431 (D.C. Cir. 1955); *Stapp v. United States*, 207 F.2d 909 (4th Cir. 1953); *Lewis v. United States*, 194 F.2d 689 (3rd Cir. 1952); *Jones v. Federal Bureau of Investigation*, 139 F. Supp. 38 (D. Md. 1956). See also, *United States v. Hambleton*, 185 F.2d 564 (9th Cir. 1950) (intentional infliction of severe emotional distress, since classified by applicable state law as a form of assault, held within statutory exception).

²⁹ The rule of sovereign immunity in the present class of cases is exemplified by cases like *Henry v. City of Los Angeles*, 114 Cal. App.2d 603, 250 P.2d 643 (1952) (juvenile shot and killed by police officer in course of duty); and *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949) (*semble*). The personal liability of the police officer for the wrongful or excessive use of force is established by such cases as *Towle v. Matheus*, 130 Cal. 574, 62 Pac. 1064 (1900) (shooting of suspect deemed excessive use of force); *Appler v. Hayes*, 51 Cal. App.2d 111, 124 P.2d 125 (1942) (unnecessary use of force to effect an arrest); and *Boyes v. Evans*, 14 Cal. App.2d 472, 58 P.2d 922 (1936) (beating of suspect without justification). *But compare* *Murphy v. Murray*, 74 Cal. App. 726, 241 Pac. 938 (1925) (no liability for shooting of suspected felon in course of attempt to escape from police custody). The California Penal Code also imposes criminal penalties for wrongful use of force in specified circumstances. See CAL. PEN. CODE §§ 147 (wilful inhumanity or oppression toward prisoners), 149 (unjustified assault or beating), 2652 (cruel or unlawful punishment inflicted upon prisoner). Reasonable force to effect an arrest, prevent an escape or overcome resistance is expressly authorized to be employed by peace officers. CAL. PEN. CODE §§ 835, 835a.

³⁰ *Hillman v. City of Anniston*, 214 Ala. 522, 108 So. 539 (1926), 216 Ala. 661, 114 So. 55 (1927), 220 Ala. 505, 126 So. 169 (1930).

³¹ *Tastor v. United States*, 124 F. Supp. 548 (N.D. Cal. 1954) (holding government liable).

³² See *City of Miami v. Albro*, 120 So.2d 23 (Fla. App. 1960); *Ragans v. City of Jacksonville*, 106 So.2d 860 (Fla. App. 1958).

³³ *Franks v. City of Alexandria*, 128 So.2d 310 (La. App. 1961).

³⁴ *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960), noted in 15 RUTGERS L. REV. 98 (1960).

³⁵ *Stephens v. City of St. Helens*, — Ore. —, 371 P.2d 686 (1962).

rendered against their peace officers for injuries sustained through the good faith use of excessive force in carrying out their duties.³⁶

The principal jurisdiction in which the barriers of the immunity doctrine have been broken down is, of course, New York. There it is frequently recognized that the wrongful conduct of law enforcement officers is a permissible basis for governmental tort liability. Such liability is governed by ordinary tort concepts, so that the public entity is responsible for the negligent shooting of a person being investigated or interrogated by the police³⁷ as well as for intentional assault upon a suspect³⁸ or a prisoner.³⁹ The general principle which protects a police officer from personal liability when he employs a degree of force which is reasonable under the circumstances also protects the public entity, and it is liable only where excessive force is employed.⁴⁰ The New York cases appear to treat the problem simply as one of application of the *respondeat superior* doctrine in a context of familiar tort law.

In California, the law recognizes that a private employer is responsible in tort for injuries inflicted by his employees, whether through negligence or intentional wrongdoing.⁴¹ Indeed, the same rule has been applied to public entities insofar as their personnel are engaged in a proprietary function,⁴² and by statute has been extended to police officers in the negligent operation of motor vehicles.⁴³ Adequate policy reasons for refusing to extend entity liability to other instances of injuries sustained at the hands of law enforcement officers are difficult to discern. To be sure, it may be argued that governmental immunity

³⁶ ILL. ANN. STAT., ch. 24 §§ 1-4-5, 1-4-6 (Smith-Hurd 1962). See *Karas v. Snell*, 11 Ill.2d 233, 142 N.E.2d 46 (1957) (holding that under the statute the city may escape liability by proving that the officer was guilty of willful misconduct or was acting *ultra vires*). WIS. STAT. § 270.58 (1957), as amended by Wis. Laws 1959, ch. 438, and Wis. Laws 1961, ch. 499. See *Matczak v. Mathews*, 265 Wis. 1, 60 N.W.2d 352 (1953) (applying statute to action founded on negligent shooting by police officer); *Larson v. Lester*, 259 Wis. 440, 49 N.W.2d 414 (1951) (*semble*).

³⁷ *Fields v. City of New York*, 4 N.Y.2d 334, 175 N.Y.S.2d 27, 151 N.E.2d 188 (1958) (negligent firing of shot to warn motorist fleeing from scene of accident, which ricocheted and killed suspect); *Burns v. City of New York*, 6 App. Div.2d 30, 174 N.Y.S.2d 192 (1958) (negligent shooting of suspect while searching him for possession of narcotics).

³⁸ *McCarthy v. City of Saratoga Springs*, 269 App. Div. 469, 56 N.Y.S.2d 600 (1945); *Daniels v. City of Syracuse*, 200 Misc. 415, 106 N.Y.S.2d 72 (1951). See also *Winant v. State of New York*, 33 Misc.2d 90, 227 N.Y.S.2d 106 (Ct. Cl. 1962) (physical assault on suspect under arrest).

³⁹ *Dailey v. State of New York*, 190 Misc. 542, 75 N.Y.S.2d 40 (Ct. Cl. 1947) (beating of prisoner). See also *Hinton v. City of New York*, 13 App. Div.2d 975, 212 N.Y.S.2d 97 (1961) (beating of person resisting arrest); *Fletcher v. State*, 15 Misc.2d 1014, 183 N.Y.S.2d 265 (Ct. Cl. 1959), *aff'd*, 9 App. Div.2d 862, 194 N.Y.S.2d 456 (1959) (shooting of parolee in course of arrest); *Ferguson v. City of New York*, 279 App. Div. 606, 107 N.Y.S.2d 534 (1951), *aff'd*, 303 N.Y. 936, 105 N.E.2d 628 (1952) (intentional shooting of plaintiff in course of duty held actionable in absence of evidence in justification).

⁴⁰ *Flamer v. City of Yonkers*, 309 N.Y. 114, 127 N.E.2d 838 (1955) (held a question of fact whether police officer employed more force than reasonably necessary to effect arrest of boisterous and argumentative drunk); *McCarthy v. City of New York*, 96 N.Y.S.2d 910 (1947), *aff'd*, 273 App. Div. 945, 78 N.Y.S.2d 568 (1948) (judgment for plaintiff affirmed on basis of evidence supporting finding that shooting of sex deviate in course of making arrest was unreasonable use of force under circumstances).

⁴¹ See, e.g., *Vargas v. Ruggiero*, 197 Cal. App.2d 709, 17 Cal. Rptr. 568 (1962) (intentional infliction of mental anguish by bill collector); *Hiroshima v. Pacific Gas & Elec. Co.*, 18 Cal. App.2d 24, 63 P.2d 340 (1936) (assault by bill collector). Under some circumstances, exemplary and punitive damages may even be recovered from the employer. See *Browand v. Scott Lumber Co.*, 125 Cal. App.2d 68, 269 P.2d 891 (1954); *Sandoval v. Southern Cal. Enterprises*, 98 Cal. App.2d 240, 219 P.2d 928 (1950).

⁴² *Ruppe v. City of Los Angeles*, 186 Cal. 400, 199 Pac. 496 (1921) (assault by meter reader for proprietary water and power department of city).

⁴³ See CAL. VEH. CODE § 17001; *Garcia v. City of Santa Monica*, 92 Cal. App.2d 53, 206 P.2d 37 (1949); *Reed v. City of San Diego*, 77 Cal. App.2d 860, 177 P.2d 21 (1947). See discussion in text at 36-40 *supra*.

is supported by the socially significant interest in maintaining vigorous and fearless enforcement of the law; but it is far from clear that this interest extends to permitting police officers with impunity either intentionally or negligently to inflict serious personal injuries, possibly even death, upon members of the public or upon prisoners in their custody. Holding the individual officer liable is seldom an adequate protection to the public, for the most effective deterrents are likely to take the form of internal disciplinary measures and supervisory controls. A salutary incentive to the establishment of such administrative precautions by public entities would be the application to them of the general principle of *respondent superior*. Moreover, the pre-*Muskopf* rules, as followed in California, appear to be contrary to sound policy in two respects. First, they impose personal liability on the officer and thus may exert a dampening effect upon the vigor with which he seeks to enforce the law. Second, they relieve the public entity of liability, thereby depriving the plaintiff of an effective remedy for what may be a most grievous wrong. A sound resolution of the problem would, it is believed, reverse the existing law by granting immunity to the law enforcement officer, so far as he acts in good faith, and by imposing ultimate financial liability upon the employing entity with a right of indemnity over against the officer where the latter was motivated by bad faith, actual malice or wilful intent to cause injury.

Injuries Inflicted by Peace Officer Negligently Retained in Public Employment Although Known to Be Unfit

At an earlier place in the present study, the liability of public officers for negligently retaining in public employment subordinate employees known to be unfit or incompetent was explored in some detail.¹ The common law principles recognizing personal liability in such cases have been generally codified insofar as officers of counties and cities are concerned,² and a scattering of statutes also make them applicable to certain other public entities.³ The problem here to be examined is whether such liability, whether derived from common law rules or from the statutory codification thereof, should be imposed upon the governmental entity for whom the superior officer was acting at the time of his negligent retention of the incompetent subordinate.

The issues are well posed by the California case of *Fernelius v. Pierce*.⁴ The complaint (which was taken as true for the purposes of demurrer) alleged that one Fred Fernelius, while a prisoner in the Oakland City jail, had been viciously and brutally beaten to death by two named police officers who were known by the defendant city manager and police chief to be of a sadistic nature and addicted to the use of force and violence against prisoners in their custody. The court held that a good cause of action was stated against the defendant officials, since, despite notice of the vicious propensity of the killer-policemen, they had negligently failed to institute proceedings under the Oakland civil service system to suspend or remove them from city employment. The court emphasized that this result was not founded upon the principle of *respondent superior*, but was based on the view that the superior

¹ See text at 130-46 *supra*.

² CAL. GOVT. CODE § 1953.6. See also CAL. GOVT. CODE § 1954.

³ See statutes cited in the text at 133-46 *supra*.

⁴ 22 Cal.2d 226, 138 P.2d 12 (1943).

officer having the power to suspend or discharge subordinates (or to institute civil service proceedings to that end) was personally liable for his neglect in failing to exercise such power with reasonable vigilance. The principal significance of this basis of liability, of course, is that it avoids, in part at least, the harshness of the rule which would impose sovereign immunity as a barrier to suit on the ground of *respondeat superior* against the employing entity, and at the same time deny any effective relief from the tortfeasor due to his judgment-proof status.

The personal liability of the superior law enforcement officer in situations comparable to *Fernelius* is reasonably well established in the United States.⁵ However, counsel have attempted on many occasions to break through the barrier of sovereign immunity by seeking to hold the employing public entity also financially responsible for the negligent retention of the known unfit employee, but with little success. For example, the doctrine of sovereign immunity was held to preclude entity liability on this theory for injuries sustained at the hands of an Illinois policeman of ungovernable temper,⁶ a Missouri jailer known to have brutally beaten other prisoners without provocations,⁷ a Mississippi police officer employed with knowledge that he had previously been convicted of murder and aggravated assault,⁸ and a Tennessee chief of police who was known to be mentally unstable and dangerous.⁹ Other similar cases are noted below.¹⁰

In two jurisdictions, however, entity liability for negligent retention is accepted today. New York, having waived sovereign immunity, has imposed liability upon a city for retaining in its employ a police officer known to be an alcoholic, a troublemaker and a person of vicious disposition, who, while off duty, shot two persons with his service pistol which he was required to always carry with him.¹¹ In the absence of at least constructive notice of the employee's dangerous traits, however, a New York entity is not liable for hiring or retaining him in its employ,¹² although, of course, it may be liable for his torts in the course of duty by operation of *respondeat superior*. In Illinois, also, following the waiver of immunity in the *Molitor* case, a city was

⁵ Representative California cases include *Marshall v. County of Los Angeles*, 131 Cal. App.2d 812, 281 P.2d 544 (1955); *Baisley v. Henry*, 55 Cal. App. 760, 204 Pac. 399 (1921). See also *Sarafini v. City & County of San Francisco*, 143 Cal. App.2d 570, 300 P.2d 44 (1956); *Abrahamson v. City of Ceres*, 90 Cal. App.2d 523, 203 P.2d 98 (1949); *Van Vorce v. Thomas*, 18 Cal. App.2d 723, 64 P.2d 772 (1937). Authorities from other jurisdictions are collected in Note, *The Tort Liability of Public Officers For the Acts of Their Subordinates*, 1961 U. ILL. L. F. 505. See also *Kusah v. McCorkle*, 100 Wash. 318, 170 Pac. 1023 (1918); *David, Tort Liability of Public Officers*, 12 So. CAL. L. Rev. 127 (1939).

⁶ *Craig v. City of Charleston*, 180 Ill. 154, 54 N.E. 184 (1899).

⁷ *Hinds v. City of Hannibal*, 212 S.W.2d 401 (Mo. 1948).

⁸ *Anderson v. Vandersilce*, 240 Miss. 55, 126 So.2d 522 (1961).

⁹ *Bobo v. City of Kenton*, 186 Tenn. 515, 212 S.W.2d 363 (1948).

¹⁰ *City of Cummings v. Chastain*, 97 Ga. App. 13, 102 S.E.2d 97 (1958) (assault by officer known to be vicious); *Lamont v. Stavanaugh*, 129 Minn. 321, 152 N.W. 720 (1915) (policeman known to have savage and vicious propensities); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 44 S.E.2d 85 (1947) (prisoner in jail burned to death by negligence of jailer known to be brutally indifferent to well-being of prisoners); *Stouffer v. Morrison*, 400 Pa. 497, 162 A.2d 378 (1960) (assault by policeman known to have vicious disposition).

¹¹ *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947). Prior to the statutory waiver of sovereign immunity in 1929, the courts of New York had denied liability under comparable circumstances. See *Lacock v. City of Schenectady*, 224 App. Div. 512, 231 N.Y.S. 379 (1928).

¹² See *Pacheco v. City of New York*, 11 Misc.2d 80, 140 N.Y.S.2d 275 (1954), *aff'd*, 285 App. Div. 1031, 140 N.Y.S.2d 500 (1955).

held liable for negligent employment of an incompetent policeman without checking into his record of street brawls, including one felony conviction, and without giving him training for the job.¹³ The officer had beaten an allegedly drunk driver so violently with his nightstick as to destroy his vision in one eye. The decision appears to accurately reflect present Illinois law, for although subsequently reversed,¹⁴ the reversal was solely on the ground that *Molitor* had abrogated sovereign immunity prospectively only and hence the immunity doctrine was still applicable to the facts in the case, which had occurred before the *Molitor* decision.

The deterrent effect of tort law would seem to loom large among the policy considerations relevant to the present problem. It would manifestly be in the public interest to ensure, so far as possible, that police and law enforcement personnel are fully qualified and competent to carry out their responsibilities without injury to the public. Imposition of tort liability upon the employing entity where there has been a negligent failure to employ due care in these personnel matters, particularly in the kinds of cases above cited in which citizens were severely injured at the hands of police officers with a known propensity for brutal and vicious behavior, would seem to assist in implementing this policy. Moreover to impose tort liability upon public entities in such cases would be consistent with the tort liabilities of private employers. In private tort law, recovery against an employer is apparently recognized, notwithstanding the fact that the employee may not be personally liable (*e.g.*, the employee may not be legally negligent because a lower quantum of care is required of him as a minor or incompetent person than would apply to a normal adult) where the employer by hiring a substandard employee had created the risk of harm.¹⁵ Liability in such cases is not an application of the *respondeat superior* doctrine, but is imposition of primary liability founded on the employer's own fault. A similar analogy to private tort law is found in the cases holding the owner of a motor vehicle liable for injuries sustained through the negligent driving of a third party, where such liability is adjudged *not* under the limited vicarious liability provisions of the Vehicle Code applicable to owners,¹⁶ but for *personal* negligence in entrusting the owned vehicle to a driver known to be incompetent or inexperienced.¹⁷

The only apparent alternative to entity liability, which would to some extent still implement the risk-distributing function of tort law, would be a continuation of the personal liability of the superior officer for his negligent failure to institute disciplinary proceedings against the subordinate known to be unfit. This alternative, however, has several deficiencies. The superior officer may be without assets from which

¹³ *Peters v. Bellinger*, 22 Ill. App.2d 105, 159 N.E.2d 528 (1959) (relying on the original opinion handed down in *Molitor v. Kaneland Community Unit Dist. No. 302*, on May 22, 1959). See *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), opinion on rehearing, declaring abrogation of sovereign immunity to be prospective only. See Hickman, *Municipal Tort Liability in Illinois*, 1961 U. ILL. L. F. 475, 487-88.

¹⁴ *Peters v. Bellinger*, 19 Ill.2d 367, 166 N.E.2d 581 (1960).

¹⁵ RESTATEMENT, TORTS §§ 307, 308, 909 (1934); 2 HARPER & JAMES § 26.17.

¹⁶ CAL. VEH. CODE § 17151 (limiting owner's liability to maximum of \$5,000 for property damage and \$10,000 for personal injuries).

¹⁷ See, *e.g.*, *Caccamo v. Swanston*, 94 Cal. App.2d 957, 212 P.2d 246 (1949); *McCalla v. Grosse*, 42 Cal. App.2d 546, 109 P.2d 358 (1941). Compare RESTATEMENT, TORTS §§ 307, 380, 390; Annots. 168 A.L.R. 1364 (1947), 163 A.L.R. 1418 (1946).

the judgment can be satisfied, and even assuming (as is not always the case) that his official bond inures to the plaintiff's benefit, it may be so low in amount as to discharge only a small portion of the judgment.¹⁸ In addition, as we have already pointed out at an earlier stage in the present study, the Legislature has enacted a number of statutory provisions limiting the liability of public officers for torts of their subordinates,¹⁹ possibly to remove discouragements to the holding of part-time public office as a public service by qualified and successful individuals for whom the meager compensation, if any, is largely irrelevant. Finally, the official immunity doctrine has in recent years been expanded considerably so that it today is recognized to embrace the discretionary activities of governing boards and supervisory officers in the investigation and taking of disciplinary action against subordinate employees.²⁰ Although the courts have not yet explicitly faced the problem, it is quite possible that this expanded concept of official immunity has narrowed correspondingly the ambit of personal liability for negligent retention of unfit employees. The substantial policy considerations which support the official immunity doctrine—which considerations are at their strongest in relation to mere negligent omissions as contrasted to malicious or bad faith acts—argue the wisdom of seeking a solution to the negligent retention problem through the avenue of entity liability.

It is thus suggested that public entities in California be made liable in tort for the negligent employment or retention in employment of individuals whom responsible appointing or supervisory officials knew, or reasonably should have known, were unfit or incompetent, and who, because of such unfitness or incompetency, caused injury to person or property. In order to permit full exercise of discretion and judgment in personnel matters, without the fettering influence of fear of personal liability, it is also believed that the appointing and supervisory officers should themselves be accorded complete personal immunity from ultimate financial responsibility in such cases, save only in instances where their conduct was marked by malice, corruption or intentional wrongdoing. The internal pressures derived from the organizational power structure and the demands of administrative accountability to higher authority may be accepted as reasonably adequate to induce such officers, while acting in good faith, to exercise care and prudence in selecting and supervising subordinates, without the additional fear of personal financial loss.

Inadequate Supervision of Jail and Prisoners

The inmate of a jail or prison is in a peculiarly vulnerable position insofar as injuries sustained during incarceration are concerned. The demands of correctional policy require that he be subject to strict disciplinary control by prison officials; yet as an individual he retains a juridically cognizable interest in freedom from unlawful invasion of his person. As the Supreme Court of Arkansas put it, "A man does

¹⁸ See the discussion of official bonds in the text at 297-302 *supra*. The amounts of most bonds of officials of local public entities are fixed by local authorities. See CAL. GOVT. CODE §§ 24150, 36518, 37209. The official bond of the defendant chief of police in *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943), a wrongful death case, was only \$5,000.

¹⁹ See the statutory provisions discussed in the text, *supra* at 130-46.

²⁰ See *Lipman v. Brisbane Elementary School Dist.*, 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961); *Hardy v. Vial*, 48 Cal.2d 577, 311 P.2d 494 (1957).

not cease to be a human being because he is convicted and imprisoned.”²¹ Hence the question arises as to the extent to which tortious injuries sustained while in prison or jail should provide a basis of legal redress against the public entity operating the facility.

The imprisonment and supervision of convicts has traditionally been classified as a “governmental” function for which public tort liability does not obtain. Numerous cases, for example, document the rule that a prisoner may not recover from the public entity for the negligent failure of jail officials to supervise the activities of dangerous prisoners who were thus left free to assault and beat the plaintiff or to burn him sadistically.²² Again, it has repeatedly been held that the negligence of the jailer in failing to take precautions against fire could not provide a ground of recovery against the entity for serious injuries suffered when the jail burned down.²³ Even in cases where the public entity knowingly maintained its detention facility in a grossly unhealthy and unsanitary condition, the resulting illness or disease contracted by an inmate has been deemed nonactionable.²⁴ Finally, the fact that the entity, through its jail or prison personnel, required the prisoner to work with defective tools or appliances or under conditions exposing him to unusual risks of injury, and negligently failed to take precautions against such injury, has been deemed insufficient to make the entity responsible therefor.²⁵ The decisions in California, prior to *Muskopf*, are thoroughly consistent with the general rules elsewhere in this regard.²⁶

²¹ *St. Louis I.M. & S. Ry. v. Hydrick*, 109 Ark. 231, 234, 160 S.W. 196, 199 (1913). Compare CAL. PEN. CODE § 2650: “The person of a prisoner sentenced to imprisonment in the State prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced.”

²² *McAuliffe v. City of Victor*, 15 Colo. App. 337, 62 Pac. 231 (1900) (jail set afire by fellow convict); *Wilson v. City of Macon*, 88 Ga. 455, 14 S.E. 710 (1892) (assault by fellow prisoner); *Morgan v. City of Shelbyville*, 121 S.W. 617 (Ky. App. 1909) (beating by fellow prisoner); *Brown v. City of Shreveport*, 129 So.2d 540 (La. App. 1961) (assault by drunken fellow inmates of drunk tank); *Parks v. Town of Princeton*, 217 N.C. 361, 8 S.E.2d 217 (1940) (sadistic burning of plaintiff by fellow prisoner); *Besser v. County Comm’rs*, 58 Ohio App. 499, 11 Ohio Op. 404, 16 N.E.2d 947 (1938) (plaintiff injured by fellow prisoner seized with attack of epilepsy); *Davis v. City of Knoxville*, 90 Tenn. 599, 18 S.W. 254 (1891) (assault by fellow inmates of calaboose).

²³ *Williams v. Green Cove Springs*, 65 So.2d 56 (Fla. 1953); *Brown v. City of Craig*, 350 Mo. 336, 168 S.W.2d 1080 (1943); *Gentry v. Town of Hot Springs*, 227 N.C. 665, 44 S.E.2d 85 (1947).

²⁴ *Rose v. City of Toledo*, 1 Ohio C.C.R. (n.s.) 321, 14 Ohio C. C. Dec. 540 (1903); *Gullikson v. McDonald*, 62 Minn. 278, 65 N.E. 812 (1895); *Gray v. Mayor & Council of the City of Griffin*, 111 Ga. 361, 36 S.E. 792 (1900); *Attaway v. Mayor & Aldermen of the City of Cartersville*, 68 Ga. 740 (1882).

²⁵ *City of Atlanta v. Hurley*, 83 Ga. App. 879, 65 S.E.2d 44 (1951) (prisoner injured by cave-in while working on road as part of chain gang); *Ulrich v. City of St. Louis*, 112 Mo. 138, 20 S.W. 466 (1892) (prisoner in workhouse injured by mule known to have vicious propensity); *Savage v. City of Tulsa*, 174 Okla. 416, 50 P.2d 712 (1935) (convict injured when struck by car while painting streets without protection of suitable barricades or warnings).

²⁶ See *Grove v. County of San Joaquin*, 156 Cal. App.2d 808, 320 P.2d 161 (1958) (convict beaten by fellow prisoner; county held not liable for negligent supervision, nor was jail a dangerous and defective condition of property because of such negligent supervision); *Bryant v. County of Monterey*, 125 Cal. App.2d 470, 270 P.2d 897 (1954) (prisoner lost sight of right eye as result of injuries inflicted by “kangaroo court” in jail; held, county not liable for negligent failure to prevent operation of said “kangaroo court”); *Oppenheimer v. City of Los Angeles*, 104 Cal. App.2d 545, 232 P.2d 26 (1951) (complaint alleging impairment of plaintiff’s health, and mental anguish, from being confined in overcrowded, unsanitary and unfit jail, without decent food, held to state no cause of action against city). It should be noted that the rule formerly prevailing in California under which convicts were deemed within the scope of the Workmen’s Compensation Act with respect to injuries sustained while engaged in occupational work while in confinement (see California Highway Comm’n v. Industrial Accident Comm’n, 200 Cal. 44, 251 Pac. 808 (1926)) no longer obtains, in light of express statutory provisions to the contrary (see CAL. PEN. CODE §§ 2700, 2766), except in the case of prisoners engaged in fire suppression work (CAL. PEN. CODE § 4125.1).

The inability of the penal inmate to recover for his injuries from the public entity is matched by considerable difficulty in obtaining relief from the individual prison officials whose negligence caused the injury. The courts have erected numerous hurdles to recovery in such cases, such as imposing on the plaintiff the burden of overcoming a weighty presumption that public duty was regularly performed,²⁷ classifying the official's conduct as involving discretion and judgment so that he is protected by the official immunity doctrine,²⁸ permitting liability to be adjudged only if elements of malice or wilful misconduct were present,²⁹ or ruling that the officer's delict consisted only of a breach of a duty owed to the public generally and not to the plaintiff.³⁰

In jurisdictions where personal liability of the jailer is admitted in such cases³¹—and California appears to be such a jurisdiction³²—the remedy may, of course, be illusory in that the judgment is uncollectible. Even assuming the contrary to be true, however, the convicted felon may experience difficulty in prosecuting his remedies in any case, for the loss of his civil rights will ordinarily bar him from instituting litigation while in prison, except with the approval of the Adult Authority;³³ and the tolling of the statute of limitations³⁴ in his behalf is often of little comfort in view of the impermanence of necessary evidence with which to prove his cause of action when he has ultimately been returned to society.

Governmental liability for negligent supervision of prisoners, however, is not unknown in the United States. It is true that the Federal Tort Claims Act has been construed as not applicable to prisoners injured as the result of inadequate supervision of their activities while in prison, chiefly on the ground that liability of the United States is imposed by the Act only when a private person would be liable "under like circumstances."³⁵ Private persons, according to the accepted view, would never be found holding other persons in penal servitude and hence no comparable private liability exists.³⁶ The cited cases, however,

²⁷ See, e.g., *Riggs v. German*, 81 Wash. 128, 142 Pac. 479 (1914).

²⁸ See *Gentry v. Town of Hot Springs*, 227 N.C. 665, 44 S.E.2d (1947); *Liming v. Holman*, 10 N.J. Misc. 582, 160 Atl. 32 (1932).

²⁹ See *Moye v. McLawhorn*, 208 N.C. 812, 182 S.E. 493 (1935); *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918); *Richardson v. Capwell*, 63 Utah 616, 176 Pac. 205 (1918).

³⁰ See *Hipp v. Farrall*, 173 N.C. 167, 91 S.E. 831 (1917). Compare *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918).

³¹ See, e.g., *Smith v. Miller*, 241 Iowa 625, 40 N.W. 2d 597 (1950) (prisoner suffocated in jail fire due to negligence in care of prisoners by sheriff); *People ex rel. Coover v. Gunther*, 105 Colo. 37, 94 P.2d 699 (1939); *Eberhart v. Murphy*, 110 Wash. 158, 188 Pac. 17 (1920); Annot. 14 A.L.R.2d 353 (1950); Note, 34 IND. L. J. 609 (1959).

³² See CAL. PEN. CODE §§ 147, 2652, 4019.5; *Fernelius v. Pierce*, 22 Cal.2d 226, 138 P.2d 12 (1943); Note, 28 CALIF. L. REV. 780 (1940).

³³ As to the loss of civil rights in California, and the authority of the California Adult Authority to restore such rights, see CAL. PEN. CODE §§ 2600-2604; Note, 26 So. CAL. L. REV. 425 (1953). Compare *McCullum v. Mayfield*, 130 F. Supp. 112 (N.D. Cal. 1955) (holding that convicted felon under California law loses right to maintain ordinary civil action as plaintiff, absent restoration of such right by Adult Authority).

³⁴ See CAL. CODE CIV. PROC. § 352(3).

³⁵ *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Va. 1953), relying on 28 U.S.C. § 2674 (1959). See, to the same effect, *Berman v. United States*, 170 F. Supp. 107 (E.D.N.Y. 1959). Compare *Lack v. United States*, 262 F.2d 167 (8th Cir. 1958).

³⁶ See *Sigmon v. United States*, 110 F. Supp. 906, 910 (W.D. Va. 1953): "A private individual would never find himself 'under like circumstances' to those alleged in the complaint, because no private individual has a legal right to hold any other private individual in penal servitude." This case, and others of like import, reveal the strong impact of the decision in *Feres v. United States*, 340 U.S. 135 (1950) (holding the Federal Tort Claims Act inapplicable to injuries sustained by servicemen in the course of military duties). See *Woody, Recovery by Federal Prisoners Under the Federal Tort Claims Act*, 36 WASH. L. REV. 338 (1961); Comment, 63 YALE L. J. 418 (1954).

have involved injuries sustained by federal prisoners while engaged in prison work projects,³⁷ and the courts have, in all likelihood, been influenced in reaching a conclusion of nonliability by the fact that a special statutory procedure has been established by Congress for compensating prisoners for such industrially related injuries.³⁸ When the injury to the inmate resulted from circumstances wholly unrelated to his status as a prisoner (*i.e.*, an automobile accident caused by negligence of a federal employee while the plaintiff prisoner was riding as a passenger on a truck on an Air Force base), however, the peculiarity of the penal servitude status of the plaintiff was deemed immaterial and recovery under the Act permitted.³⁹ Likewise, recent decisions have intimated that the Act authorizes recovery for injuries sustained through an assault by a fellow-prisoner where negligent failure to properly supervise and guard against such attacks is chargeable to prison authorities.⁴⁰ The latter cases rather than the former group may forecast the future direction of the law in this regard, for there are indications of a developing trend to interpret the "like circumstances" requirement of the Federal Tort Claims Act liberally in favor of allowing recovery to an injured plaintiff even where no comparable private relationship giving rise to tort liability appears to exist.⁴¹

In a few state jurisdictions, governmental tort liability for negligent jail supervision has been recognized. Several early cases from North Carolina, for example, found a sufficient basis for such liability in a statutory duty to provide clean and sanitary jail facilities, where injury resulted from the failure of the entity to comply therewith.⁴² An early federal case arising in Virginia reached the same result but chiefly upon the ground that the particular jail was being maintained as a voluntary (and hence "corporate" or "proprietary") matter rather than pursuant to any mandatory statutory duty to do so.⁴³ More recently, the Supreme Court of Florida held a municipality liable for the death of a jail inmate who suffocated in a fire due to lack of adequate precautions to protect or evacuate prisoners in such emergencies. The case reaching this result, *Hargrove v. Town of Cocoa Beach*,⁴⁴ found it necessary to abolish the sovereign immunity doctrine, and the governmental-proprietary distinction embodied therein, as applied to

³⁷ *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Va. 1953) (plaintiff was injured as a consequence of negligence by a Government employee in instructing him to use an emery wheel known to be defective). In *Lack v. United States*, 262 F.2d 167 (8th Cir. 1958), the plaintiff had been ordered to make repairs on an overhead garage door located in the penitentiary, without warning of its dangerous condition. The facts of *Berman v. United States*, 170 F. Supp. 107 (E.D.N.Y. 1959) do not reveal the relevant circumstances.

³⁸ See 18 U.S.C. § 4126, authorizing compensation to be paid to prison inmates or their dependents for injuries suffered in connection with work under the Federal Prison Industries program. In *Sigmon v. United States*, 110 F. Supp. 906, 911 (W.D. Va. 1953), the court, after quoting Section 4126, states: "It seems fair to assume that it was the intention of Congress to provide this measure of compensation for injuries to federal prisoners, and only this measure of compensation." See Note, 34 IND. L. J. 609, 619-20 (1959).

³⁹ *Lawrence v. United States*, 193 F. Supp. 243 (N.D. Ala. 1961).

⁴⁰ *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954). See also, *Rufino v. United States*, 126 F. Supp. 132 (S.D.N.Y. 1954).

⁴¹ See Note, *Federal Government Liability "As a Private Person" Under the Tort Claims Act*, 33 IND. L. J. 339 (1958).

⁴² *Shields v. Town of Durham*, 118 N.C. 450, 24 S.E. 794 (1896); *Lewis v. City of Raleigh*, 77 N.C. 229 (1877). See also *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). Recent decisions in North Carolina, however, suggest that these early cases are no longer authoritative. See *Parks v. Town of Princeton*, 217 N.C. 361, 8 S.E.2d 217 (1940).

⁴³ *Edwards v. Town of Pocahontas*, 47 Fed. 268 (W.D. Va. 1891).

⁴⁴ 96 So.2d 130 (Fla. 1957).

municipalities, in order to conclude that the town was liable in tort.⁴⁵ In New York State, the immunity doctrine has long since been abrogated by statute, and public entities are uniformly held liable for negligent supervision of jail and prison inmates.⁴⁶

Reconciliation of the competing interests in effective penology and in protection to the individual prisoner is not an easy task, for rules of tort liability should not lightly expose the administration of jails and prisons to review by courts and juries unfamiliar with disciplinary and rehabilitative problems encountered therein. General policy decisions with respect to methods for treating prisoners are presumably arrived at by personnel who have given careful study to alternative programs and have arrived at an informed decision as to what is most consistent with sound public policy. Such decisions, for example, entail the administration of special punishments for infractions of discipline (*e.g.*, loss of exercise privileges, reduced food allotments, solitary confinement, etc.) which, under some circumstances, may result in discomfort, mental anguish or even physical injury to the prisoner. To permit tort liability in such cases would tend to disrupt and interfere substantially with formulation and execution of correctional policy. It would seem, on the whole, that no tort liability should be admitted for damages sustained as the consequence of conditions which are common to all inmates and which simply represent a reasonable application of general policy determinations by responsible prison or jail authorities with respect to the administration of such institutions.

On the other hand, most of the cases cited in the preceding discussion represent situations in which serious personal injuries, and sometimes death, resulted from want of reasonable care at the operational level, by the officers, guards and deputies actually in charge of daily supervision and care of prisoners. In most instances, the tortious conduct in question apparently was a violation of express or implied duties of the jail administrator—for example, a duty to prevent fighting among inmates,⁴⁷ to protect prisoners in case of fire,⁴⁸ to provide a decent minimum of the necessities of life and a reasonable level of sanitation.⁴⁹

General standards and policies for jail and prison administration are, in California, set by a combination of statutes and administrative

⁴⁵ The abolition of sovereign immunity in the *Hargrove* case has subsequently been limited to municipalities only. See *Moreno v. Aldrich*, 113 So.2d 406 (Fla. 1959); *Spangler v. Florida State Turnpike Authority*, 106 So.2d 421 (Fla. 1958).

⁴⁶ *Scarnato v. State of New York*, 298 N.Y. 376, 83 N.E.2d 841 (1949) (prisoner injured in fall from ladder while working in prison); *Leonhardt v. State of New York*, 264 App. Div. 808, 34 N.Y.S.2d 723 (1942) (reform school inmate injured by falling tree being chopped down by fellow inmates); *White v. State of New York*, 260 App. Div. 413, 23 N.Y.S.2d 526 (1940), *aff'd*, 285 N.Y. 723, 34 N.E.2d 896 (1941) (prisoner's eye splashed by lye, causing loss of sight, while clearing drain with defective plunger); *Sullivan v. State of New York*, 257 App. Div. 893, 12 N.Y.S.2d 504 (1939), *aff'd*, 281 N.Y. 718, 23 N.E.2d 543 (1939) (mutilation of prisoner's hand while repairing bread slicing machine); *King v. New York*, 202 Misc. 868, 117 N.Y.S.2d 386 (Ct. Cl. 1952) (prisoner injured when blowtorch being used in prison training course exploded).

⁴⁷ Compare CAL. PEN. CODE §§ 673, 2652, forbidding jail and prison officials to permit "any lack of care whatever which would injure or impair the health of the prisoner, inmate or person confined"; CAL. PEN. CODE § 4019.5, outlawing the "kangaroo court" and "sanitary committee" among jail inmates.

⁴⁸ Compare CAL. PEN. CODE § 4011.

⁴⁹ Compare CAL. PEN. CODE §§ 4007, 4015.

regulations.⁵⁰ Although as already suggested, no entity liability should ensue from the determination of such policies and standards or from their reasonable enforcement, it would not seem to be inconsistent with full administrative freedom of action to regard as actionable any unreasonable departures from those standards and policies, in the course of daily administration which foreseeably expose prisoners to a risk of injury, where injury actually occurs as a result. This is not to say that tort liability should result from a mere deviation from strict and literal adherence to applicable rules and regulations. Obviously, a degree of discretionary flexibility and adaptability to changing operational circumstances is an indispensable aspect of any form of successful penal administration, and rules and regulations seldom, if ever, can anticipate with detailed language the precise needs of any given future situation. One can reasonably argue, however, that *unreasonable* departures from established standards and policies, interpreted from the viewpoint of the reasonably prudent jail or prison employee, which foreseeably create a risk of injury to prisoners, should be a basis for tort liability of the governmental entity. Liability, as thus narrowly defined, would seem to be an incentive to more careful detentional care, and thus tend to promote the underlying protective correctional and rehabilitative objectives of modern civilized penology.

Negligent Failure to Provide Medical Aid to Prisoner

The California Penal Code contains several provisions which expressly contemplate the existence of an affirmative duty on the part of jail and prison officials to render adequate and appropriate medical care to prisoners within their custody. Section 673 of the Penal Code, for example, explicitly declares that "It shall be unlawful . . . to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined" in any state, city or county prison, jail or other detentional institution. A similar prohibition is repeated in Section 2652 with explicit reference to the state prisons. Section 2690 authorizes the removal of prisoners from state penal institutions for the purpose of "furnishing to the person medical treatment not available at the prison or institution" in which he is confined. Any county or city jail having a daily average occupancy of more than 100 inmates is required by Section 4023 to have "available at all times a duly licensed and practicing physician for the care and treatment of all persons confined therein," at the expense of the county or city. Sections 4011 and 4011.5 establish procedures for the removal from a city or county jail of prisoners therein who are in need of medical treatment or hospitalization which cannot be provided in the jail itself, and the providing of such treatment in the county hospital. Under Section 4012, a procedure is established for removing prisoners from one jail to another when a contagious disease breaks out which the jail physician determines may endanger the health

⁵⁰ See 39 CAL. JUR.2d *Prisons and Prisoners* §§ 21, 33 (1957). See CALIFORNIA BOARD OF CORRECTIONS, MINIMUM JAIL STANDARDS, INCLUDING STANDARDS FOR FEEDING, CLOTHING AND BEDDING (1952). For detailed information on the variable quality of jails in California, see CALIFORNIA SPECIAL STUDY COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, THE COUNTY JAILS: AN EVALUATION (1957). Compare, generally, CALIFORNIA SPECIAL CRIME STUDY COMMISSION, FINAL REPORT ON ADULT CORRECTIONS AND RELEASE PROCEDURES (1949).

of the inmates. There can be little doubt of the existence of a duty on the part of jail authorities to provide reasonable medical care to prisoners clearly in need of such care.¹

Notwithstanding the existence of such duty, however, the California courts have (in the pre-*Muskopf* period) found the sovereign immunity doctrine to be a complete bar to liability of a public entity whose officers had failed to conform thereto. In *Bryant v. County of Monterey*,² for example, the plaintiff prisoner had been severely beaten by members of a "kangaroo court" in the county jail. The complaint alleged (and on demurrer the allegations must be taken as true) that the jail officials (a sheriff and his deputy), with knowledge that he was in need of medical treatment, negligently failed for a space of three and one-half days to provide such treatment, with the result that plaintiff permanently lost the sight of his left eye. Holding the operation of the jail to be "a purely governmental function," the court held the county entirely immune from liability, citing the earlier decision in *Wood v. Cox*.³ The latter case was a wrongful death action, in which the complaint alleged that city police officers had lodged an individual, under a "public drunk" charge, in the city jail where he lay unconscious for several hours and then died. During this time, other inmates of the jail, apparently moved by the appearance of the dying man, repeatedly requested that a doctor be called. No medical aid was summoned. It subsequently was found that the prisoner had died from a ruptured blood vessel apparently sustained in an automobile accident occurring shortly prior to his arrest. Conceding that the failure to provide medical care was negligent, the court stated that it was "compelled by the authorities" to hold the city not liable.⁴

The cited California cases are consistent with the great weight of case law in the United States, which denies liability of the public entity itself⁵ although occasionally admitting personal liability of the negligent jail officials.⁶ Even under the Federal Tort Claims Act, the fact that prisoners are in a unique status of penal servitude which is unmatched by private counterparts, coupled with the "discretionary function" immunity provided by the Act, has led to a denial of relief in

¹ See, e.g., *People v. Armstrong*, 188 Cal. App.2d 745, 749, 10 Cal. Rptr. 618, 620 (1961) ("The purpose of section 4100.5 of the Penal Code is obviously a humanitarian one to assure that prisoners in need of medical attention will receive the same . . ."); *McCollum v. Mayfield*, 130 F. Supp. 112, 115 (N.D. Cal. 1955) (holding complaint stated good cause of action under Federal Civil Rights Act, 42 U.S.C. § 1983, where it alleged deliberate refusal of jailer to provide medical care to inmate of county jail who was known to have been seriously injured, since "A refusal to furnish medical care when it is clearly necessary, such as alleged here, could well result in the deprivation of life itself [and on the facts alleged] . . . amounts to the infliction of permanent injuries, which is, to some extent, a deprivation of life, of liberty and of property").

² 125 Cal. App.2d 470, 270 P.2d 897 (1954).

³ 10 Cal. App.2d 652, 52 P.2d 565 (1935).

⁴ *Id.* at 653, 52 P.2d at 565, relying heavily on 6 *McQUILLIN, MUNICIPAL CORPORATIONS*, § 2591 (2d ed. 1928) and *Nisbet v. City of Atlanta*, 97 Ga. 650, 25 S.E. 173 (1895).

⁵ See *Britt v. Ocala*, 65 So.2d 753 (Fla. 1953), decided before the abolition of municipal immunity in *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); *Bogart's Adm'x v. City of Newport*, 234 Ky. 410, 28 S.W.2d 489 (1930); *Wittenbrook v. City of Columbus*, 33 Ohio L. Abs. 586, 35 N.E.2d 980 (1941); *Kelley v. Cook*, 21 R.I. 29, 41 Atl. 571 (1898); *McKenzie v. City of Florence*, 234 S.C. 428, 108 S.E.2d 825 (1959).

⁶ See *Annots.* 61 A.L.R. 569 (1929), 50 A.L.R. 268 (1927), 46 A.L.R. 94 (1927).

such medical cases against the United States.⁷ A Florida decision some twenty-five years ago, however, found a basis for municipal liability, notwithstanding the governmental nature of the jail function, where a prisoner in the city jail contracted a contagious venereal disease as a result of negligent failure to comply with a statute requiring isolation of prisoners afflicted with such diseases. Since the statutory duty was a mandatory one, its violation was actionable.⁸ The only substantial body of decisional law admitting liability of public entities for negligent failure to provide medical care to prisoners, as might be expected, is found in the decisions from New York. There, in fact, situations closely comparable to those involved in the California cases previously discussed, liability of the governmental entity has been affirmed to exist in view of the general abolition of sovereign immunity in that state.⁹

The duty of jail and prison authorities in California to provide medical care to persons in their custody appears to be reasonably clear;¹⁰ and there can be no dispute as to the propriety of recognizing the existence of such duty, in view of the relative helplessness of the convicted person to obtain such care through his own resources. The California Legislature has already required the State to accept full financial responsibility for medical malpractice by State personnel actually administering to the needs of inmates,¹¹ and has authorized local entities to do the same through purchase of liability insurance.¹² A failure to provide medical attention when it is needed, however, can have equally (and, indeed, in many cases far more) disastrous consequences to life and health, and would seem to deserve similar legislative recognition.

Acceptance of financial responsibility for tortious failure to provide medical care to prisoners would, of course, be a logical corollary to the existing statutory duty to provide such care. It should be recognized, however, that imposition of such liability should not be permitted to interfere with the reasonable exercise of discretion and judgment of jail and prison authorities in determining general standards of health care. An administrative decision to provide a routine medical or dental checkup of prisoners at periodic intervals, for example, should not result in liability where a serious illness (*e.g.*, a cancerous growth) develops undiscovered between checkups, although it would have been detected had such checkup examinations been held at more frequent intervals. The breaking out of a contagious disease in the jail or prison

⁷ See *Jones v. United States*, 249 F.2d 864 (7th Cir. 1957); *Morton v. United States*, 228 F.2d 431 (D.C. Cir. 1955); *Van Zuch v. United States*, 118 F. Supp. 468 (E.D.N.Y. 1954). Recent decisions in the Second Circuit, however, have allowed recovery. *Muniz v. United States*, 305 F.2d 285 (2d Cir. 1962); *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962). See *Woody, Recovery by Federal Prisoners Under the Federal Tort Claims Act*, 36 WASH. L. REV. 333 (1961).

⁸ *Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150 (1937). See also *Bourgeois v. County of Dade*, 99 So.2d 575 (Fla. 1957).

⁹ See *O'Grady v. City of Fulton*, 4 N.Y.2d 717, 171 N.Y.S.2d 108, 148 N.E.2d 317 (1958), *affirming* 4 App. Div.2d 743, 164 N.Y.S.2d 935 (1957); *Dunham v. Village of Canistota*, 303 N.Y. 498, 104 N.E.2d 872 (1952); *Tierney v. State of New York*, 266 App. Div. 434, 42 N.Y.S.2d 877 (1943), *aff'd*, 292 N.Y. 523, 54 N.E.2d 207 (1944).

¹⁰ See CAL. PEN. CODE §§ 673, 2652, 2690, 4011, 4011.5, 4012, 4023, discussed in the text at 426-27 *supra*.

¹¹ CAL. GOVT. CODE § 2002.5, providing that in malpractice actions brought against state officers or employees licensed in the healing arts, the State shall pay any judgment or settlement against the defendant; provided that such duty "shall be limited to those [judgments and settlements] arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public." (Emphasis added.)

¹² CAL. GOVT. CODE § 1231.

undoubtedly requires the appropriate medical authorities to exercise sound discretion in determining whether its existence is likely to endanger the health of other inmates to an extent sufficient to justify an application for a court order authorizing their removal to another place of detention pursuant to Section 4012 of the Penal Code; but a possible threat of entity tort liability should not be permitted to influence the way in which this policy-permeated medical discretion is exercised, particularly when it is already, by statute, subject to judicial supervision and review. In short, there would appear to be certain types of decisions involving the general standard of medical care of prisoners which are so highly discretionary and involve such broad considerations of administrative policy that they should be deemed nonactionable even where they subsequently prove to have been mistaken.

In the daily correctional or custodial supervision of individual prisoners, however, an adequate basis for entity liability in tort would seem to be found in the normal standard of reasonable care. The New York decisions have encountered no noticeable difficulty in applying customary tort principles in this area. In the leading New York case of *Dunham v. Village of Canisteo*,¹³ for example, an elderly citizen, who later stated to the police that he had suffered a fall, was found lying unconscious on the floor of a fire station late in the afternoon on a cold wintry day. Thinking him to be intoxicated, the police lodged him in a jail until he should recover, although no formal drunk charge was made. During the night, the injured man requested the aid of a doctor and repeatedly complained of pain, but no medical aid was obtained until some 18 hours after he was taken to the jail. He died about a week later, and there was competent expert testimony that the delay in obtaining medical aid had contributed, together with serious internal injuries and the onset of pneumonia, to his death. The Court of Appeals held the defendant village liable on customary principles of negligence. Pointing out that the village authorities were under a duty to exercise ordinary care to the individual once they had taken him into custody, the court per Conway, J., stated:

The care required in the instant case included the procurement of medical assistance, if the village officials knew or should have known that the deceased was hurt or injured and in need of a doctor. . . . Our examination of the record has disclosed evidence upon which the jury could find that the village authorities, if they did not know the nature and extent of the decedent's injuries, knew at least that he was in pain, that he had fallen down, and that he was in need of medical attention. With such knowledge, under the circumstances, the village authorities were under a duty to obtain medical care for the deceased.¹⁴

It is submitted that the standard of liability articulated in the New York cases would strike a defensible balance between the need for administrative discretion and adequate protection of the prisoner's interests, and should be adopted in California. Under it, public entities would be liable for failure to provide medical care if, but only if, the officials in actual custodial charge of the jail or prison inmate actually

¹³ 303 N.Y. 498, 104 N.E.2d 872 (1952).

¹⁴ *Id.* at 502, 104 N.E.2d at 874.

knew, or had knowledge of facts from which they reasonably should have known, that the individual was in need of immediate medical attention.¹⁵ The issue would, of course, ordinarily be a question of fact so that evidence would be admissible to prove by way of defense that the guard or jailer in good faith believed, with reason, that the prisoner was "faking" an illness or injury. Manifestly the officer in charge, not being medically trained, must exercise a measure of uninformed discretion under whatever circumstances may arise; and sound personnel policy might well indicate that he should not be personally liable if that discretion is later found to have been negligently exercised, provided he acted in good faith and without malice or wrongful intent. Liability upon the employing entity, on the other hand, would tend to effectuate the existing statutory duty to provide reasonable medical care by providing an incentive to the development of internal administrative procedures, where requests for medical aid are made by prisoners, to reduce the risk of liability.

Negligence of Prison or Jail Officials in Permitting Escape

Attention has previously been directed to cases in which the courts have wrestled with the question whether public entities should be held liable for injuries sustained at the hands of mentally ill persons who escape from public mental institutions because of negligence in guarding them.¹⁶ A closely analogous issue involves the liability of the entity for negligently permitting escapes by convicts who then injure members of the public.

The only decision which has been discovered bearing on this point is *Williams v. State of New York*,¹⁷ in which no basis for entity liability was found to exist. There a man named Kennedy, who had been convicted of robbery with a toy pistol, escaped from a minimum security prison farm as a consequence of the negligent absence of the guard assigned to his work party. Subsequently, using a knife as a weapon, he forced a passing motorist to drive him some distance away in order to make his escape good; but in so doing, the motorist was subjected to such fear as to bring on a brain hemorrhage which caused his death. A judgment for wrongful death awarded by the New York Court of Claims was reversed on appeal on the ground that there was no duty on the part of the State to protect the public from exposure to risk of injury from this escaped convict, since, according to the court, "nothing in Kennedy's record . . . gave any indication that he was likely to wander from the prison and assault members of the public."¹⁸ On this basis, the court found it possible to distinguish the New York decisions sustaining public entity liability for injuries suffered at the hands of

¹⁵ *Ibid.* See also *O'Grady v. City of Fulton*, 4 N.Y.2d 717, 171 N.Y.S.2d 108, 148 N.E.2d 317 (1958), *affirming* 4 App. Div.2d 743, 164 N.Y.S.2d 985 (1957) (citizen arrested for public intoxication who subsequently died as a result of negligent failure to procure medical attention—so explained in *Schuster v. City of New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958)); *Tierney v. State of New York*, 266 App. Div. 434, 42 N.Y.S.2d 877 (1943), *aff'd*, 292 N.Y. 523, 54 N.E.2d 207 (1944) (citizen who had been injured in automobile accident and was dazed and uncoordinated, arrested on charge of drunk driving, and denied adequate medical care until about 24 hours after arrest).

¹⁶ See text at 390-92 *supra*.

¹⁷ 308 N.Y. 548, 127 N.E.2d 545 (1955). The Nebraska Legislature has accepted liability for torts of escapees in selected cases. See, e.g., Neb. Stat. 1951, ch. 93, p. 720; Neb. Stat. 1947, ch. 202, p. 660.

¹⁸ *Id.* at 556, 127 N.E.2d at 550.

mental patients who had been negligently permitted to escape notwithstanding their known propensity for violent and harmful conduct.¹⁹

The stated ground of decision in *Williams* appears to be inadequate. Surely there is a reasonable basis for anticipating that almost any prisoner may, under some circumstances, attempt to escape unless precautions are taken, and the very fact that a guard had been posted on Kennedy's work party indicates the state's realization of this possibility. To be sure, a convict whose record indicates a docile temperament with no propensity for violence may not expose the public to much risk of harm once his escape has been made good. But, as one commentator on the *Williams* case has pointed out,

. . . in effecting the escape, or upon being recaptured, assaultive actions are readily foreseeable. With possible freedom from confinement in the offing, the escapee is quite likely to use force and endanger the lives and property of those who stand in his way. The escape itself, aside from the purpose of confinement or the escapee's history, creates a foreseeable risk of harm to members of the public . . . and is independent of the purpose of confinement or the individual's known propensities.²⁰

The decision of the Court of Appeals can probably be better understood in light of what it conceived to be the underlying policy considerations relevant to the issue of liability. In addition to pointing out the dangers of imposing a "heavy responsibility" upon the state, the court stated:

But, even beyond the fact that fundamental legal principles will not permit affirmance here, public policy also requires that the State be not held liable. To hold otherwise would . . . dissuade the wardens and principal keepers of our prison system from continued experimentation with "minimum security" work details—which provide a means for encouraging better-risk prisoners to exercise their senses of responsibility and honor and so prepare themselves for their eventual return to society. Since 1917, the Legislature has expressly provided for out-of-prison work, Corrective Law § 182, and its intention should be respected without fostering the reluctance of prison officials to assign eligible men to minimum security work, lest they thereby give rise to costly claims against the State, or indeed inducing the State itself to terminate this "salutary procedure" looking toward rehabilitation.²¹

It must be admitted that these policy considerations are indeed weighty ones. California, too, has a vital interest in the development of more effective techniques of treatment and rehabilitation of convicts so that they may resume a useful role in society, and much of the State's

¹⁹ See, e.g., *Weihls v. State of New York*, 267 App. Div. 233, 45 N.Y.S.2d 542 (1943). Compare *Scolavino v. State of New York*, 297 N.Y. 460, 74 N.E.2d 174 (1947); *Jones v. State of New York*, 267 App. Div. 254, 45 N.Y.S.2d 404 (1943). For a comparative discussion of the problems of liability for torts of escaped mental patients, as contrasted with torts of escaped convicts, see Note, 34 *NEB. L. REV.* 660 (1955).

²⁰ Note, 7 *HASTINGS L. J.* 330, 331 (1956).

²¹ *Williams v. State of New York*, 308 N.Y. 548, 557, 127 N.E.2d 545, 550 (1955).

system of penology is directed to that end.²² However, it is submitted that the New York court's remarks were misdirected in the *Williams* case. The quoted policy considerations undoubtedly support a conclusion that the State should not be held liable for the policy determination to maintain minimum security detentional facilities and extramural work parties, road gangs or farm labor details as a part of the over-all program of correction and rehabilitation. Indeed, in the process of developing the most constructive and appropriate techniques for handling of different classes of convicts, reasonable decisions may even be made to establish correctional facilities without guards, where carefully selected prisoners are housed under an "honor" system with only periodic administrative supervision. No liability should result from this type of discretionary policy decision, for as the New York court properly points out, such liability might dissuade the State from employing the most salutary methods of penology.

To this extent, the *Williams* decision is believed to be thoroughly sound. However, the court therein appears to have overlooked the fact that the plaintiff was not seeking to impose liability for negligence in the determination to utilize the minimum security techniques with respect to Kennedy, but solely for the negligence of the guard assigned to his work party. All that would be required by a holding of liability in such cases would be the burden of reasonable care in the execution of whatever program of correction and rehabilitation is decided upon at the policy and planning level. Had the guard in *Williams* exercised reasonable vigilance within the framework of his duties, the state would not have been liable for Kennedy's escape since there would have been no actionable negligence. In short, it would seem to be consistent with the New York court's policy discussion to impose liability for absence of ordinary care in the actual administration of the minimum security correctional program, without interfering with or imposing undue burdens upon the untrammelled formulation of correctional policy. It should not be assumed that the responsible authorities contemplate that such correctional programs will be carelessly administered. Assuming the intention is to require administration in the exercise of ordinary care, policy objections to imposition of tort liability would appear to be reduced to those applicable to waiver of sovereign immunity generally.

For the stated reasons, it is believed that *Williams* is not sound and that California should assume public liability for the reasonably foreseeable torts of convicts and prisoners who are negligently permitted to escape from custody.

²² See, e.g., CAL. PEN. CODE §§ 2000-2002 (California Institution for Men at Chino), §§ 2035-2042 (Deuel Vocational Institution), §§ 2045-2045.6 (correctional training facilities), §§ 2046-2046.6 (medium security prisons), §§ 2048-2048.6 (California Correctional Institution at Tehachapi), § 2054 (vocational education for inmates), §§ 2760-2774 (employment of prisoners at road camps), §§ 2780-2792 (employment of prisoners in public parks and forests), §§ 4100-4135 (county industrial farms and road camps), §§ 4200-4227 (joint county road camps). On current trends in correctional policy generally, see CALIFORNIA SPECIAL CRIME STUDY COMMISSION, FINAL REPORT ON ADULT CORRECTIONS AND RELEASE PROCEDURES (1949); Symposium, *Crime and Correction*, 23 LAW & CONTEMP. PROB. 583 (1953).

Wrongful Infliction of Personal Injury or Property Damage by Policemen in Line of Duty

The overwhelming weight of authority in the United States holds police officers, as well as their bondsmen, personally liable for negligent or other wrongful acts causing personal injury or property damage to members of the public.²³ For example, a policeman who negligently fires his gun in an attempt to make an arrest, and accidentally strikes and injures an innocent bystander, generally is personally liable for the damages sustained thereby.²⁴ Under some circumstances, however, there may be statutory limitations upon such personal liability, such as the provision of the California Vehicle Code which immunizes the driver of an authorized emergency vehicle from personal liability.²⁵

The established theory that law enforcement is a "governmental" function has led to a considerable body of law holding public entities immune from liability for the torts of their police officers,²⁶ notwithstanding the personal liability of the latter. Municipalities, for example, have been held not responsible for damages sustained when a police officer carrying out his duties negligently fired a shot which struck a bystander,²⁷ negligently failed to control a horse which bolted,²⁸ negligently roped off a portion of a street without adequate warning to users,²⁹ negligently placed a wire screen across a stream in an effort to find a dead body,³⁰ and negligently cleared an obstruction from the street in such a way as to cause injury to a passer-by.³¹ Intentional torts of police officers have likewise been deemed within the sovereign immunity doctrine, as where policemen made wrongful threats of criminal prosecution on groundless charges,³² or wrongfully trespassed upon and caused injury to plaintiff's property.³³

Torts of peace officers of the type here under discussion would appear not to invoke any substantial arguments on grounds of law enforcement policy for continuation of the immunity doctrine. In the rare case where the police officer's negligence occurred while he was acting in a "proprietary" capacity, for example, the courts have ex-

²³ Annot., 60 A.L.R.2d 873 (1958); Note, 28 U. CINC. L. REV. 488 (1959); Note, 21 U. PITT. L. REV. 132 (1959).

²⁴ Liability may be imposed on the basis of negligence, where officer was not justified in seeking to shoot the suspect (see *Cerri v. United States*, 80 F. Supp. 831 (N.D. Calif. 1948); *Young v. Kelley*, 60 Ohio App. 382, 13 Ohio Op. 1, 21 N.E.2d 602 (1938); *Day v. Walton*, 199 Tenn. 10, 281 S.W.2d 685 (1955)) or on the basis that it was negligent to attempt to shoot under the circumstances, even if justification otherwise existed for attempting to shoot the suspect in question. *Davis v. Hellwig*, 21 N.J. 412, 122 A.2d 497 (1956) (crowded street); *Cook v. Hunt*, 178 Okla. 477, 63 P.2d 693 (1936) (office of bank); *Shaw v. Lord*, 41 Okla. 347, 137 Pac. 885 (1914) (lobby of hotel).

²⁵ CAL. VEH. CODE § 17004, discussed in the text at 166 *supra*.

²⁶ See 13 McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.51, 53.79, 53.80 (3rd ed. 1950). Exceptions exist, however, as in New York, *infra* note 35, and in Florida, see *Thompson v. City of Jacksonville*, 130 So.2d 105 (Fla. App. 1961).

²⁷ *Culver v. City of Streator*, 130 Ill. 238, 22 N.E. 810 (1889); *Whitfield v. City of Paris*, 84 Tex. 431, 19 S.W. 536 (1892). Compare *Scott v. City of New York*, 2 App. Div.2d 854, 155 N.Y.S.2d 787 (1956), *aff'd*, 9 N.Y.2d 764, 215 N.Y.S.2d 72, 174 N.E.2d 745 (1961) (holding that city was not liable to bystander struck by bullet during exchange of shots with fleeing suspect who had escaped from police custody, in absence of any evidence of police negligence in the use of their firearms or evidence that plaintiff was struck by bullet from police gun rather than gun of miscreant).

²⁸ *Elliott v. City of Philadelphia*, 75 Pa. 347 (1874).

²⁹ *Steele v. McKeesport*, 298 Pa. 116, 148 Atl. 53 (1929).

³⁰ *Sehy v. Salt Lake City*, 41 Utah 535, 126 Pac. 691 (1912).

³¹ *Jackson v. City of Paris*, 33 Tenn. App. 55, 228 S.W.2d 1015 (1949).

³² *Butler v. City of Moberly*, 131 Mo. App. 172, 110 S.W. 682 (1908).

³³ *Savage v. District of Columbia*, 52 A.2d 120 (D.C. Mun. App. 1947); *Gillmor v. Salt Lake City*, 32 Utah 180, 89 Pac. 714 (1907).

perienced no reluctance to apply the same rules of liability which pertain to private persons in analogous situations.³⁴ The courts of New York State, moreover, consistently do the same thing in holding public entities (there, of course, unprotected by the sovereign immunity doctrine) liable for such police torts as negligent firing of a gun,³⁵ negligent direction of traffic,³⁶ negligent control of a mounted policeman's horse,³⁷ and negligent disposition of a gun turned over to police custody for preventive purposes.³⁸ California has, of course, for many years followed a policy of imposing liability upon public entities for negligent operation by police officers of motor vehicles in the course of duty.³⁹ Moreover, the California Community Services District Law, which expressly authorizes the creation of districts for the purpose, *inter alia*, of establishing and maintaining "a police department or other police protection to protect and safeguard life and property,"⁴⁰ also expressly requires the district to pay any judgment against any district police officer for "any act or omission in his official capacity, except in case of actual fraud or actual malice," without obligation for repayment by the officer.⁴¹

The existing legislative policy represented in the last cited statute is believed to be sound both from the standpoint of substantial justice to the injured member of the public and from the standpoint of effective law enforcement. The fear of personal liability from good faith acts by policemen—such as firing his gun at an escaping felon—may be a detrimental clog upon fearless performance of duty and thus injurious to the public interest. The police officer often must act with "snap judgment" under emergency conditions where even the best-intentioned acts may be subsequently regarded by a jury as negligent or otherwise wrongful. In such cases, it is believed that the risks attached to law enforcement activities should properly be borne by the public as a whole, and not by the police officer, save where his conduct was malicious or deliberately wrongful.

Adoption and Enforcement of Police Regulations

The determination of a legislative body to impose regulations enforceable by criminal sanctions, for the promotion of the public health,

³⁴ *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1953) (operation of police rifle range for recreational purposes).

³⁵ *Meistinsky v. City of New York*, 285 App. Div. 1153, 140 N.Y.S.2d 212 (1955), *aff'd*, 309 N.Y. 998, 132 N.E.2d 900 (1956) (untrained policeman fired point-blank at suspected robbers but hit innocent victim of robbery); *Wilkes v. City of New York*, 283 App. Div. 724, 127 N.Y.S.2d 853 (1954), *aff'd*, 308 N.Y. 726, 124 N.E.2d 338 (1954) (evidence held to support determination that police officer fired gun negligently, in attempt to ward off attack by drunken assailant, thereby striking innocent bystander; city held liable). See also *Collins v. City of New York*, 8 App. Div.2d 613, 185 N.Y.S.2d 740 (1959), *aff'd*, 7 N.Y.2d 822, 196 N.Y.S.2d 700, 164 N.E.2d 719 (1959) (off-duty policeman negligently dropped paper bag in which he was carrying service pistol pursuant to orders to carry gun with him during off-duty hours, thereby causing pistol to discharge and injure innocent bystander; city held liable for negligent handling of gun).

³⁶ *Joy v. City of Jamestown*, 207 Misc. 873, 141 N.Y.S.2d 325 (1955), *aff'd*, 286 App. Div. 991, 144 N.Y.S.2d 742 (1955) (policeman negligently directed vehicle to move ahead in violation of plaintiff's right of way in crosswalk).

³⁷ *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604, 161 A.L.R. 364 (1945).

³⁸ *Benway v. City of Watertown*, 1 App. Div.2d 465, 151 N.Y.S.2d 485 (1956) (gun delivered to police for safekeeping, in view of threats by owner to kill his wife with it, later negligently returned to owner, who proceeded to shoot the wife and then commit suicide).

³⁹ CAL. VEH. CODE § 17001.

⁴⁰ CAL. GOVT. CODE § 61600(h).

⁴¹ CAL. GOVT. CODE § 61633. See text at 66 *supra*.

safety or welfare, frequently has severe detrimental consequences for private individuals, particularly where law enforcement authorities undertake to implement such regulations by police action. With two possible exceptions, it appears to be well settled in all jurisdictions that no liability will be incurred by either the public entity or its officers for damages resulting from mere adoption or otherwise non-tortious enforcement of such police regulations.¹ Even under the blanket waiver of sovereign immunity which obtains in New York, the courts have continued to hold public entities free from tort liability for their legislative acts,² while the Federal Tort Claims Act contains an express exception which precludes liability in such cases.³ Nonliability here would seem to be indispensable to the continuation of government itself, for the very essence of the power to govern is the power to regulate, to protect and promote the public welfare. Surely, a legislative expression of public policy should not ordinarily, under traditional conceptions of the separation of governmental powers, be subjected to reexamination by the judiciary except on constitutional grounds.

In the recent case of *McClain v. City of South Pasadena*,⁴ for example, an action for damages was brought against a city because the plaintiff had been excluded from a municipal swimming pool under a police power regulation restricting its use to residents of the city. Finding on the evidence that the plaintiff had been excluded not because of her race (as claimed) but because of nonresidency, the court denied relief, holding the regulation to be valid exercise of the city's police power. "It is implicit in the theory of the police power," said Mr. Justice Vallée, "that an individual cannot complain of incidental injury, if the power is exercised for proper purposes of public health, safety, morals, and general welfare, and if there is no arbitrary and unreasonable application in a particular case."⁵ In another recent case, the same judge epitomized the law in these words: "Damage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society."⁶

Since almost every exercise of the police power—which, in effect, means nearly every exercise of the power to legislate—is likely to be

¹ See, e.g., *Elrod v. City of Daytona Beach*, 132 Fla. 24, 180 So. 378 (1938) (no liability for enactment of ordinance later held invalid); *Fidelity Laboratories, Inc. v. Oklahoma City*, 191 Okla. 473, 130 P.2d 834 (1942) (no liability for enactment of ordinance which destroyed plaintiff's business). See generally 18 McQUILLIN, MUNICIPAL CORPORATIONS § 13.35 (3rd ed. 1950).

² See *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99 (1917) (holding that there was no liability for property damage caused by beavers as a consequence of legislation protecting such animals from hunters). Although this case was decided prior to the legislative waiver of sovereign immunity in 1929, it has been followed in recent decisions. See Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30, 33 (1958), and cases there cited.

³ See Federal Tort Claims Act, 28 U.S.C. § 2680(a), providing that the Act shall not apply to "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid. . . ." In *Dalehite v. United States*, 346 U.S. 15, 33 (1953), the court indicated, in dictum, that this provision "bars tests by tort action of the legality of statutes and regulations."

⁴ 155 Cal. App.2d 423, 318 P.2d 199 (1957).

⁵ *Id.* at 435, 318 P.2d at 207, citing *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 264 P.2d 932 (1953).

⁶ *City of Los Angeles v. Gage*, 127 Cal. App.2d 442, 453, 274 P.2d 34, 40 (1954). See also *McDonough v. Goodcell*, 13 Cal.2d 741, 91 P.2d 1035 (1939); *Reynolds v. Barrett*, 12 Cal.2d 244, 83 P.2d 29 (1938). Compare *Miller v. Schoene*, 276 U.S. 272 (1928), with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

injurious to someone, the existing rule of nonliability is deemed to be salutary and essential, and should be continued in existence. The Supreme Court, in *Muskopf*, undoubtedly intended to leave the rule undisturbed, for in pointing out that "basic policy decisions of government within constitutional limitations are . . . necessarily nontortious,"⁷ Mr. Justice Traynor referred to cases in which private injuries resulting from exercises of the police power were held to be nonrecoverable,⁸ and cited, significantly, a leading treatise criticizing the contrary view which has been reached in France.⁹ Accordingly, no legislative action would seem to be necessary to perpetuate the present California law in this regard.

Two possible limitations upon the principle of nonliability should be considered. One, of constitutional origin, requires the payment of just compensation when private property is taken or damaged for public use.¹⁰ As applied by the California courts, this principle (often described as "inverse condemnation") sets an outermost boundary to the exercise of the police power, and imposes liability when an invasion of property interests is not judicially believed to be overborne by a showing of necessity and urgency for the governmental action taken.¹¹ A considerable body of case law has developed in connection with cases of this type,¹² and the Legislature has modified the common law rules by a series of statutory provisions applicable in special cases.¹³ Although there appears to be a need for statutory reform to bring a greater measure of consistency into the legislative pattern referred to,¹⁴ it is believed the present judicial administration of the inverse condemnation principle strikes a tolerable balance between the interest in protecting private property and the interest in public welfare and progress.

A second limitation upon nonliability for adoption and enforcement of police regulations relates to the possibility that a given regulation may ultimately be held unconstitutional or otherwise invalid. What little authority has been found on this point indicates that public entities will not be held liable for the enactment or enforcement of

⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 220, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

⁸ *People ex rel. Dep't of Pub. Works v. Symons*, 54 Cal.2d 855, 9 Cal. Rptr. 363, 357 P.2d 451 (1960) (denying recovery in eminent domain action for noise, dust, loss of privacy, loss of access, and like disagreeable consequences of construction of freeway on lands adjoining plaintiff's, on grounds that "there is no right to recover for all elements of damage caused by the construction of a public improvement," *id.* at 858, 9 Cal. Rptr. at 365, 357 P.2d at 453); *Holloway v. Purcell*, 35 Cal.2d 20, 217 P.2d 665 (1950) (holding that State may, as a matter of policy, relocate a state highway without liability to persons engaged in business along old highway who will be economically hurt by diversion of traffic to the new route).

⁹ 3 DAVIS, ADMINISTRATIVE LAW § 25.11 (1958), criticizing an extreme, and probably atypical, French decision awarding damages to a manufacturer of cream substitutes who was put out of business by a police regulation forbidding the manufacture and sale of such products.

¹⁰ CAL. CONST., Art. I, § 14, discussed in the text, at 102-08 *supra*.

¹¹ See, e.g., *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955); *Hunter v. Adams*, 180 Cal. App.2d 511, 4 Cal. Rptr. 776 (1960); *Ward Concrete Co. v. Los Angeles County Flood Control Dist.*, 149 Cal. App.2d 840, 309 P.2d 546 (1957).

¹² See text, at 102-08 *supra*, and cases there cited.

¹³ See the discussion in the text, *supra*, of legislative provisions regulating the liability of public entities for utility relocations, pp. 79-91, restoration of crossings and intersections, pp. 91-96, and destruction of diseased plants and animals, pp. 75-76, in which the existing nonuniformity of legislative policy was pointed out.

¹⁴ *Ibid.*

invalid legislation,¹⁵ although public officials and employees engaged in such enforcement often have been held personally liable therefor.¹⁶ Manifestly, the risk of personal liability in such cases may deter vigorous law enforcement or at least delay such enforcement until a clarifying judicial construction of the law may be obtained. Such deterrence or delay would seem to be contrary to sound public policy, and the trend of decisions thus appears to favor immunity from liability of the officer.¹⁷ This trend has been exemplified in California by Section 1955 of the Government Code, which grants personal immunity to public officers and employees who act "in good faith and without malice" under the apparent authority of a statute subsequently declared to be unconstitutional. This provision, however, is unduly narrow in its stated scope, and does not extend to all of the situations which fall within the ambit of its underlying policy.¹⁸ It should, therefore, be amended to extend its protection to acts taken under local charter provisions and ordinances; acts which are later judicially declared to be unconstitutional applications of an otherwise valid legislative provision; acts which are later judicially declared not to be within the authority of the statute, charter or ordinance relied upon when construed to avoid doubts as to its constitutionality; and acts not taken under direct authority of a statute or other legislative provision but which derive their ultimate claim of validity therefrom.

The policy considerations which support Section 1955, as well as its suggested liberalization, it should be noted, are not applicable in cases wherein the public officer or employee is on notice that the statute or local regulation which he is seeking to enforce has *previously* been judicially declared to be invalid. In such cases, it would seem that the *bona fides* of the officer is in issue, and imposition of personal liability for bad faith or malicious enforcement would tend to implement rather than interfere with sound public policy.¹⁹

A final problem, of course, is whether the employing public entity should itself bear the financial responsibility for damages sustained by private citizens as a consequence of the good faith enforcement of regulations subsequently judicially declared to be invalid. Unless such liability is provided for, the injuries sustained would appear to be irreparable and without remedy in view of the existing (as well as the recommended expansion of) personal immunity of the enforcement officer. It is probable that relatively few cases of this type would arise,

¹⁵ *McCarter v. City of Florence*, 216 Ala. 72, 112 So. 335 (1927); *Elrod v. City of Daytona Beach*, 132 Fla. 24, 180 So. 378 (1938); *Worley v. Town of Columbia*, 88 Mo. 106 (1885).

¹⁶ See *Golden Gate Bridge & Highway Dist. v. Felt*, 214 Cal. 308, 5 P.2d 585 (1931); *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516 (1896); *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562 (1894); *McCauley v. Weller*, 12 Cal. 500 (1859); *Smith v. Costello*, 77 Idaho 205, 290 P.2d 742 (1955); *Sumner v. Beeler*, 50 Ind. 341 (1875); *Rapacz, Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585 (1927).

¹⁷ See, e.g., *Golden v. Thompson*, 194 Miss. 241, 11 So.2d 906 (1943); *Tyrell v. Burke*, 110 N.J.L. 225, 164 Atl. 586 (1933); *Bricker v. Sims*, 195 Tenn. 361, 259 S.W.2d 661 (1953); *Wichita County v. Robinson*, 155 Tex. 1, 276 S.W.2d 509 (1954). Compare *Prosser, TORTS*, § 109 (2d ed. 1955); Note, 11 HASTINGS L. J. 75 (1959).

¹⁸ See analysis in the text at 155-57 *supra*.

¹⁹ *Accord*: *Miller v. Stinnett*, 257 F.2d 910 (10th Cir. 1958) (arrest for noncompliance with occupational licensing ordinance known to arresting officer to have been previously judicially declared constitutionally unenforceable against person arrested); *Vickrey v. Dunivan*, 59 N.M. 90, 279 P.2d 853 (1955) (arrest under purported ordinance actually known to be nonexistent). Compare *Kenyon v. City of Chicopee*, 320 Mass. 528, 70 N.E.2d 741 (1946) (arrest under ordinance known to be invalid said to constitute a false arrest).

in any event, for all intendments are in favor of the constitutionality of legislation and decisions invalidating policy determinations by legislative bodies are, on the whole, infrequent. It may plausibly be argued that liability should be imposed in such cases, not upon any theory of fault, but rather on a theory of indemnity against losses inadvertently caused the citizen in the course of good faith, but mistaken, governmental action. The constitution imposes limitations upon public entities and officials for the protection of the public and its rights generally; and it would not seem to be inappropriate that the public generally, rather than the individual specifically wronged, should bear the losses occasioned when those rights are inadvertently invaded. Ample protection to the public treasury might be obtained, if believed essential, by restricting liability in such cases to actual pecuniary loss, precluding recovery for humiliation, embarrassment, mental anguish, pain and suffering or other intangible elements. (Where the enforcement action complained of is tortious in other respects, independently of the fact that the provision being enforced is invalid, *e.g.*, an arrest which is wrongful or made with excessive force, damages of the latter variety presumably would be recoverable in an action founded on such tort.)

Failure to Adopt Safety Regulations or Precautions

One of the principal functions for which governmental entities exist is the exercise of the police power for the protection of the public safety and welfare. The failure of responsible public officials to enact appropriate regulations of conduct, or to impose standards of behavior, may thus arguably constitute a breach of duty for which, in the event of injuries resulting proximately therefrom, the public entity should be liable. The adoption of safety regulations, however, is typically classified as a "governmental" function with the result that nonfeasance in connection therewith is nonactionable.²⁰ Numerous decisions to this effect have been reached, for example, where the plaintiff's injury was attributed to a failure to forbid racing in the streets,²¹ impose regulations designed to control unmuzzled dogs,²² abate a public nuisance known to exist,²³ forbid the riding of bicycles on the public sidewalks,²⁴ impose controls upon the parking of automobiles,²⁵ or erect boulevard stop signs at street intersections.²⁶

The California cases are consistent with those cited from other states. In *Perry v. City of Santa Monica*,²⁷ for example, it was alleged that the plaintiff was injured in a vehicle collision caused by the failure

²⁰ See Annots., 161 A.L.R. 1404 (1946), 92 A.L.R. 1495 (1934); 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.36 (3rd ed. 1950).

²¹ *Marth v. City of Kingfisher*, 22 Okla. 602, 98 Pac. 436 (1908).

²² *Smith v. Borough of Selinsgrove*, 199 Pa. 615, 49 Atl. 213 (1901).

²³ *City & County of Denver v. Hstau*, 95 Colo. 118, 33 P.2d 387 (1934); *Stoddard v. City of New York*, 212 N.Y.S.2d 886 (1961); *McDade v. City of Chester*, 117 Pa. 414, 12 Atl. 421 (1888); *Hubbell v. Viroqua*, 67 Wis. 343, 30 N.W. 847 (1886).

²⁴ *Tarbutton v. Tennille*, 110 Ga. 90, 35 S.E. 282 (1900); *Rogers v. City of Binghamton*, 101 App. Div. 352, 92 N.Y. Supp. 179 (1905), *aff'd*, 186 N.Y. 595, 79 N.E. 1115 (1906); *Howard v. Brooklyn*, 30 App. Div. 217, 51 N.Y.S. 1058 (1898); *Bryant v. City of Orangeburg*, 70 S.C. 137, 49 S.E. 229 (1904); *Jones v. City of Williamsburg*, 97 Va. 722, 34 S.E. 883 (1900).

²⁵ *Bradley v. City of Oskaloosa*, 193 Iowa 1072, 188 N.W. 896 (1922).

²⁶ *Arthur v. City of Albany*, 98 Ga. App. 746, 106 S.E.2d 347 (1958); *Locigno v. City of Chicago*, 32 Ill. App.2d 412, 178 N.E.2d 124 (1961); *Martin v. City of Winchester*, 278 Ky. 200, 128 S.W.2d 543 (1939); *Tolliver v. City of Newark*, 145 Ohio St. 517, 62 N.E.2d 357 (1945); *Kirk v. City of Muskogee*, 183 Okla. 536, 83 P.2d 594 (1938); *Powell v. City of Nashville*, 167 Tenn. 334, 69 S.W.2d 894 (1934); *Bradshaw v. City of Seattle*, 43 Wash.2d 766, 264 P.2d 265 (1953).

²⁷ 130 Cal. App.2d 370, 279 P.2d 92 (1955).

of the defendant city to have any stop sign, traffic signal or other traffic control device at a heavily traveled "blind" intersection. Seeking to avoid the barrier of the sovereign immunity doctrine, the plaintiff's counsel attempted to plead the case as one arising under the Public Liability Act on the theory that the absence of traffic control devices had made the intersection in question "dangerous and defective." It was held that the complaint stated no cause of action. The court observed that there was no allegation that the streets themselves were in any way irregular, defective or obstructed, and construed the applicable statutes as giving the city discretionary authority, but no affirmative duty, to install such traffic control devices as it deemed to be necessary. The city was thus not liable, even though the complaint alleged affirmatively that city officials had previously actually determined that it was in fact necessary to place stop signs at the intersection in question, but had delayed doing so until after the plaintiff had been hurt. This result has been cited approvingly in subsequent cases.²⁸

In *Seybert v. County of Imperial*,²⁹ a closely comparable conclusion was reached. The plaintiff had been struck by defendant's motor boat while she was water skiing on a county-owned and operated recreational lake. Her attempt to categorize the lake as "dangerous and defective" under the Public Liability Act, because of the county's failure to promulgate rules and regulations imposing safe standards for operation of speed boats thereon, was held to be nugatory. Pointing out that there was no allegation that the lake was in any way physically defective, the court found no basis for liability either under the statute or otherwise.³⁰

The promulgation by the defendant county of rules and regulations governing the operation of motor boats on the lake involved is a governmental function and the county cannot be held liable for failure to enact such ordinances or rules.³¹

Similarly, public entities have been held not liable in California for failure to erect handrails or post signs warning of possible hazards from high winds while using a public sidewalk,³² failure to direct traffic manually after malfunction of a mechanical control device,³³ and failure to post signs or guardrails to warn motorists of a sharp and dangerous curve in what appeared to be a straight and continuous road.³⁴

The California decisions affirming the rule of nonliability, of course, were all reached in the context of the then (pre-*Muskopf*) settled rule

²⁸ See, e.g., *Ross v. Atchison, T. & S.F. Ry.*, 141 Cal. App.2d 178, 296 P.2d 372 (1956) (holding county not liable for failure to paint warning of approaching railroad intersection on pavement of street leading to such intersection). Compare *Mercado v. City of Pasadena*, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 334 P.2d 968 (1959).

²⁹ 162 Cal. App.2d 209, 327 P.2d 560 (1958).

³⁰ *Id.* at 213, 327 P.2d at 563. To the same effect, see *Shipley v. City of Arroyo Grande*, 92 Cal. App.2d 748, 208 P.2d 51 (1949); *Campbell v. City of Santa Monica*, 51 Cal. App.2d 626, 125 P.2d 561 (1942).

³¹ *Id.* at 213, 327 P.2d at 563.

³² *Belcher v. City & County of San Francisco*, 69 Cal. App.2d 457, 158 P.2d 996 (1945).

³³ *Goodman v. Raposa*, 151 Cal. App.2d 830, 835, 312 P.2d 65, 69 (1957) ("Nor could the city be held liable in failing to direct traffic while the lights were being repaired. Such nonfeasance is within the exercise of a governmental function . . ."). See also *Hoel v. City of Los Angeles*, 136 Cal. App.2d 295, 288 P.2d 989 (1955).

³⁴ *Gillespie v. City of Los Angeles*, 114 Cal. App.2d 513, 250 P.2d 717 (1952). Compare *Ross v. Atchison, T. & S.F. Ry.*, 141 Cal. App.2d 178, 296 P.2d 372 (1956) (holding no liability for failure to post additional warning of railroad crossing, where existing warning signs could reasonably have been deemed adequate).

of sovereign immunity. The issue to be evaluated now is whether such nonliability is a sounder result from the viewpoint of public policy than a rule of liability in such cases. An examination of the New York decisions may prove helpful in this regard. In view of the abolition of sovereign immunity in that state, a number of decisions have imposed tort liability upon public bodies for failure to impose regulations or take safety precautions. A finding that the state highway authorities had negligently failed to post signs which were adequate in number, location and design to give fair warning to motorists of an unusually dangerous curve was held, for example, to make the state liable for injuries resulting therefrom.³⁵ Similarly, the negligent failure to post a boulevard stop sign at a heavily traveled "T" intersection was found to impose public liability since, "had the sign been there, the driver would have obeyed it and avoided the accident."³⁶ Even where signs are posted, the governmental body may be found liable in New York if the court determines that such signs are defective, confusing or inadequate in appearance.³⁷

Other New York cases, however, are difficult to reconcile in principle with those just cited. Recent decisions, for example, have apparently attempted to curtail the scope of possible liability for nonfeasance consisting of failure to post warning signs, by imposing on the plaintiff a more difficult burden of establishing a proximate casual relationship between such nonfeasance and the injury complained of.³⁸ Moreover, several cases have ruled as a matter of law that the State of New York is not liable for negligent failure to post signs warning of deer crossings along public highways, where motorists have been injured through striking such animals.³⁹ Although the result in these deer cases may possibly be reconciled factually with the intersection cases referred to above,⁴⁰ it is difficult in principle to see why the state's duty is any less to exercise ordinary care to guard against collisions with deer known to be in the habit of crossing a highway at a particular point than with intersecting vehicular traffic.

In appraising the most desirable rule for adoption in California, with respect to failure of public bodies to adopt safety precautions or regulations, certain significant distinctions should be observed. First, it should be recognized that there is a practical difference between a failure to act at all, and negligence in the taking of action. The deci-

³⁵ *Canepa v. State of New York*, 306 N.Y. 272, 117 N.E.2d 550 (1954).

³⁶ *Eastman v. State of New York*, 303 N.Y. 691, 103 N.E.2d 56 (1951), as explained in *Applebee v. State of New York*, 308 N.Y. 502, 507, 127 N.E.2d 289, 291 (1955). See also, to the same effect, *Nuss v. State of New York*, 301 N.Y. 768, 95 N.E.2d 822 (1950).

³⁷ *Ziehm v. State of New York*, 270 App. Div. 876, 61 N.Y.S.2d 99 (1946).

³⁸ See, e.g., *Hicks v. State of New York*, 4 N.Y.2d 1, 171 N.Y.S.2d 827, 148 N.E.2d 885 (1953); *Applebee v. State of New York*, 308 N.Y. 502, 127 N.E.2d 289 (1955).

³⁹ See *Morrison v. State of New York*, 204 Misc. 224, 123 N.Y.S.2d 111 (Ct. Cl. 1953); *Anthony v. State of New York*, 204 Misc. 241, 122 N.Y.S.2d 830 (Ct. Cl. 1950). It has been suggested that these cases may be based upon a misconception of the earlier New York decision in *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99 (1917) (holding that the state was not liable for damage to property by animals protected against hunting by game conservation laws). See Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30, 40 (1958).

⁴⁰ In each of the deer cases cited in the preceding note, the result appears to be consistent with a holding of lack of proximate causal relationship between the absence of the warning sign and the accident complained of. See *Mann v. State of New York*, 47 N.Y.S.2d 553 (Ct. Cl. 1944).

sions in California under the Public Liability Act,⁴¹ as well as comparable holdings elsewhere,⁴² strongly suggest that it may be appropriate to impose tort liability for a negligent failure to adequately maintain stop signs or traffic control devices, for example, when the basic policy decision has once been made to install and operate such devices. Such a result is strongly grounded in practical considerations. Users of the highways become used to the existence of such signs or signals, and tend to rely upon their existence for their safety in proceeding down the street. The negligent failure of the entity, after notice, to repair or properly maintain the equipment so that it will perform its intended function may thus create something akin to a trap; and the violation of reasonable expectations of those relying on the device may directly lead to serious injuries.⁴³ Where no sign, traffic control device or other regulatory precautions are utilized, however, the basis for reliance is removed, and the user of the street is bound to proceed accordingly.

A second point of distinction relates to the matter of duty. If there is a clear and mandatory duty to erect and maintain a warning sign—for example, a sign warning of a grade crossing with a railroad line—failure to act may properly be deemed actionable, where such statutory duty was intended for the protection of the very person injured by its absence.⁴⁴ In the great majority of situations in which the problem has arisen, however, no such mandatory statutory duty existed. Instead, the public entity sought to be held responsible had broad discretionary powers to determine for itself the necessity for regulatory measures as well as the nature of the steps to be taken. *Perry v. City of Santa Monica*,⁴⁵ *supra*, for example, surveys the applicable provisions of the California Vehicle Code and emphasizes the breadth of discretion

⁴¹ See, e.g., *Irvin v. Padelford*, 127 Cal. App.2d 135, 273 P.2d 539 (1954) (boulevard stop sign removed by city employees to repair wiring on lamp post to which it was attached, held to create dangerous condition of intersection, since motorists on through boulevard had a right to assume that intersecting traffic would halt at said stop sign); *Bady v. Detwiler*, 127 Cal. App.2d 321, 273 P.2d 941 (1954) (defective operation of traffic signal, so that it indicated "GO" in both directions at intersection, held basis of liability of city); *Rose v. County of Orange*, 94 Cal. App.2d 688, 211 P.2d 45 (1949) (stop sign at boulevard intersection which had been knocked down and not replaced in position held to create dangerous and defective condition of intersection).

⁴² *Johnston v. City of East Moline*, 405 Ill. 460, 91 N.E.2d 401 (1950); *Foley v. City of New York*, 294 N.Y. 275, 62 N.E.2d 69 (1945); *Dulinak v. State of New York*, 177 Misc. 368, 30 N.Y.S.2d 796 (Ct. Cl. 1940), *aff'd*, 262 App. Div. 1064, 30 N.Y.S.2d 838 (1941).

⁴³ See *Irvin v. Padelford*, 127 Cal. App.2d 135, 273 P.2d 539 (1954), as explained in *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 597, 334 P.2d 968, 971 (1959): "[I]n *Irvin* . . . liability was based on the fact that its [i.e., the stop sign's] total absence, when a driver on the through street was entitled to rely on its protective presence, created a dangerous condition of public property." See also *Goodman v. Raposa*, 151 Cal. App.2d 830, 312 P.2d 65 (1957). In the *Dudum* case, *supra*, the court held that a question of fact existed, which precluded summary judgment, as to whether the failure of the city to prevent the obscuring of a stop sign by foliage was the proximate cause of injury to a motorist entering the intersection from the side street on which the sign was posted, rather than to a motorist on the through street, as in the *Irvin* case. In the words of the *Dudum* opinion: "We note . . . that concealment of the stop sign could be a proximate cause of the collision if it be shown that defendant truck driver knew of the stop sign, relied on its protection to him as a driver on the arterial street, and so acted in reliance that his conduct and the plaintiff's failure to stop, if excused by the claimed concealment of the sign, concurred as proximate causes of the accident." *Dudum v. City of San Mateo*, 167 Cal. App.2d 593, 598, 334 P.2d 968, 971 (1959).

⁴⁴ See *Hebbard v. Ives*, 8 App. Div.2d 648, 184 N.Y.S.2d 971 (1959) (statutory duty to post railroad grade crossing); *Lyle v. Florito*, 187 Wash. 537, 60 P.2d 709 (1936) (statutory duty to post boulevard stop sign at through highway intersection). *But compare* *Powell v. City of Nashville*, 167 Tenn. 334, 69 S.W.2d 894 (1934) (holding city not liable for failure to post sign pursuant to city's own ordinance).

⁴⁵ 130 Cal. App.2d 370, 279 P.2d 92 (1955).

vested in the state and local authorities with respect to boulevard stop signs and other traffic control devices.⁴⁶ Manifestly, these matters should properly be left, in most cases, to the informed judgment of responsible public officials; for their resolution ordinarily will require an evaluation of a large variety of technical data and policy criteria, including traffic volume frequency and peak load factors, physical layout and terrain, visibility hazards and obstructions, prevailing weather conditions, nature of vehicular use, normal traffic speed in the area, volume of pedestrian traffic, alignment and curvature information, need for similar precautionary measures at other like places, alternative methods of control, and availability of currently budgeted funds to do the job. Decisions not to adopt control devices, when based on premises of this order do not appear to be readily susceptible to intelligent and rational reexamination by untrained juries or judges sitting as triers of fact.

The recent New York decision of *Weiss v. Fote*⁴⁷ appears to be in point here. Plaintiff was injured as the result of an allegedly negligent decision, on the part of Buffalo city traffic authorities, in establishing a four-second interval between the changing of the red and green traffic signals at an intersection. Plaintiff introduced evidence tending to prove that the interval fixed by the city was too short to permit orderly clearing of intersecting traffic before opposing cars were permitted to proceed. A jury verdict against the city was reversed on appeal. The New York Court of Appeals pointed out that there was uncontradicted evidence that the intersection had been studied by competent city personnel and the "clearance interval" in question deliberately selected in the good faith belief that it was reasonably safe. In the opinion of the majority of the court:

[W]e perceive no basis for preferring the jury verdict, as to the reasonableness of the "clearance interval," to that of the legally authorized body which made the determination in the first instance. . . . The city's defense which we here sustain rests not on any anarchronistic concept of sovereignty, but rather on regard for sound principles of government administration and a respect for the expert judgment of agencies authorized by law to exercise such judgment. . . . We are of the opinion that the traditional reliance on a jury verdict to assess fault and general tort liability is misplaced where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury.⁴⁸

Although the *Weiss* case does not deal directly with the kind of non-feasance which is our present concern, the quoted statement from the court's opinion is believed to underscore the elements of policy which are relevant to the question of liability for failure to adopt police regulations or precautions. In the absence of known physically danger-

⁴⁶ See, e.g., CAL. VEH. CODE § 21352, providing that Department of Public Works "may erect stop signs at any entrance to any state highway"; CAL. VEH. CODE § 21354, providing that a city or county "may designate any highway under its jurisdiction as a through highway and may erect stop signs at entrances thereto"; CAL. VEH. CODE § 21356, providing that both state and local authorities "may erect yield right-of-way signs." (Emphasis added.)

⁴⁷ 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960).

⁴⁸ *Id.* at 586, 588, 200 N.Y.S.2d at 413, 415, 167 N.E.2d at 66, 68.

ous or defective property conditions—with respect to which negligent failures to remedy or warn have long been actionable under the Public Liability Act⁴⁹—it would seem that the New York court's reasoning constitutes a persuasive basis for rejecting liability for such inaction. To permit reexamination in tort litigation of such inaction, involving as it does a vast congeries of policy determinations at the legislative and planning levels, would appear to create too great a danger of impolitic interference with freedom of decision-making by those public officials in whom the function of making such decisions has been vested. It is thus suggested that liability in such cases be denied in California.

Failure to Enforce Existing Law

The California decisions—all dating from the pre-*Muskopf* period—uniformly hold that public entities are not liable for negligent failure to enforce the law. In *Shipley v. City of Arroyo Grande*,¹ for example, a pedestrian, who had been struck on the sidewalk by a car which went out of the operator's control while it was being parked diagonally along the curb, contended that the city was liable for its failure to enforce a state statute requiring vehicles to be parked parallel to the curb and not diagonally. Liability was denied, apparently on alternative grounds, first, because failure to enforce the law "is an incident of governmental power" which does not give rise to municipal liability, and second, because the parallel parking provision was not designed for protection of pedestrians but for benefit of users of the highway. In view of the first of these grounds, the latter one surely was not intended to imply that liability might obtain if the plaintiff were in the protected class. This view is reinforced by the fact that the principal case relied on, *Campbell v. City of Santa Monica*,² reached a comparable result very clearly posited upon the governmental immunity concept. In this case, injuries sustained by the plaintiff when struck by a car being driven on a sidewalk along the beachfront in violation of city ordinance provisions were held not a basis for tort liability of the city, even though it was claimed that the city had negligently failed to enforce the prohibition against vehicular traffic on the sidewalk. In the words of the court:

While a city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, its failure to enforce such ordinance imposes no liability upon it, in the absence of statute. This is so regardless of whether its failure is occasioned by want of barricades or signs or by want of the necessary police officers. . . . By making and enforcing ordinances regulating the use of streets and sidewalks the city exercises a governmental power, and so for any breach thereof there is no liability.³

There appears to be a high degree of unanimity on this point in all jurisdictions. Except for an occasional decision in which outrageous indifference to their responsibilities by public officials may have motivated the courts to invoke a questionable application of nuisance theory

⁴⁹ See text at 42-59 *supra*.

¹ 92 Cal. App.2d 748, 208 P.2d 51 (1949).

² 51 Cal. App.2d 626, 125 P.2d 561 (1942).

³ *Id.* at 629, 125 P.2d at 563.

as a basis of liability,⁴ the courts have quite uniformly ruled that no liability attaches for failure to enforce existing law.⁵ Illustrations include cases in which injury was sustained as the alleged consequence of failure of enforcement officials to enforce automobile parking regulations,⁶ prohibitions against the riding of bicycles on city streets,⁷ prohibitions against coasting of sleds on streets,⁸ restrictions against fireworks⁹ and firearms¹⁰ in city limits, one-way traffic requirements,¹¹ dog licensing and muzzling ordinances,¹² and ordinances forbidding the maintenance of defined types of public nuisances.¹³ In one very recent case, the court refused to find a basis for liability where responsible city officials not only publicly announced that they would not prosecute violations of a city ordinance, but deliberately encouraged persons to violate its provisions.¹⁴

Even in New York, where the general statutory waiver of sovereign immunity might suggest that a different result would be reached, public entities are generally still deemed immune from liability for failure to enforce the law. New York courts have ruled, for example, that there is no liability for failure to enforce safety regulations with respect to the number of fire exits required in multiple residential buildings,¹⁵ nor with respect to heating equipment known to city officers to be in a defective condition and from which source a fatal fire is ultimately ignited.¹⁶ The negligent failure of motor vehicle licensing officials to physically seize and impound the license or automobile registration of a motorist whose right to drive had been suspended, where such seizure is required by law, has been held not actionable in behalf of plaintiffs who thereafter sustained injury from negligent driving by the suspended motorist.¹⁷ The negligent failure to revoke an automobile registration where statutory grounds therefor were known to the state to exist has likewise been deemed nonactionable.¹⁸

In a recent New York case, a city was held immune from tort liability where it appeared that a police officer had observed a car loaded with 15 passengers, whose crowded condition clearly obstructed the

⁴ See *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836 (1901) (condonation of racing of bicycles at high speed classified as actionable nuisance); *Johnson v. City of New York*, 186 N.Y. 139, 78 N.E. 715 (1906) (automobile racing in street); *Burnett v. City of Greenville*, 106 S.C. 255, 91 N.E. 203 (1917) (*semble*).

⁵ See *Annots.*, 161 A.L.R. 1404 (1946), 92 A.L.R. 1495 (1934).

⁶ *Means v. City of Barnesville*, 28 Ga. App. 671, 112 S.E. 739 (1922); *White v. City of Casper*, 35 Wyo. 371, 249 Pac. 562 (1926).

⁷ *Millett v. Princeton*, 167 Ind. 582, 79 N.E. 909 (1907).

⁸ See *Annot.*, 46 A.L.R. 1434 (1927).

⁹ *Adamczyk v. Gambelli*, 25 Ill. App.2d 121, 166 N.E.2d 93 (1960); *Ball v. Town of Woodbine*, 61 Iowa 83, 15 N.W. 846 (1883).

¹⁰ *Norristown v. Fitzpatrick*, 94 Pa. 121 (1880); *O'Rourke v. City of Sioux Falls*, 4 S.D. 47, 54 N.W. 1044 (1893). See also *Jolly's Adm'x v. City of Hawesville*, 89 Ky. 279, 12 S.W. 313 (1889) (no liability for failure to prevent "sham battle" in city streets).

¹¹ *Doughty v. Philadelphia Rapid Transit Co.*, 321 Pa. 136, 184 Atl. 93 (1936).

¹² *Addington v. Town of Littleton*, 50 Colo. 623, 115 Pac. 896 (1911). Compare *Givens v. City of Paris*, 5 Tex. Civ. App. 705, 24 S.W. 794 (1893) (no liability for failure of police to enforce ordinance against cattle running loose in city streets, where cow gored plaintiff); *Little v. City of Madison*, 49 Wis. 605, 6 N.W. 249 (1880) (no liability for failure of police to enforce ordinance forbidding the giving of a "bear show" on public streets).

¹³ *City & County of Denver v. Ristau*, 95 Colo. 118, 33 P.2d 387 (1934); *Veraguth v. City of Denver*, 19 Colo. App. 473, 76 Pac. 539 (1904).

¹⁴ *Bidinger v. City of Circleville*, — Ohio App. —, 177 N.E.2d 408 (1961).

¹⁵ *Reid v. City of Niagara Falls*, 216 N.Y.S.2d 850 (1961).

¹⁶ *Rivera v. City of Amsterdam*, 5 App. Div.2d 637, 174 N.Y.S.2d 530 (1958); *Motyka v. City of Amsterdam*, 179 N.Y.S.2d 924 (1958).

¹⁷ *Craver v. State of New York*, 204 Misc. 214, 123 N.Y.S.2d 58 (Ct. Cl. 1953); *Chikofsky v. State of New York*, 203 Misc. 646, 117 N.Y.S.2d 264 (Ct. Cl. 1952).

¹⁸ *Granger v. State of New York*, 14 App. Div.2d 645, 218 N.Y.S.2d 742 (1961).

driver's vision and ability to operate safely, but had failed to stop or apprehend the driver for violating a state motor vehicle regulation against overloaded cars.¹⁹ Soon thereafter the car went out of control and fatal injuries were sustained by its passengers. The court explained the basis for its ruling of nonliability by pointing out that the alleged negligence consisted merely of a refusal to be an instrument for good, of the mere withholding of a benefit, rather than an active wrong. In addition, ". . . the duty to furnish . . . police protection goes to its citizens and residents as a whole and a duty running to the public generally does not inure to a member of the public individually."²⁰ Grounds similar to these are asserted also in other New York cases,²¹ although an occasional decision²² attempts to justify the result on the theory that law enforcement has no private counterpart and hence is not within the New York's statutory acceptance of tort liability "in accordance with the same rules of law as applied to actions . . . against individuals."²³

These formal grounds for denying liability, as advanced by the New York courts, can scarcely be regarded as more than unsatisfactory and sterile conceptualisms. Manifestly the very purpose for maintaining a corps of peace officers is to obtain enforcement of the law for the protection of the public and each member thereof who would be threatened by nonenforcement. Any attempt to hide behind a claim of lack of private tort analogies must be treated as nothing less than specious in view of the ease with which the federal courts have avoided similar problems under the Federal Tort Claims Act.²⁴ Moreover, there are numerous other cases in which, absent any close functional counterpart in private relationships, the New York courts have willingly imposed liability on public entities for police torts.²⁵

It seems evident that the true basis for denying liability for failure to enforce existing law is simply that such liability is judicially believed to be contrary to sound public policy. A suggestion to this effect appears in a relevant decision of the New York Court of Claims, in which the plaintiff had been deprived of a civil action for overcharge of rent by the negligent failure of public rent control officers to enforce the law by prosecuting the landlord. The plaintiff, who had a choice of remedies, had authorized the appropriate officers to bring the enforcement action, and had delayed instituting a personal action until after the statute of limitations had expired, in reliance on the prospect of official enforcement. The court referred to the fact that an administrative decision had been made *not* to institute official enforcement pro-

¹⁹ *Libertella v. Maenza*, 21 Misc.2d 317, 191 N.Y.S.2d 191 (1959).

²⁰ *Id.* at 319, 191 N.Y.S.2d at 193.

²¹ See, e.g., *Rivera v. City of Amsterdam*, 5 App. Div.2d 637, 174 N.Y.S.2d 530 (1958); *Miletits v. State of New York*, 204 Misc. 381, 123 N.Y.S.2d 586 (Ct. Cl. 1953); *Chilkofsky v. State of New York*, 203 Misc. 646, 117 N.Y.S.2d 264 (Ct. Cl. 1952). Compare *Murray v. Wilson Line*, 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd*, 296 N.Y. 345, 72 N.E.2d 29 (1947).

²² See, e.g., *Granger v. State of New York*, 14 App. Div.2d 645, 218 N.Y.S.2d 742 (1961).

²³ N.Y. Ct. Cl. Act § 3.

²⁴ See Note, *Federal Government Liability "As a Private Person" Under the Tort Claims Act*, 33 IND. L. J. 339 (1958).

²⁵ Compare, for example, the New York decisions imposing liability for mistreatment of prisoners in police custody, e.g., *Ferguson v. City of New York*, 279 App. Div. 606, 107 N.Y.S.2d 534 (1951), *aff'd*, 303 N.Y. 936, 105 N.E.2d 628 (1952); *Daniels v. City of Syracuse*, 200 Misc. 415, 106 N.Y.S.2d 72 (1951); *Dailey v. State of New York*, 190 Misc. 542, 75 N.Y.S.2d 40 (Ct. Cl. 1947), despite the fact that no private person is permitted to hold individuals in comparable penal servitude.

ceedings against the landlord for past violations in view of the fact that the latter had voluntarily brought himself into conformity with the rent control law *in futuro*. Such decision involved questions of discretionary enforcement policy; and, said the court, "The policy of the State or Local Rent Administrator with respect to the prosecution of particular violations necessarily transcends the interest of a particular tenant."²⁶

Law enforcement necessarily requires the vesting of a degree of discretion and judgment in the officers charged with that public duty.²⁷ In a recent California decision, for example, the failure of a policeman to arrest a person known to be intoxicated, who shortly thereafter injured the plaintiff while driving a car, was held not to impose personal liability on the officer. The court pointed out that:

The power of a police officer to arrest or not to arrest is a power in which discretion is vested in the officer. Section 836, Penal Code, describing the circumstances permitting an arrest, provides that a peace officer "may" arrest under such circumstances. If he "may" arrest, he may "not" arrest.²⁸

The court's candid willingness to recognize that a law enforcement officer is not always under an affirmative duty to make an arrest particularly where minor offenses are concerned, is in full accord with accepted practices in criminal law administration.²⁹ A recent perceptive address by an able and experienced judge begins with these words:

If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable. Living would be a sterile compliance with soul-killing rules and taboos. By comparison, a primitive tribal society would seem free, indeed. . . .

The thesis of this discussion is that the presence and expansion of discretion in crime control is both desirable and inevitable in a modern democratic society. The thesis is that discretion may not be eliminated, except at intolerable cost—and this is true at every level—police, prosecutor, grand jury, petty jury, court, probation, correction, and parole.³⁰

In most states, the degree of strictness of law enforcement probably differs, from community to community, due to a variety of circumstances, including variations in geographic conditions, ethical attitudes toward different offenses, administrative resources, quality of enforce-

²⁶ *Miletits v. State of New York*, 204 Misc. 381, 383-84, 123 N.Y.S.2d 586, 589 (Ct. Cl. 1953).

²⁷ See generally FOUNDED, *CRIMINAL JUSTICE IN AMERICA* 41 (1930); Roberts, *Paradoxes in Law Enforcement*, 52 J. CRIM. L., C. & P. S. 224 (1961).

²⁸ *Tomlinson v. Pierce*, 178 Cal. App.2d 112, 116, 2 Cal. Rptr. 700, 703 (1960). See, to the same effect, *Rubinow v. County of San Bernardino*, 169 Cal. App.2d 67, 336 P.2d 968 (1959).

²⁹ Compare Hall, *Police and Law in a Democratic Society*, 28 IND. L. J. 133 (1953). As to the prosecutor's discretion whether to prosecute or not, and as to choice of charge, see Klein, *District Attorney's Discretion Not to Prosecute*, 32 L. A. BAR BULL. 323 (1958); Note, 103 U. PA. L. REV. 1057 (1955); Note, 30 IND. L. J. 74 (1954). Compare Remington & Joseph, *Charging, Convicting and Sentencing the Multiple Criminal Offender*, 1961 WIS. L. REV. 528.

³⁰ Hon. Charles D. Breitell, Justice of the New York Supreme Court, Appellate Division, First Department, address at University of Chicago School of Law, January 1960, published in Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

ment officers, local traditions and mores, and other factors as well. The prevailing policy with respect to such enforcement in any specified community is probably a reflection of diverse economic, social, demographic, fiscal and cultural pressures expressed in politically significant ways. Imposition of tort liability for failure of law enforcement thus might seriously interfere with the effective operation of our system of local self-government as well as with the practical need for continued discretion by law enforcement officials. The present rule of nonliability in this area is thus deemed to be fundamentally sound and should be left undisturbed.

Failure to Provide Police Protection Against Threatened Injury by Third Parties

As is the case with law enforcement, a considerable measure of discretion and judgment must also be exercised by police officials in determining when, and to what extent, preventive police protection should be extended to citizens exposed to a risk of harm from the action of third parties. For example, the presence of a large number of people peaceably congregated in a small area is hardly unusual under modern urban conditions; yet, such a crowd, under certain circumstances conducive to panic, disorder or emotionalism, may behave collectively in ways which cause serious injury to members thereof or to innocent bystanders. To what extent would it be consistent with sound public policy to impose tort liability upon a public entity for such injuries because of its negligent failure to provide sufficient police protection under the circumstances?

A situation closely similar to the one hypothesized was the foundation for decision in the New York case of *Murrain v. Wilson Line, Inc.*,¹ where several persons had been killed in the stampede of a crowd gathered on a city-owned pier waiting to board an excursion liner. Pointing out that even under the statutory waiver of sovereign immunity in New York, the courts had continued to recognize immunity for mere failure to exercise a governmental function (as distinguished from negligent exercise thereof),² the alleged negligent failure of the city to provide adequate police protection to prevent such injuries was held nonactionable. Analogizing the pier to a public street, the court found no special or private duty to the members of the crowd. Instead, said the court,

The City's duty . . . was no greater than its public duty to provide police protection to crowds gathered in the streets or other public places. . . . The claim is that the police force failed to take the affirmative action which was necessary to avoid injury to members of the public, which is simply a failure of police protection. Such failure is not a basis of civil liability to individuals.³

One difficulty which the *Murrain* case poses stems from the implication that if the duty were not purely "public" but "private" in

¹ 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

² The development of a substructure of distinction between "governmental" and "proprietary" functions, in the judicial application of the general statutory waiver of sovereign immunity in New York, is analyzed in NEW YORK COMMITTEE, FIRST INTERIM REPORT 16-21 (Legis. Doc. No. 42, 1955). See also, Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958).

³ *Murrain v. Wilson Line, Inc.*, 270 App. Div. 372, 377, 59 N.Y.S.2d 750, 754 (1946).

nature, a failure to provide adequate police protection might give rise to liability. Indeed, New York courts have expressly conceded that public entities are liable for negligent failure to protect patrons of city-owned subway system from assault and robbery, since the providing of transportation to the public is a "proprietary" or "private" function of the city.⁴ Except for the practical difference that the task of properly policing the subway system may be slightly less onerous than that of policing the public sidewalks, it is difficult to comprehend why liability should obtain in the one case and not in the other—for surely the duty is as much to "the public" rather than to a specified member thereof in one case as in the other, and the conceptual distinction between proprietary and governmental activities is obviously more a formularization of the result rather than a reason for it. Moreover, in New Jersey, under a statute which the court construed as waiving sovereign immunity, it has recently been held that a milkman beaten and robbed on an elevator operated by a public housing authority was entitled to recover for his injuries upon a showing of negligence of the authority (after notice of previous criminal acts of violence under like circumstances) in failing to provide adequate police protection for persons on its premises.⁵

The "public duty" rationale of the *Murray* case has also proven to have its own inherent limitations. In the subsequent case of *Schuster v. City of New York*,⁶ the New York Court of Appeals held that the city could be held liable for the death of a key witness who had identified a wanted notorious criminal, and thereafter, because of failure of the police to provide protection against threats of underworld reprisals, was shot by confederates of the arrested criminal. The *Murray* case was held not to bar relief, since the duty owed to Schuster was found not to be the general public duty referred to in that case, but a "special duty to use reasonable care for the protection of persons who have collaborated . . . in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."⁷ This "special duty" was found to have arisen in light of the fact that the city, seeking to apprehend a dangerous criminal, had actively solicited the help of the public and had made affirmative use of such assistance when it was rendered. Having gone forward in the creation of a relationship with the citizen offering his assistance, the city was bound to continue to go forward in furnishing necessary police protection arising therefrom, for "inaction in furnishing police protection to such persons would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an

⁴ See *Amoruso v. New York City Transit Authority*, 12 App. Div.2d 11, 207 N.Y.S.2d 855 (1960) (holding that a question of fact was presented on the evidence as to whether city, in light of previous like assaults and "muggings" in subway system, had acted with due care in light of the principle that the city, in its proprietary capacity as a railroad carrier, "is under a duty to take reasonable precautions for the protection and safety of its passengers"). Compare *Langer v. City of New York*, 9 Misc.2d 1002, 171 N.Y.S.2d 390 (1953), *aff'd*, 8 App. Div.2d 709, 135 N.Y.S.2d 751 (1959) (holding city not liable where evidence supported conclusion of trier of fact that city had employed due care to protect against such "muggings" in subway passageways).

⁵ *Goldberg v. Housing Authority of the City of Newark*, 175 A.2d 433 (N.J. App. 1961).

⁶ 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958).

⁷ *Id.* at 80-81, 180 N.Y.S.2d at 269, 154 N.E.2d at 537.

injury.”⁸ The court’s somewhat involved semantics, however, did not wholly obscure the underlying policy considerations which motivated its conclusion in favor of liability:

If it were otherwise, it might well become difficult to convince the citizen to aid and co-operate with the law enforcement officers. . . . To uphold such a liability does not mean that municipalities are called upon to answer in damages for every loss caused by outlaws or by fire. Such a duty to Schuster bespeaks no obligation enforceable in the courts to exercise the police powers of government for the protection of every member of the general public. Nevertheless, where persons actually have aided in the apprehension or prosecution of enemies of society under the criminal law, a reciprocal duty arises on the part of society to use reasonable care for their police protection, at least where reasonably demanded or sought. . . . The duty of everyone to aid in the enforcement of the law, which is as old as history, begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner.⁹

The duty rationale of the *Murray* case thus is revealed, through the *Schuster* opinion, as simply a convenient doctrinal justification for what is fundamentally a policy evaluation. The hollowness of the traditional New York distinction between misfeasance and nonfeasance¹⁰ is also underscored by the court’s not entirely successful effort to translate the decision *not* to provide police protection to Arnold Schuster into a “positive” or “active” working of injury—an attempt which clearly illustrates that misfeasance and nonfeasance are simply different sides of the same coin.¹¹ On policy grounds, it can be persuasively contended that a public entity should not be liable for damages when its constituted law enforcement officers, acting reasonably and within their discretion, decide to ignore a request from a citizen for special police protection above and beyond that extended to the general public,¹² or determine that no additional police are needed or can be spared

⁸ *Id.* at 82, 180 N.Y.S.2d at 271, 154 N.E.2d at 538. Subsequent cases, it should be noted, have construed this language to mean that mere failure to enforce the law, absent a pre-existing relationship imposing a special duty to the plaintiff, will not impose liability on the public entity for resulting damages. See, e.g., *Libertella v. Maenza*, 21 Misc.2d 317, 191 N.Y.S.2d 191 (1959).

⁹ *Id.* at 81, 180 N.Y.S.2d at 269-70, 154 N.E.2d at 537.

¹⁰ That the purported distinction is really a reflection of judicial policy evaluation is emphasized in NEW YORK COMMITTEE, FIRST INTERIM REPORT 16-21 (Legis. Doc. No. 42, 1955). Pointing out that the partial abolition of the distinction between “governmental” and “proprietary” functions had freed the New York Court of Appeals from the inflexibility with which *stare decisis* had clothed that distinction, the Joint Legislative Committee suggests that a need arose to develop new “generalized solving formulae” which would be sufficiently indefinite and uncertain “as to provide fresh, untrammelled instruments of policy determination.” The newly devised distinction between acts of omission and acts of commission was such a formula. The Committee concludes: “The practical result of the Court’s search for a solution of the problem of municipal tort liability, therefore, is that through the exchange of one artificial formula for another it continues to perform the function of determining liability case by case in an area where the real issue is one of public policy. . . .” *Id.* at 20.

¹¹ See Comment, 15 RUTGERS L. REV. 98, 111-112 (1960).

¹² The general rule in such cases, notwithstanding the result reached in *Schuster* under the special circumstances there, is one of nonliability. See *Rocco v. City of New York*, 282 App. Div. 1012, 126 N.Y.S.2d 198 (1953), as explained and applied in *Libertella v. Maenza*, 21 Misc.2d 317, 191 N.Y.S.2d 191 (1959). See also *Isereau v. Stone*, 3 App. Div.2d 243, 160 N.Y.S.2d 336 (1957), and *Mentillo v. County of Cayuga*, 2 Misc.2d 820, 150 N.Y.S.2d 97 (1956), relying on a New York constitutional provision immunizing counties from liability for the acts of sheriff, but opining in dictum that, absent such provision, there would still be no basis of liability because of failure to provide police protection on request from a citizen.

to control a crowd known to have gathered.¹³ If every request of this type—justified or unjustified, rational or irrational—were required under threat of tort liability to be honored, even to the extent of investigating the extent to which justification exists, the routine handling of police business might well be severely handicapped. The decision to act or not, in such cases, must necessarily be made in the light of known circumstances and under the conditions of personnel dispersion, previous assignments, emergency calls, and other competing demands for police service which then exist. The considerations suggested as relevant to immunity for failure to enforce existing law, in the immediately preceding subdivision,¹⁴ would seem to be equally relevant here.

On the other hand, when a policy decision has been made to act in the premises—to extend police assistance or protection—it would not appear to be an unduly burdensome rule to require that reasonable care be employed in doing so. Thus, for instance, a policeman who, at the request of a citizen, undertakes to place a violently insane and dangerous person under custody for the protection of his associates, may reasonably be deemed to act tortiously, thereby imposing liability upon his employer, if he negligently releases the mentally ill individual thereby permitting him to cause injury.¹⁵ In private law, a comparable duty to perform carefully (and to continue to perform carefully) a gratuitous undertaking for the protection of another has long been recognized.¹⁶ Indeed, the result in *Schuster* might well be valid on this basis, for the police in that case had in fact extended police protection to Schuster, but had withdrawn it before the fatal shooting. As a concurring opinion therein cogently observes:

The assumption by the respondent of the partial protection of plaintiff's intestate under the circumstances of this case carried with it the obligation not to terminate such protection if in the exercise of reasonable care it was apparent that its acceptance of

¹³ Nonliability in such cases is the general rule. See, e.g., *Woodford v. City of St. Petersburg*, 84 So.2d 25 (Fla. 1955) (crowd at baseball game); *Healy v. City of Kansas City*, 277 Mo. 619, 211 S.W. 59 (1919) (crowd at celebration of Independence Day); *Rush v. Town of Farmerville*, 156 La. 857, 101 So. 243 (1924) (mob violence). See also *Gianfortone v. City of New Orleans*, 61 Fed. 64 (E.D. La. 1894) (no liability for failure to resist lynch mob's attack on jail which resulted in murder of eleven prisoners).

¹⁴ See text at 443-47 *supra*.

¹⁵ *Mentillo v. City of Auburn*, 2 Misc.2d 818, 150 N.Y.S.2d 94 (1956). The court here points out that the police officer, after taking the insane person into custody for purpose of placement in a hospital, simply took him home and released him, thereby permitting him to be at large to shoot the plaintiff. This, said the court, was not a mere failure to protect the public at large, but was "negligence . . . in attempting to afford such protection. . . . Even if there is no liability on the part of the [city] for failure to furnish police protection to the public, when said [city] undertook to act and took D'Agnesi [the insane man] into custody, they assumed the duty of acting carefully." *Id.* at 819-20, 150 N.Y.S.2d at 95.

¹⁶ RESTATEMENT, TORTS, §§ 324, 325 (1934). The principle of these sections of the Restatement was relied upon to hold the United States liable for negligence under the Federal Tort Claims Act, notwithstanding the "discretionary function" immunity therein contained, in permitting the light of a lighthouse to become extinguished. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). Mr. Justice Frankfurter there points out that: "[I]t is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner. . . . The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order. . . ." *Id.* at 64-65, 69. To the same effect, see *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955). *But compare P. Dougherty Co. v. United States*, 97 F. Supp. 287 (D. Del. 1951), *rev'd*, 207 F.2d 626 (3d Cir. 1953), *cert. denied*, 347 U.S. 912 (1954).

the information furnished and services rendered by plaintiff's intestate and its public acknowledgement of his role, confirmed by the assumption of his partial protection by the respondent [city], either enlarged or prolonged the risk of bodily harm to the plaintiff's intestate. . . . The voluntary assumption of plaintiff's intestate's partial protection carried with it the obligation to exercise reasonable prudence in regard to the foreseeable risks engendered thereby. "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425; . . .¹⁷

This approach is believed to be a sound basis for imposing tort liability upon public entities, although, as previously indicated, the mere failure to provide adequate police protection in the absence of mandatory statutory duty or voluntary assumption of a duty to do so, should remain nonactionable.

It may be observed that the mob violence statutes are at least peripherally relevant to the present point. As already pointed out,¹⁸ Section 50140 of the California Government Code makes cities and counties liable for property damage caused by mobs or riots, without regard for fault. The underlying basis for such liability, at least in part, would seem to be that the failure of the community to prevent mob violence, when acting either through its police personnel or through private action of individual citizens, justifies distributing the risk of loss over the taxpayers at large. In the absence of such a statute, of course, entity liability for failure to protect against mob violence ordinarily has been denied.¹⁹ Comparable statutes in several other jurisdictions, including notably Illinois,²⁰ Kansas,²¹ and New Jersey,²² have long accepted liability not only for property damage but also for personal injuries from mob violence,²³ unlike the California provision. Yet the rationale which supports recovery for property damage would seem to apply equally—or, possibly, with even greater vigor in the estimation of those who value personal interests above property interests—to personal injuries and death resulting from such civil disorders. If the general policy of Section 50140 is sound—as it is believed to be—consideration should be given to modifying its terms to include therein liability for personal injuries as well as property damage, and possibly

¹⁷ *Schuster v. City of New York*, 5 N.Y.2d 75, 86-87, 180 N.Y.S.2d 265, 274-75, 154 N.E.2d 534, 541 (1958) (per McNally, J.).

¹⁸ See the text at 72-73 *supra*.

¹⁹ *Rush v. Town of Farmerville*, 156 La. 857, 101 So. 243 (1924); *Gianfortone v. City of New Orleans*, 61 Fed. 64 (E.D. La. 1894).

²⁰ ILL. ANN. STAT., ch. 38 § 515 (Smith-Hurd 1935). See, as to application of this statute, *Slaton v. City of Chicago*, 8 Ill. App.2d 47, 130 N.E.2d 205 (1955); *Barnes v. City of Chicago*, 323 Ill. 203, 153 N.E. 321 (1926).

²¹ KAN. GEN. STAT. ANN. § 12-201 (1949). See *Hendren v. City of Arkansas City*, 122 Kan. 361, 252 Pac. 218 (1927). Compare *Koska v. City of Kansas City*, 123 Kan. 362, 255 Pac. 57 (1927).

²² N.J. STAT. ANN., Tit. 2A, § 48-8 (1952). See *Halley v. City of Newark*, 22 N.J. Misc. 139, 36 A.2d 210 (1944).

²³ Some states also have express provisions imposing liability upon local entities for death as the result of a "lynching." See, e.g., S.C. CODE, § 10-1961 (1952), applied in *Kirkland v. County of Allendale*, 128 S.C. 541, 123 S.E. 648 (1924); W.VA. CODE ANN. § 6038 (1955), applied in *Lanham v. Buckhannon*, 97 W.Va. 339, 125 S.E. 157 (1924).

to defining more accurately and realistically the crucial terms, "mob" and "riot."²⁴

Injuries Sustained by Citizens Aiding Police in Enforcing the Law

The duty of the private citizen to assist in the enforcement of law has an ancient history,²⁵ and today is embodied in the statutes of most of the states of the Union. Section 150 of the California Penal Code, for example, makes it a misdemeanor punishable by a fine of not less than \$50 nor more than \$1,000 for any male person over the age of 18 years to refuse to aid in making an arrest, recapturing an escapee, preventing a breach of the peace or preventing the commission of any other criminal offense, "being thereto lawfully required by any . . . officer concerned in the administration of justice." The citizen, in short, must respond to the call of the peace officer as in medieval times. "The ancient ordinance abides as an interpreter of present duty. Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand."²⁶ But what if, in fulfilling this duty, the individual sustains serious personal injury, possibly even fatal wounds, or property damage? Should the public entity be financially liable for such losses?

A recent Wyoming decision²⁷ poses this issue in its sharpest form. The complaint alleged that a law-abiding citizen was there instructed by a policeman to assist in the pursuit and apprehension of a dangerous felon, and that the officer had negligently failed to warn of the dangers involved or to advise of the need to take suitable safety precautions. The citizen was killed by the suspected felon while thus assisting the policeman. The Wyoming Supreme Court denied relief, feeling itself constrained to adhere to the doctrine of sovereign immunity where "governmental" functions were concerned, but suggesting that compensation for the loss might be secured by private legislative bill.

The Legislature of New York authorized a substantially more equitable solution to the instant problem when, in 1932, it enacted an amendment to its statutory command for citizens to aid the police upon request (*i.e.*, New York's counterpart to California Penal Code Section 150). This amendment, now found in Section 1848 of the New York Penal Law, provides:

Where such command [to aid a police officer] is obeyed and the person obeying it is killed or injured or his property or that of his

²⁴ See text at 72-73 *supra*. Taken literally, the California statute would seem to impose liability whenever "two or more persons acting together" use force and violence to disturb the public peace. See CAL. PEN. CODE § 404; *People v. Bundte*, 87 Cal. App.2d 735, 197 P.2d 823 (1948). Application of the statutory definition so as to preclude liability under an insurance policy designating riot as an excluded risk, however, was denied in a case arising from an assault and battery committed by two persons on a third in a remote and unfrequented place. *Connell v. Clark*, 88 Cal. App.2d 941, 200 P.2d 26 (1948). The need for a reasonable definition, in order to prevent entity liability from arising under such a statute upon the basis of ordinary criminal conduct involving more than one miscreant, has been judicially recognized. See *Maus v. City of Salina*, 154 Kan. 38, 114 P.2d 808 (1941).

²⁵ See *Babington v. Yellow Taxi Corp.* 250 N.Y. 14, 164 N.E. 726, 61 A.L.R. 1354 (1928); *Riker v. City of New York*, 204 Misc. 878, 126 N.Y.S.2d 229 (1953), *aff'd*, 286 App. Div. 808, 143 N.Y.S.2d 620 (1955).

²⁶ *Cardozo, C.J.*, in *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 17, 164 N.E. 726, 727 (1928).

²⁷ *Maffel v. Town of Kemmerer*, 80 Wyo. 33, 338 P.2d 808 (1959). See also the related case of *In re Maffel's Claim*, 80 Wyo. 117, 338 P.2d 818 (1959).

employer is damaged and such death, injury or damage arises out of and in the course of aiding an officer in arresting or endeavoring to arrest a person or retaking or endeavoring to retake a person who has escaped from legal custody or executing or endeavoring to execute any legal process, the person or employer so injured or whose property is so damaged or the personal representatives of the person so killed shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such officer is employed at the time such command is obeyed.

This provision, it will be observed, does not predicate liability upon any fault on the part of the entity or its officers, but "makes liability absolute" by authorizing a cause of action, where it applies, "even if the police and other public authorities have taken the utmost care."²⁸ Such liability is founded upon a governmental policy of "care and solicitude for the private citizen who cooperates with the public authorities in the arrest and prosecution of criminals."²⁹ It has thus been held in New York that the statutory liability does not preclude the pursuit of any common law remedies founded on negligence in cases to which the statute is inapplicable;³⁰ and that reasonably construed, its reference to municipal corporations includes not only cities³¹ but counties³² as well. Its generally liberal interpretation is illustrated by a recent case allowing recovery for permanent disability sustained by a private detective who was struck by a brick when, at the request of a police officer, he assisted in quelling a disturbance caused by a disorderly group of youths who were throwing bottles, bricks and other objects at the officer.³³

In view of the mandatory nature of the citizen's duty to aid the police upon demand, and its importance to maintenance of law and order, it is believed that the imposition of absolute liability, as in New York, is an equitable and justifiable means for compensating losses sustained in performance of that duty. The paucity of cases involving the New York statute suggests that the extent of actual financial outlay thereunder is probably extremely modest; and the elimination of possible misgivings as to financial consequences in the event injury is sustained might conceivably tend to promote more willing and whole-hearted cooperation by citizens when called upon to give aid in law enforcement. Adoption of a provision similar to the New York statute above quoted should thus be considered for California. An alternative approach to the problem would be through legislation making work-

²⁸ *Schuster v. City of New York*, 5 N.Y.2d 75, 86, 180 N.Y.S.2d 265, 274, 154 N.E.2d 534, 541 (1958).

²⁹ *Ibid.* Illinois also has a similar statutory policy. ILL. ANN. STAT., ch. 24, §§ 1-4-5, 1-4-6 (Smith-Hurd 1962).

³⁰ *Schuster v. City of New York*, *supra* note 28; see also *Adamo v. Village of Mamaroneck*, 4 App. Div.2d 758, 164 N.Y.S.2d 874 (1957).

³¹ See *Riker v. City of New York*, 204 Misc. 878, 126 N.Y.S.2d 229 (1953), *aff'd*, 286 App. Div. 808, 143 N.Y.S.2d 620 (1955).

³² *Sawyer v. Town of Southport*, 6 App. Div.2d 553, 179 N.Y.S.2d 897 (1958). *But see* *Commisso v. Meeker*, 8 N.Y.2d 109, 202 N.Y.S.2d 287, 168 N.E.2d 365 (1960), impliedly disapproving the *Sawyer* case.

³³ *Riker v. City of New York*, *supra* note 31.

men's compensation benefits available to citizens injured in the course of assisting in law enforcement.³⁴

Violations of Federal Civil Rights Act

In February 1961, the United States Supreme Court rendered its decision in the important case of *Monroe v. Pape*.³⁵ The complaint in this action, which was instituted in a federal district court, alleged facts indicating that certain police officers of the City of Chicago, acting under color of Illinois law, had wrongfully broken into the plaintiffs' home and had thereafter engaged in conduct amounting to assault and battery, trespass, and false imprisonment of plaintiffs while ostensibly seeking evidence relating to an unsolved murder. Damages were sought from the officers and from the City of Chicago. The action was predicated upon a section of the Federal Civil Rights Act which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.³⁶

Similar attempts previously to utilize this statutory provision in fashioning an effective federal civil remedy for misconduct of state officials had proved abortive in the light of restrictive interpretations imposed by the lower federal courts.³⁷ The Supreme Court, however, in a rare display of near unanimity (with only Mr. Justice Frankfurter dissenting, and then only in part) concluded that the complaint stated a good cause of action against the defendant police officers, although not against the defendant City of Chicago. The unlawful conduct of the officers constituted a violation of due process clause of the fourteenth amendment, and was thus a basis for personal liability under the Civil Rights Act; but the legislative history of the statute convinced the court that public entities were not intended to be included in the category of "persons" made liable. It may be noted, also, that a previous decision of the Supreme Court, which apparently is still good law, had ruled that

³⁴ An early case indicating that persons summoned into law enforcement service under Section 150 of the Penal Code are entitled to workmen's compensation benefits, see *County of Monterey v. Industrial Acc. Comm'n*, 199 Cal. 221, 248 Pac. 912 (1926), has been qualified in later cases which intimate that such benefits are not available to persons who are not compensated for their services (as was the claimant in the *County of Monterey* case, *supra*). See Department of Nat. Resources v. Industrial Acc. Comm'n, 208 Cal. 14, 279 Pac. 987 (1929). *Cf.* *City of Long Beach v. Industrial Acc. Comm'n*, 4 Cal.2d 624, 51 P.2d 1039 (1935). It should be noted that individuals pressed into fire suppression service under Section 4010 of the Public Resources Code are covered by workmen's compensation by virtue of Section 4458.5 of the Labor Code. The last cited provision would thus provide a useful pattern for extending similar benefits to citizens pressed into law enforcement activities.

³⁵ 365 U.S. 167 (1961), discussed in Sperber, *Monroe v. Pape: Redress Under the Civil Rights Acts Redefined*, 21 LAW IN TRANSITION 197 (1961).

³⁶ REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

³⁷ See, e.g., *Egan v. City of Aurora*, 275 F.2d 377 (7th Cir. 1960), *rev'd*, 365 U.S. 514 (1961), on authority of *Monroe v. Pape*, *supra* note 35; *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959); *Simmons v. Whitaker*, 252 F.2d 224 (5th Cir. 1958); *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954).

the Civil Rights Act was not intended to impose liability upon public officials for legislative acts which were within the scope of the traditional personal immunity of legislators.³⁸

The precise impact of *Monroe v. Pape* remains to be seen, although the lower federal courts have recognized that it requires a far more liberal attitude toward civil rights actions for damages than was previously the accepted approach.³⁹ A number of unanswered problems likely to arise under the statute, however, are unresolved, including the important issues whether liability thereunder is to be governed by customary principles of state tort law or by federally ascertained and declared standards, whether state rules for measurement of damages will obtain or not, and whether recovery under state law in an action in the state courts will bar further relief under the federal Act, or vice versa.⁴⁰ A recent decision, however, squarely holds that the availability of a state remedy will not preclude the plaintiff from proceeding under the Civil Rights Act, and indicates, in purposeful *dictum*, that state-recognized discretionary immunities may not be available to shield state officials from liability under the federal Act.⁴¹

The issue relevant to the present study, of course, is whether public entities, notwithstanding their immunity from direct liability under the Civil Rights Act, should assume financial responsibility (whether through payment of insurance premiums to protect their personnel, or through assumption of payment of judgments against such personnel) for violations by their police officers of that Act. By analogy to suggestions offered earlier,⁴² it is believed that consideration should be given to adoption of statutory provisions, adapted along the pattern of existing Illinois⁴³ and Wisconsin⁴⁴ legislation, under which public entities in California would be required to assume ultimate financial responsibility for such torts of their police officers, except where they acted through malice, fraud, corruption or with wrongful intent.

³⁸ *Tenney v. Brandhove*, 341 U.S. 367 (1951).

³⁹ See, e.g., *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962) (complaint held to state cause of action under Civil Rights Act for false arrest, illegal search, and assault and battery by police officers); *Hughes v. Noble*, 295 F.2d 495 (5th Cir. 1961) (holding complaint stated cause of action under Civil Rights Act for false arrest and imprisonment, and failure to provide medical aid to prisoner); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961) (cause of action stated for false arrest and ensuing assault and battery by police officers causing death of arrested citizen); *Hardwick v. Hurley*, 239 F.2d 529 (7th Cir. 1961) (assault and battery). Compare also the decision in *Egan v. City of Aurora*, 275 F.2d 377 (7th Cir. 1960), decided prior to the *Monroe* case, with the same court's decision in *Egan v. City of Aurora*, 291 F.2d 706 (7th Cir. 1961), following a reversal and remand by the United States Supreme Court, 365 U.S. 514 (1961), on authority of the *Monroe* decision.

⁴⁰ See Note, 75 HARV. L. REV. 211 (1961).

⁴¹ *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962).

⁴² See the text, *supra* at 413-15, 433-34.

⁴³ ILL. ANN. STAT., ch. 24, §§ 1-4-5, 1-4-6 (Smith-Hurd 1962).

⁴⁴ WIS. STAT. § 270.53 (1957), as amended by Wis. Laws 1959, ch. 438, and Wis. Laws 1961, ch. 499.

Firefighting and Fire Protection

Publicly administered programs of fire prevention and fire protection have long, and almost uniformly, been regarded as a "governmental" function throughout the United States and hence a form of activity protected against tort liability by the doctrine of sovereign immunity.¹ Only very rarely has a court departed from the conceptual pattern to classify particular aspects of fire department activities as "proprietary."² Indeed, one of the earliest cases in California applying the doctrine of governmental immunity did so in connection with property damage caused by a San Francisco fire engine en route to a blaze. The immunity of the city was so entirely beyond question that the Supreme Court was satisfied to dispose of the issue by a flat declaration of law unadorned by either legal citation or analysis. "At common law, and in the absence of statutory provisions," said the Court, "the defendant, as being a municipal corporation, would not be liable for the negligence complained of in this action."³ This statement appears to accurately reflect the law in California with respect to fire services prior to the abrogation of the immunity doctrine by the *Muskopf* decision.⁴

Most of the decisions relating to torts arising in the course of firefighting or fire protection activities do not attempt to probe beneath the surface of the immunity doctrine, but instead apply the rule of immunity unquestioningly. The occasional court willing to explore the rationale of immunity in this area of the public business, however, almost invariably seizes upon the potentially disastrous fiscal consequences of liability as a justification for denying recovery. In New York, where governmental tort immunity had previously been replaced by a rule of statutory liability "in accordance with the same rules of law" that apply to private individuals or corporations,⁵ for example, the "crushing burden" which the court thought an opposite result might entail was judicially invoked to sustain nonliability of a city for its negligent failure to maintain adequate water pressure for firefighting purposes.⁶ The New York case law was relied upon to reach the

¹ MCQUILLIN, MUNICIPAL CORPORATIONS §§ 53.52, 53.32 (3rd ed. 1950); Annot., 84 A.L.R. 514 (1933), 33 A.L.R. 688 (1924), 9 A.L.R. 143 (1920).

² See *Bowden v. City of Kansas City*, 69 Kan. 587, 77 Pac. 573 (1904) (city held engaged in "ministerial" function in caring for firehouse property, hence liable for injury sustained as result of hole in floor of firehouse); *Fowler v. City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919) (negligent driving of fire engine on return trip to firehouse after fire call held actionable); *City of Sand Springs v. Gray*, 182 Okla. 248, 77 P.2d 56 (1938) (negligent operation of fire engine outside city in performing fire service under contract with property owner held "proprietary" activity). It should be noted that the *Fowler* case was subsequently overruled in *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922), while the *City of Sand Springs* case was nullified by legislation. See OKLA. STAT., Tit. 11, § 343 (1961).

³ *Howard v. City & County of San Francisco*, 51 Cal. 52, 55 (1875). The arguments of counsel in this case, as summarized in the report, indicate that the principal dispute revolved around the issue whether firefighting was to be classified as a "governmental" function.

⁴ The principal cases treating the fire protection function as a "governmental" function for which no liability arises in the absence of statute include *Stang v. City of Mill Valley*, 38 Cal.2d 486, 240 P.2d 980 (1952) and *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940). See also *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962).

⁵ N.Y. Ct. CL. Act § 8, enacted in 1939, based on earlier provision of Court of Claims Act of 1929.

⁶ *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945) (citing and relying upon *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), per *Cardozo, C.J.*). The rule in the *Steitz* case is still followed in *New York. Siraco v. Village of Whitehall*, 5 App. Div.2d 925, 171 N.Y.S.2d 1003 (1958). *Cf. Shaw v. Village of Hempstead*, 15 Misc.2d 72, 177 N.Y.S.2d 744 (1958).

same result in California,⁷ even though liability was being asserted here under the Public Liability Act by allegations that the city had actual knowledge of the defective condition of its water mains and hydrants and had negligently failed to remedy it.⁸ In Florida, notwithstanding prior judicial disapproval of the governmental immunity doctrine,⁹ a recent decision refuses to impose tort liability on a municipality for negligence in the firefighting activities of its fire department on the ground that "a conflagration might cause losses, the payment of which would bankrupt the community."¹⁰ This language seems to be but the echo of the same view expressed in a state which has long adhered strictly to the doctrine of immunity: "If such liability existed, history records many disastrous fires which would have resulted in complete bankruptcy of the municipality."¹¹ Similar views are widely expressed in the case law.¹²

A supporting argument often advanced in conjunction with the fear of crippling fiscal consequences contends that fire service activities are voluntarily undertaken by governmental entities not out of legal duty to do so but as an extension of special benefits for the public welfare at large. The fear of catastrophic liabilities, so the argument goes, might dissuade public officials from engaging in the fire protection function at all, to the general detriment of the public weal. Thus, although the city of Manchester had installed (and presumably assumed the responsibility of maintaining) a system of fire hydrants, its negligent failure to keep the hydrants in proper working order, thereby permitting plaintiff's house to be destroyed by fire, was said by the New Hampshire Supreme Court to be a mere nonactionable "failure to carry out a voluntary and gratuitous undertaking."¹³ In like vein, an Ohio court pointed out that municipal liability for defective firefighting equipment might make the cost of operating a liability-proof system so expensive that "no city would dare undertake to extinguish fires" for the cost alone would make it "impracticable, almost, for a city to enter into any such enterprise, and yet, an enterprise that is very needful indeed to any city."¹⁴ The Supreme Court of Tennessee has also warned that "the hazard of pecuniary loss," if the immunity doctrine were abrogated as to firefighting, might become so great as

⁷ *Stang v. City of Mill Valley*, 38 Cal.2d 486, 240 P.2d 980 (1952) (citing and relying on both the *Steitz* and *Moch Co.* cases, cited in note 6 *supra*). Cf. *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962).

⁸ The refusal of the majority of the California Supreme Court to apply the Public Liability Act in accordance with its literal language has been severely criticized in the legal literature. See, e.g., 3 DAVIS, ADMINISTRATIVE LAW 457-59 (1958); Note, 25 So. CAL. L. REV. 489 (1951-52).

⁹ *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

¹⁰ *Steinhardt v. Town of North Bay Village*, 132 So.2d 764, 767 (Fla. App. 1961).

¹¹ *City of Columbus v. McIlwain*, 205 Miss. 473, 487, 38 So.2d 921, 923 (1949).

¹² See, e.g., *Miralago Corp. v. Village of Kenilworth*, 290 Ill. App. 230, 242, 7 N.E.2d 602, 607 (1937) ("damages which might prove so onerous as to destroy the municipality itself"); *Brinkmeyer v. City of Evansville*, 29 Ind. 187, 193 (1867) (power to organize a fire department could not have been intended to make municipalities "responsible as insurers in case of failure" to put out fire); *Akron Water Works Co. v. Brownless*, 10 Ohio C.C.R. 620, 627, 5 Ohio C.C. Dec. 1, 5 (1895) (rejecting rule of liability on ground that any defect in fire apparatus "would make it liable sometimes for almost the entire town, or for a large block of buildings," thereby making fire protection "so expensive . . . that it would be impracticable, almost, for a city to enter into any such enterprise"); *Irvine v. City of Chattanooga*, 101 Tenn. 291, 295, 47 S.W. 419, 420-21 (1898) ("the hazard of pecuniary loss . . . might well frighten our municipal corporations from assuming the startling risk").

¹³ *Stevens v. City of Manchester*, 81 N.H. 369, 370, 127 Atl. 873 (1924).

¹⁴ *Akron Water Works Co. v. Brownless*, 10 Ohio C.C.R. 620, 627, 5 Ohio C.C. Dec. 1, 5 (1895).

to "frighten our municipalities from assuming the startling risk."¹⁵

To be sure, the fiscal consequences which potentially might flow from unlimited liability of public bodies engaged in firefighting functions should be carefully evaluated in formulating a rational rule of law. Great conflagrations of the distant past continue to find their counterparts in modern holocausts, such as the wind-borne fire which in a single day wiped out more than 450 valuable homes in the foothills of western Los Angeles in November 1961. The general rule of immunity which still prevails elsewhere in the United States, and which characterized the law of California before the *Muskopf* decision, is not, however, an absolutely necessary consequence of such deep-rooted fiscal concern. The policy equation also should take into account the interest in providing some measure of protection against potentially catastrophic personal consequences to individuals unnecessarily suffering injuries and loss of property due to negligently opposed fires beyond their power to guard against or suppress. As a distinguished judge, Mr. Justice William Johnson, once stated in another context, "it is among the duties of society to enforce the rights of humanity."¹⁶ Thus, a desirable approach to the problem would seek to identify possible legal criteria intermediate between the extremes of immunity and liability, which might better serve the interests of distributive justice without endangering the capacity of government to fulfill its appointed tasks.

A tentative evaluation of the immunity doctrine as applied to firefighting services suggests that there are certain logical weaknesses and unrealistic assumptions inherent in it. As judicially articulated, for example, the principle of sovereign immunity is often postulated as an alternative to placing the entity in the position of an insurer against fire losses.¹⁷ Obviously, under accepted tort principles, the dichotomy thus posed is a false one; for the entity, far from being an insurer, would be liable only when it was established that it had failed to exercise ordinary prudence and diligence in carrying out its fire protection and suppression responsibilities. In the nature of the judicial process, it is entirely likely that in most major conflagrations (and only in such cases is the catastrophe liability problem of realistic concern) the losses sustained by large numbers of individual property owners could not possibly be proven to be a proximate consequence of tortious conduct by firefighting or other public personnel.

On the other hand, it is conceivable that public negligence in dealing with a fire in its incipency—when it is still small and easily controllable—might permit it to spread and develop into a serious disaster. To so conceive, however, is merely to recognize that appropriate limitations should be devised to strike a reasonable balance. For example, the flexible concept of proximate cause offers opportunities for restricting liability by cutting off the chain of causation where intervening conditions, such as high winds, excessively low humidity, or public panic, preclude the taking of effective measures to prevent the spread of fire. The entity might, perhaps, be held liable for negligence which results in the destruction of the property which initially catches on fire (and

¹⁵ *Irvine v. City of Chattanooga*, 101 Tenn. 291, 295, 47 S.W. 419, 420-21 (1898).

¹⁶ *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213, 283 (1827).

¹⁷ See, e.g., *Brinkmeyer v. City of Evansville*, 29 Ind. 187 (1867). See also cases cited *supra*, notes 10-12.

possibly for the loss of immediately adjoining property which likewise would foreseeably be exposed to loss by any such negligence); but, provided reasonable action is taken in light of the whole problem to try to prevent the further spread of the blaze through the operation of intervening conditions such as those suggested, no liability would attach for private losses sustained beyond the initial perimeter area. The exact details of the suggested rule are not here of concern. What is of moment is that the resources of legal imagination are believed to be adequate to the task of formulating rules of liability which need not embrace either of the two extremes of unlimited responsibility or of full immunity.

A further criticism which may justifiably be levied against the immunity doctrine as applied to fire services is that it is wholly unrealistic insofar as it regards the function of fire protection as a *voluntary* undertaking of government. Total expenditures for local fire protection activities by state and local entities in the United States currently amount to approximately \$1 billion per year,¹⁸ while total fire losses appear to amount to about 10 percent more, in dollars, than the amounts expended for fire protection.¹⁹ It has been authoritatively estimated that about 20 to 25 percent of the resources of average municipalities in California are devoted to fire protection services.²⁰ In addition, the unincorporated area of the State (and at least a part of the incorporated territory)²¹ is blanketed by more than 450 fire protection districts operating on annual financial budgets totalling more than \$25 million per year,²² while additional fire services are provided by various other types of districts (such as Community Services Districts)²³ as well as by the State²⁴ and by county government.²⁵ Indeed, general law cities in California are *required*—not merely authorized—to establish a fire department in every case where the city is not included within the boundaries of an established fire protection district.²⁶

Obviously, provision for fire prevention and firefighting services cannot realistically be regarded as a purely voluntary undertaking by

¹⁸ U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 409 (1961).

¹⁹ *Id.* at 475. From 1957 through 1960, the average annual total fire loss in the United States was slightly above one billion dollars, or about six dollars per capita.

²⁰ CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, FINAL REPORT—FIRE GRADING AND RATING 23 (1961).

²¹ Some of the territory within city boundaries may be included within fire protection districts under certain conditions. See CAL. H. & S. CODE §§ 13821 (Fire Protection District Law of 1961), 14010, 14202 (Local Fire District Law).

²² CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA 11 (FISCAL YEAR 1959-60).

²³ CAL. GOVT. CODE § 61600(d). Other types of districts (other than fire protection districts) authorized to provide fire protection functions include: Resort Districts (CAL. PUB. RES. CODE §§ 10018, 11202, 11349); Public Utility Districts (CAL. PUB. UTIL. CODE § 16463); County Water Districts (CAL. WATER CODE § 31120); and Municipal Improvement Districts (e.g., Estero Municipal Improvement District Act § 79, Cal. Stat. (1st Ex. Sess.) 1960, ch. 82, § 79, p. 464).

²⁴ See CAL. H. & S. CODE §§ 13100-13169 (duties of State Fire Marshal); CAL. PUB. RES. CODE §§ 4000-4015 (forest fire responsibilities of State Forester).

²⁵ See CAL. GOVT. CODE §§ 25210.50-25210.57 (authorizing counties to provide structural fire protection through instrumentality of county service areas); CAL. PUB. RES. CODE §§ 4006, 4050 (authorizing county nonstructural fire protection and suppression activities). For a description of the functions performed by the Los Angeles County Forester and Fire Warden, see CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, PRELIMINARY REPORT COVERING FRINGE AREA PROBLEMS IN THE COUNTY OF LOS ANGELES 59-64 (1953).

²⁶ CAL. GOVT. CODE § 38611, "The legislative body of a city organized under general law shall establish a fire department for the city . . ." except where the city "is included within the boundaries of an established fire protection district."

governmental bodies in California. It is in fact recognized by public officials as one of the most basic and fundamental services which government renders on behalf of the citizens whom it serves.²⁷ To be sure, the extent of fiscal support and nature of physical equipment and facilities to be devoted to this function will undoubtedly vary from place to place, depending upon a variety of geographic, economic, political and other considerations. Such variations are amply reflected in the community fire protection grading and rating standards upon which fire insurance rates are predicated.²⁸ But, to the extent that a community has in fact established a firefighting and fire prevention system upon which the residents are dependent for protection against the menace of fire, the continued operation and maintenance of the system can scarcely be termed a "voluntary" one except in the legally irrelevant sense that organized government is itself a voluntary undertaking. Common sense suggests, therefore, that the problem of tort liability arising from the activities of public officers and employees engaged in fire service functions should be explored from the initial premise that such functions constitute the performance of a public duty rather than the mere voluntary extension of a gratuitous benefit.

The prevalence of the immunity doctrine in judicial opinions discussing fire service functions of governmental entities should not be permitted to obscure the extensive legislative modifications which have been made in this area. A substantial majority of all of the decisions of the American courts affirming the nonliability of public agencies for fire service activities appear to have involved either the operation of fire trucks and other firefighting equipment or dangerous and defective conditions of public property under the jurisdiction and control of fire departments.²⁹ In these two areas, however, the California Legislature has already enacted statutory rules imposing liability: Section 17001 of the Vehicle Code, relating to the operation of motor vehicles, including fire department vehicles;³⁰ and Section 53051 of the Government Code, relating to dangerous or defective conditions, including

²⁷ Compare the prepared statement presented on behalf of the League of California Cities in connection with legislative studies into fire grading and rating problems: "The League of California Cities is interested in fire grading and rating because these two closely related enterprises performed by the insurance industry profoundly affect the manner in which cities perform a *vital city service*. Fire protection is, along with police protection, a *basic municipal function*." CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, TRANSCRIPT OF PROCEEDINGS—FIRE GRADING AND RATING 81 (Los Angeles, Dec. 8, 1959). (Emphasis added.) See also *id.* at 90, quoting a resolution adopted at the 1957 Annual Meeting of the American Municipal Association.

²⁸ See CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, FINAL REPORT—FIRE GRADING AND RATING *passim* (1961).

²⁹ See cases collected in the annotations in 84 A.L.R. 514 (1933), 33 A.L.R. 638 (1924), and 9 A.L.R. 143 (1920).

³⁰ California Vehicle Code Section 17001 imposes liability upon public entities generally for negligent operation of motor vehicles, including fire department vehicles. See *Johnson v. Fontana County Fire Protection Dist.*, 15 Cal.2d 380, 101 P.2d 1092 (1940); *Farmers Auto. Inter-Ins. Exch. v. Calkins*, 39 Cal. App.2d 390, 103, P.2d 230 (1940). When operated as "emergency vehicles," such fire department vehicles are relieved from compliance with certain statutory provisions relating to speed and rules of the road (CAL. VEH. CODE § 21055), and in such cases the driver is personally immune from tort liability arising from such emergency vehicle operation (CAL. VEH. CODE § 17004), although the entity is still liable for negligent operation of the vehicle (in respects other than non-compliance with exempted statutory requirements). See *Torres v. City of Los Angeles*, 53 Cal.2d —, 22 Cal. Rptr. 866, 372 P.2d 906 (1962); *West v. City of San Diego*, 54 Cal.2d 469, 6 Cal. Rptr. 289, 353 P.2d 929 (1960); *Peerless Laundry Services, Ltd. v. City of Los Angeles*, 109 Cal. App.2d 703, 241 P.2d 269 (1952).

fire department property.³¹ Other California statutes make selected public entities liable for the torts of their personnel while engaged in carrying out fire prevention and suppression functions, chiefly in the form of provisions requiring the entity to satisfy any judgments against its personnel arising out of torts committed by them in the course of their duties.³² Still other provisions impose liability directly upon California public agencies in connection with elimination of certain types of fire hazards, such as inflammable weeds and grass;³³ and express authority exists for the State to assume liability by contract for damages resulting from operation of fire communications systems under lease arrangements.³⁴

The pattern of statutes altering the rule of tort immunity in California for fire service activities is not unique, although it is perhaps more extensive than in most states. Some states have gone considerably further than California. Wisconsin, for example, has adopted a general statutory requirement that public entities shall pay judgments rendered against public officers (including, *inter alia*, firefighting personnel) for acts done by them in good faith performance of official duty.³⁵ Connecticut has enacted a similar rule, limited to firemen engaged in performing fire duties, under which the employing public entity is required to pay all sums such firemen become obligated to pay "by reason of liability imposed . . . by law for damages to person or property," except for damages resulting from wilful or wanton misconduct.³⁶ Massachusetts likewise requires its public entities to indemnify their firemen for liabilities incurred in the performance of duty, leaving the maximum amount of such indemnity to the discretion of the appointing authority.³⁷

The significance of these statutes, as of those previously cited from California, is, of course, that legislative bodies both in this State and elsewhere have found the rule of immunity to be unduly restrictive in several significant respects and have waived sovereign immunity accordingly. No evidence has been found which suggests that even the extensive—in fact, nearly comprehensive—waivers of immunity in Wisconsin, Connecticut and Massachusetts have crippled any of the public entities in those states, or have tended to bring about a curtailment of fire services. The willingness of other states to assume such liabilities, notwithstanding the repeated forebodings of doom which

³¹ Section 53051 of the Government Code relates to tort liability for defective public property of all types, including that employed in firefighting work, owned or maintained by cities, counties and school districts. See discussion in the text at 42-59 *supra*.

³² See CAL. GOVT. CODE § 61633 (requiring community services districts to satisfy judgments against their personnel, including judgments founded on torts committed in the course of fire protection and suppression duties of such districts); CAL. WATER CODE § 31090 (requiring county water districts to satisfy tort judgments against their personnel, who are also authorized by Section 31120 of the Water Code to provide fire protection service). A number of water districts which supply water for fire protection purposes are under a similar obligation. See the statutes discussed in the text at 65-72 *supra*.

³³ CAL. GOVT. CODE §§ 39586, 53057 (imposing liability for personal injury and property damage resulting from burning of weeds and rubbish). See text at 63-65 *supra*.

³⁴ CAL. PUB. RES. CODE § 4004. See text at 98 *supra*.

³⁵ WIS. STAT. § 270.58 (1957), as amended by Wis. Laws 1959, ch. 438 and Wis. Laws 1961, ch. 499.

³⁶ CONN. GEN. STAT. § 7-308 (Supp. 1961).

³⁷ MASS. ANN. LAWS, ch. 41, § 100 (1961). The Massachusetts statute also relieves the public entity from any duty to indemnify the fireman for tort liability incurred by him to the extent such liability is covered by insurance purchased by the entity.

characterize judicial opinions on the subject, suggests that a modest expansion of public liability in California for injuries arising from tortious acts in connection with fire services may be deserving of favorable legislative consideration.

A final preliminary aspect of the problem which should not escape our attention is the pervasive influence of fire insurance covering losses to buildings and their contents. The Florida court recently pointed out, for example, that denial of public liability for negligence in firefighting was supported, as a policy, not only by the fear of community bankruptcy but also by "the realization that the crushing burden of extensive losses can better be distributed through the medium of private insurance."³⁸ The Supreme Court of the United States has given voice to the same thought, adding a reminder that tort liability would be in practical effect simply an alternative method of spreading the risks of fire. In words spoken by Mr. Justice Lamar some fifty years ago, the rule of nonliability simply leaves the property owner "to protect himself against that hazard by insurance, paying the premium direct to an insurance company instead of indirectly through taxation."³⁹

The point last made deserves to be re-emphasized. To the extent that governmental entities are made liable in tort, the ultimate costs of discharging such liability will be borne by those who provide the financial resources of the entity through payment of taxes or of fees and charges for public services. The individuals who thus ultimately bear the risk, it will be noted, ordinarily are approximately the same individuals whose losses are thereby distributed. All taxpayers and consumers of public services, for example, are generally exposed to a roughly comparable possibility of serious loss from negligent operation of governmental motor vehicles. The burden of public tort liability in such cases is thus justified by the reciprocal advantage secured to those who foot the bill. In the case of property losses by fire, however, it must be remembered that all property owners are not taxpayers and all taxpayers are not property owners.⁴⁰ Moreover, most buildings are already insured against fire hazards by their owners, so that the risk has already been distributed over the very class of persons to be benefited; and it is unlikely that any pressing justification can be found for redistributing it over the larger, not identical, class of taxpayers through the indirect mechanism of tort liability.

In any event, it can be persuasively argued that property insurance is a better technique for distributing the risk than tort liability, even where the latter is underwritten by liability insurance.⁴¹ The owner of

³⁸ *Steinhardt v. Town of North Bay Village*, 132 So.2d 764, 767 (Fla. App. 1961).

³⁹ *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 233 (1912). To the same effect, see *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952). Although these cases involve the rule of nonliability of private water companies under contract to supply municipalities with water for firefighting purposes, the principles of decision invoked are closely analogous to the rules usually relied on in cases involving public entity immunity in like situations.

⁴⁰ See text at 277-78 *supra*. In 1957, the total assessed valuation of tax-exempt property in California amounted to approximately \$1.3 billion, or 5.4% of taxable property values, thereby relieving these property owners from a corresponding share of the tax burden. *Vieg et al., CALIFORNIA LOCAL FINANCE* 182 (1960). On the other hand, many persons who pay sales, use and business license taxes (all of which are significant sources of local governmental revenue, see *id.* at 149-157) undoubtedly are not subject to direct property taxation as owners of taxable property.

⁴¹ See generally *Morris, Hazardous Enterprises and Risk Bearing Capacity*, 61 *YALE L. J.* 1172, 1178 (1952).

property can quite rationally determine the value of his property and buy the exact amount of insurance protection he needs; but the public entity seeking to insure against tort liability must necessarily guess at the amount required, for losses will be incurred in a sporadic and scattered fashion and in unpredictably varying amounts. In a tort liability setting, the entity may thus be constrained to provide protection against the maximum predictable risk to be safe. To the extent the appraisal of the risk is excessive, waste of public funds will result; to the extent it is deficient, unforeseen financial drains may result. The institutional dynamics of the property insurance business may also be expected to result in more rapid and favorable settlement of property loss claims by fire insurers in dealing with their own customers than by liability insurers in negotiating with third parties claiming adversely to such customers, where the exacerbating issue of liability is additionally present. Finally, public awareness of the cost of protection against fire losses may be much more acute where insurance premiums are paid as a discrete item of personal expenditure, and hence, may be a more effective incentive for political pressures toward better public fire protection, than where such costs are included along with other low-visibility items in a general tax bill, water rate schedule or sales tax exaction.

In view of the differences noted, it is not entirely satisfactory to argue, as some authorities have done,⁴² that under "sound principles of justice" the burden of liability for fire losses should be placed initially upon the firefighting entity at fault. So far as property losses are concerned, the preceding analysis appears to justify a contrary view.⁴³ Personal injuries and loss of life from fire, however, are not ordinarily covered by insurance which contemplates fire as a special risk, any more than ordinary life insurance or medical and hospitalization insurance contemplates automobile accidents in a special sense. As to these types of injuries, therefore, as distinguished from property losses, the traditional fault analysis may be a more appropriate basis for appraising the problem of fire service torts.

Against the background considerations just reviewed, we turn next to an evaluation of the recurring situations in which claims of tort liability have been made against public entities in the past, and hence presumably will continue to be made in the future, in connection with fire services. Excluded from the scope of the survey, however, are cases dealing with negligence in operating fire department motor vehicles and cases dealing with dangerous and defective conditions of fire department property. These two types of cases, as we have already noted, have been treated by the Legislature in a pervasive fashion,

⁴² *E.g.*, Vanderbilt, C.J., dissenting in *Reimann v. Monmouth Consol. Water Co.*, 9 N.J. 134, 140, 87 A.2d 325, 332 (1952). See also, to the same effect, Seavey, *The Waterworks Cases and Stare Decisis*, 66 HARV. L. REV. 34 (1952); Corbin, *Liability of Water Companies for Losses by Fire*, 19 YALE L. J. 425 (1910). Although these authorities deal principally with the liability of private water companies for negligent failure to maintain adequate water pressure or supply for firefighting purposes as required by their contract with the municipality in which the injured property owner resided, they are deemed relevant for the purpose for which they are here cited in view of the reliance of the courts on such private tort cases when analyzing the public liability issue in the firefighting context. See, *e.g.*, *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945), relying on the private tort case of *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1923).

⁴³ *Cf.* 2 HARPER & JAMES 1052-53.

without regard for the peculiar nature of the governmental function being performed, and presumably should continue to be so treated. The focus of the present section of this study is upon problems of tort liability which are peculiar to the rendition of fire services.

Failure to Provide a System of Fire Protection

It is uniformly recognized throughout the United States that no tort liability will ensue from the failure of a public body to organize, maintain and operate a system of fire protection.¹ It seems abundantly clear that even where, as now is the case in California by statute, there is a statutory duty for cities to establish fire departments,² the extent of a municipality's performance of that duty involves matters of legislative and fiscal policy which entail a high order of discretion and judgment on the part of the governing body. Similarly, although counties in California appear to have adequate statutory authority to provide structural fire protection services throughout unincorporated territory,³ political decisionmaking generally appears to have resisted doing so except through the mechanism of fire protection districts or county service areas by which the cost of the service is paid by the property owners receiving the benefit.⁴ As a result, some portions of the State are apparently without any publicly organized structural fire protection today.

A determination not to establish a fire protection system manifestly is the product of competing interest and diverse policy considerations susceptible of reconciliation primarily through political channels, and quite unfitted to the processes of judicial administration. Accordingly, it is believed that no tort liability should be imposed under any circumstances for the failure of a public entity to provide a fire protection system, whether it be its duty to do so or not.

Failure to Take Adequate Precautions to Prevent or Suppress Fire

Claims have frequently been made, but uniformly without avail, seeking to impose tort liability upon public entities for some inherent deficiency in its firefighting program. Liability has been denied, for example, where losses resulted from a failure to keep the city firehouse properly manned with firemen,⁵ where fire hydrants were located too far from the blaze to be available to the firemen as a source of water

¹ See *Edmondson v. Town of Morven*, 41 Ga. App. 209, 152 S.E. 280 (1930); *Phillips v. Kentucky Utils. Co.*, 206 Ky. 151, 266 S.W. 1064 (1924); *Fowler v. City of Cleveland*, 100 Ohio St. 153, 126 N.E. 72 (1919), overruled on other grounds in *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922).

² CAL. GOV'T. CODE § 38611, quoted in note 26, p. 459 *supra*.

³ See CAL. PUB. RES. CODE §§ 4006, 4050. Cf. CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON STATE AND LOCAL TAXATION, FISCAL PROBLEMS OF URBAN GROWTH IN CALIFORNIA 7 (1953): "It seems clear . . . that a county, if it chose, could provide fire protection for its inhabitants equal to that furnished by a city or district."

⁴ See CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, PRELIMINARY REPORT COVERING FRINGE AREA PROBLEMS IN THE COUNTY OF LOS ANGELES 59-64 (1953), indicating that Los Angeles County does not provide general structural fire protection service in unincorporated territory but instead actively promotes the use of fire protection districts for this purpose. Similar policies are documented in other counties by CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON STATE AND LOCAL TAXATION, FISCAL PROBLEMS OF URBAN GROWTH IN CALIFORNIA (1953). See *id.* at 36 ("only a basic level of fire protection" furnished by Napa County), 117-18 (crop and grass fire protection principally offered by Alameda County), 227 (no fire protection service afforded by Sacramento County). *But compare id.* at 87, indicating Kern County as the only one in California which engages in superior level countywide fire protection service as a general policy.

⁵ *Irvine v. City of Chattanooga*, 101 Tenn. 291, 47 S.W. 419 (1898).

supply,⁶ where fire-extinguishing equipment made available to city personnel was inadequate to the need,⁷ where the hoses supplied to the fire company were too short to extend from a properly located hydrant to the fire,⁸ and where inadequate precautions were taken to prevent fire by insisting on special means for the handling of inflammable materials.⁹ A combination of inadequate equipment and poorly trained firemen was held, in a recent Florida case, not to be an admissible basis for municipal tort liability notwithstanding the abolition of governmental immunity in that state, since the decisions of public officials responsible for these conditions were deemed to involve an "exercise of legislative or quasi-legislative powers" for which on policy grounds governmental tort liability should not be imposed.¹⁰

As in the case of failure of public entities to establish any firefighting system, it is also believed that no tort liability should attach for mere insufficiency of fire regulations, equipment, facilities or personnel, as such. The admonition of Mr. Justice Jackson that it "is not a tort for Government to govern,"¹¹ together with Mr. Justice Traynor's declaration that "basic policy decisions of government within constitutional limitations are . . . necessarily nontortious,"¹² would seem to be pertinent here. The scope and details of fire regulations are clearly legislative matters, while the proportion of the limited public revenues which should be channeled into fire engines, extinguishers, hoses, pumps, ladders, nets, forcible entry tools, training courses and training facilities, and other aspects of a public entity's fire protection and prevention program necessarily involve basic issues of fiscal and political policy as well as of management evaluation. In a fast-growing urban area, characterized mainly by residential buildings, the tax base may be strained to provide even minimal fire protection consistent with the pace of construction, while in a fully established industrial area with a strong and stable tax base, maximum fire protection may be achieved with relative ease. In addition, shifts in population patterns and subdivision development often, and perhaps even normally, precede the optimum extension of public services such as fire protection, so that there frequently will be time lags during which the quality and quantity of service is below even the intended level in a particular community.

The inherent sufficiency and adequacy of a public fire protection program is thus a reflection of basic planning and administrative discretion at the policymaking level of government—a level at which the intrusion of tort liability would in all likelihood prove to be unduly

⁶ *Larimore v. Indianapolis Water Co.*, 197 Ind. 457, 151 N.E. 333 (1926).

⁷ *Brinkmeyer v. City of Evansville*, 29 Ind. 137 (1867); *Hughes v. State of New York*, 252 App. Div. 263, 299 N.Y.S. 387 (1937). See also *Steinhardt v. Town of North Bay Village*, 132 So.2d 764 (Fla. App. 1961); *Bowden v. City of Kansas City*, 69 Kan. 587, 77 Pac. 573 (1904); *Grant v. City of Erie*, 69 Pa. 420 (1871).

⁸ *Small v. City of Frankfort*, 203 Ky. 188, 261 S.W. 1111 (1924). See also *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962); *Larimore v. Indianapolis Water Co.*, 197 Ind. 457, 151 N.E. 333 (1926).

⁹ *Dalehite v. United States*, 346 U.S. 15, 43 (1953) (rejecting a contention that the United States was liable under the Federal Tort Claims Act for negligence on the part of the Coast Guard in failing to require that special safety precautions be taken in loading and storing fertilizer mixture which exploded and led to Texas City disaster of 1947).

¹⁰ *Steinhardt v. Town of North Bay Village*, 132 So.2d 764, 767 (Fla. App. 1961).

¹¹ *Jackson, J.*, dissenting in *Dalehite v. United States*, 346 U.S. 15, 57 (1953), quoted with approval by *Traynor, J.*, in *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 220, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

¹² *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 220, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

disruptive, and hence a level at which extraneous interferences should manifestly be minimized.

Negligent Maintenance of Firefighting Equipment or Water Supply System

Once a decision has been made to maintain and operate a fire prevention and protection program, the problem of tort liability focuses upon negligence or wilful misconduct at the operational level as distinguished from the planning or policymaking level. The basic political decision, by hypothesis, has now been reached; the entity has provided some degree of fire protection by actually making equipment and facilities available. If the personnel charged with the maintenance and use of such equipment and facilities—whatever they may be, whether large or small, adequate or inadequate—have not acted in a reasonably prudent manner in maintaining them for their intended purpose, should public tort liability attach?

The answer ordinarily given to this question is an unequivocal "No."¹³ Thus, although a simple periodic inspection would presumably ensure that fire hydrants are in good working order, liability has been denied where through negligence of public employees the hydrants were allowed to become unusable in extinguishing a fire.¹⁴ Similarly, where a fire department tank and pump engine arrived at the scene of a fire only to find that its water tank, which had a capacity more than sufficient to control the blaze, was empty as the result of negligence on the part of firemen in the care of the equipment, immunity from tort liability for the resulting fire loss was affirmed.¹⁵ The failure of fire hoses due to negligence in their care and maintenance by fire personnel likewise has been said to give rise to no public liability.¹⁶ In the leading California case of *Stang v. City of Mill Valley*,¹⁷ also, the California Supreme Court held that no cause of action was stated by a complaint alleging that city officials knew the water lines leading to the fire hydrant fronting on the plaintiff's property, and the fire hydrant itself, had become clogged with refuse and incapable of providing sufficient water for effective fire control, and yet had negligently failed to remedy the situation. The *Stang* case is representative of the general rule in the United States that public entities are immune from liability for inadequate water supply or pressure at fire hydrants.¹⁸

¹³ See cases collected in Annots., 163 A.L.R. 348 (1946); 84 A.L.R. 514 (1933); 33 A.L.R. 688 (1924); and 9 A.L.R. 143 (1920).

¹⁴ *Terrell v. Louisville Water Co.*, 127 Ky. 77, 105 S.W. 100 (1907); *City of Columbus v. McIlwain*, 205 Miss. 473, 38 So.2d 921 (1949); *Stevens v. City of Manchester*, 81 N.H. 369, 127 Atl. 873 (1924); *Siraco v. Village of Whitehall*, 5 App. Div. 2d 925, 171 N.Y.S.2d 1003 (1958). See also *Mabe v. City of Winston-Salem*, 190 N.C. 486, 130 S.E. 169 (1925) (relying on statutory provision exonerating city from liability for inadequacy of water supply).

¹⁵ *Steinhardt v. Town of North Bay Village*, 132 So.2d 764 (Fla. App. 1961).

¹⁶ See *Robinson v. City of Evansville*, 87 Ind. 334 (1882).

¹⁷ 38 Cal.2d 486, 240 P.2d 950 (1952).

¹⁸ See, e.g., *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962); *Gilbertson v. City of Fairbanks*, 262 F.2d 734 (9th Cir. 1959); *Miralago Corp. v. Village of Kenilworth*, 290 Ill. App. 230, 7 N.E.2d 602 (1937); *Yowell v. Lebanon Waterworks Co.*, 254 Ky. 345, 71 S.W.2d 658 (1934); *Siraco v. Village of Whitehall*, 5 App. Div. 2d 925, 171 N.Y.S.2d 1003 (1958); *Hughes v. State of New York*, 252 App. Div. 263, 299 N.Y.S. 387 (1937); *Nashville Trust Co. v. City of Nashville*, 182 Tenn. 545, 188 S.W.2d 342 (1945). *Cf. Mack v. Charlotte City Waterworks*, 181 N.C. 383, 107 S.E. 244 (1921). But note that where there was a personal contract between the city and the property owner under which the former was obligated to provide adequate water pressure and supply for fire-fighting purposes, liability for breach of such obligation has been recognized. See *Phillips v. Kentucky Utils. Co.*, 206 Ky. 151, 266 S.W. 1064 (1924). Occasional dictum in California cases also supports this view. See *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 87 Pac. 1093 (1906). See also *Luis v. Orcutt Town Water Co.*, 204 Cal. App.2d —, 22 Cal. Rptr. 389 (1962).

An unsatisfactory feature of the cases denying liability for negligent maintenance or operation of firefighting equipment and facilities is the failure of the courts, on the whole, to do more than apply the immunity doctrine in a superficial manner. The water failure cases are especially instructive in this connection. The New York case of *Steitz v. City of Beacon*¹⁹ (relied upon heavily in the California Supreme Court's decision in *Stang*), for example, refused to impose liability upon a city for its negligence in failing to keep a pressure valve in its water system in good repair, thereby resulting in inadequate water for firefighting purposes. The New York Court of Appeals said that this case was "governed" by the previous "controlling" decision in *Moch Co. v. Rensselaer Water Co.*,²⁰ where it had been held that a private water company was not liable for breach of its statutory duty to supply water for extinguishing fires. (The *Moch* case is undeniably consistent with the majority rule in the United States,²¹ although private water companies are recognized as liable in the three minority jurisdictions of Florida,²² Kentucky²³ and North Carolina.²⁴) The difficulty with this view, however, is that *Moch* and *Steitz* may well be factually distinguishable in a significant way.

Steitz (like *Stang*) involved negligence in the routine maintenance of existing facilities. *Moch*, however, was apparently a case of failure to supply water in adequate amounts and under sufficient pressure without reference to negligent maintenance or repair. A moment's reflection suggests that there may be a world of difference between the two situations. Inadequate supply and insufficient pressure may be attributable to a number of possible causes—including not only a negligently maintained valve or clogged hydrant but also some inherent deficiency in the system, such as a water tank of limited capacity, a standpipe of insufficient elevation to provide necessary hydrostatic pressure, or a pipeline of unduly narrow dimensions to carry the load. If the failure of the water supply to meet firefighting needs was in fact due to an inherent defect of this sort, the considerations advanced in the immediately preceding section of the present topic would support a conclusion of nonliability, for an inadequate water supply in such a situation would clearly be the result of discretionary determinations made at the planning and policymaking level of government.

If the lack of water in the fire lines, however, was not due to any inherent deficiencies built into the system, but could have been avoided through the exercise of ordinary care in its maintenance and operation,

¹⁹ 295 N.Y. 51, 64 N.E.2d 704 (1945).

²⁰ 274 N.Y. 160, 159 N.E. 896 (1928).

²¹ See Annot., 62 A.L.R. 1205 (1929). California cases in accord include *Luning Mineral Prods. Co. v. East Bay Water Co.*, 70 Cal. App. 94, 232 Pac. 721 (1924); *Niehaus Bros. Co. v. Contra Costa Water Co.*, 159 Cal. 305, 113 Pac. 375 (1911). A scholarly criticism of the general rule and its doctrinal underpinnings is contained in Corbin, *Liability of Water Companies for Losses by Fire*, 19 YALE L. J. 425 (1910).

²² E.g., *Florida Pub. Utils. Co. v. Wester*, 150 Fla. 373, 7 So.2d 788 (1942); *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. 81 (1906).

²³ *Pineville Water Co. v. Bradshaw*, 266 S.W.2d 305 (Ky. Ct. App. 1953); *Clay v. Catlettsburg, Kenova & Ceredo Water Co.*, 301 Ky. 456, 192 S.W.2d 358 (1946); *Harlan Water Co. v. Carter*, 220 Ky. 493, 295 S.W. 426 (1927).

²⁴ *Potter v. Carolina Water Co.*, 253 N.C. 112, 116 S.E.2d 374 (1960); *Fisher v. Greensboro Water-Supply Co.*, 128 N.C. 375, 38 S.E. 912 (1901); *Gorrell v. Greensboro Water-Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899). See also *Guardian Trust & Deposit Co. v. Fisher*, 200 U.S. 57 (1906).

different considerations become relevant. The community is entitled to no greater level of fire protection and water service than it determines through its responsible public officials to acquire, and the threat of tort liability should not be interposed to insist that the system be wholly adequate to all present and future demands made upon it. A negligently conceived or mediocre system may well be better than no system at all. But the community, having determined as a matter of policy to adopt a system having a planned level of performance, should be entitled to rely upon the personnel in charge of that system to maintain and operate it with reasonable prudence and diligence. Liability for negligence of this latter type, which frustrates the reasonable expectations of individuals relying upon the system to supply water for fire-extinguishing purposes, would seem to follow readily under modern tort principles,²⁵ in the absence of countervailing policy considerations.

The failure of the New York and other courts to observe the distinction here noted is apparently a product of judicial preoccupation with the problem of the "crushing burden" which it is thought that a rule of liability might impose. As suggested in the preliminary analysis,²⁶ persuasive policy arguments exist for distributing the risk of property damage from fire, notwithstanding negligence of the public fire department personnel, through the mechanism of fire insurance. To the extent that denial of liability in the cited cases was a reflection of judicial acceptance of these policy arguments, no need existed for observing the suggested distinction between "built-in" or inherent deficiencies and those caused by negligent maintenance. Losses realized in either case would be within the scope of fire insurance policies covering the damaged property. Moreover, substantially all of the water supply cases, involving both public and private defendants, related to claims solely for property losses.²⁷

On the other hand, had the plaintiff sustained personal injuries or been suing for wrongful death, the distinction would seem to have warranted consideration. The public entity whose negligent maintenance and operation of the system caused such loss is obviously in a better position to distribute the burden of the risk than is the injured and ordinarily uninsured or underinsured plaintiff, and the risk is one which all members of the public share equally, whether they be property owners or renters, taxpayers or casual visitors. Although the paucity of reported cases involving such claims would suggest that the matter is of relatively minor significance, it is believed that public entity tort liability for death and personal injuries arising from negligent maintenance of firefighting equipment and facilities, including water systems designed for fire suppression purposes, is justified.

²⁵ Seavey, Comment, 66 HARV. L. REV. 84 (1952); 2 HARPER & JAMES 1052-53, pointing out that liability in the waterworks cases is consistent with recognized tort principles, but that the determination whether to extend accepted tort principles to such cases involves basic policy considerations.

²⁶ See text at 462-63 *supra*.

²⁷ Only one relevant personal injury case has come to the author's attention, and that involved negligence in the actual suppression of an existing fire rather than negligent maintenance of equipment. See *Rhodes v. City of Kansas City*, 167 Kan. 719, 208 P.2d 275 (1949) (child injured by stepping into rubbish pile containing smoldering fire which fire department had attempted, but through negligence had failed, to extinguish).

The preceding analysis would suggest the advisability of a statutory rule imposing liability upon public entities for death or personal injuries, but withholding such liability for property damages, in the types of cases here under consideration. The difference in result, of course, is justified solely on practical rather than conceptual grounds. However, a closer inspection of the practical grounds advanced in its support indicates that the suggested rule may require further refinement.

It may well be true that most structures in urban areas are insured against fire loss, and that fire insurance is readily available through which such risks can be efficiently distributed in an equitable fashion. However, consideration should be given to types of property exposed to fire risks for which insurance protection is either unavailable, available only at very great cost, or is generally not secured under existing ownership practice. Certain kinds of property uses may create excessive risks, such as factories, or property in the vicinity of factories, engaged in the production of plastics, explosives, munitions or volatile fuels. In rural areas of the state, where structural fire protection is often not provided by public entities under any circumstances, insurance may not be economically feasible as a risk-distributing mechanism, even if available. Moreover, it is possible that specific kinds of property, illustrated perhaps by such things as growing crops, forest resources and farming equipment, may not be widely insured against fire hazards in practice. Indeed, even in urban communities, it is probable that many property owners carry fire insurance protection at levels which are less than the replacement value of the insured property. In such instances, partial coverage, as distinguished from full coverage, may represent a reasonable and rational choice by the property owner: He may have decided that he could reasonably rely upon his proximity to water mains and fire hydrants, together with the reputed efficiency of the local fire department, to prevent a total fire loss, and to insure only against the portion of the loss which he estimates as the risk realistically to be anticipated. Even when the property owner believes he is fully covered, moreover, property values may have increased since the original purchase of insurance coverage, without any corresponding increase in policy limits, or changes of circumstances may have occurred which create policy defenses of which the insured is unaware,²⁸ thereby exposing him to losses not covered by his policy.

The hypothetical situations illustrated in the preceding paragraph suggest that a blanket principle denying liability for property damage resulting from fire, where the public entity has negligently failed to maintain and repair its firefighting equipment and facilities, may not be equitable in some situations. Consideration should thus be given to a possible alternative solution: Perhaps the entity should be exposed to tort liability for property damage solely to the extent such damage is in fact not covered by fire insurance. Such a rule would preserve the basic

²⁸ *E.g.*, the policy may have become unenforceable due to a change of circumstances which increased the hazard without the consent of the insurer, or which resulted in the insured building being allowed to remain vacant and unoccupied for more than 60 days. See CAL. INS. CODE §§ 2071, 6010; 28 CAL. JUR.2d *Insurance*, §§ 440-43 (1956).

policy determination to distribute the risk of negligent fire losses by precluding subrogation suits by insurance companies—a solution for which some precedent exists under Kentucky law.²⁹ However, it clearly would not make the entity an insurer of that portion of the property not covered against loss, for its liability would be tortious rather than contractual, and thus would exist only on satisfactory proof of negligence. Imposition of liability to this extent thus would not, in all likelihood, discourage property owners from securing as much insurance policy protection as at present, for the combined possibility that the fire department would in fact be negligent in fighting any given fire, that such negligence could be proven if it did occur, and that the loss could be proven to have proximately resulted therefrom, is surely of little practical significance in appraising the need for insurance protection. A rule of limited liability along these lines, however, would provide a means for distributing the risk of negligent fire loss to the extent that it is not distributed adequately by private insurance, and would concurrently provide a healthy incentive to maximum care and maintenance of firefighting facilities.

Negligent Conduct in Course of Firefighting and Fire Prevention Activities

We here turn from the problem of liability for negligent failure to maintain fire suppression equipment and facilities in good working order to the closely similar, yet factually distinguishable, problem of active negligence in the course of actually suppressing a fire or performing some other fire service duty. Again it should be noted that the principal situation in which litigation has widely arisen—that of negligent operation of fire trucks while going to or coming from fire calls—has been previously considered by the California Legislature, and liability of the employing entity presently is the statutory rule in such cases in California.¹ Our attention presently, then, is confined to non-vehicular torts involving active negligence comparable to that which is the basis of liability in the vehicle cases. The existence of the statutory rule in the latter cases, however, suggests that an extension of liability to other aspects of active employee negligence on the routine operational level of the fire service function would not be inconsistent with existing policy.

The general principle of immunity from liability for torts committed in the course of “governmental” functions has been extensively invoked as the basis for denying recovery for negligence of public employees engaged in suppressing fires or in fire prevention work. At the scene of a fire, for example, the firemen may have negligently attached their fire hoses to a hydrant located too far away for the available hose length to reach the blaze although a nearer hydrant was equally accessible, and the ensuing delay in transferring to the closer source of

²⁹ Kentucky is one of the minority states recognizing that a private water company supplying water to a community under contract with a local public entity is liable for fire losses sustained as a result of its negligent failure to supply adequate water for firefighting purposes or to keep its mains and hydrants in good repair. See cases cited in note 23 *supra*. The water company, however, is liable only to the extent that the plaintiff's damage is not covered by fire insurance; and the insurance company is not subrogated to the property owner's cause of action against the water company. *Burford v. Glasgow Water Co.*, 233 Ky. 54, 2 S.W.2d 1027 (1928); *Harlan Water Co. v. Carter*, 220 Ky. 493, 295 S.W. 426 (1927).

¹ See CAL. VEH. CODE §§ 17001, 17004, 21055, discussed in note 30, p. 460 *supra*.

water when the error was discovered permitted the fire to do extensive unnecessary damage.² Possibly the firemen sent to the scene performed in a slothful and indolent manner, negligently failing to attack the blaze with the diligence reasonably to be expected from them, thereby causing the plaintiff to sustain a substantial loss.³ On the other hand, although commendable energy and diligence was displayed, perhaps the actions taken to suppress the blaze were negligent in the sense that they were not in conformity with the standard of care reasonably to be expected from firefighting personnel, with the result that the fire was not fully extinguished,⁴ property was unnecessarily destroyed,⁵ or innocent bystanders sustained personal injuries.⁶ The cases cited indicate that no liability will attach to the public entity in any of the postulated fact situations under the prevailing rule of governmental immunity.

Away from the actual scene of a fire, the same result obtains where firemen tortiously cause injuries while performing their duties. Flushing of fire hydrants is commonly employed as a means of cleaning and testing such facilities; and hence, when a fireman engaged in this function negligently opens such a hydrant valve under circumstances which endanger others, the judicial classification of the hydrant testing as "governmental" precludes liability of the municipality for the resulting damages.⁷ In a bizarre case, illustrating the same principle, firemen summoned to investigate a possible fire hazard caused by a quantity of gasoline which had been dumped in the street apparently attempted to ascertain the extent of the hazard by negligently touching a flame to the damp street surface, thereby igniting the gasoline fumes and causing extensive damage to plaintiff's car parked nearby. Again, the "governmental" nature of fire hazard investigation precluded relief against the city.⁸

It is worthy of note, however, that negligence in the course of firefighting duties is actionable under the Federal Tort Claims Act. When the question was first presented, as one among several issues involved in *Dalehite v. United States*,⁹ a case arising out of the Texas City disaster in April of 1947, the Supreme Court ruled to the contrary. The issue conceivably could have been disposed of on the ground of insufficiency of evidence, for the Court of Appeals had ruled below¹⁰

² *Barker v. City & County of Denver*, 113 Colo. 543, 160 P.2d 363 (1945); *Barber Laboratories, Inc. v. City of New Orleans*, 227 La. 104, 78 So.2d 525 (1955).

³ *Banks v. City of Albany*, 83 Ga. App. 640, 64 S.E.2d 93 (1951). See also *United States v. California*, 208 F. Supp. 861 (S.D. Cal. 1962). Compare *Perkins v. City of Lawrence*, 177 Kan. 612, 281 P.2d 1077 (1955).

⁴ *Rhodes v. City of Kansas City*, 167 Kan. 719, 208 P.2d 275 (1949). See also *Terrell v. Louisville Water Co.*, 127 Ky. 77, 105 S.W. 100 (1907).

⁵ Compare *Davis v. City of Lebanon*, 108 Ky. 688, 57 S.W. 471 (1900) (flooding of plaintiff's goods by water being used to extinguish fire), with *Aschoff v. City of Evansville*, 34 Ind. App. 25, 72 N.E. 279 (1904) (flooding of plaintiff's property due to failure of firemen to turn off water main being used for firefighting, notwithstanding their knowledge that main was leaking badly).

⁶ *Klassette v. Liggett Drug Co.*, 227 N.C. 353, 42 S.E.2d 411 (1947) (pedestrian slipped and fell on oily pavement caused by water running from building as result of firefighting activities). See also *Rhodes v. City of Kansas City*, 167 Kan. 719, 208 P.2d 275 (1949) (child injured by stepping into rubbish pile containing hidden smoldering fire which firemen had negligently failed to extinguish fully).

⁷ *Brink v. City of Grand Rapids*, 144 Mich. 472, 108 N.W. 430 (1906). However, it may be a question of fact whether the flushing of the hydrant is for fire prevention purposes, which would be a "governmental" function, or for water supply purposes, which would be a "proprietary" function. See *Judson v. Borough of Winsted*, 80 Conn. 384, 68 Atl. 999 (1908).

⁸ *Perkins v. City of Lawrence*, 177 Kan. 612, 281 P.2d 1077 (1955).

⁹ 346 U.S. 15 (1953).

¹⁰ *In re Texas City Disaster Litigation*, 197 F.2d 771, 780 (5th Cir. 1952).

that there was no substantial evidence of any negligent act of the Coast Guard in fighting the fire in question, as claimed by the plaintiff. Preferring to rest its decision on an interpretation of the Tort Claims Act, the Supreme Court instead declared that the Act had not changed "the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."¹¹ Pointing out that public agencies were not liable under general tort law for negligence in firefighting, the Court concluded that the Tort Claims Act, in limiting the liability of the United States to "the same manner and to the same extent as a private individual under like circumstances,"¹² did not adopt a different rule. In the words of Mr. Justice Reed, "if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other 'public bodies for injuries due to fighting fire.'"¹³

The deliberate denial of liability in *Dalehite*, grounded upon an affirmation of the governmental immunity doctrine as the unwritten setting against which the Federal Tort Claims Act was to be construed, was of short-lived duration. Two years later, in an opinion from which Mr. Justice Reed vigorously dissented, the Court flatly refused to read into the Tort Claims Act the "irreconcilable" and "disharmonious" case law distinctions which have developed under the doctrine of sovereign immunity.¹⁴ As Mr. Justice Frankfurter put it, "The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts."¹⁵ Subsequently, in *Rayonier, Inc. v. United States*,¹⁶ decided in 1957, with only two dissents the Supreme Court squarely held that the United States would be liable under the Act for negligence of the Forest Service in fighting a forest fire if, under the law of the state where the action arose, private persons would be liable under similar circumstances. Again the distinction between "governmental" and "proprietary" functions, as developed in local government law, was rejected, and any intimations to the contrary in the *Dalehite* opinion were expressly disapproved. Accordingly, there can be little doubt that liability is today the rule under the Federal Tort Claims Act in cases of negligent firefighting or other fire service activities.¹⁷

The legislative policy in favor of eliminating tort immunity, which is reflected in the Federal Tort Claims Act, has also had partial expression in California legislation. Attention has already been directed to the matter of vehicular torts involving fire duties, where liability is generally imposed upon California public entities,¹⁸ and to various statutory provisions under which public entities are required to satisfy personal judgments given against their personnel for torts in connection with official duties relating to fire suppression and prevention.¹⁹ Due to the generality of their language, the statutory provisions referred to are not pinpointed to the issue of negligence of firefighters as

¹¹ *Dalehite v. United States*, 346 U.S. 15, 43 (1953).

¹² Federal Tort Claims Act, 28 U.S.C. § 2674 (1959).

¹³ *Dalehite v. United States*, 346 U.S. 15, 44 (1953).

¹⁴ *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

¹⁵ *Id.* at 65.

¹⁶ 352 U.S. 315 (1957).

¹⁷ For a perceptive analysis of the *Rayonier* case and its relationship to the "discretionary function" exception to liability under the Federal Tort Claims Act, see Comment, 33 IND. L. J. 339 (1958).

¹⁸ See text and authorities cited *supra* at 460, note 30.

¹⁹ See text and authorities cited *supra* at 461, note 32.

such. A California statutory provision which is thus narrowly focussed, however, is Section 53057 of the Government Code, which provides, in pertinent part:²⁰

A local agency which authorizes its employees to burn weeds and rubbish on vacant property shall be liable for injuries to persons and damage to other property caused by negligence of the employees in burning the weeds and rubbish. . . .

For the purposes of this section, "local agency" shall include all other districts in addition to school districts.

The significance of this waiver of immunity is underscored by the fact that cities, counties and fire districts are expressly authorized not only to clear weeds and rubbish which constitute a fire hazard,²¹ but to employ fire for that purpose.²² The principle of liability here recognized is, of course, that of ordinary negligence; and, despite the fact that a fire started for weed abatement purposes and negligently permitted to get out of control may, like any other source of combustion, start a widespread conflagration, the Legislature was willing to impose liability upon the employing public entity whose employees were negligent in controlling the blaze.

It is thus submitted that an expansion of public entity tort liability for negligence in the performance of fire service duties, such as fire suppression work, would not be inconsistent with existing legislative policy although it would extend that policy more generally. The underlying concepts of distributive justice, which justify efforts to spread the risk of loss as widely as possible rather than to have it rest without recourse upon the shoulders of the injured person, would also appear to support a similar extension of liability for intentional torts of fire personnel, with ultimate financial responsibility resting upon the culpable officer or employee in the event of malicious or intentionally wrongful conduct.

Two suggestions may be offered in qualification of the recommended expansion of public tort responsibility.

First, consideration should here again be given to the appropriateness of restricting public liability for damage to property, as the result of negligent firefighting or other like cause, solely to damage which is not included within the coverage of an insurance policy. The reasons advanced in support of this proposal in the immediately preceding section (discussing negligent maintenance of equipment) are here fully relevant and need not be repeated.

Second, consideration should be given to a statutory provision defining in some detail the kinds of functions and activities which are deemed to be fire duties. Firefighting is still authorized to be performed

²⁰ The words omitted, for the sake of brevity, from the section as quoted merely refer to the claims procedure for implementing claims thereunder, and authorize the entity to insure against liability imposed by the section and charge the cost of such insurance as part of the assessment against the property on which the weed abatement work was performed. The term, "local agency," as used in the quoted section includes not only districts but also cities and counties. See CAL. GOVT. CODE § 53050.

²¹ See CAL. GOVT. CODE § 39560 (b) (cities); CAL. H. & S. CODE §§ 13867 (fire protection districts), 14106 (local fire districts), 14462.5 (county fire protection districts), 14875 (b) and 14875 (e) (counties).

²² CAL. H. & S. CODE § 13055.

in California by volunteer firemen under some circumstances,²³ while forest fires are an occasion for summoning civilians into involuntary fire service.²⁴ In both of these instances there may arise possible problems of ascertaining when such civilian service begins and ends for entity tort liability purposes. In addition, firefighting and fire prevention work may be done by persons in official custody, such as boys committed to the Youth Authority²⁵ or county jail prisoners,²⁶ under some circumstances, thereby possibly creating comparable problems. Definitional language may also be helpful in light of the fact that fire departments often provide not only fire prevention and protection services, but also emergency and rescue services.²⁷ Moreover, existing differences between the statutory definitions of eligible "safety members" of county retirement systems,²⁸ as contrasted with the definitions of "fire service officers" eligible for the benefits of the County Peace

²³ See CAL. GOVT. CODE § 38611 (requiring general law cities to establish a fire department in charge of a fire chief with both training and experience as a fireman, but authorizing the other members of the fire department to consist of "paid firemen or such companies of volunteer firemen as the legislative body may determine"); CAL. H. & S. CODE §§ 14825-860 (authorizing the organization of volunteer fire companies in unincorporated towns); CAL. PUB. RES. CODE §§ 4008, 4009 (authorizing the State Forester to appoint voluntary fire wardens under stipulated circumstances).

²⁴ CAL. PUB. RES. CODE § 4010 (authorizing the State Forester or his duly authorized agent, or any duly authorized state officer charged with firefighting duties or with enforcement of state fire laws, "to summon any able-bodied man to assist in suppressing any forest fire within their respective jurisdictions," subject to certain exceptions; and authorizing payment for such services at rates fixed in accordance with firefighting wages established for Federal Forest Service personnel). Comparable authority is vested in county fire officials, and county fire protection district officers, by CAL. PUB. RES. CODE § 4160.

It should be noted that persons impressed into fire service pursuant to Section 4010 are entitled to workmen's compensation benefits when injured in the course of such activities, CAL. LABOR CODE § 4458.5, but persons compelled to serve under Section 4160 apparently are not so covered. See Department of Nat. Resources v. Industrial Acc. Comm'n, 208 Cal. 14, 279 Pac. 987 (1929). Consideration should be given to extending workmen's compensation benefits to all such involuntary citizen firefighters, as well as to those who assist voluntarily.

²⁵ See CAL. WEL. & INST. CODE § 1760.4 (providing that "boys housed in forestry camps established by the Youth Authority may be required to labor . . . on the making of forest roads for fire prevention or firefighting . . . or on the making of fire trails and firebreaks, or in fire suppression," and authorizing the Authority to make provision for payment of wages to the boys performing such work).

²⁶ See CAL. PEN. CODE § 4125.1 (authorizing the county board of supervisors to contract with the State or Federal Governments for "the performance of work and labor" by county jail, industrial farm or road camp prisoners "in the suppression of fires" in or adjacent to State or Federal lands). The term, "suppression of fires," is defined to include construction of firebreaks and other improvements for fire prevention and suppression. This section also provides that prisoners engaged in such work "shall be subject to workmen's compensation benefits to the same extent as a county employee," and the board of supervisors is required to cover such persons while so engaged "with accident, death and compensation insurance as is otherwise regularly provided for employees of the county." See also CAL. PEN. CODE § 6202, authorizing the Director of Corrections to assign inmates of the California Conservation Center to "perform public conservation projects including, but not limited to, forest fire prevention and control."

²⁷ See CAL. H. & S. CODE §§ 13853-854 (authorizing fire protection districts to maintain and operate ambulance, rescue and first aid services both within and without the district), §§ 14093-94 (granting similar authority to local fire districts), §§ 14444.1, 14455.8 (granting similar authority to county fire protection districts).

²⁸ Government Code Section 31469.3(b) defines "safety member" by reference to Government Code Section 31470.4, which in turn describes as eligible for membership as "safety members" all county foresters and firewardens and their assistants and deputies, together with "fire apparatus engineers, fire prevention inspectors, forest firemen, fire patrolmen, aircraft pilots, and foremen assigned to fire suppression crews, all other personnel assigned to active fire suppression in any county forester's or county firewarden's department and all officers, engineers, and firemen of any county fire protection district, and all other personnel assigned to active fire suppression in any county fire protection district. . . ." It will be observed that primary emphasis in this definition is upon assignment to duties which involve actual fire suppression functions, but that personnel not so assigned may also be included, such as administrative personnel of fire protection districts.

Officer and Fire Service Retirement Plan Law,²⁹ suggest the need for clarification of fire service functions for tort liability purposes. The New York Joint Legislative Committee on Municipal Tort Liability, it may be noted, found this matter of definition of duties of fire personnel to be a critical phase of the problem in that state.³⁰ Likewise, the liberal Connecticut legislation making public entities in that state responsible for tort liabilities of their firemen expressly included a comprehensive definition of "fire duties" to prevent uncertainty. The latter provision, which is set forth at length in the appended footnote,³¹ illustrates the type of specification which may be desirable for adoption in California.

Extraterritorial and Mutual Aid Fire Service

Very few fire departments have sufficient equipment and manpower to control a major conflagration unassisted. In small communities, particularly, protection against a fire of disastrous proportions often is dependent upon receipt of help from firefighting forces maintained by other public agencies. The statutes of California give full recognition to this situation by numerous authorizations for public entities to engage in fire suppression work outside their boundaries. Section 13050 of the Health and Safety Code, for example, authorizes cities, counties and county fire protection districts to fight any fire outside their boundaries "which is of such proportions that it cannot be adequately handled" by the fire department of the territory in which the fire is raging, as well as fires which are both outside their boundaries and outside the boundaries of any city or county fire protection district (and thus presumably without organized fire protection service). Extraterritorial firefighting under this provision, as well as under other closely analogous authorizations, is subject to reimbursement of costs by

²⁹ Government Code Section 32204 defines the persons eligible for inclusion in the County Fire Service Retirement Law in substantially the same language as is used in Government Code Section 31470.4 (except that no mention is made of "aircraft pilots"), but then specifically excludes from its scope "Bookkeepers, stenographers, cooks, laborers, county fire protection district fire foremen, call firemen, and volunteer employees, or persons who are not employed for full time duty, or other employees not performing the duties of any of the persons enumerated and any honorary deputy county firewarden or honorary deputy county forester, or voluntary firewarden holding appointment as such but receiving no compensation therefor and not regularly performing particular official duties. . . ." The enumerated exclusions would appear to include certain personnel who probably are within the scope of the "safety member" provisions of the county retirement law as defined in Section 31470.4, quoted in the preceding note.

³⁰ NEW YORK COMMITTEE, SIXTH REPORT 42 (Legis. Doc. No. 14, 1960): "It is apparent . . . that the definition of firemanic duties is crucial to the whole problem of liability."

³¹ CONN. GEN. STAT. § 7-314 (Supp. 1961) provides, in pertinent part, that "the term 'fire duties' includes duties performed while at fires, while answering alarms of fire, while directly returning from fires, while at fire drills or parades, while at tests or trials or any of the apparatus or equipment normally used by the fire department, while instructing or being instructed in fire duties, while answering or returning from ambulance calls where the ambulance service is part of the fire service, while answering or returning from fire department emergency calls and any other duty ordered to be performed by a superior or commanding officer in the fire department." A more comprehensive definition, which is particularly designed to resolve uncertainties as to when volunteer firemen are engaged in firemanic functions, was recommended by the New York Committee in its sixth report at pages 25-26. Manifestly, in view of the various categories of persons who may be engaged in firefighting in California, as indicated in the text, any definitional provisions should also clarify the identity of the entity made responsible for the tortious conduct of different categories of such persons.

the public entity benefited by the service.¹ In cases of fires constituting great public calamities, on request for outside help by the fire chief in the public entity where the fire is raging, Section 53021 of the Government Code authorizes cities, counties and fire districts to extend extraterritorial emergency fire protection assistance at their own expense, on the statutory ground that such services are "conclusively deemed for the direct protection and benefit" of the public entity rendering the services.² Other general statutory provisions commonly authorize public entities to engage in extraterritorial fire protection activities on such terms as they deem reasonable;³ to contract with other entities to provide fire service for them;⁴ to enter into agreements to provide fire protection services to specific property owners outside their boundaries;⁵ and to enter into "mutual aid" agreements on prescribed terms.⁶ The extension of fire protection services outside political boundary lines appears to be a prevailing and common characteristic of public administration at the local government level in California today.⁷

From the viewpoint of governmental tort liability, extraterritorial fire service presents a situation which is conceptually distinguishable from the rendition of fire services within the boundaries of the public entity. The traditional classification of firefighting as a "governmental" function appears to be theoretically impaired when the fire department is carrying out such functions outside its "home" territory, and especially when (as many of the statutes above cited expressly contemplate) such service is paid for by the entity receiving the benefit thereof.

¹ Expenses incurred in extraterritorial fire service under Section 13050 of the Health and Safety Code are declared to be charges against the entity in which the fire occurred. CAL. H. & S. CODE §§ 13051, 13052. See also, to the same effect, CAL. H. & S. CODE §§ 13053, 13054 (authorizing county firefighting facilities, equipment and personnel to be employed in extinguishing or controlling fires outside the county's boundaries, with the cost of such service being paid by the county in which the fire occurs).

² See also, to the same effect, CAL. H. & S. CODE § 14406 (authorizing the use of county fire protection district apparatus, equipment and personnel in fighting fires in other districts, in unincorporated territory not within any fire district, and within cities, upon proper request).

³ CAL. H. & S. CODE § 13052.5 (authorizing county fire protection districts and contiguous cities to contract with each other for the furnishing of fire protection service "in such manner and to such extent" as the respective legislative bodies "may deem advisable"). Cf. CAL. H. & S. CODE § 13879 (authorizing the governing board of fire protection districts organized under the Fire Protection District Law of 1961 to permit the use of district equipment and personnel in fighting fires outside the district "upon such terms and conditions as the district board may prescribe").

⁴ CAL. GOVT. CODE §§ 55600-55605 (contracts for performance of fire service by county for cities or fire districts within the county); CAL. GOVT. CODE §§ 55606-55609 (contracts between counties and State for interchange of fire services within such counties); CAL. GOVT. CODE § 55632 (contracts between local agencies for furnishing of supplementary fire protection); CAL. H. & S. CODE § 14408 (contracts for furnishing of fire protection service for city by county fire protection district); CAL. H. & S. CODE § 14690 (contracts between fire protection districts for rendition of fire service by one district within another). See also CAL. H. & S. CODE § 13942 (authorizing city included within fire protection district to provide supplementary firefighting equipment and facilities and to contract with district for acquisition, maintenance and use thereof); CAL. H. & S. CODE § 14202 (similar authorization for cities located within local fire districts); CAL. PUB. RES. CODE § 4050 (contracts under which county assumes firefighting responsibilities of State within county).

⁵ CAL. H. & S. CODE § 13941 (authorizing private owners of property to contract for extraterritorial fire service by districts functioning under Fire Protection District Law of 1961); CAL. H. & S. CODE § 14201 (similar authority as to districts functioning under Local Fire District Law).

⁶ CAL. H. & S. CODE §§ 13855 (Fire Protection District Law of 1961), 14095 (Local Fire District Law), 14455.5 (county fire protection districts).

⁷ For an account of the interlocking contractual and mutual aid relationships between public entities providing fire protection services in Los Angeles County, see CALIFORNIA LEGISLATURE, ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, PRELIMINARY REPORT COVERING FRINGE AREA PROBLEMS IN THE COUNTY OF LOS ANGELES 59-64 (1953).

Under these conditions, such extraterritorial fire service would seem to have some of the aspects of a business operation for compensation, where no direct and immediate public benefit (other than pecuniary compensation) is realized by the entity doing the work. It thus may appear to be a "proprietary" function. The Supreme Court of Oklahoma was sufficiently impressed by these distinctions to hold, in an important decision in 1938,⁸ that such extraterritorial fire service for compensation pursuant to contract was not a "governmental" function, but was a "proprietary" activity for which the city was exposed to tort liability. Although several other courts have reached a conclusion to the contrary,⁹ the Oklahoma decision obviously creates a conflict of authorities which portends the possibility of tort liability if a similar case were to arise, as a question of first impression, in some other jurisdiction which ordinarily recognizes tort immunity as applicable to fire services. Moreover, even if (as previously suggested herein) a larger measure of tort liability were to be accepted in California as to fire prevention and fire suppression activities, the issue would still arise as to which public entity—the aiding entity or the aided entity—should be liable for torts arising in connection with extraterritorial fire service.¹⁰

Because of the existing uncertainty as to whether sovereign immunity is entitled to receive full judicial recognition with respect to extraterritorial and mutual aid fire service, a number of states have adopted statutes to clarify the law. Legislation exists, for example, in Alabama,¹¹ Georgia,¹² Mississippi,¹³ Oklahoma,¹⁴ Oregon¹⁵ and Vermont¹⁶ which declares public entities immune from tort liability while providing fire services outside their boundaries. Certain California statutory provisions follow suit by declaring that "all of the privileges and immunities from liability" which surround the performance of fire service activities within the entity "shall apply" to the activities of its fire-fighting forces outside the entity also.¹⁷ Other California provisions, possibly not worded sufficiently to cover the problem of tort immunity of the public entity concerned but only of its personnel, declare that "all the privileges and immunities from liability, exemptions from laws and rules . . . and other benefits, which apply to officers, agents, or employees" engaged in fire service within the entity apply likewise

⁸ *City of Sand Springs v. Gray*, 182 Okla. 248, 77 P.2d 56 (1938). This decision was subsequently nullified by legislation. See OKLA. STAT., Tit. 11, § 343 (1961).

⁹ *Banks v. City of Albany*, 83 Ga. App. 640, 64 S.E.2d 93 (1951); *King v. City of San Angelo*, 66 S.W.2d 418 (Tex. Civ. App. 1933); *Eulrich v. City of Clintonville*, 238 Wis. 481, 300 N.W. 219 (1941).

¹⁰ The New York Committee found that the law of New York was in a state of considerable uncertainty on this score. See its Sixth Report at pages 31-32, referring to various questions left unsettled by the decision in *Tilson v. Kuhner*, 283 App. Div. 604, 129 N.Y.S.2d 59 (1954). The court in the cited case intimated that liability for torts occurring in the performance of extraterritorial fire service activities would rest primarily upon the entity which had actual control over the personnel or instrumentality causing the injury, whether that was the entity calling for extraterritorial assistance or the entity which responded to the call.

¹¹ ALA. CODE, Tit. 37, § 450(1) (Recomp. 1959).

¹² GA. CODE ANN. § 86-1817 (1961).

¹³ MISS. CODE ANN. § 3470 (Supp. 1960).

¹⁴ OKLA. STATS., Tit. 11, § 343 (1961).

¹⁵ ORE. REV. STAT. § 476.600 (1961).

¹⁶ VT. STAT. ANN., Tit. 20, § 2962 (1959).

¹⁷ CAL. H. & S. CODE § 13052.5. To the same effect, see CAL. GOVT. CODE § 55634.

to fire service performed extraterritorially.¹⁸ Of tangential interest to the same problem is the fact that statutory authorizations for public entities to engage in mutual aid fire protection agreements contemplate that such agreements may be consummated in some cases with private firms which maintain their own private firefighting forces; and, in performing functions under such mutual aid agreements, the firm maintaining the *private* firefighting forces is declared by statute to "have the same immunity from liability for civil damages on account of personal injury to or death of any person or damage to property resulting from acts or omissions of its fire department personnel" as the public entity with whom the mutual aid agreement was made.¹⁹

In Connecticut, where public entities are required by law to satisfy tort liabilities of their firefighting personnel incurred while performing fire duties,²⁰ the problem of extraterritorial fire service has been settled by statute. All "interlocal agreements" for extraterritorial fire service are required by law in that state to include provisions "for the indemnification of contracting public agencies and their officials, officers or employees, by means of insurance or otherwise, against any losses, damages or liabilities" arising out of the providing of services under such agreements.²¹ Thus, the initial liability remains an obligation of the fire service employee and his employer; but the ultimate financial incidence is left to contractual agreement between the two entities.

The New York Joint Legislative Committee on Municipal Tort Liability conducted a prolonged investigation of the present problem, which recently culminated in a legislative solution not unlike that adopted in Connecticut. Starting from the premise that public entities in New York are generally liable for torts of their employees, the Committee pointed out that numerous difficult problems were likely to arise with respect to tort liability under the mutual aid fire protection system when a fire department answers a call for service outside its home territory:

When operating in response to an outside call, it may, through negligence, cause injury to persons or property (1) while the aiding department is still in its own territory, but on its way to the fire, (2) after the aiding department has left its own territory, but before it has reached the fire, (3) while the aiding department is fighting the fire, (4) while the aiding department is returning, but is still outside its own territory, (5) while the aiding department is returning, and after it is back in its own territory. In each of the stated situations the question arises whether any resulting liability falls upon (a) the aiding department, or (b) the calling department.²²

¹⁸ CAL. GOVT. CODE § 53023. See also CAL. GOVT. CODE § 55634, declaring that all "privileges and immunities from liability" granted to the "fire or police force" of any local agency shall apply when engaged in extraterritorial fire service and when traveling to and from the location of such extraterritorial service. *Query*: In using the term "fire or police force," did the Legislature intend to embrace immunities of the *entity* which maintains, or solely the immunities of the *personnel* who operate, the fire and police protection service?

¹⁹ CAL. H. & S. CODE §§ 13855, 14095, 14455.5. To the same effect, see CAL. VEH. CODE § 17004.5.

²⁰ CONN. GEN. STAT. § 7-308 (Supp. 1961).

²¹ CONN. GEN. STAT. § 7-339f (Supp. 1961).

²² NEW YORK COMMITTEE, SIXTH REPORT 44 (Legis. Doc. No. 14, 1960).

Finding the law of New York to be in a state of some uncertainty with respect to the problem posed in the last sentence of the passage just quoted, the Committee called attention to the fact that a call for aid often results in responses from a number of nearby fire departments. It illustrated its point by reference to an unusual rural fire in New York which had attracted over 1,000 firefighters from some 32 fire departments, utilizing approximately 130 pieces of firefighting equipment. The volume of external aid which might be summoned into a small fire district or a small municipality obviously could be very extensive under some fire conditions; and to the Committee it was thus apparent "that to impose liability upon the calling area for the negligence of all firemen responding to a call for assistance would impose a crushing financial burden upon that area, be it municipality or fire district."²³ On the other hand, the Committee pointed out,

[T]o impose liability upon a municipality or fire district for the negligence of its own firemen whether at home or abroad i.e., to impose liability upon the aiding area in all of the situations previously outlined, would avoid the imposition of such a burden in favor of one which is sufficiently limited to be adequately insured against. It would improve the efficiency and performance of the departments by making them responsible for their own negligence irrespective of the territory in which they were operating.²⁴

Further studies by the New York Committee supported the belief that adequate liability insurance coverage at reasonable premium rates was available to protect the public entity against liabilities incurred while providing fire services away from the home area.²⁵ The Committee's recommendations were enacted into law, as an amendment to Section 209(1) of the New York General Municipal Law, by the 1961 session of the New York Legislature.²⁶

It is believed that the principles incorporated into the Connecticut and New York statutes, under which public fire departments are regarded, for tort liability purposes, in exactly the same light when providing extraterritorial fire service as when engaged in the performance of such duties in their home territory, is basically sound. To the extent that such extraterritorial service is performed pursuant to contract, the ultimate financial risk may be allocated as between the contracting entities by agreement. Sound public policy would seem to support the view that responsibility for negligence in the performance of non-

²³ *Id.* at 45.

²⁴ *Id.* at 46.

²⁵ *Id.* at 46-48, pointing out that ordinary "manufacturers and contractors" non-vehicular tort liability insurance was readily available at manual premium rates to protect against liability both at home and abroad; while "protective liability extension" coverage to protect the aided entity from liability arising from the acts of another entity responding to a call for mutual-aid assistance was only available at additional premium cost, and at premiums requiring individual bargaining based on potential exposure since no manual rates were applicable. Under the "home area" rule only the former type of coverage would be needed, thereby eliminating the expense of the latter type which would be needed if an aided entity were liable for torts of an aiding fire department.

²⁶ N.Y. Laws 1961, ch. 867, adding to N.Y. GEN. MUNIC. LAW § 209 a new sentence reading: "While responding to a call for assistance under this subdivision authorizing extraterritorial fire service a city, village, town or fire district shall be liable for the negligence of firemen occurring in the performance of their duties in the same manner and to the same extent as if such negligence occurred in the performance of their duties within the area regularly served and protected by such departments or companies."

contractual extraterritorial fire service pursuant to statutory emergency powers should rest with the aiding entity, which presumably will retain the power of direct supervision and control over the fire personnel at the scene and hence properly should be under the obligation to employ reasonable care in what is done. Moreover, the New York studies indicate that since the risk exposure is greater and less certain, the cost to aided entities of insurance protection from tort liabilities arising from the conduct of aiding fire companies would in all likelihood be substantially greater than the aggregate cost if each company were to insure itself both at home and abroad.²⁷ Accordingly, it is submitted that whatever rules of governmental tort liability are adopted for fire service torts committed in home territory should also apply equally to public entities while engaged in extraterritorial fire protection and suppression activities. In effect, this would not impose liability upon either the aiding entity or the aided entity as such. Rather, liability would be imposed upon the entity whose negligence caused the harm.

Destruction of Property to Avert a Conflagration

During a fire which swept San Francisco on December 24, 1849, John W. Geary, the Alcalde of that city, ordered certain buildings blown up in an effort to prevent the spread of the fire. At the time of the destruction of these structures, it was not inevitable that they would be consumed by the flames, although the Alcalde and other high city officials apparently believed they were in the path of the fire and if eliminated would make its suppression considerably easier. The owner of one such building subsequently brought an action against the city to recover for the damage he had thus sustained; but his claim was rejected by the Supreme Court.²⁸ Speaking through Mr. Justice Bennett, the court in emphatic dictum strongly intimated that it did not believe such damage to be compensable on the theory of inverse condemnation, but, declining to decide the matter explicitly, denied liability on the ground that the Alcalde and other city officers had no statutory authority to destroy the building in question and hence their act, being *ultra vires*, was not binding upon the city. A subsequent action brought by another property owner seeking to hold the Alcalde personally liable met with equal lack of success.²⁹ The Supreme Court, through Chief Justice Murray, found no basis for personal liability either, for such destruction was justified, and hence nontortious, under the "higher laws of impending necessity."³⁰ When necessary to avert a conflagration, he declared, a structure in the path of the flames may be destroyed for the general good without incurring liability, for in such cases "the private rights of the individual yield to the considerations of general convenience, and the interests of society."³¹

These early California cases are consistent with the general rule throughout the United States.³² Indeed, only one case (an early Georgia

²⁷ NEW YORK COMMITTEE, SIXTH REPORT 46-48 (Legis. Doc. No. 14, 1960).

²⁸ *Dunbar v. The Alcalde & Ayuntamiento of San Francisco*, 1 Cal. 355 (1850).

²⁹ *Surocco v. Geary*, 3 Cal. 69 (1853).

³⁰ *Id.* at 73.

³¹ *Ibid.*

³² See, e.g., *Bowditch v. City of Boston*, 101 U.S. 16 (1879); *McDonald v. City of Red Wing*, 13 Minn. 25 (1868); *Russell v. City of New York*, 2 Denio (N.Y.) 461 (1845); Annot., 14 A.L.R.2d 79 (1950).

decision of 1849)³³ appears to hold to the contrary, in the absence of statute, although some cases suggest that the officer ordering the destruction may be personally liable if he acted without reasonable grounds for believing such destruction was necessary.³⁴ The early California cases also appear to represent the existing law of California, despite the plea by Chief Justice Murray, more than a century ago, for legislation to ameliorate the situation:

The legislature of the State possess [*sic*] the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty. . . .³⁵

Although no California statutes have been discovered which attempt to resolve the difficulty, statutory authorization for compensation to owners of destroyed buildings under these circumstances does exist in certain other states, notably in Georgia³⁶ and Massachusetts.³⁷ The latter provision, like an earlier New York statutory enactment on the subject,³⁸ is defective in that it applies only to structures and not to personal property therein which is destroyed along with the building. The Georgia statute, however, seems to provide a sound guide to equitable legislative policy. It provides that when local entities

. . . destroy the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration . . . any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such municipal corporation or county.³⁹

The philosophy underlying this statute is that expressed by Judge Lumpkin of the Georgia Supreme Court more than five decades ago:

[I]f the private property of an individual, the whole or part of which might otherwise have been saved to the owner, is taken or destroyed for the benefit of the public, . . . those for whose supposed benefit the sacrifice was made, ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all.⁴⁰

It is suggested that a statute following the general pattern of the Georgia measure would be a desirable addition to California law, although the occasion for its use may be somewhat rare. To the extent that such losses are covered by the usual standard form fire insurance

³³ *Bishop & Parsons v. Mayor & City Council of Macon*, 7 Ga. 200, 50 Am. Dec. 400 (1849). This case was expressly disapproved by the California Supreme Court in *Dunbar*, *supra* note 28.

³⁴ See, e.g., *Conwell v. Emrie*, 2 Ind. 35 (1850). Cf. *Surocco v. Geary*, 3 Cal. 69, 74 (1853): "If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass."

³⁵ *Surocco v. Geary*, 3 Cal. 69, 74 (1853).

³⁶ GA. CODE ANN. § 88-401 (1937).

³⁷ MASS. ANN. LAWS, ch. 48, § 5 (1961).

³⁸ See *Russell v. City of New York*, 2 Denio (N.Y.) 461 (1845) (construing an 1813 statute authorizing compensation for destruction of buildings to prevent conflagration, but silent as to compensation for goods destroyed therein, as not applicable to loss of inventory in store which was blown up to stop fire).

³⁹ GA. CODE ANN. § 88-401 (1937).

⁴⁰ *Bishop & Parsons v. Mayor & City Council of Macon*, 7 Ga. 200, 202, 50 Am. Dec. 400 (1849).

policy, of course, the practical considerations previously advanced in favor of distributing the risks through insurance premiums would seem to obtain.⁴¹ As to uninsured risks, however, even if the Georgia pattern is followed, it would appear that since the plaintiff must show that his property would not otherwise have been destroyed by the fire, liability is not likely to be often adjudged under such a provision.⁴² California precedents for statutory compensation in such cases, of course, already exist in provisions authorizing payment for diseased animals and plants destroyed as health menaces.⁴³

Park, Recreation, Cultural and Amusement Functions

The maintenance of parks, playgrounds, recreation centers, beaches and other public facilities for leisure time activity is a function which, for purposes of governmental tort liability, has been treated quite differently by the courts from the functions of providing medical care, police protection and fire service, previously discussed. The latter functions, it will be recalled, have been classified with substantial uniformity as "governmental" in nature and thus within the protective scope of the sovereign immunity doctrine. Cases relating to the operation of facilities and programs for recreational, cultural and amusement purposes, however, constitute a quagmire of inconsistent and confusing holdings, some concluding that such functions are "governmental" and others that they are "proprietary."¹ Although there would appear to be little point in an attempt to compare cases from other jurisdictions on this point, it is perhaps of significance to observe that the "erosion of governmental immunity," to which Mr. Justice Traynor referred in *Muskopf*,² has been extremely pronounced in the public recreation field. Thus, for example, among states other than California which have generally adhered to the immunity doctrine, the following appear to recognize a broad area of tort liability by classifying some, if not all, aspects of park and recreation activities as "proprietary": Colorado,³ Delaware,⁴ Florida,⁵ Idaho,⁶ Indiana,⁷ Mississippi,⁸ Missouri,⁹ Mon-

⁴¹ The California Standard Form Fire Insurance Policy apparently covers most losses caused by "acts of destruction at the time of and for the purpose of preventing the spread of fire," but has certain excluded perils and exceptions. CAL. INS. CODE § 2071.

⁴² See, e.g., *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844) (denying liability under Massachusetts statute for destruction of building already doomed by flames). Compare *Vandevender v. City of Atlanta*, 150 Ga. 444, 104 S.E. 227 (1920).

⁴³ See the text at 75-76 *supra*.

¹ See *DYER & LICHTIG, LIABILITY IN PUBLIC RECREATION passim* (1949); and Annots., 142 A.L.R. 1340 (1943), 99 A.L.R. 686 (1935), 42 A.L.R. 263 (1926), 29 A.L.R. 863 (1924). On liability for the operation of public beaches and swimming pools, see Annot. 55 A.L.R.2d 1434 (1957). As to operation of community auditoriums or recreation centers, see Annot., 47 A.L.R.2d 544 (1956).

² *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

³ *City of Longmont v. Swearingen*, 81 Colo. 246, 254 Pac. 1000 (1927) (municipal swimming pool); *City of Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040 (1913) (merry-go-round); *BANKS, MUNICIPAL TORT LIABILITY IN COLORADO* 12 (1961).

⁴ *Pennell v. Mayor & Council of Wilmington*, 23 Del. 229, 78 Atl. 915 (1906) (rest room facility in park).

⁵ *Woodford v. City of St. Petersburg*, 84 So.2d 25 (Fla. 1955) (baseball diamond); *Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945) (swimming pool); *Ide v. City of St. Cloud*, 150 Fla. 806, 3 So.2d 924 (1924) (bathing beach). The cited cases were decided prior to the judicial abrogation of governmental immunity of Florida municipalities by the decision in *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

⁶ *Boise Dev. Co. v. City of Boise*, 30 Idaho 675, 167 Pac. 1032 (1917) (physical improvement of park facilities).

tana,¹⁰ New Jersey,¹¹ New Mexico,¹² Oklahoma,¹³ Pennsylvania,¹⁴ South Dakota,¹⁵ Texas,¹⁶ Vermont,¹⁷ Virginia,¹⁸ West Virginia¹⁹ and Wyoming.²⁰

This list of states, however, does not fully reflect the inroads which have been made upon the immunity doctrine. Jurisdictions in which the courts still profess to classify recreational activities as "governmental" often rely upon an "exception" to the immunity rule, under which it is proper to impose tort liability for defective conditions of park property.²¹ Upon occasion, the courts may circumvent the immunity rule in "hard cases" by invoking the doctrine that public entities are liable

- ⁷ City of Kokomo v. Loy, 185 Ind. 18, 112 N.E. 994 (1916) (maintenance of park grounds); City of Terre Haute v. Webster, 112 Ind. App. 101, 40 N.E.2d 972 (1942) (drinking fountain in park). See also, Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938) (park maintenance); City of Evansville v. Blue, 212 Ind. 130, 8 N.E.2d 224 (1937) (swimming pool); City of Indianapolis v. Baker, 72 Ind. App. 323, 125 N.E. 52 (1919) (baseball diamond).
- ⁸ City of Laurel v. Hutto, 220 Miss. 253, 70 So.2d 605 (1954) (pathway in park); City of Jackson v. McFadden, 181 Miss. 1, 177 So. 755 (1937) (municipal football stadium); City of Columbia v. Wilks, 166 So. 925 (Miss. 1936) (swimming pool); Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861 (1925) (zoo).
- ⁹ Kuenzel v. City of St. Louis, 278 Mo. 277, 212 S.W. 876 (1919) (restroom in park); Capp v. City of St. Louis, 251 Mo. 345, 158 S.W. 616 (1913) (river running through park); Lewis v. City of Kansas City, 233 Mo. App. 341, 122 S.W.2d 852 (1938) (electric power lines in park); Thayer v. City of St. Joseph, 227 Mo. App. 623, 54 S.W.2d 442 (1932) (swimming pool).
- ¹⁰ Felton v. City of Great Falls, 118 Mont. 586, 169 P.2d 229 (1946) (swimming pool).
- ¹¹ Weeks v. City of Newark, 62 N.J. Super. 166, 162 A.2d 314 (1960), *aff'd per curiam*, 34 N.J. 250, 168 A.2d 11 (1961) (swimming pool); Leeds v. City of Atlantic City, 13 N.J. Misc. 868, 181 Atl. 892 (1935) (municipal convention hall in use as indoor football stadium); Martin v. City of Asbury Park, 111 N.J.L. 364, 168 Atl. 612 (1933) (bathhouse at public beach).
- ¹² Murphy v. City of Carlsbad, 66 N.M. 376, 348 P.2d 492 (1960) (merry-go-round). See also State v. City of Albuquerque, 67 N.M. 383, 355 P.2d 925 (1960) (parks generally held to be "proprietary").
- ¹³ City of Sapulpa v. Young, 147 Okla. 179, 296 Pac. 418 (1931) (swing in park).
- ¹⁴ DeSimone v. City of Philadelphia, 380 Pa. 137, 110 A.2d 431 (1955) (municipal swimming pool); Styer v. City of Reading, 360 Pa. 212, 61 A.2d 382 (1948) (municipal playground); Miller v. City of Philadelphia, 345 Pa. 1, 25 A.2d 185 (1942) (hiking trail in park); McCallister v. Borough of Homestead, 322 Pa. 341, 185 Atl. 533 (1936) (bathing beach); Paraska v. City of Scranton, 313 Pa. 227, 169 Atl. 434 (1933) (swing in playground).
- ¹⁵ Bucholz v. City of Sioux Falls, 77 S.D. 322, 91 N.W.2d 606 (1958) (pistol and rifle shooting range); Orrison v. City of Rapid City, 76 S.D. 145, 74 N.W.2d 489 (1956) (swimming pool); Jensen v. Juul, 66 S.D. 1, 278 N.W. 6 (1938) (baseball park bleacher seats); Glibas v. City of Sioux Falls, 64 S.D. 45, 264 N.W. 196 (1935) (swimming pool); Norberg v. Hagna, 46 S.D. 568, 195 N.W. 438 (1923) (swimming pool).
- ¹⁶ Scroggins v. City of Harlingen, 131 Tex. 237, 112 S.W.2d 1035 (1938) (amusement device in park); City of Waco v. Branch, 117 Tex. 394, 5 S.W.2d 498 (1928) (lawns and shrubbery in park); Claitor v. City of Comanche, 271 S.W.2d 465 (Tex. Civ. App. 1954) (swing in park).
- ¹⁷ Marshall v. Town of Brattleboro, 121 Vt. 417, 160 A.2d 762 (1960) (ski tow in park).
- ¹⁸ Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610, 120 A.L.R. 1368 (1939) (public swimming resort on lake). The Virginia legislature, however, shortly after this decision enacted for cities and towns a statutory immunity from liability for simple negligence in the operation of recreational facilities, but declared such entities liable for "gross or wanton" negligence in connection therewith. VA. CODE ANN. § 15-714 (1950); see WARP, MUNICIPAL TORT LIABILITY IN VIRGINIA 27-30 (1941).
- ¹⁹ Ashworth v. City of Clarksburg, 118 W.Va. 476, 190 S.E. 763 (1937) (swimming pool).
- ²⁰ Ramirez v. City of Cheyenne, 34 Wyo. 67, 241 Pac. 710, 42 A.L.R. 245 (1925) (swing in park playground).
- ²¹ Such "exceptions" appear in some cases to be of judicial invention, see Florey v. City of Burlington, 247 Iowa 316, 73 N.W.2d 770 (1955); White v. City of Charlotte, 211 N.C. 186, 189 S.E. 492 (1937), but are more often based upon statutory authority. See City of Cleveland v. Pine, 123 Ohio St. 578, 176 N.E. 229 (1931); City of Cleveland v. Ferrando, 114 Ohio St. 207, 150 N.E. 747 (1926); Flesch v. City of Lancaster, 264 Wis. 234, 58 N.W.2d 710 (1953). Compare Powless v. County of Milwaukee, 6 Wis.2d 78, 94 N.W.2d 187 (1959).

for maintaining a "nuisance" in a public park.²² Moreover, it should be recalled that sovereign immunity has been judicially repealed in Illinois,²³ Michigan,²⁴ and Wisconsin,²⁵ and has been at least partially eliminated by statute in Alaska,²⁶ Hawaii,²⁷ New York,²⁸ and, possibly, Washington.²⁹ It thus appears that approximately half the states of the Union now recognize the tort liability of public entities in the performance of some or all park and recreation functions. Indeed, the trend toward public tort liability in parks and recreation functions is so pronounced that a leading authority has flatly declared that the rule favoring liability "will ultimately prevail."³⁰

It is readily conceded that some of the states listed above still classify *particular phases* of recreational activities as immune,³¹ but at the same time, states which generally regard such functions as immune

²² See, e.g., *Hoffman v. City of Bristol*, 113 Conn. 386, 155 Atl. 499 (1931) (negligently maintained diving board over shallow water in park swimming area held to be a nuisance); *Towner v. City of Melrose*, 305 Mass. 165, 25 N.E.2d 336 (1940) (injury to plaintiff's property from water breaking through sluiceways on municipal golf course held actionable on nuisance theory); *Robb v. City of Milwaukee*, 241 Wis. 432, 6 N.W.2d 222 (1942) (maintenance of baseball diamond without adequate fencing or screens to prevent batted balls from striking pedestrians passing by constituted actionable nuisance as to pedestrian struck by ball).

²³ *Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959). See also *List v. O'Connor*, 19 Ill.2d 337, 167 N.E.2d 188 (1960). The Illinois legislature promptly reinstated the immunity doctrine, but only in piecemeal fashion. See ILL. ANN. STAT., ch. 34, § 301.1 (Smith-Hurd Supp. 1961) (almost complete immunity for counties); ch. 57½, § 3a (Smith-Hurd Supp. 1961) (immunity for forest preserve districts); ch. 105, §§ 12.1-1, 333.2a, 491 (Smith-Hurd Supp. 1961) (immunity for park districts); ch. 122, §§ 821-831 (Smith-Hurd Supp. 1961) (limited immunity for school districts). See generally Hickman, *Municipal Tort Liability in Illinois*, 1961 U. ILL. L. FORUM 475; Comment, *Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction*, 54 Nw. U. L. Rev. 588 (1959).

²⁴ *Williams v. City of Detroit*, 346 Mich. 231, 111 N.W.2d 1 (1961).

²⁵ *Holytz v. City of Milwaukee*, 16 Wis.2d —, 115 N.W.2d 618 (1962). This ruling had been anticipated by extensive legislative enlargement of governmental tort liability. A Wisconsin statute requires public entities to satisfy judgments against their personnel for torts committed in the course of duty and in good faith. See Wis. STAT. § 270.58 (1957), as amended by Wis. Laws 1959, ch. 438, and Wis. Laws 1961, ch. 499; *Larson v. Lester*, 259 Wis. 440, 49 N.W.2d 414 (1951). See Comment, *Governmental Tort Liability and Immunity in Wisconsin*, 1961 Wis. L. Rev. 486, 491-96. In addition, the Wisconsin "safe place" statute waives immunity insofar as injuries are sustained as the result of defective buildings, including recreational facilities. See Wis. STAT. § 101.06 (1959); *Flesch v. City of Lancaster*, 264 Wis. 234, 58 N.W.2d 710 (1953) (holding swimming pool building within "safe place" statute).

²⁶ ALASKA COMP. LAWS ANN. §§ 56-7-1 *et seq.* (Supp. 1958).

²⁷ HAWAII REV. LAWS §§ 245A-1 *et seq.* (Supp. 1960).

²⁸ N.Y. CT. CL. ACT § 8. However, even absent statutory waiver, New York recognized that tort liability could obtain in the course of public recreational activities on the basis of its classification of such activities as "proprietary". See, e.g., *Peterson v. City of New York*, 267 N.Y. 204, 196 N.E. 27 (1935); *Van Dyke v. City of Utica*, 203 App. Div. 26, 196 N.Y. Supp. 277 (1922).

²⁹ Wash. Laws 1961, ch. 136, discussed in Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312 (1961). See also *Lightner v. Balow*, — Wash.2d —, —, 370 P.2d 982, 984 (1962) (concurring opinion by Foster, J.); Wash. State Bar Convention, Panel Discussion on Tort Claims Against the State of Washington (Sept. 1961).

³⁰ 18 MCQUILLIN, MUNICIPAL CORPORATIONS 453-54 (3d ed. 1950). The full statement is: "In view of the tendency of late decisions and the development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation."

³¹ See, e.g., *Healy v. City of Kansas City*, 277 Mo. 619, 211 S.W. 59 (1919) (maintenance of public order in park during patriotic celebration classified as governmental function). Compare *Buck v. McLean*, 115 So.2d 764 (Fla. App. 1959) (conduct of baseball game by school district treated as immune governmental function since part of over-all educational program).

sometimes appear to classify *specific phases* of recreation or amusement activities as "proprietary."³²

The California cases do not lend themselves to ready classification on either side. Instead, they provide a prime illustration of *ad hoc* judicial treatment of the problem. Although the maintenance and operation of public parks, playgrounds and beaches has often been said to be a "governmental" function in California for which no tort liability may attach absent a statutory waiver of sovereign immunity,³³ a golf course in a park has been held to be "proprietary,"³⁴ as has a playground for children maintained by a public housing authority.³⁵ On the other hand, despite repeated judicial admonitions that the "proprietary" category includes amusement and entertainment activities such as a fireworks display,³⁶ horse racing,³⁷ or a community theatre project,³⁸ the California courts have nonetheless insisted upon applying the rule of immunity to such "governmental" activities as a merry-go-round,³⁹ miniature train for children,⁴⁰ exhibition of wild animals in a zoo,⁴¹ swimming pool,⁴² playground,⁴³ facilities for water sports,⁴⁴ and camping or picnicking facilities.⁴⁵ Again, while some cases appear to emphasize the view that cultural and educational activities, such as agricultural,⁴⁶ military,⁴⁷ zoological⁴⁸ and artistic⁴⁹ exhibitions, are

³² See *Matthews v. City of Detroit*, 291 Mich. 161, 289 N.W. 115 (1939) (classifying the operation of miniature railway in park, where small fee was charged to riders, as "proprietary" notwithstanding generally "governmental" capacity of parks and recreation function); *Glenn v. City of Raleigh*, 248 N.C. 378, 103 S.E.2d 482 (1958) (revenue-producing picnic and recreational area of park classified as "proprietary"); *Dean v. Board of Trustees*, 65 Ohio App. 362, 29 N.E.2d 910 (1940) (municipal auditorium leased to private operator held to be "proprietary"); *City of Kingsport v. Lane*, 35 Tenn. App. 183, 243 S.W.2d 289 (1951) (city held liable, although operation of playground classified as "governmental," in light of fact city had purchased liability insurance and carrier had agreed therein not to invoke sovereign immunity defense); *Griffin v. Salt Lake City*, 111 Utah 94, 176 P.2d 156 (1947) (municipal swimming pool operated on a commercial basis held "proprietary").

³³ See *Farrell v. City of Long Beach*, 132 Cal. App.2d 818, 283 P.2d 296 (1955) (playground); *Williams v. City of Alhambra*, 131 Cal. App.2d 262, 280 P.2d 177 (1955) (parks generally); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940) (playground); *Benton v. City of Santa Monica*, 106 Cal. App. 339, 289 Pac. 203 (1930) (public bathing beach). *Cf. Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953); *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919).

³⁴ *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954).

³⁵ *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951).

³⁶ *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953).

³⁷ *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958).

³⁸ *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950).

³⁹ *Carr v. City & County of San Francisco*, 170 Cal. App.2d 48, 338 P.2d 509 (1959).

⁴⁰ *Meyer v. City & County of San Francisco*, 9 Cal. App.2d 361, 49 P.2d 893 (1935).

⁴¹ *McKinney v. City & County of San Francisco*, 109 Cal. App.2d 844, 241 P.2d 1060 (1952).

⁴² *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); *Crone v. City of El Cajon*, 133 Cal. App. 624, 24 P.2d 846 (1933).

⁴³ *Farrell v. City of Long Beach*, 132 Cal. App.2d 818, 283 P.2d 296 (1955); *Howard v. City of Fresno*, 22 Cal. App.2d 41, 70 P.2d 502 (1937). See also *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940); *Schmidt v. City of Vallejo*, 122 Cal. App. 5, 10 P.2d 107 (1932).

⁴⁴ See *Seybert v. County of Imperial*, 162 Cal. App.2d 209, 327 P.2d 560 (1958); *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868 (1952); *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.2d 80 (1931).

⁴⁵ *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919). See also *Perry v. City of San Diego*, 80 Cal. App.2d 166, 181 P.2d 98 (1947); *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943).

⁴⁶ See *Guidi v. State*, 41 Cal.2d 623, 262 P.2d 3 (1953); *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958).

⁴⁷ *Pianka v. State*, 46 Cal.2d 208, 293 P.2d 458 (1956).

⁴⁸ *McKinney v. City & County of San Francisco*, 109 Cal. App.2d 844, 241 P.2d 1060 (1952).

⁴⁹ *Burnett v. City of San Diego*, 127 Cal. App.2d 191, 273 P.2d 345 (1954).

“governmental,” other cases classify as “proprietary” such closely similar functions as community dramatics,⁵⁰ historic celebrations,⁵¹ and exhibitions depicting the operations of municipal government.⁵²

The vagaries of result documented in the cases just reviewed suggest that the doctrine of immunity from tort liability has operated in this State with conspicuous lack of uniformity and fairness in the area of public recreation. Any effort to perceive a consistent rationale in the California decisions would manifestly be an attempt to reconcile the irreconcilable. In practice, however, it is probable that prior to *Muskopf* the majority of injuries sustained in the course of recreational programs were embraced within exceptions to the immunity rule, and that reported cases illustrating the application of the immunity rule in such situations are really more aberrational than typical. Reasons for this conclusion are not hard to locate. In addition to the fact that many park and recreation functions are “proprietary” in California, the Public Liability Act,⁵³ which applies to the three most active local agencies in the public recreation field—cities, counties and school districts—has been a prolific source of tort liability for injuries sustained through recreation and amusement activities.⁵⁴ Indeed, it appears that injuries sustained as a result of dangerous or defective conditions of property on public parks, beaches and playgrounds constitute a substantial proportion of all reported tort actions arising out of this segment of governmental operations;⁵⁵ and, for such injuries, cities, counties and school districts are already fully liable in California. In the second place, school districts, which carry a major share of the burden of community recreation programs⁵⁶ as well as conduct a full-fledged physical education and exercise program integrated into the curriculum,⁵⁷ have long been fully liable in tort for the negligence of their officers and employees.⁵⁸ Finally, a number of districts, including com-

⁵⁰ *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950).

⁵¹ *Chafar v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917).

⁵² *Sanders v. City of Long Beach*, 54 Cal. App.2d 651, 129 P.2d 511 (1942).

⁵³ CAL. GOVT. CODE § 53051. See the text at 42-59 *supra*.

⁵⁴ Among the California cases involving recreational torts, the following involved claims of dangerous or defective property conditions: *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Chafar v. City of Long Beach*, 174 Cal. 478, 163 Pac. 670 (1917); *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958); *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958); *Burnett v. City of San Diego*, 127 Cal. App.2d 191, 273 P.2d 345 (1954); *Plaza v. City of San Mateo*, 123 Cal. App.2d 103, 266 P.2d 523 (1954); *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868 (1952); *Betts v. City & County of San Francisco*, 108 Cal. App.2d 701, 239 P.2d 456 (1952); *Harper v. Vallejo Housing Authority*, 104 Cal. App.2d 621, 232 P.2d 262 (1951); *Rhodes v. City of Palo Alto*, 100 Cal. App.2d 336, 223 P.2d 639 (1950); *Perry v. City of San Diego*, 80 Cal. App.2d 166, 181 P.2d 98 (1947); *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943); *Sanders v. City of Long Beach*, 54 Cal. App.2d 651, 129 P.2d 511 (1942); *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940); *Howard v. City of Fresno*, 22 Cal. App.2d 41, 70 P.2d 502 (1937); *Schmidt v. City of Vallejo*, 122 Cal. App. 5, 10 P.2d 107 (1932); *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.2d 30 (1931); and *Benton v. City of Santa Monica*, 106 Cal. App. 339, 289 Pac. 203 (1930). See also *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962).

⁵⁵ A substantial proportion—possibly a majority—of the reported cases, collected in the annotations cited in note 1, *supra*, involve dangerous or defective conditions of public park or recreation property.

⁵⁶ See CAL. EDUC. CODE §§ 16651-16664, the Community Recreation Act.

⁵⁷ CAL. EDUC. CODE §§ 8151-8156. See *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal.2d 207, 253 P.2d 1 (1953); *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 81 P.2d 894 (1938).

⁵⁸ CAL. EDUC. CODE § 903. See the text at 40-42 *supra*.

munity services districts and both general law and special act water districts, have authority to maintain and operate facilities for purposes of recreation; but in so doing they are required by law to satisfy tort judgments against their officers and personnel.⁵⁹

Before attempting to identify and evaluate the public policy considerations which are relevant to the question whether tort liability should be further expanded in this area, three significant characteristics of the park and recreation functions of governmental entities should be briefly mentioned. The importance of these characteristics lies in the fact that they provide a basis for marking a possible distinction between park and recreation functions on the one hand, and medical, police and fire protection functions on the other. Admittedly, in each instance, the differences in question are primarily matters of degree; but as with so many other problems in the law, differences of degree often justify differences in legal result.

First, a tremendous variety of public functions and responsibilities are embodied within the generic term "parks and recreation." On the other hand, medical care, law enforcement, and fire protection and suppression involve relatively specific activities having rather narrow and easily identifiable factual dimensions. This is not so with parks or public recreation. The diversities of activities, duties and responsibilities which are embraced within these concepts are apparently restricted only by the fertility of the imagination and the practical limitations of available physical resources. Public recreation programs may include such diversification as, for example, facilities and services for travelers—such as roadside rests, scenic lookouts, picnic shelters and camping sites—to enjoyment of the natural environment through nature study, hiking, climbing, horseback riding, hunting and fishing; to personal athletic participation in individual sports such as archery, golf, tennis, marksmanship, boating, swimming, water skiing, skin diving and ice skating; to the physical development of children through playground equipment, supervised games and encouragement of craft and hobby projects; to educational and cultural improvement by means of art exhibitions, zoological gardens, historical monuments, community theatre projects and musical events; to the competitive appeal of organized team sports such as baseball, softball, basketball and football; or to the social delights of dancing, roller skating and other similar activities. In connection with each of these categories of services, public entities may have responsibilities which range from minimal (*e.g.*, occasional inspection of physical facilities for maintenance and safety) to comprehensive (*e.g.*, management, supervision, maintenance of public order, protection against fire hazards, control of public health menaces, organization of daily programs, custodial care of children, provision for food, shelter

⁵⁹ See CAL. GOV'T. CODE §§ 61600(e) (authorizing community services districts to engage in recreation functions) and 61633 (requiring such districts to satisfy tort judgments against their personnel); CAL. WATER CODE §§ 31161 (authorizing county water districts to engage in recreational activities) and 31090 (requiring assumption of tort judgments against personnel); Desert Water Agency Law, Cal. Stat. 1961, ch. 1069, § 15(6), p. 2762 (recreation functions), § 24, p. 2772 (assumption of tort judgments), CAL. GEN. LAWS ANN. Act 9097, §§ 15(6), 24 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 100-15(6), 100-24 (West Supp. 1961); Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, §§ 2(d), 4, pp. 5032, 5033 (recreation functions), § 37, p. 5040 (assumption of tort liability), CAL. GEN. LAWS ANN. Act 9380, §§ 2(d), 4, 37 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 93-2(d), 93-4, 93-37 (West 1959).

and utility services, and the like). The variety of possible recreation programs, and the potentially great range of public responsibilities assumed in connection with any given program, all combine to suggest that risk exposure in this area may be unusually large and subject to extreme variations between different entities otherwise equally situated.

Second, the number and types of public entities authorized to engage in diversified recreation programs are very extensive—far more so than is true in the cases of law enforcement, medical care and fire protection. California has an extensive system of state-operated parks and beaches; but local community activity in this field is also a major governmental function, exercised through cities, counties and a variety of special districts.¹ The Education Code provisions regarding community recreation programs, for example, are a source of general authority for all cities, counties, public corporations, school districts and other districts to undertake recreation programs as very broadly defined.²

Counties are explicitly authorized to engage not only in the maintenance and operation of parks and beaches,³ but also in such activities as music, pageants, dramatic plays, art galleries, museums, sporting events and the like.⁴ Although the powers of Regional Park Districts⁵ and of Recreation and Park Districts⁶ obviously bring these types of entities squarely within the present topic, it is perhaps less well known that many other special districts have explicit statutory authority to conduct recreation programs. Included in this number, for example, are community services districts,⁷ public utility districts,⁸ municipal utility districts,⁹ county water districts,¹⁰ veterans' memorial districts,¹¹ small craft harbor districts,¹² municipal improvement districts,¹³ and many

¹ For detailed descriptions of the magnitude and variety of California's state parks and recreation programs, see CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN (1960); CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON RECREATION, STATE BEACHES AND PARKS, REPORT (Supp. to App. to Sen. J., 1959 Gen. Sess.); CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON RECREATION, STATE BEACHES AND PARKS, FOURTH PARTIAL REPORT: RECREATION AND STATE PARKS (1957). Statutory authority for the various state-operated recreation programs includes CAL. FISH & GAME CODE §§ 1300-1375 (wildlife conservation); CAL. H. & S. CODE §§ 4050-4055 (regulation of recreational uses of water supply reservoirs); CAL. PUB. RES. CODE §§ 5001-5092 (state park system), and 5801-5882 (small craft harbors); CAL. WATER CODE §§ 11900-11925 (conservation and recreation facilities in connection with state water projects).

² CAL. EDUC. CODE §§ 16651-16664.

³ Counties derive general powers with respect to parks and recreation from CAL. EDUC. CODE §§ 16651-16664, CAL. GOVT. CODE § 25208.5, and CAL. PUB. RES. CODE §§ 5157, 5301-5304. See also CAL. GOVT. CODE §§ 25210.4(c), 25210.60-25210.68 (authorizing creation of county service areas for local park and recreation purposes).

⁴ See CAL. GOVT. CODE §§ 25351 (buildings for "sports events, athletic contests"), 25351.3 (music centers, opera houses, auditoriums), 25353 (water rights and property for "public pleasure grounds"), 25550-25557 (county aid to city parks and recreation programs), 25558-25562 (operas, pageants, plays), 25660-25662 (fishing facilities); CAL. PUB. RES. CODE §§ 5120-5132 (museums), 5135-5138 (art galleries).

⁵ CAL. PUB. RES. CODE §§ 5500-5595, particularly §§ 5541, 5558, 5562.

⁶ CAL. PUB. RES. CODE §§ 5780-5787.4.

⁷ CAL. GOVT. CODE § 61600(e).

⁸ CAL. PUB. UTIL. CODE § 16463.

⁹ CAL. PUB. UTIL. CODE § 12816.5.

¹⁰ CAL. WATER CODE § 31161.

¹¹ CAL. MIL. & VET. CODE § 1191.

¹² CAL. HARB. & NAV. CODE §§ 7000-7340. See also San Diego Unified Port District Act, Cal. Stat. (1st Ex. Sess.) 1962, ch. 67, § 33, p. —, § 37(5), p. —, CAL. GEN. LAWS ANN. Act 3207, §§ 33, 37(5) (Deering Supp. 1962), CAL. HARB. & NAV. CODE APP. 1, §§ 33, 37(5) (West Supp. 1962).

¹³ See, e.g., Bethel Island Municipal Improvement District Act, Cal. Stat. (1st Ex. Sess.) 1960, ch. 22, § 77, p. 333; Embarcadero Municipal Improvement District Act, Cal. Stat. (1st Ex. Sess.) 1960, ch. 81, § 77, p. 447; Estero Municipal Improvement District Act, Cal. Stat. (1st Ex. Sess.) 1960, ch. 82, § 77, p. 463.

special act flood control districts and water agencies.¹⁴ Indeed, since it has been squarely held that the use of water for recreation purposes is a "beneficial use" for which the power of eminent domain may be employed by flood control districts even in the absence of express statutory authority,¹⁵ it appears that all public entities charged with authority to control or conserve water for beneficial use may undertake at least some forms of recreation programs incident to their water storage and conservation functions.¹⁶ The Legislature has expressed itself favorably in this connection by enacting general enabling legislation under which public water reservoirs may be utilized for recreation purposes, with specified conditions and safeguards.¹⁷ It is probably accurate to conclude that power to engage in some form of public recreation program is vested by law in more public entities in California than comparable power relating to any other realm of public service. The impact of rules expanding tort liability—conceding that the areas within which any such expansion may take place are relatively narrow in light of the broad range of existing liability—will thus be more pervasive than with respect to other kinds of injury-producing governmental functions.

Third, the magnitude of the public interest in parks and recreation is already substantial,¹⁸ and the demand for increasing public expendi-

¹⁴ See, e.g., Alameda County Flood Control and Water Conservation District Act, Cal. Stat. 1949, ch. 1275, § 5(14), as amended by Cal. Stat. 1961, ch. 1565, § 1, p. 3384, CAL. GEN. LAWS ANN. Act 205, § 5(14) (Deering Supp. 1961), CAL. WATER CODE APP. § 55-5(14) (West Supp. 1961); Desert Water Agency Law, Cal. Stat. 1961, ch. 1069, § 15(6), p. 2762, CAL. GEN. LAWS ANN. Act 9097, § 15(6) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 100-15(6) (West Supp. 1961); Monterey County Flood Control and Water Conservation District Act, Cal. Stat. 1947, ch. 699, § 4, as amended by Cal. Stat. (1st Ex. Sess.) 1956, ch. 60, § 1, p. 452, CAL. GEN. LAWS ANN. Act 5064, § 4 (Deering Supp. 1961), CAL. WATER CODE APP. § 52-4 (West 1956); San Geronimo Pass Water Agency Law, Cal. Stat. 1961, ch. 1435, § 15(6), p. 3246, CAL. GEN. LAWS ANN. Act 9099, § 15(6) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 101-15(6) (West Supp. 1961); Siskiyou County Flood Control and Water Conservation District Act, Cal. Stat. 1959, ch. 2121, § 3(q), p. 4947, CAL. GEN. LAWS ANN. Act 7688, § 3(q) (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 89-3(q) (West 1959); Tehama County Flood Control and Water Conservation District Act, Cal. Stat. 1957, ch. 1280, § 3.2, as added by Cal. Stat. 1961, ch. 2213, § 1, p. 4559, CAL. GEN. LAWS ANN. Act 8510, § 3.2 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. § 82-3.2 (West Supp. 1961); Yolo County Flood Control and Water Conservation District Act, Cal. Stat. 1951, ch. 1657, § 3(m), as amended by Cal. Stat. 1961, ch. 895, § 1.5, p. 2502, CAL. GEN. LAWS ANN. Act 9307, § 3(m) (Deering Supp. 1961), CAL. WATER CODE APP. § 65-3(m) (West Supp. 1961); Yuba-Bear River Basin Authority Act, Cal. Stat. 1959, ch. 2131, §§ 2(d), 4, pp. 5032, 5033, CAL. GEN. LAWS ANN. Act 9330, §§ 2(d), 4 (Deering Supp. 1961), CAL. WATER CODE APP. 1959 SUPP. §§ 93-2(d), 93-4 (West 1959).

¹⁵ Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d —, 20 Cal. Rptr. 252 (1962).

¹⁶ See, in accord, CAL. WATER CODE § 1243, enacted in 1959: "The use of water for recreation and the preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the State Water Rights Board shall take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources." See also CAL. WATER CODE § 1257.

¹⁷ CAL. H. & S. CODE §§ 4050-4055.

¹⁸ In 1960, the State held 618,817 acres of park and recreation land, of which 1,920 acres was developed area; counties held 38,675 acres, of which 22,170 acres were developed; cities held 47,176 acres, of which 28,609 acres were developed; and recreation districts held 11,112 acres, of which 10,736 acres were developed. CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN, PART II, 129 (1960). The State's investment in park and recreation lands, as of 1959, exceeded \$50,000,000. CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON RECREATION, STATE BEACHES AND PARKS, REPORT 14 (Supp. to App. to Sen. J., 1959 Gen. Sess.). During the 1960-61 fiscal year, a total of 329 out of the 372 cities in California expended nearly \$90,000,000 on parks and recreation programs, ranging from a high of over \$14,000,000 in Los Angeles to lows of \$8.00 and \$3.00 reported for the cities of Plymouth and Cudahy, respectively, while some 43 cities reported no expenditures for this function. CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA 18-24 (Fiscal Year 1960-61). During

tures in these areas will undoubtedly continue to grow as more and more of our population congregates in cities.¹⁹ To a considerable extent, provision for parks, playgrounds and other related functions is inter-related with and augments the objectives of the broader aspects of public health and crime prevention and control. Yet, admitting all that can be said for the public recreation function, it still embodies many activities and operations which are undoubtedly peripheral when they are compared to the more fundamental functions of law enforcement, prevention and control of disease, rendition of medical care to the indigent sick and afflicted, and prevention and control of fire or other natural and manmade disasters. When only limited public funds are available, a launching ramp for pleasure boats or a new eighteen-hole golf course are surely of lower priority in any responsible ordering of public improvements than the enlargement of an already overcrowded contagious disease hospital, the expansion of communications facilities for an overworked police force, or the improvement of water purification devices for the public water supply. In short, public recreation programs surely must be deemed to make less insistent demands upon public resources and finances than the more important functions of the types mentioned. The risks of entity tort liability are unlikely to impair the effective performance of public health and safety responsibilities, for it appears to be generally agreed that these functions *must* be carried out to a basic minimal level at least, without primary concern over costs. A large portion of the activities comprising modern public park and recreation programs, however, might well be curtailed, deferred or even completely eliminated if the risk of tort liability were to impose unduly large obligations upon the public treasury. To forestall such adverse consequences, it would not be unreasonable to expect those persons who voluntarily participate in the public recreation program to assume a portion of the risk of injuries arising therefrom (albeit tortiously) as part of the price to be paid for benefits received. This line of argument, it may be noted, has less force where medical care, police protection and fire suppression are concerned, for voluntary citizen participation motivated by considerations of personal pleasure and enjoyment are not typical aspects of these public services; nor do such services make fiscal demands which are so plainly marginal, as are many phases of the public recreation program. Accordingly, it is submitted that the limits of governmental tort liability in the recrea-

the same period, 53 out of the 58 counties in the State expended nearly \$16,000,000 on public recreation programs, ranging from \$8.4 million in the County of Los Angeles to \$3,906 in the County of Sutter, while some 5 counties made no expenditures in this area. CALIFORNIA STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING COUNTIES OF CALIFORNIA 5 (Fiscal Year 1960-61). A total of 91 special districts whose primary function was recreation (*e.g.*, regional park districts, county recreation districts, recreation and park districts) expended more than \$4.8 million during fiscal year 1959-60 in carrying out their responsibilities. CAL. STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA 11 (Fiscal Year 1959-60). In addition, substantial amounts were undoubtedly expended for public recreation by other multifunction districts authorized to do so, as well as by the more than 300 school districts which participate in the public recreation program. See CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN, PART II, 122-23 (1960).

¹⁹ The pressures for expansion of public park and recreation services are outlined, and future growth of public participation projected, in CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN—*passim* (1960). See also CALIFORNIA LEGISLATURE, SENATE INTERIM COMMITTEE ON RECREATION, STATE BEACHES AND PARKS, REPORT 7-12 (Supp. to App. to Sen. J., 1959 Gen. Sess.).

tion field require a more sensitive evaluation of possible detrimental implications than has been true in the other specific fields previously surveyed in the course of the present study.

In view of the variety of possible activities covered by the phrase, "parks and recreation," an attempt to analyze policy considerations relating to discrete phases of such programs would undoubtedly entail much duplication and repetition. It seems advisable, therefore, to approach the problem from the standpoint of functional sources of injury claims. Unless special considerations can be identified as existing within the framework of public recreation which might justify possible modifications in the policy evaluations previously made, those sources of tort liability will not be re-examined. For example, insofar as injuries to persons or property result from a negligent failure to provide adequate law enforcement or police protection in public parks, the discussion earlier in the present study relating to public tort responsibility in the performance of the police function would seem to be fully applicable.²⁰ To the extent that medical care and prevention of disease (*e.g.*, sanitation and first aid) are incidental to public recreation programs, and fire prevention and suppression are undertaken within or in the vicinity of public parks and recreation areas, the previous analyses of policy factors relevant to tort liability in the performance of the health and fire functions²¹ would appear to require no revision or alteration grounded in any peculiarities of the public recreation function. However, three important functional sources of potential injuries to person and property, which have characteristics deserving of special consideration in the context of public recreation, may be identified.

Dangerous and Defective Conditions of Recreation and Park Property

One perusing the reported decisions involving claims of tortious injury arising in the course of public recreation programs is immediately struck by the frequency with which such claims involve dangerous or defective conditions of property.¹ The California decisions alone provide illustrations of injuries resulting in public parks and beaches from a hole in a pedestrian way,² a slippery condition along the banks of a pond,³ a children's sandbox in close proximity to a baseball diamond,⁴ the maintenance of a slide in a swimming pool at such a point that swimmers were likely to be struck by persons coming down the slide,⁵ the existence of rocks and shoals under the water at a point often used by bathers for purposes of diving,⁶ a dilapidated picnic structure,⁷ and a tree so weakened and decayed that it was about to fall.⁸ Other jurisdictions supply additional examples, including de-

²⁰ See the text at 404-55 *supra*.

²¹ See the text, *supra*, pp. 379-404 (medical treatment and hospital care) and pp. 456-82 (fire fighting and fire protection).

¹ See DYER & LICHTIG, *LIABILITY IN PUBLIC RECREATION* 32-45 (1949).

² *Brown v. Fifteenth Dist. Agricultural Fair Ass'n*, 159 Cal. App.2d 93, 323 P.2d 131 (1958). See also *Burnett v. City of San Diego*, 127 Cal. App.2d 191, 273 P.2d 345 (1954).

³ *Magnuson v. City of Stockton*, 116 Cal. App. 532, 3 P.2d 30 (1931). See also *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962) (slippery canal bank at picnic and camping site).

⁴ *Bauman v. City & County of San Francisco*, 42 Cal. App.2d 144, 108 P.2d 989 (1940).

⁵ *Barrett v. City of San Jose*, 161 Cal. App.2d 40, 325 P.2d 1026 (1958).

⁶ *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956).

⁷ *Perry v. City of San Diego*, 80 Cal. App.2d 166, 181 P.2d 98 (1947).

⁸ *Smith v. County of San Mateo*, 62 Cal. App.2d 122, 144 P.2d 33 (1943).

fective playground equipment,⁹ shallow water beneath a diving board,¹⁰ a hole in the protective screen behind home plate in a baseball park,¹¹ insecurely constructed bleacher seats,¹² the lack of fencing along the banks of a stream running through the park,¹³ inadequate barriers or railing around the bear's cage in a zoo,¹⁴ sharp and jagged stones allowed to remain beneath a swing,¹⁵ an unprotected gas heater located in a community recreation building,¹⁶ the absence of a backstop or barrier behind a baseball diamond,¹⁷ and a snowdrift allowed to accumulate at the foot of a toboggan slide.¹⁸

In reviewing the cases just cited, it is apparent that many, if not most, of the injuries in question were of a *kind* which might be expected to occur in connection with public recreation programs, no matter how carefully they may be conducted and maintained. Many phases of recreation and amusement activities are inherently risky, while participation in others presupposes certain physical skills and abilities, a minimum degree of strength and coordination, or occasionally even a stable and mature emotional outlook. Ordinarily, park property is not dangerous *per se*; the danger stems from the way in which it is used. A rifle employed for target practice on a marksmanship range may be completely innocuous, but in the hands of careless or inexperienced youths may prove lethal. The existence of a shallow bottom or of concealed hazards below water at a swimming facility causes no harm until a bather dives in at that spot. Even the strongest and best constructed swing or slide in a playground may be the source of injury to a child who loses his balance, relaxes his grip, or indulges in exhibitionism. A mountain hiking trail may well create a risk of serious fall to hikers using it, even where ordinary care is employed. In short, the very nature of a parks and recreation program, which deliberately invites and encourages individuals to participate in enjoyment of outdoor life, physical exercise, athletic endeavors, games, sports, and the like, is such as to create a greater exposure of harm to such participants than if they remained inactive. To expose public entities to possible tort liability for every injury sustained in this context because of the situation or condition of the recreational property being used may well permit juries to impose upon public entities financial

⁹ *City of Canon City v. Cox*, 55 Colo. 264, 133 Pac. 1040 (1913) (defective merry-go-round, city held liable); *Smith v. City of Iowa City*, 213 Iowa 391, 239 N.W. 29 (1931) (defective teeter board, immunity rule applied); *Clark v. City of Louisville*, 273 Ky. 645, 117 S.W.2d 614 (1938) (swing in playground, immunity rule applied); *Van Dyke v. City of Utica*, 203 App. Div. 26, 196 N.Y. Supp. 277 (1922) (slide in playground, city held liable).

¹⁰ *Hoffman v. Bristol*, 113 Conn. 386, 155 Atl. 499 (1931) (shallow water beneath diving board, city held liable); *Norberg v. Hagna*, 46 S.D. 568, 195 N.W. 438 (1923) (*semble*, city held liable).

¹¹ *Buck v. McLean*, 115 So.2d 764 (Fla. App. 1959) (school district not liable). See also *Pollan v. City of Dothan*, 243 Ala. 99, 8 So.2d 813 (1942) (*semble*).

¹² *Penix v. City of St. Johns*, 354 Mich. 259, 92 N.W.2d 332 (1958) (city held not liable for collapse of bleacher seats). Presumably the result would be to the contrary today in view of the abrogation of sovereign immunity in *Williams v. City of Detroit*, 346 Mich. 231, 111 N.W.2d 1 (1961).

¹³ *Capp v. City of St. Louis*, 251 Mo. 345, 158 S.W. 616 (1913) (city held liable).

¹⁴ *Hyde v. City of Utica*, 259 App. Div. 477, 20 N.Y.S.2d 335 (1940) (city held liable).

¹⁵ *Paraska v. City of Scranton*, 313 Pa. 227, 169 Atl. 434 (1933) (city held liable).

¹⁶ *Ramirez v. City of Ogden*, 3 Utah2d 102, 279 P.2d 463 (1955) (city held immune).

¹⁷ *Honaman v. City of Philadelphia*, 322 Pa. 535, 185 Atl. 750 (1936) (city held liable to passer-by struck by foul tip). See also, to the same effect, *Robb v. City of Milwaukee*, 241 Wis. 432, 6 N.W.2d 222 (1942).

¹⁸ *Cegelski v. City of Green Bay*, 231 Wis. 89, 285 N.W. 343 (1939) (city not liable under "safe place" statute, nor at common law).

burdens the absence of which, in many cases, was assumed when the decision was made to undertake the recreation program. Juries might also, upon occasion, impose such burdens for risks which the injured person impliedly assumed as part of the price for the availability to him of the recreational activity in question.

Two suggestions for legislative treatment would appear to find support in the foregoing analysis.

Exemption From Liability. Certain types of public property in use for recreation functions may possibly be identified as warranting express exemption from the usual rules imposing liability for dangerous or defective conditions. Those rules, as presently embodied in the Public Liability Act, may be perfectly appropriate as applied to streets, sidewalks and public buildings and grounds, where the uses ordinarily to be anticipated generally entail no special risks.¹⁹ They may be somewhat inappropriate where recreation facilities are involved which inherently pose more than ordinary hazards; and such inappropriateness may be underscored by the fact that funds to improve and maintain recreation properties in a fully safe condition are often meagre or even unavailable in view of their peripheral nature and low intensity claim to tax support. Although the matter is predominantly one of degree, in which subjective preferences and values undoubtedly are significant factors, a tentative appraisal would seem to indicate that exemption from liability should be expressly given to public entities for injuries sustained as a result of dangerous or defective conditions of:

(a) *Hiking and Riding Trails and Recreational Access Roads.* Section 54002 of the Government Code already declares that the State, cities and counties are not liable for damages caused by accidents on public bridle trails. Although the section is in need of amendment to clarify other ambiguities therein,²⁰ its underlying basic policy seems to be fully applicable to hiking trails as well as to trails and roads not open for general public transportation use but providing access to fishing, hunting and primitive camping areas. Such trails and roads ordinarily serve other primary purposes, such as firebreaks, communications maintenance, timber management, drainage and interior access, in addition to recreation; and in many instances they are made available for recreational use only as an incidental byproduct of the more dominant activity. To hold the public entity to a high standard of care in maintenance and improvement of such roads and trails, which are neither designed nor intended for general use, and which may extend into remote wilderness areas and be traveled only infrequently, would, of course, be wholly impractical. Indeed, the potential threat of liability lurking behind the normal negligence standard of "reasonable" care—a standard which experience demonstrates can be applied by juries to an extremely wide range of evidentiary suppositions—might conceivably demand the taking of protective precautions, including the purchase of insurance, which, although possibly modest in absolute terms

¹⁹ *But cf.* the special problem of snow and ice on sidewalks, discussed in the text at 375-77 *supra*.

²⁰ See the text, *supra*, pp. 177-79, pointing out that Section 54002 does not apply to all entities maintaining bridle trails, makes an ambiguous use of the word "accidents," and is not restricted to injuries sustained by equestrians or as a result of the equestrian use made of the trail.

may be so expensive that it would discourage multiple recreational use of such facilities altogether. On balance, the existing policy reflected in Section 54002 would seem to warrant extension of complete immunity to all hiking, riding, fishing, hunting, and interior access roads and trails maintained by all public entities.

(b) *Beaches, Lakes, Ponds and Streams.* The use of the State's water resources "for recreation and the preservation and enhancement of fish and wildlife resources" has been legislatively affirmed as a beneficial use entitled to consideration in allocating appropriative rights;²¹ and artificial water reservoirs recently have been declared available for recreational use under certain limited conditions,²² chiefly as a response to the greatly increased popularity of recreational aquatic activities during the past few years.²³ Water, however, can be a source of injury and death. Yet it would seem imprudent to require public entities to station lifeguards or other supervisors, and to maintain in a fully safe condition, all the many miles of shorelines which are in public ownership and available for various types of aquatic recreation.²⁴ On the other hand, the obvious danger from water sports has made it customary to provide lifeguard service in places where large numbers of people congregate for such purposes. The determination of the extent to which such services can be supported out of the public treasury, together with the number and the locations of the lifeguard stations, availability of offshore boat patrols, and frequency of inspection and surveillance in the interests of safety and welfare of water users, are all matters of policy-level discretion involving the fundamental power of government to govern. Moreover, certain types of physical hazards, such as steep and slippery banks along a lake or stream, unusual depressions worn in a beach by the action of waves, or the presence of underwater rocks with jagged edges, may be difficult or impossible to remove, modify or correct; or the cost of doing so, even where not impossible, may be wholly out of proportion to the benefits to be derived therefrom. It would seem to follow that a reasonable degree of immunity from tort liability arising out of dangerous or defective conditions of public property usable for aquatic recreation may be advisable in order not to interfere with or discourage optimum use of scarce water resources devoted to recreational uses.

It is suggested, for example, that consideration be given to enactment of a legislative grant of immunity of public entities from tort liability for injuries arising from conditions of public natural or seminatural water facilities (*i.e.*, beaches, lakes, ponds, rivers, streams, reservoirs, canals and other like bodies of water, but excluding artificial swimming pools) and their shorelines, except in the case of concealed hazards con-

²¹ CAL. WATER CODE §§ 1243, 1257. See also *Monterey County Flood Control & Water Conservation Dist. v. Hughes*, 201 Cal. App.2d —, 20 Cal. Rptr. 252 (1962).

²² CAL. H. & S. CODE §§ 4050-4055.
²³ See CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN, PART I, 46-57 (1960); *Id.*, PART II, 47-59 (1960); SCOTT & McCARTY, RECREATIONAL USE OF WATER SUPPLY RESERVOIRS 1-3 (1957).

²⁴ AS of 1958, the State operated 287,177 feet of ocean beach facilities, plus an additional 76,082 feet of designated beach areas on inland lakes and streams, or nearly 70 miles in all. Comparable figures for counties were 155,774 feet of ocean beaches and 21,467 feet of inland beaches, while for cities the figures were 424,772 feet and 11,310 feet, respectively. Recreation districts operated 3,960 feet of ocean beaches and 5,855 feet of inland beaches. CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN, PART II, 150 (1960). The total of all publicly operated beaches, based on the foregoing figures, was in excess of 180 miles of beach frontage.

stituting a substantial threat of serious physical injury or death where the hazard was actually known to a public entity but reasonable warning thereof was not given. Under this suggestion, for example, the public entity would not be threatened with tort liability if it failed to inspect or patrol its beaches or lake shores in search of dangerous or defective conditions; but, at the same time, if a hazardous condition were discovered, the giving of a reasonable warning would be required. A city with 10 miles of public beach along the ocean would have no need to fear tort liability if it failed to provide lifeguard service at all points, although it might appropriately be held liable if such service were provided but the lifeguard performed his duties in a negligent manner.²⁵ Open and observable dangers, moreover, would not provide a basis of recovery, notwithstanding the plaintiff's excusable failure actually to note their existence, for the entity's responsibility would be limited under this suggestion to defects amounting to known "traps" of which warning was not given. In effect, the proposal would place users of aquatic recreation facilities (other than artificial swimming pools) in substantially the position of licensees who must generally take physical conditions of property as they find them.²⁶

The proposed exception for artificially constructed swimming pools is founded upon the belief that such facilities can, with ordinary care, be designed, constructed and maintained in a reasonably safe manner, while a comparable degree of safety cannot always be achieved where natural conditions prevail. Such pools are relatively small compared to most natural bodies of water suitable for recreation purposes, and reasonable duties of inspection and maintenance would not be unduly onerous. Moreover, it is normally expected that the number of users of such swimming pools will be larger in proportion to the physical area of the pools than would be the case with natural water facilities. In turn, this concentration creates exposure to a larger number of possible injuries which appropriate precautions at moderate expense could generally forestall.

(c) *Other "Undeveloped" Park and Recreation Grounds.* The reasons advanced in the preceding paragraph for extending immunity to all defects in natural water recreation facilities, except known "traps" of which warning has not been given, would seem to warrant application also to the vast publicly owned but "undeveloped" park and recreation areas in the State.²⁷ The crux of the matter evidently lies in

²⁵ See the discussion *infra*, pp. 506-509.

²⁶ See *Palmquist v. Mercer*, 43 Cal.2d 92, 102, 272 P.2d 26, 32 (1954) (holding that private property owner was under a duty, with respect to horseback rider licensee, only of "refraining from wanton or wilful injury," and that licensee rider "was obliged to take the premises as he found them insofar as any alleged defective condition thereon might exist"). The private owner, however, does have a duty to warn of known hidden defects which he has reason to believe the licensee will not discover. RESTATEMENT, TORTS § 342 (1934), approved in *Nelsen v. Jensen*, 177 Cal. App.2d 270, 2 Cal. Rptr. 180 (1960). See generally *Oettinger v. Stewart*, 24 Cal.2d 133, 148 P.2d 19 (1944).

²⁷ As of 1960, the State owned 618,817 acres of park and recreation lands, of which all but 1,920 acres (or roughly 99.7%) was classified as "undeveloped." About 43% of county recreational land holdings, 39% of city holdings, and 4% of recreation district holdings, were classified as undeveloped. CALIFORNIA PUBLIC OUTDOOR RECREATION COMMITTEE, CALIFORNIA PUBLIC OUTDOOR RECREATION PLAN, PART II, 129 (1950). Although careful efforts have been made to define optimum standards for development of parks and recreation areas, it must be recognized that the actual degree to which these standards may be met in a given area is a function of numerous variables, including physical and topographical conditions, and that such standards are at best only guides to definition and planning. *Id.* at 80-91.

the definition of "undeveloped." What is here intended by that term is those portions of public lands intended for recreational uses which are presently being held in their natural state, without substantial artificial improvements or changes except to the extent that such changes are essential to their preservation and prudent management (such as firetrails and firebreaks, roads for prudent lumbering for conservation purposes, projects for reforestation of burned areas, and the like). In short, areas which are "developed" by cutting of roads and sidewalks, construction of buildings, vehicle parking areas, camping sites with stoves, running water, sanitary facilities, garbage service and organized recreation activities, or which consist of playgrounds, golf courses, picnic tables and other typical recreation facilities characteristic of municipal parks, would be excluded from the scope of this suggested immunity, and presumably would be covered by the Public Liability Act (or its successors). The distinction between the "developed" and the "undeveloped" sectors of a park might well be difficult to identify in terms of boundary lines on a map, and might have to be treated as a question of fact; but some scope for administrative determination of the matter could be provided by authorization for park officials to post signs indicating where the physical limits of the "improved" park areas are. (Such posting might well be combined with the use of the "use-at-your-own-risk" technique discussed below.)

Defense of Assumption of Risk. Consideration also should be given to a possible modification of the defense of assumption of risk, where public recreation facilities are claimed to have been dangerous or defective, in recognition of the fact that certain inherent dangers of injury are characteristic of many aspects of such facilities.

The defense of assumption of risk is recognized under existing law as applicable to tort actions founded upon defective conditions of public property,¹ but it can be argued that the defense is not sufficiently protective to entities engaged in public park and recreation activities and, hence, should be strengthened in a manner consistent with the practical realities of the problem. Those realities, as previously suggested, include: (a) the need to protect public recreation functions from becoming such an unduly burdensome source of tort liability as to discourage their expansion and financial support, (b) recognition of the increased risks involved to both participants and spectators in connection with activities calling for muscular coordination, physical skills or bodily contact, and (c) the fact that the persons exposed to such risks will ordinarily be those who have voluntarily sought out the benefits and advantages of the recreation program for their own physical well-being, amusement or pleasure.

The doctrine of assumption of risk, as it presently operates in California with respect to defective public recreation facilities, is well exemplified in the case of *Hawk v. City of Newport Beach*.² A seventeen-

¹ See *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Marlowe v. City of Los Angeles*, 147 Cal. App.2d 680, 305 P.2d 604 (1957); *Parcher v. City of Los Angeles*, 106 Cal. App.2d 421, 235 P.2d 220 (1951); *Owen v. City of Los Angeles*, 82 Cal. App.2d 933, 187 P.2d 860 (1947). In *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, 162, 265 P.2d 904, 906 (1954), the Supreme Court pointed out that "the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another."

² 46 Cal.2d 213, 293 P.2d 48 (1956).

year-old boy was seriously injured at a municipal beach when he dived into shallow water from a rock projecting out from the shore, apparently striking the bottom. After concluding that there was evidence sufficient to sustain a jury's verdict to the effect that the injury had resulted from a dangerous and defective condition of public property and that the conditions of liability established by the Public Liability Act were satisfied, the court considered the defendant city's contention that the plaintiff had assumed the risk of injury in making his dive. The city's argument relied upon evidence indicating that plaintiff was familiar with the general physical condition of the rock and its surrounding area, was accustomed to swimming and diving and therefore understood the possible dangers from diving into shallow water, and had not undertaken to investigate carefully the depth of the water at the point of his dive although he knew the water level had not been above his waist as he waded out to the rock. The court rejected the argument, pointing out that there was evidence that plaintiff had not used the area before, but knew it was a supervised recreational area, and that he had seen other boys diving from the same rock without injury. The issue of assumption of risk was thus held to be a question of fact for the jury and not a question of law. In the words of the court:

The defense of assumption of risk as a matter of law is likewise unavailing. The elements of this defense are a person's voluntary acceptance of a risk and an appreciation of the magnitude of that risk. [Citing cases.] Even if David can be said to have realized that his dive was attended with some degree of danger, it cannot be said as a matter of law that he appreciated the magnitude of that danger.³

The defense of assumption of the risk, it should be noted, is regarded in California law as distinguishable from contributory negligence.⁴ The difference has been defined by the Supreme Court, in a case involving personal injuries sustained as the result of a slippery condition on a private sidewalk, in these words:

The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest., Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk.⁵

³ *Id.* at 218, 293 P.2d at 51. To the same effect, see *Florez v. Groom Dev. Co.*, 53 Cal.2d 347, 1 Cal. Rptr. 340, 343 P.2d 200 (1959).

⁴ The leading California case appears to be *Prescott v. Ralphp Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904 (1954). See also *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 240 P.2d 580 (1952).

⁵ *Prescott v. Ralphp Grocery Co.*, 42 Cal.2d 158, 161-62, 265 P.2d 904, 906 (1954).

The principal differences between contributory negligence and assumption of risk, as defenses, are thus: (a) that assumption of risk is a defense even where plaintiff acted with due care,⁶ and (b) assumption of risk requires a showing of actual subjective knowledge of the risk and its magnitude on the part of the plaintiff;⁷ while contributory negligence is predicated upon an objective "reasonable man" standard.

The first of these elements has led to a considerable amount of confusion in the cases, chiefly due to a failure on the part of courts and counsel to distinguish carefully between two different applications of the defense of assumption of risk.⁸ This defense obviously overlaps and really becomes merely a variety of contributory negligence where the evidence supports a finding that plaintiff did not act with due care; for assumption of risk is often employed to describe a situation in which the plaintiff, having knowledge of the dangerous condition, nevertheless fails to exercise ordinary care to avoid injury from it, and thus, in effect, voluntarily assumes the risk of his own unreasonable exposure to that danger.⁹ Examples from recent California decisions include a motorcyclist who negligently continued to operate a motorcycle with knowledge that it had a defective wheel which was likely to cause a serious accident;¹⁰ a farm worker who negligently used a metal pole to dislodge walnuts from a tree, knowing that his acts would tend to expose him to injury from electricity passing through electric wires adjacent to the tree;¹¹ and a spectator at a racing car meet who negligently stationed himself at an unprotected spot near a turn on the track, with knowledge that the racers were likely to go out of control and off the track, especially at turns.¹² In such instances, the same evidence would support a finding of both assumption of risk and contributory negligence, assuming subjective knowledge of the risk is shown. Cases involving this aspect of the defense of assumption of risk are not directly relevant to the suggested modification of that defense which is here being advanced, for such situations are believed to be adequately assimilated into the defense of contributory negligence for most purposes germane to the problem of public tort liability for defective recreational property.

A second application of the doctrine of assumption of risk—and the one which is believed to be most relevant here—involves cases in which the plaintiff sustains injury while acting *with* due care but with knowledge of an existing risk and its magnitude.¹³ That assumption of risk is a defense here, also, is exemplified in cases denying recovery to per-

⁶ *Ibid.*; see also *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 282 P.2d 69 (1955).

⁷ *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, 265 P.2d 904 (1954). See also *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956); *Ziegler v. Santa Cruz City High School Dist.*, 193 Cal. App.2d 200, 13 Cal. Rptr. 912 (1961); *Martin v. Stone*, 187 Cal. App.2d 726, 10 Cal. Rptr. 184 (1960); *Perry v. First Corp.*, 167 Cal. App.2d 359, 334 P.2d 299 (1959).

⁸ Similar difficulties exist in other states. See 2 HARPER & JAMES § 21.1; PROSSER, *Torts* § 55 (2d ed. 1955); Annot., *Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (1962).

⁹ *Ibid.* See 2 HARPER & JAMES, *loc. cit. supra*, at 1162, referring to this rule as "assumption of risk in a secondary sense." See also RESTATEMENT, *Torts* § 466, comments *c* and *d* (1934); *cf. Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 82 A.L.R.2d 1208 (1959).

¹⁰ *Saeter v. Harley Davidson Motor Co.*, 186 Cal. App.2d 248, 8 Cal. Rptr. 747 (1960).

¹¹ *Inouye v. Pacific Gas & Elec. Co.*, 53 Cal.2d 361, 1 Cal. Rptr. 848, 348, P.2d 208 (1959).

¹² *Morton v. California Sports Car Club*, 163 Cal. App.2d 685, 329 P.2d 967 (1958).

¹³ 2 HARPER & JAMES §§ 21.1-21.8 (1956).

sons who, while in the exercise of ordinary care, are injured by thrown or batted balls while watching a baseball game,¹⁴ by a flying puck at a hockey match,¹⁵ or by being thrown from an amusement device at an amusement park.¹⁶ A recent illustration, exemplifying the operation of the defense in an action brought under the Public Liability Act, involves personal injuries sustained when the plaintiff slipped and fell while crossing a gutter in a city street, in which moss, algae and water had combined to create a dangerous and defective condition.¹⁷ In sustaining an order granting defendant a new trial after a verdict for plaintiff, the District Court of Appeal pointed out that there was evidence tending to show that plaintiff knew of the danger and its magnitude, but that she nevertheless undertook to cross the gutter (which was necessary to reach her car) employing a "considerable degree of care in proceeding deliberately." On such evidence, the defense of assumption of risk was tenable, for, in the words of Mr. Presiding Justice Shinn,¹⁸ "If she had knowledge and appreciation of the danger involved and voluntarily accepted the risk, she alone would have to bear the responsibility for her injury; if she did accept the risk her use of the care that was demanded would not relieve her of that responsibility." In effect, knowing that there was some risk of harm even if she acted carefully, the court concluded that plaintiff simply "took a chance and lost." Comparable language would be directly applicable to many forms of public recreational activities in which citizen participation, however carefully done, involves some risk of harm because of the inherent nature of the public equipment or facilities in question.

In cases of this second category, just described, contributory negligence is not an alternative defense, for by hypothesis the plaintiff acted reasonably and with due care. The issue of liability here normally revolves about the requirement that plaintiff have actual subjective knowledge of the risk rather than merely constructive notice thereof. In a few situations, most notably those involving spectators at baseball games who are struck by balls hit into the grandstand, the courts have ruled the hazard to be so obvious that, as a matter of law, the plaintiff must have known of it, and thus assumed the risk of injury.¹⁹ In effect,

¹⁴ *Quinn v. Recreation Park Ass'n*, 3 Cal.2d 725, 46 P.2d 144 (1935); *Brown v. San Francisco Ball Club, Inc.*, 99 Cal. App.2d 484, 222 P.2d 19 (1950). See also *Mann v. Nutrilite, Inc.*, 136 Cal. App.2d 729, 289 P.2d 282 (1955) (softball game). Similar rules obtain in other states. See, e.g., *Blackhall v. Capital Dist. Baseball Ass'n*, 154 Misc. 640, 278 N.Y. Supp. 649 (1935); *Powless v. County of Milwaukee*, 6 Wis.2d 78, 94 N.W.2d 187 (1959); *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 181 Pac. 679 (1919).

¹⁵ See *Shurman v. Fresno Ice Rink, Inc.*, 91 Cal. App.2d 469, 205 P.2d 77 (1949); *Thurman v. Ice Palace, Inc.*, 36 Cal. App.2d 364, 97 P.2d 999 (1939). See also *Modoc v. City of Eveleth*, 224 Minn. 556, 29 N.W.2d 453 (1947).

¹⁶ See *Lyle v. Disneyland, Inc.*, 178 Cal. App.2d 18, 2 Cal. Rptr. 704 (1960); *Knowles v. Roberts-at-the-Beach Co.*, 115 Cal. App.2d 196, 251 P.2d 389 (1953).

¹⁷ *Marlowe v. City of Los Angeles*, 147 Cal. App.2d 680, 305 P.2d 604 (1957).
¹⁸ *Id.* at 684-85, 305 P.2d at 607.

¹⁹ See *Brown v. San Francisco Ball Club, Inc.*, 99 Cal. App.2d 484, 490, 222 P.2d 19, 22 (1950), quoting with approval from *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 240 N.W. 903, 904 (1932), the statement that: "In our opinion no adult of reasonable intelligence, even with the limited experience of the plaintiff, could fail to realize that he would be injured if he was struck by a thrown or batted ball, such as are used in league games of the character of which he was observing, nor could he fail to realize that foul balls were likely to be directed toward where he was sitting. . . . It is our opinion that the plaintiff, notwithstanding his alleged limited experience, must be held to have assumed the risk of the hazards to which he was exposed." To the same effect, see *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368, 371 (Tex. Civ. App. 1941) (holding that the "universal common knowledge" of the potential dangers arising from the characteristics of baseball "must be imputed to every reasonable person having the admitted experience and opportunities of plaintiff to know these things").

these cases pay only lip service to the subjective knowledge requirement, for a judicial ruling that plaintiff "must have known" of the risk²⁰ is simply another way of applying the objective standard of the reasonable man: "Since any reasonable man would have known, plaintiff must have known also." In most situations, however, the issue of plaintiff's subjective knowledge is regarded as a question of fact. For example, the court's impression that the public is less familiar with the dangers of flying hockey pucks than with the dangers of flying baseballs has led to the issue of knowledge being treated as one of fact in the hockey cases but one of law in the baseball cases.²¹

Insofar as the matter is deemed one of fact, however, the efficacy of the defense is diminished substantially, for it is obviously a difficult task to prove the subjective knowledge of the plaintiff by means of extrinsic evidence, particularly where such evidence offered by the defendant is ordinarily refuted by plaintiff's own positive testimony to the contrary. It seems probable, although empirical evidence is admittedly impossible to muster, that the present state of the law of assumption of risk is not strictly in accord with the practicalities of public recreational programs. Participants therein, for the most part, undoubtedly know and appreciate the inherent risks involved but "take a chance" for the sake of exercise, amusement and pleasure; yet, if any injury does result, it is often extremely difficult for the defendant to prove the requisite facts showing that this was the case. In one instance, for example, even though there were prominently displayed signs warning of the danger and announcements were made over a public address system to the same effect, a defense of assumption of risk was held unavailing where the jury in effect had determined that the plaintiff had paid no attention to the warnings or had failed to appreciate their significance, and hence did not know of the risk.²²

In view of the underlying policy considerations which tend to support the view that public recreation programs should be shielded from unnecessary tort liability, it is suggested that a special rule of evidence be enacted which would strengthen the defense of assumption of risk in public recreation tort cases involving claimed defective property conditions. The proposed rule is predicated upon the belief that the public entity should be entitled to presume that users of parks and recreation facilities are generally reasonable persons possessing ordinary awareness of the risks attached to their activities, and should have the power to protect itself effectively against persons lacking such awareness by posting signs or warnings of possible dangers to users of park and recreation facilities, and by giving notice that users of its facilities do so at their own risk. Under existing law, such signs are regarded as some evidence on the issue of assumption of risk;²³ but existing law still places the burden of proof upon the defendant public entity that the plaintiff obtained *actual knowledge* of the risk.

²⁰ See *Prescott v. Ralphs Grocery Co.*, 42 Cal.2d 158, 162, 265 P.2d 904, 906 (1954) (stating that where the evidence supports an inference that "plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk").

²¹ See *Shurman v. Fresno Ice Rink, Inc.*, 91 Cal. App.2d 469, 205 P.2d 77 (1949).

²² *Ibid.*; but cf. *Knowles v. Roberts-at-the-Beach Co.*, 115 Cal. App.2d 196, 251 P.2d 389 (1953) (warnings given by public announcement, plus obvious characteristics of "hobby horse," held to constitute evidence of actual knowledge sufficient to support finding of assumption of risk).

²³ *Shurman v. Fresno Ice Rink, Inc.*, 91 Cal. App.2d 469, 205 P.2d 77 (1949).

It is thus suggested that the defendant public entity be permitted to establish a defense of assumption of risk by proving, to the satisfaction of the trier of fact, that the plaintiff either had actual knowledge, or in the exercise of ordinary care should have known, of the risk and its magnitude.²⁴ In effect, the proposal would substitute an objective, reasonable man standard for the existing subjective one in the evaluation of the plaintiff's comprehension of the risk at the time he voluntarily proceeded to participate in the recreational activity which brought about his injuries. The public entity, as under the present law, could prove that there were posted signs and notices indicating the danger, or that users proceeded at their own risk, or could seek to establish that the risk was obvious from the type of property in question or the use proposed to be made of it; but then, unlike the present rule, it would be entitled to an instruction that the jury must find for the defendant if the plaintiff should have realized the risk, even though he did not do so, and thereafter acted voluntarily and in a reasonable manner in such a way as to incur an injury of the kind to which the unperceived risk exposed him. Under the proposed test, for example, the injured diver in the *Hawk* case might well fail to recover, for although there was substantial evidence tending to show that he had no actual knowledge of the risk entailed in diving from the rock, the jury might be persuaded that a reasonable swimmer of his age and experience should have known.

It should be noted that the proposal does not make assumption of risk identical with contributory negligence, however. The latter defense is based on the unreasonableness of the plaintiff's conduct; the former assumes the reasonableness of his conduct, but uses the standard of ordinary care simply to appraise the plaintiff's state of mind. David Hawk, perhaps, should have known of the risk—hence the jury might well conclude that his voluntary decision to dive constituted an assumption of whatever risks were attendant upon the making of the dive, whether known or unknown, including the one which injured him. But, since he had seen others diving from the same rock without injury, and since the degree of risk depends to some extent on how the dive is executed (*i.e.*, whether it is a "shallow" or "deep" dive), the jury might still conclude that his conduct was not unreasonable. Or the jury might find that his failure to appreciate the risk was unreasonable—hence negligent—but that such negligence was not a contributing cause of the injury. In either case, he would be free of contributory negligence, but under the proposed rule would have assumed the risk.

The real impact of the proposed modified rule, it will be noted, is to alter in practical effect the standard of care required of the defendant public entity.²⁵ Under present rules of assumption of risk, the entity

²⁴ A few decisions had intimated that the suggested rule was the law in California, at least where the hazard was open and notorious, *Brown v. San Francisco Ball Club, Inc.*, 99 Cal. App.2d 484, 222 P.2d 19 (1950), but this view was squarely rejected by the Supreme Court in *Hawk v. City of Newport Beach*, 46 Cal.2d 213, 293 P.2d 48 (1956).

²⁵ See 2 HARPER & JAMES § 21.1 (1956), for an analysis of the relationship between assumption of risk in its primary sense and the defendant's duty of care. See also *Brown v. San Francisco Ball Club, Inc.*, 99 Cal. App.2d 484, 487, 222 P.2d 19, 20 (1950) (per Fred B. Wood, J.): "To the extent that the duty of self-protection rests upon the invitee, the duty of the invitor to protect is reduced. The extent of these relative duties depends upon many factors involving the capacity and opportunity of the invitor to protect the invitee and the capacity and opportunity of the invitee to protect himself."

(which we here must assume is substantively liable under the Public Liability Act) must maintain its recreational facilities and equipment in a condition which will be free from known risks unperceived by the least perceptive participant or user. Such a standard, it is believed, may be unduly high in the light of the inherent characteristics of many aspects of parks and recreation functions. The suggested substitute rule would mean that the recreational property only must be maintained in a condition which is free from known risks which would not be reasonably apparent to an average prudent participant or user. To be sure, the distinction may appear to be subtle; but "hard" cases almost always involve those borderline situations in which subtle distinctions may affect the result.

Absence or Inadequacy of Supervision

It is well settled in California and elsewhere that a private proprietor of recreation or amusement facilities is under a duty to employ reasonable care to see that his patrons are not injured while participating in the activities available on such premises.¹ Under some circumstances, this duty may require the employment of adequate supervisory personnel to protect participants from reasonably foreseeable hazards, such as the danger which a motorboat running too close to shore might pose for bathers,² the danger of injury from over-boisterous conduct of fellow participants,³ the danger of injury resulting from failure of some participants to adhere to reasonable safety rules,⁴ or the inherent dangers characteristic of the particular activity, such as the risk of drownings in connection with the operation of a swimming pool.⁵ The courts ordinarily regard the question whether failure to provide supervision was negligent, and hence a source of tort liability, as a question of fact to be tested by the usual common law standard of due care in light of all the circumstances.⁶

¹ See *Sorensen v. Hutson*, 175 Cal. App.2d 817, 346 P.2d 785 (1959) (privately operated bathing and water skiing facility); *Sample v. Eaton*, 145 Cal. App.2d 312, 302 P.2d 431 (1956) (privately promoted wrestling match); *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942) (private ice skating rink open to public); *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 123 P.2d 144 (1942) (privately operated swimming pool open to public); *Ratcliff v. San Diego Baseball Club*, 27 Cal. App.2d 733, 81 P.2d 625 (1938) (private baseball park); *Potts v. Crafts*, 5 Cal. App.2d 83, 42 P.2d 87 (1935) (privately operated amusement park). Cf. *Anderson v. Ocean Sport Fishing, Inc.*, 28 Cal. App.2d 712, 83 P.2d 515 (1938). See also *Annots.*, 75 A.L.R.2d 792 (1961) (merry-go-rounds); 69 A.L.R.2d 1067 (1960) (slides and chutes); 67 A.L.R.2d 965 (1959) (picnic grounds); 66 A.L.R.2d 689 (1959) (roller coasters and miniature railways); 48 A.L.R.2d 104 (1956) (private swimming pools open to public); 16 A.L.R.2d 912 (1951) (amusement devices generally).

² *Sorensen v. Hutson*, 175 Cal. App.2d 817, 346 P.2d 785 (1959). Compare the factually similar case of *Seybert v. County of Imperial*, 162 Cal. App.2d 209, 327 P.2d 560 (1958), in which a bather injured by a speedboat was denied recovery against a public entity upon grounds of sovereign immunity and inapplicability of the Public Liability Act.

³ *Sample v. Eaton*, 145 Cal. App.2d 312, 302 P.2d 431 (1956). See also *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729 (1946).

⁴ *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942).

⁵ *Rovegno v. San Jose Knights of Columbus Hall Ass'n*, 108 Cal. App. 591, 291 Pac. 848 (1930). See also *Flora v. Birmimi Water Co.*, 161 Cal. 495, 119 Pac. 661 (1911); *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 123 P.2d 144 (1942).

⁶ *Sorensen v. Hutson*, 175 Cal. App.2d 817, 346 P.2d 785 (1959); *Sample v. Eaton*, 145 Cal. App.2d 312, 302 P.2d 431 (1956); *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942); *Rovegno v. San Jose Knights of Columbus Hall Ass'n*, 108 Cal. App. 591, 291 Pac. 848 (1930). See also *Anderson v. Ocean Sport Fishing, Inc.*, 28 Cal. App.2d 712, 83 P.2d 515 (1938); *Ferrill v. Board of Educ.*, 6 App. Div.2d 690, 174 N.Y.S.2d 91 (1958); *Henroid v. Gregson Hot Springs Co.*, 52 Mont. 447, 158 Pac. 824 (1916); *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563, 67 N.W. 479 (1896), *opinion on rehearing*, 50 Neb. 214, 69 N.W. 757 (1897).

In jurisdictions recognizing that public entities are liable for their torts in connection with public parks and recreation programs, the courts have developed a body of case law which follows the private law rules quite closely. Generally speaking, absence of supervision is not tortious unless a duty to supervise exists,⁷ and then only when the lack of supervision is found to be the proximate cause of the plaintiff's injury.⁸ Similarly, even when supervision is provided, the sufficiency thereof is ordinarily a question of fact.⁹ Thus, the operation of a public swimming pool without a lifeguard on duty to protect swimmers has been held to support a determination of negligence by the trier of fact, where the volume of use and inexperience of many of the users of the pool could reasonably be deemed to require lifeguard service.¹⁰ On the other hand, the failure to post a lifeguard at all times is not necessarily negligence if alternative precautions are taken,¹¹ or if the pool is open to users only during hours when the lifeguard is on duty and there was no evidence that it was in fact frequently used without permission outside of those hours.¹² Even when a lifeguard is provided, however, the number of swimmers, size of the pool and nature of the hazards involved may be so great that a jury could reasonably conclude that the entity was negligent in failing to provide a greater number of lifeguards.¹³ Similar principles have been applied with respect to playgrounds, where absence of a supervisor may be consistent with due care in one factual setting (*e.g.*, schoolyard left open for youngsters to use for play, thereby providing a play area away from street, where yard was not equipped with mechanical appliances or recreational apparatus that presented any unusual risk of injury),¹⁴ but may be justifiably found to be negligent in another (*e.g.*, playground equipped with swings, slides and other apparatus which created a risk of injury to

⁷ Compare *Volz v. City of St. Louis*, 326 Mo. 362, 32 S.W.2d 72 (1930) (holding jury reasonably could have held on evidence that there was no duty to supervise where danger from melting ice on pond was obvious), with *City of Longmont v. Swearingen*, 81 Colo. 246, 254 Pac. 1000 (1927) (affirming judgment for plaintiff based on determination that absence of supervision was negligent).

⁸ See *City of Longmont v. Swearingen*, 81 Colo. 246, 254 Pac. 1000 (1927); *Di Simone v. City of Philadelphia*, 380 Pa. 137, 110 A.2d 431 (1955) (holding absence of lifeguards at swimming pool could reasonably be found to be proximate cause of drownings). *But cf.* *Crone v. City of El Cajon*, 133 Cal. App. 624, 24 P.2d 846 (1933) (holding city's failure to employ more than one lifeguard was, as a matter of law, not the proximate cause of drowning); *City of Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937) (*semble*).

⁹ See *Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945) (two lifeguards for 250 bathers); *Ferrill v. Board of Educ.*, 6 App. Div.2d 690, 174 N.Y.S.2d 91 (1958) (two playground supervisors for 150 children). See also *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 123 P.2d 144 (1942) (issue of negligence of lifeguards at private swimming facility open to public held a question of fact for jury).

¹⁰ *City of Longmont v. Swearingen*, 81 Colo. 246, 254 Pac. 1000 (1927); *Di Simone v. City of Philadelphia*, 380 Pa. 137, 110 A.2d 431 (1955); *Ashworth v. City of Clarksburg*, 118 W.Va. 476, 190 S.E. 763 (1937).

¹¹ See *Henroid v. Gregson Hot Springs Co.*, 52 Mont. 447, 158 Pac. 824 (1916) (inquiry made as to swimming capabilities of pool users, plus a demonstration test where any doubt existed, coupled with posted prohibition on use by juvenile nonswimmers unaccompanied by adult swimmers). Compare *Scott v. City of Long Beach*, 109 Cal. App. 254, 292 Pac. 664 (1930) (absence of supervision or lifeguards at municipal bathing lagoon held not negligent, without analysis or discussion of duty problem).

¹² *McCallister v. Borough of Homestead*, 322 Pa. 341, 185 Atl. 533 (1936).

¹³ *Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945). See also *Ferrill v. Board of Educ.*, 6 App. Div.2d 690, 174 N.Y.S.2d 91 (1958).

¹⁴ *Kantor v. Board of Educ.*, 251 App. Div. 454, 296 N.Y. Supp. 516 (1937). See also *Underhill v. Alameda Elementary School Dist.*, 133 Cal. App. 733, 24 P.2d 849 (1933).

children).¹⁵ Likewise, the question as to the adequacy of numbers of playground supervisors in a given context is often a question of fact for the jury.¹⁶ In many of the cited cases, the courts have emphasized the variability of factual circumstances and difficulty in laying down hard and fast rules as to what is reasonable, although appropriate recognition is given to the need to appraise the magnitude of the risk in determining the extent of the duty.¹⁷ The principal significance of the cases here cited, however, lies in the fact that they demonstrate the willingness of the courts in a number of jurisdictions to utilize the normal common law standards of reasonable care as the basis for determining tort liability of public entities for absence or inadequacy of supervision of recreational activities.

Judicial administration of tort liability becomes somewhat less difficult and precautionary practices to avoid such liability are easier to develop, when the standards of care are authoritatively prescribed in statutory provisions or administrative regulations, although the extent to which this is true depends to some degree upon how specific the prescribed standards are. California cases involving the liability of school districts for inadequate supervision of playground and recreation activities of students provide a useful set of illustrations. The California Education Code provides, in Section 13557, that:

Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess.

The purpose of this provision, which has been said to be the prevention of disorderly or dangerous conduct likely to cause injury to students,¹⁸ has been further implemented by a rule prescribed by the State Board of Education declaring:

Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision, by teachers, of the conduct and direction of the play of the pupils of the school or on the school grounds during recesses and other intermissions and before and after school. All athletic or social activities, wherever held, when conducted under the name or auspices of any public school, or of any class or organization thereof, shall be under the direct supervision of the authorities of the district.¹⁹

Since these provisions establish a statutory duty to provide supervision on school playgrounds during times when those grounds are

¹⁵ *Peterson v. City of New York*, 267 N.Y. 204, 196 N.E. 27 (1935) (swing); *Lopez v. City of New York*, 4 App. Div.2d 48, 163 N.Y.S.2d 562 (1957), *aff'd*, 4 N.Y.2d 738, 171 N.Y.S.2d 860, 148 N.E.2d 909 (1958) (playground swing); *Miller v. Board of Educ.*, 249 App. Div. 738, 291 N.Y. Supp. 633 (1936) (monkey bars); *Van Dyke v. City of Utica*, 203 App. Div. 26, 196 N.Y. Supp. 277 (1922) (slide).

¹⁶ *Ferrill v. Board of Educ.*, 6 App. Div.2d 690, 174 N.Y.S.2d 91 (1958).

¹⁷ *Bucholz v. City of Sioux Falls*, 77 S.D. 322, 91 N.W.2d 606 (1958).

¹⁸ See *Rodrigues v. San Jose Unified School Dist.*, 157 Cal. App.2d 842, 322 P.2d 70 (1958); *Tymkowitz v. San Jose Unified School Dist.*, 151 Cal. App.2d 517, 312 P.2d 388 (1957); *Charonnat v. San Francisco Unified School Dist.*, 56 Cal. App.2d 840, 133 P.2d 643 (1943); *Forgnone v. Salvador Union Elementary School Dist.*, 41 Cal. App.2d 423, 106 P.2d 932 (1940); *Buzzard v. East Lake School Dist.*, 34 Cal. App.2d 316, 93 P.2d 233 (1939); *Ogando v. Carquinez Grammar School Dist.*, 24 Cal. App.2d 567, 75 P.2d 641 (1938).

¹⁹ CAL. ADMIN. CODE, Tit. 5, § 18.

open to play by children,²⁰ they provide a criterion of negligence in actions founded upon the general waiver of immunity of school districts incorporated in what is now Section 903 of the Education Code.²¹ In *Tymkowicz v. San Jose Unified School District*,²² for example, a student died as the result of a fall while playing a game known as "black-out" on the school premises during recess. In this game, the participant is required to hold his breath while another boy squeezes him around the chest until temporary unconsciousness is induced; and the decedent, while thus partially unconscious, had fallen and struck his head on the blacktop paving of the school yard. Noting that there was evidence indicating that school officials knew that the game was being persistently played by boys on the school premises, but had done nothing to put an end to the practice, and that there was no supervisor present as required by the applicable statute and administrative regulation, the court affirmed a judgment for wrongful death against the school district. Similarly, in *Ogando v. Carquinez Grammar School District*,²³ a young girl pupil sustained a severe cut on her arm when she ran into a glass door being used by her and her companions as the base for a game of hide-and-seek. As the result of profuse arterial bleeding, and delay in securing first aid, the youngster died shortly afterwards. On the basis of evidence of the absence of any supervisors on the playground at the time of the accident, the appellate court affirmed an order granting a new trial to the plaintiff following a verdict for the defendant in the ensuing wrongful death action. In other significant decisions, the absence of any supervisor during a luncheon recess was held to constitute an actionable wrong with respect to a pupil whose arm was broken in a scuffle with fellow pupils,²⁴ while the actual presence of one supervisor in a large school playground where 150 students were engaged in various types of play was held to be insufficient to satisfy the duty of supervision in an action brought on behalf of a student whose leg was broken in a fight which the supervising teacher failed to discover.²⁵ In the latter case, the court ruled that in view of the likelihood of some arguments and fighting on the playground as shown by past experience and facts of common knowledge, the jury was justified in finding that the assignment of but one teacher to supervision duty constituted a negligent breach of the "duty on the school authorities to provide sufficient supervision so that the fighting may be stopped

²⁰ The administrative rule has been held inapplicable to injuries occurring in the interval between successive classes, *Reithardt v. Board of Educ.*, 43 Cal. App.2d 629, 111 P.2d 440 (1941). An early case held school districts not liable for lack of supervision unless a duty to supervise exists, hence a complaint merely alleging that an injury was sustained as the result of a game of baseball being played on the school grounds failed to state a cause of action in the absence of allegations that the game was authorized by the school authorities, or was played during a regular recess, or during a period when the playground was open for use as a community recreation center. *Underhill v. Alameda Elementary School Dist.*, 133 Cal. App. 733, 24 P.2d 849 (1933).

²¹ See the text at 40-42 *supra*.

²² 151 Cal. App.2d 517, 312 P.2d 388 (1957).

²³ 24 Cal. App.2d 567, 75 P.2d 641 (1933).

²⁴ *Forgnone v. Salvador Union Elementary School Dist.*, 41 Cal. App.2d 423, 106 P.2d 932 (1940).

²⁵ *Charonnat v. San Francisco Unified School Dist.*, 56 Cal. App.2d 840, 133 P.2d 643 (1943).

before serious injury results." ²⁶ The number of supervisors necessary to satisfy the duty, it will be noted, was treated as an issue of fact. ²⁷

The school district cases suggest the advisability of utilizing statutory and administrative standards of care as a base point for any expansion of tort liability in connection with public recreation programs. A number of such prescribed standards appear to exist under present California law. Section 24101.4 of the Health and Safety Code, which appears to be applicable to both privately owned and publicly owned swimming pools, ²⁸ for example, establishes a standard of lifeguard service which would appear to be useful in this connection:

Lifeguard service shall be provided for any public swimming pool which is of wholly artificial construction and for the use of which a direct fee is charged. For all other swimming pools, lifeguard service shall be provided or signs shall be erected clearly indicating that such service is not provided.

The term "lifeguard service," as used in the quoted provision, is defined in Section 24100.1 of the same code to mean:

. . . the attendance, at all times that persons are permitted to engage in water-contact sports, of one or more lifeguards who hold Red Cross or Y.M.C.A. senior lifeguard certificates or have equivalent qualifications and who have no duties to perform other than to superintend the safety of participants in water-contact sports.

In addition, the State Department of Public Health has prescribed somewhat more detailed standards by administrative regulations which state:

Where lifeguard service is provided, the number of lifeguards provided shall be adequate to continuously maintain surveillance over the bathers.

²⁶ *Id.* at 844, 133 P.2d at 645.

²⁷ See also *Rodriguez v. San Jose Unified School Dist.*, 157 Cal. App.2d 842, 322 P.2d 70 (1958) (affirming judgment for defendant district in action for death of student who fell from horizontal bar and struck head on blacktop pavement beneath bar, where plaintiff claimed the district was negligent in stationing only one supervisor in playground). In the court's words, "There is no absolute rule as to the number of pupils one supervisor may adequately oversee, nor is there any fixed standard of supervision; the question as to compliance with the law is one for the determination of a jury under the facts of the particular case." *Id.* at 848, 322 P.2d at 74.

²⁸ Although Health and Safety Code Section 24101.4 does not explicitly refer to "public swimming pools" which are owned and operated by public entities, nothing in its wording, or that of related sections *in pari materia* therewith, appears to militate against a broad interpretation making the statutory rule applicable to all public swimming pools. Health and Safety Code Section 24100, for example, defines "public swimming pool" to mean "any public swimming pool, bathhouse, public swimming and bathing place and all related appurtenances." (Emphasis added.) See also CAL. ADMIN. CODE, Tit. 17, § 7775, making the state administrative regulations for public swimming pools expressly applicable to "all pools" except private pools maintained by an individual for his family and friends, and specifically including within the ambit of the regulations "all commercial pools, real estate and community pools, pools at . . . resorts . . . [and] public or private schools." (Emphasis added.) In this connection, it is significant that in the recent case of *Flournoy v. State*, 57 Cal.2d 497, 20 Cal. Rptr. 627 (1962), the Supreme Court held that since sovereign immunity no longer can be invoked as a shield against tort liability of public entities, the principle of statutory construction which ordinarily denies application of general statutory language to public entities may not be invoked to protect the State from liability under the California wrongful death statute. See also *Lehmann v. Los Angeles City Bd. of Educ.*, 154 Cal. App.2d 256, 316 P.2d 55 (1957) (holding that safety regulations of the Department of Industrial Safety were applicable, notwithstanding their general terminology, to school districts).

Where no lifeguard service is provided, the warning sign shall be placed in plain view and shall state "Warning—No Lifeguard on Duty" with clearly legible letters, at least 4 inches high. In addition, the sign shall also state "Children Should Not Use Pool Without An Adult In Attendance."

The health officer may require posting of notices directing the bathers to make use of the toilets and showers before entering the pool. At all pools diagrammatic illustrations of artificial respiration procedures shall be posted where clearly visible from the nearby deck and shall be protected against the elements. Also, the location and telephone number of the nearest ambulance, hospital, fire or police rescue service, physician and pool operator shall be kept similarly posted together with instructions that in case of need manual or mouth-to-mouth artificial respiration should be started immediately and continued until a physician arrives or mechanical resuscitators are applied.

Every swimming pool shall be equipped for safety and rescue purposes with one or more light, strong poles (bamboo or other) with blunt ends or hooks, not less than 12 feet in length, and one or more life rings, approximately 17 inches in outside diameter, accessible for use. Such life rings shall have attached to them a $\frac{3}{16}$ -inch line long enough to span the maximum width of the pool. The line shall be stored when not in use in such a way as to prevent kinking or fouling. When, in the opinion of the health officer, any pool is of such size that unaided swimming rescues by lifeguards may not offer sufficient protection to swimmers, one or more square-sterned boats, equipped with oars and oarlocks and life rings, or paddle boards, as the health officer shall order, shall be provided. A standard 10- or 24-unit first aid kit shall be provided at all swimming pools where required by the health officer.²⁹

Other regulations, applicable at public beaches and ocean bathing and aquatic sports areas, require a "safety program" to be established "to minimize the hazard of injury and drowning and to render succor to persons in distress."³⁰ It seems clear that the determination whether these statutory and administrative standards have been met, in any given case, would be a question of fact for the jury.³¹

Other regulations, applicable to organized camping facilities, also lend themselves to possible utilization as standards of supervisory care for tort liability purposes. Such regulations are authorized to be promulgated by the State Director of Public Health pursuant to Section 18897.2 of the Health and Safety Code, and may include such minimum standards of operation as he determines to be "necessary to protect the health and safety of campers." This authority is restricted, however, to "organized camps," a term defined by Section 18897 to mean "a site

²⁹ CAL. ADMIN. CODE, Tit. 17, § 7829. The first paragraph of this regulation, omitted in the text above, merely requires all pools to comply with Health and Safety Code Sections 24100.1 and 24101.4.

³⁰ CAL. ADMIN. CODE, Tit. 17, §§ 7950-7961. These regulations, authorized by CAL. H. & S. CODE §§ 24155-24159, are in terms applicable to public entities as well as private persons. See also CAL. H. & S. CODE § 4471, authorizing the promulgation of regulations governing the recreational use of water supply reservoirs. No such regulations appear to have been issued as of the present writing.

³¹ See *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 123 P.2d 144 (1942) (holding that issue of compliance with state regulations governing lifeguard service at private swimming pools open to public was a question of fact for the jury).

with program and facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational, or recreational objectives, for five days or more during one or more seasons of the year." Operation of an organized camp in violation of the prescribed regulations is declared by Section 18897.4 to be a misdemeanor.

Pursuant to this authority, the Director has promulgated a series of regulations³² many of which relate to structural standards and to health and sanitary measures, but including requirements that each organized camp (a) adopt a plan of evacuation in case of fire, flood or other general emergency,³³ (b) adopt "special measures" to protect campers against the hazards of high-speed roads near campsites,³⁴ (c) adopt "special measures" to protect campers from diseases transmitted by insects, rodents or other animals,³⁵ (d) provide lifeguard service at swimming pools and natural bathing places,³⁶ (e) designate some person who is at least 18 years of age as a waterfront director,³⁷ and (f) have at all times at least one counselor, 18 years of age or more, for each 10 campers under 16 years of age, with the additional qualifications that "counselors shall possess demonstrated competence to supervise safety of camp activities [and] . . . shall have been trained in the principles of First Aid."³⁸

It seems evident from a perusal of the foregoing statutory and administrative standards for school playground supervision, lifeguard service and organized camping that they do not cover all aspects of public recreation programs in which the problem of liability for lack of supervision may arise, nor are they sufficiently specific to eliminate difficult issues of fact. No general statewide regulations, for example, have been discovered applicable to public playgrounds. Moreover, the number of lifeguards necessary to be deemed "adequate to continuously maintain surveillance over bathers," the extent of supervision which is essential in a given situation to comply with the needs of a "safety program" relating to ocean aquatic sports, and the specific content of the required "special measures" which must be taken for protection of organized campers, are obviously matters of degree.

The California case of *Lindsey v. De Vaux*,³⁹ in which a judgment awarding damages for the drowning of plaintiff's son in a private

³² CAL. ADMIN. CODE, Tit. 17, §§ 30700 *et seq.* These regulations appear to be applicable to organized camps under either private or public ownership. See CAL. H. & S. CODE § 18897.4, providing that "No organized camp shall be operated in this State" except in conformity to the applicable regulations; CAL. ADMIN. CODE, Tit. 17, § 30703, providing that the regulations apply everywhere in the State. See generally, as to the applicability of general statutory language to public entities, *Flournoy v. State*, 57 Cal.2d 497, 20 Cal. Rptr. 627 (1962), and *Lehmann v. Los Angeles City Bd. of Educ.*, 154 Cal. App.2d 256, 316 P.2d 55 (1957), discussed in note 28 *supra*. Although organized camps operated by public entities were held to be immune from tort liability under pre-*Muskopf* law, *Kellar v. City of Los Angeles*, 179 Cal. 605, 178 Pac. 505 (1919), except to the extent such immunity had been waived by statute such as the Public Liability Act, *Smith v. County of San Mateo*, 62 Cal. App. 122, 144 P.2d 33 (1943), private operators of organized camps have been regarded as liable in tort for negligent supervision in respects other than those aspects of camp life governed by the cited regulations. See *Wallace v. Der-Ohanian*, 199 Cal. App.2d 141, 18 Cal. Rptr. 892 (1962) (affirming judgment for eleven-year-old camper sexually molested by unknown person while sleeping in camp, on ground evidence disclosed lack of reasonable care and supervision to protect girl campers from such injuries).

³³ CAL. ADMIN. CODE, Tit. 17, § 30723.

³⁴ *Id.*, § 30702.

³⁵ *Id.*, § 30735.

³⁶ *Id.*, § 30740.

³⁷ *Ibid.*

³⁸ *Id.*, § 30751.

³⁹ 50 Cal. App.2d 445, 123 P.2d 144 (1942).

swimming pool was affirmed, illustrates the way in which issues of the latter type are judicially handled. The plaintiff in this action relied upon a regulation of the State Board of Health—a predecessor to the lifeguard regulations discussed above—requiring swimming pools to have “one or more qualified lifeguards,” with no other duties to perform, “on lifeguard duty . . . whenever the pool is open for public use.” With respect to the adjective “qualified,” the court stated:

While no exact standard has been specified it may reasonably be assumed that a qualified lifeguard is one who has at least ordinary powers of observation, who is vigilant and attentive to duty, and who realizes that, particularly in a swimming pool in which young children are charged admission to swim, he should be watchful for any sign of distress or danger and quick to render assistance.⁴⁰

Under the evidence, the court concluded that the jury might, with reason, have determined that the lifeguard at the defendant's pool had not been “qualified” within the meaning of the state regulation as thus judicially defined. With respect to the requirement that the lifeguard be “on lifeguard duty,” the court approved the giving to the jury of an instruction to the effect that

. . . it is the duty of a lifeguard to use reasonable care and diligence in watching a public swimming pool and the persons using the same, so that he may, in case of an emergency, render reasonable assistance to one likely to drown.⁴¹

Thus, in applying the somewhat general language of the applicable state standards of swimming pool supervision, the court simply introduced the element of reasonableness and treated the issue as one of fact for the jury.

Although the *Lindsey* case involved a *private* recreation facility, consideration should be given to making the same approach to tort liability applicable to similar facilities under public ownership or operation (except where, as was previously suggested, public policy may be deemed to justify continuation of tort immunity). In short, under this proposal, compliance with applicable state-prescribed minimum standards of supervision, applied according to the test of reasonable prudence, would exonerate public entities from tort liability grounded upon a claim of lack of, or inadequacy of, supervision of park and recreation facilities; but the issue of compliance *vel non* would be primarily one for the trier of fact. To the extent that there are no applicable state standards of care and supervision, or such state standards as do exist fail to cover the particular recreational activity in the course of which the injury occurred, the issues whether supervision was reasonably required or, if required, whether the amount of supervision given under the circumstances corresponded to what was reasonable, would also be primarily issues of fact.

The proposal just advanced, it should be noted, does not mean that public entities would always be liable, or even exposed to necessary liability, whenever they fail to provide supervision in connection with recreational programs. The prescribed standards themselves may not

⁴⁰ *Id.* at 453, 123 P.2d at 149. See also *Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945).

⁴¹ *Lindsey v. De Vaux*, 50 Cal. App.2d 445, 456, 123 P.2d 144, 150 (1942).

always require supervision—as in the case of swimming pools which are not of “wholly artificial construction,” where signs stating that lifeguard service is not provided constitute a legally permissible alternative which fully meets the standard of care.⁴² The concept of reasonableness also undoubtedly would preclude many claims, for surely it would not be deemed unreasonable for public entities with shorelines to decline to provide lifeguard service everywhere along such coast that individuals might go to engage in aquatic sports, or for the State to decline to post recreation supervisors throughout the vast desert and mountain areas of the state park system. Finally, it must be kept in mind that it is often extremely difficult to establish any connective link between absence of supervision and the happening of an injury which would satisfy the requirement of proximate cause. Failure to referee a basketball practice, for example, was held in one case not to be the proximate cause of a fatal injury where it was apparent that the presence of a referee would not have diminished the likelihood of the injury occurring. As the court properly pointed out,⁴³ “there are certain hazards and unavoidable accidents which occur in all such athletic sports against which a referee may not guard by the greatest degree of caution.” Or, as another court put it, speaking of baseball games among school children:

. . . it is also a matter of common knowledge that children participating in such games and in fact in any form of play may injure themselves and each other and that no amount of precaution or supervision on the part of parents or others will avoid such injuries. The injuries which may result from the playing of said games are ordinarily of an inconsequential nature and are incurred without fault on the part of anyone.⁴⁴

Considered with these rather typical judicial comments, it is noteworthy that the California appellate courts have generally displayed no reluctance to rule that proximate cause has not been proven, as a matter of law, notwithstanding an established failure to provide reasonable supervision;⁴⁵ although where any plausible factual basis exists

⁴² See CAL. H. & S. CODE § 24101.4.

⁴³ *Kerby v. Elk Grove Union High School Dist.*, 1 Cal. App.2d 246, 253, 36 P.2d 431, 434 (1934).

⁴⁴ *Underhill v. Alameda Elementary School Dist.*, 133 Cal. App. 733, 735, 24 P.2d 849, 851 (1933).

⁴⁵ See *Woodsmall v. Mt. Diablo Unified School Dist.*, 188 Cal. App.2d 262, 10 Cal. Rptr. 447 (1961) (plaintiff injured in school playground when pushed by fellow student; court held that absence of supervisor was not a proximate cause of the injury, since on the uncontradicted evidence it was clear that supervision would have made no difference, and that the proximate cause of the injury was the push given by the fellow student); *Wright v. City of San Bernardino High School Dist.*, 121 Cal. App.2d 342, 263 P.2d 25 (1953) (injury caused by plaintiff being struck in eye by tennis ball while playing games without supervision in gymnasium held not attributable to lack of supervision, for court was satisfied that supervisor could not have foreseen the circumstances and chain of events which led up to the injury and hence could have done nothing to prevent or forestall its occurrence); *Kerby v. Elk Grove High School Dist.*, 1 Cal. App.2d 246, 36 P.2d 431 (1934) (failure of teacher to referee basketball “free play” session held not the proximate cause of fatal injury sustained when player was struck by thrown basketball); *Underhill v. Alameda Elementary School Dist.*, 133 Cal. App. 733, 24 P.2d 849 (1933) (absence of supervision not a cause of injury to baseball player struck by bat swung by fellow player); *Crone v. City of El Cajon*, 133 Cal. App. 624, 24 P.2d 846 (1933) (presence of only one lifeguard at swimming pool held not a proximate cause of drowning where several experienced swimmers were present, together with guard, and nobody noticed anything unusual or observed decedent in distress prior to discovery of his body at bottom of pool). See also, to the same effect, *Reithardt v. Board of Educ.*, 43 Cal. App.2d 629, 111 P.2d 440 (1941); *Weldy v. Oakland High School Dist.*, 19 Cal. App.2d 429, 65 P.2d 851 (1937).

for concluding that the injury complained of might have been prevented or its consequences reduced in severity had supervision been provided, the issue of proximate cause is usually treated as one of fact.⁴⁶

Negligent Supervision and Other Tortious Conduct

In the immediately preceding discussion, attention was directed to the problem of tort liability resulting from an absence or inadequacy of supervision. Our concern here is with cases where recreational supervisors were provided but their conduct allegedly failed to measure up to the standard of ordinary care, together with other situations in which public personnel engage in tortious behaviour in connection with park and recreation programs.

Negligent recreational supervision may assume any one of innumerable forms. California decisions involving school districts (which, of course, are generally liable for negligence of their employees) document instances of alleged negligence in permitting students to sit in dangerous positions, such as on a window ledge¹ or stairway railing;² negligent failure to intervene and stop a fight between students at recess;³ negligent failure to prevent the riding of bicycles on the school playground where small children were at play;⁴ negligent failure to prevent rowdiness and throwing of bottles at a school football game;⁵ negligent failure to properly supervise and control youngsters engaged in play or games.⁶ In other jurisdictions, negligent supervision has been regarded as a basis of liability where lifeguards have failed to use ordinary care in performing their safety functions;⁷ or park supervisors have heedlessly permitted boys to shoot rifles at trees and objects in a park near a frequented public street and sidewalk,⁸ or responsible officials have failed to intervene to stop dangerous antics

⁴⁶ See *Tymkowicz v. San Jose Unified School Dist.*, 151 Cal. App.2d 517, 312 P.2d 388 (1957) (evidence held sufficient to support determination that lack of supervision was proximate cause of death of student who struck head on pavement during game of "blackout," where it was reasonably foreseeable that such absence of supervision would lead to rowdiness and dangerous games, including "blackout"); *Charonnat v. San Francisco Unified School Dist.*, 56 Cal. App.2d 840, 133 P.2d 643 (1943) (absence of adequate number of supervisors held to be a proximate cause of broken leg sustained by student in fight on schoolyard, since jury could reasonably have concluded that if more supervisors had been present one of them would have discovered the fight and stopped it before serious injury was sustained); *Forgnone v. Salvador Union Elementary School Dist.*, 41 Cal. App.2d 423, 106 P.2d 932 (1940) (*semble*).

¹ *Reithardt v. Board of Educ.*, 43 Cal. App.2d 629, 111 P.2d 440 (1941) (judgment for plaintiff reversed on ground no negligence or proximate causation shown by evidence).

² *Ziegler v. Santa Cruz City High School Dist.*, 193 Cal. App.2d 200, 13 Cal. Rptr. 912 (1961) (judgment for district affirmed on appeal, on ground defense of assumption of risk supported by evidence).

³ *Charonnat v. San Francisco Unified School Dist.*, 56 Cal. App.2d 840, 133 P.2d 643 (1943) (judgment for plaintiff affirmed).

⁴ *Buzzard v. East Lake School Dist.*, 34 Cal. App.2d 316, 93 P.2d 233 (1939) (judgment for plaintiff affirmed).

⁵ *Weldy v. Oakland High School Dist.*, 19 Cal. App.2d 429, 65 P.2d 851 (1937) (judgment of dismissal affirmed on ground complaint failed to show negligent failure to act to avert foreseeable harm).

⁶ *Kerby v. Elk Grove Union High School Dist.*, 1 Cal. App.2d 246, 36 P.2d 431 (1934) (judgment for defendant affirmed).

⁷ *Thayer v. City of St. Joseph*, 227 Mo. App. 623, 54 S.W.2d 442 (1932); *Glirbas v. City of Sioux Falls*, 64 S.D. 45, 264 N.W. 196 (1935); *Curcio v. City of New York*, 275 N.Y. 20, 9 N.E.2d 760 (1937).

⁸ *Stevens v. City of Pittsburgh*, 329 Pa. 496, 198 Atl. 655 (1938) (pedestrian passer-by struck by stray bullet held entitled to recover from city).

by ice skaters on a crowded skating rink,⁹ throwing of horseshoes on a crowded public beach,¹⁰ and illegal discharge of fireworks in a crowded park on the Fourth of July;¹¹ or playground directors have failed to observe and halt obviously dangerous activities of children in the play area.¹²

One of the principal difficulties suggested by the cited cases stems from the fact that most of them involved *inaction*—a failure on the part of the supervisor to take preventive action or to apprehend the need to take such action when confronted with a foreseeable risk of substantial injury. The fact that injury occurred provides a ready-made logical peg upon which to hang an all-too-easy inference that the supervisor who was then present must have been negligent in failing to prevent its occurrence. Yet, in balancing the need for reasonable supervision where the number of participants and magnitude of risk exposure requires it, against the potential reduction in park and recreation opportunities which is likely to attend any substantial increased burden of public expense, it can be cogently argued that the level of supervisory care required of supervisors should not be fixed at an unduly high level. After all, a playground supervisor cannot be expected to be everywhere at once, giving personal attention to every phase of the program simultaneously; nor can even the most diligent lifeguard be expected to keep each individual swimmer at a crowded public beach or large municipal plunge under constant personal surveillance.

It is thus suggested that the experience reflected in cases from New York might be utilized as the basis for development of an appropriate standard against which the acts and omissions of recreation supervisors may be evaluated for purposes of tort liability. In New York, a distinction is made between "general" and "specific" supervision. All that is required of recreation supervisors is "general" supervision and care, as distinguished from continuous, direct and specific attention.¹³ The supervisor, for example, is not negligent merely because he is not personally directing the particular activities in the course of which the plaintiff is injured, as long as he is on duty and giving his attention to

⁹ *Fritz v. City of Buffalo*, 277 N.Y. 710, 14 N.E.2d 815 (1938) (city held liable for injury sustained by plaintiff in collision with ice skater catapulted into him by "crack-the-whip" game, of which supervisors were aware but negligently failed to stop).

¹⁰ *Rafsky v. City of New York*, 257 App. Div. 855, 12 N.Y.S.2d 560 (1939) (city held liable for injury sustained when plaintiff struck by horseshoe thrown by lifeguard, on basis of city's negligence in failing to supervise said lifeguard more carefully).

¹¹ *Caldwell v. Village of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 (1952) (holding city liable for negligent failure to prevent known use of fireworks in park under circumstances endangering other park users).

¹² *Bruenn v. North Yakima School Dist.*, 101 Wash. 374, 172 Pac. 569 (1918) (plaintiff injured as result of teeter board being placed across seat of swing in playground; judgment for plaintiff affirmed on ground of negligence of supervising teacher in failing to observe and prevent improper and dangerous use of board).

¹³ See *Caldwell v. Village of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 (1952); *Peterson v. City of New York*, 267 N.Y. 204, 196 N.E. 27 (1935); *Lopez v. City of New York*, 4 App. Div.2d 48, 163 N.Y.S.2d 562 (1957), *aff'd*, 4 N.Y.2d 738, 171 N.Y.S.2d 860, 148 N.E.2d 909 (1958); *Curcio v. City of New York*, 275 N.Y. 20, 9 N.E.2d 760 (1937); *Graff v. Board of Educ.*, 258 App. Div. 813, 15 N.Y.S.2d 941 (1939); *Lane v. City of Buffalo*, 232 App. Div. 334, 250 N.Y. Supp. 579 (1931); *Nestor v. City of New York*, 28 Misc.2d 70, 211 N.Y.S.2d 975 (1961); *Riief v. State of New York*, 16 Misc.2d 132, 184 N.Y.S.2d 437 (1959).

the general superintendence of the recreation activities in the park.¹⁴ "There is no requirement that the supervisor have under constant and unremitting scrutiny the precise spots wherein every phase of play activity is being pursued; nor is there compulsion that the general supervision be continuous and direct."¹⁵ On the other hand, where the duty of general supervision exists, the New York courts hold the public entity liable for the supervisor's total abdication of his responsibilities. As the court stated in a case where the supervisor had simply gone off to lunch, leaving the park playground entirely unattended, the city "had abandoned its duty of general supervision and had in effect terminated any measures designed to care for and protect the youngsters at play. . . ."¹⁶

To be sure, a legislatively declared standard formulated along the lines of the New York cases would merely provide a basis for the framing of instructions to the jury, and would ordinarily not (except possibly in extreme cases) transform the basic issue of negligence from one of fact to one of law. It would, however, as the New York cases appear to demonstrate, clarify somewhat the factual contours of the conceptual abstraction known as "reasonableness," and focus the jury's attention upon the over-all problems of the recreation program rather than the particular aspect which produced the injury to the plaintiff. By so doing, such a standard might provide some modest assurance against tort liability being imposed in cases not involving rather extreme departures from the sort of general supervisory care which jurors, as average citizens familiar with customary park and recreation programs in the community, anticipate and expect from park and recreation employees.

So far as negligence or intentional tortious conduct is attributed to park and recreation personnel in respects other than supervision, the reported cases suggest, by their relative paucity of numbers, that no major difficulties are likely to be encountered by a rule imposing liability upon public entities to the same extent as upon private persons similarly situated. Such a rule is therefore recommended for adoption. Examples of torts which would be thus covered include the negligent removal of a seriously injured football player from the field without the supervision of a physician, thereby aggravating his injuries;¹⁷ negligence in requiring a reluctant girl student with a weak knee to perform a somewhat difficult tumbling stunt in the course of which she sustained serious injuries;¹⁸ negligence in requiring a youngster to be

¹⁴ See, e.g., *Peterson v. City of New York*, 267 N.Y. 204, 196 N.E. 27 (1935) (reversing judgment for plaintiff for injuries received in a fall from a playground swing, on ground jury had been erroneously instructed in effect that it could find defendant city liable if direct management and control of swing by attendant would have prevented plaintiff's injury, such instruction being erroneous since duty of entity was merely to provide general supervision); *Curcio v. City of New York*, 275 N.Y. 20, 9 N.E.2d 760 (1937) (no liability where lifeguard was on duty in pool and giving general supervision to activities therein, as well as to special needs of young boys, and person who drowned was an expert and experienced swimmer).

¹⁵ *Nestor v. City of New York*, 28 Misc.2d 70, 71, 211 N.Y.S.2d 975, 977 (1961).

¹⁶ *Lopez v. City of New York*, 4 App. Div.2d 48, 51, 163 N.Y.S.2d 562, 565 (1957), *aff'd*, 4 N.Y.2d 738, 171 N.Y.S.2d 860, 148 N.E.2d 909 (1958). See also *Nestor v. City of New York*, 28 Misc.2d 70, 211 N.Y.S.2d 975 (1961).

¹⁷ *Welch v. Dunsmuir Joint Union High School Dist.*, 326 P.2d 633 (Cal. App. 1958) (hearing granted by Supreme Court on August 7, 1958, and case subsequently dismissed).

¹⁸ *Bellman v. San Francisco High School Dist.*, 11 Cal.2d 576, 81 P.2d 894 (1938) (judgment for plaintiff sustained on ground jury could find on evidence that defendant acted negligently in compelling girl to perform stunt without adequate instruction and against her consent).

thrown aloft in a "blanket-toss" game against the child's wishes, with resultant serious injuries;¹⁹ negligence of a team coach in assigning a player who was not fully recovered from previous injuries to play in a football game;²⁰ negligence in mismatching opponents for the purpose of instruction in competitive contact sports;²¹ and negligence in assigning a wholly untrained person without qualifications for the job to the task of supervising a gymnasium activity period.²²

In most of the situations illustrated by the cited cases, it will be observed that the officer or employee whose tortious act or omission was the basis of the entity's liability was acting in a manner probably consistent with good faith and reasonable interpretation of his responsibilities. The determination that such conduct was tortious and justified imposition of liability for the ensuing damages, was of necessity an *ex post facto* appraisal of what happened, made with the benefit of hindsight as to the consequences. Such cases thus simply illustrate the commonplace fact that actions which at the time may be believed by the actor to be a reasonable carrying out of his public recreation duties and instructions (*e.g.*, the compulsory expulsion of a troublemaker from the playground; the administration of first aid to an injured individual; etc.) may subsequently be held to be unreasonable by a jury. In order to prevent any undesirable reduction of incentives tending to induce public personnel to carry out their responsibilities vigorously and conscientiously, therefore, it is suggested that public personnel should not ultimately be held financially responsible for their torts in the course of parks and recreation duties, except in the event that it is determined that the officer or employee was motivated by malice or injurious intent.

¹⁹ *Rook v. State*, 254 App. Div. 67, 4 N.Y.S.2d 116 (1938).

²⁰ *Morris v. Union High School Dist.*, 160 Wash. 121, 294 Pac. 998 (1931).

²¹ *Brooks v. Board of Educ.*, 15 App. Div.2d 495, 222 N.Y.S.2d 184 (1961) (Judgment for smaller boy affirmed where he was injured by much larger and stronger boy assigned as opponent in soccer instruction session).

²² *Garber v. Central School Dist. No. 1*, 251 App. Div. 214, 295 N.Y. Supp. 850 (1937).

PROBLEMS RELATING TO CONSTITUTIONALITY OF LEGISLATIVE SOLUTION

In the course of this study, a variety of suggestions have been advanced with respect to possible legislation to cope with the problems posed by the *Muskopf* and *Lipman* decisions. Entirely apart from the merits of these suggestions, it is apparent from the existing state of the law that a comprehensive legislative program would inevitably incorporate substantial changes in both common law and statutory rules pertaining to governmental tort liability. Such legislation, for example, might restore in part the principle of tort immunity which, as a judicially created rule, was laid to rest in *Muskopf*. On the other hand, it conceivably might establish rules of governmental liability which, in some instances where official discretion is tortiously exercised, are more liberal to injured plaintiffs than the partial liability recognized in *Lipman*. Presumably, also, some of the statutory immunities identified in the study might be eliminated, while limitations might be created to restrict the scope of at least some of the existing statutory liabilities.

Whatever legislative modifications emerge, moreover, will undoubtedly take into account the element of time. Although there is little doubt that the *Muskopf* and *Lipman* decisions could have been declared by the Supreme Court to have only *prospective* effect¹—a device which has been employed by other courts which have abrogated the governmental immunity doctrine²—the Court failed (or refused) to do so. Later decisions³ have made it clear that *Muskopf* and *Lipman* have retrospective as well as prospective effect, wiping out the immunity doctrine and making the common law of torts (except as limited by *Lipman*) applicable to injuries sustained before as well as after their effective date. While the practical implementation of the common law rules has been suspended temporarily by the 1961 moratorium legislation,⁴ a substantial number of claims which would appear to be actionable thereunder have accrued (and will continue to accrue) between the effective date of *Muskopf* and *Lipman* and the effective date of the legislative response thereto. That response will thus necessarily look to both the future and the past. If it purports to establish

¹ See *Great No. Ry. Co. v. Sunburst Co.*, 287 U.S. 358, 363-66 (1932), cited approvingly by Traynor, J., in *Sutter Basin Corp. v. Brown*, 40 Cal.2d 235, 249, 253 P.2d 649, 667 (1953) (concurring opinion); *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (concurring opinion by Frankfurter, J.); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. Pa. L. Rev. 1 (1960).

² *Holytz v. City of Milwaukee*, 16 Wis. —, 115 N.W.2d 618 (1962); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

³ *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962) (holding that the tort cause of action involved in the *Muskopf* decision was not destroyed, but merely was suspended by 1961 moratorium legislation). See also *Flournoy v. State*, 57 Cal.2d 497, 20 Cal. Rptr. 627, 370 P.2d 331 (1962) (recognizing actionability of wrongful death claim which arose prior to *Muskopf*); *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962) (*accord*).

⁴ CAL. CIV. CODE § 22.3, added by Cal. Stat. 1961, ch. 1404, p. 3209, as construed in *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962), and *Thelander v. Superior Court*, 58 Cal.2d —, 26 Cal. Rptr. 643, 376 P.2d 571 (1962).

a uniform system of governmental tort liability with only prospective effect, it will constitute an implied legislative authentication of the judicial application of common law standards to previously accrued causes of action. The alternative is an explicit application to previously accrued injuries of some expressly declared legislative policy, whether that be a policy of abrogation or of recognition. In either event, the legislative solution will have retrospective effect.

At least two significant constitutional problems thus appear to be involved in the development of an appropriate legislative program: (a) To what extent may the Legislature constitutionally modify or eliminate the existing common law rules governing tort liability of governmental entities? This issue, it will be noted, comprises both the potential enlargement of governmental tort liability beyond, as well as its diminution below, the level which would obtain under the common law as declared in *Muskopf* and *Lipman*. (b) To what extent may newly declared statutory rules governing tort liability of governmental entities constitutionally be given retrospective effect to authorize, modify or eliminate liabilities arising from factual occurrences prior to the effective date of such rules? In analyzing this problem, attention should be directed to possible distinctions between claims which arose prior to the effective date of the *Muskopf* decision, and those arising subsequent thereto.

Legislative Competence to Alter the Common Law

Putting to one side the problem of retrospective application, there can be little doubt that the Legislature constitutionally may alter, modify or eliminate the common law rules governing tort liability of public entities, provided, of course, that such legislation does not violate constitutional restrictions against arbitrary classification. Since the multi-various differences between public entities and private individuals (including corporations) preclude any effective contention that legislative distinctions favoring public entities in matters of tort liability would be arbitrary,⁵ it is significant that even as to matters of purely private tort liability, the constitutional power of the Legislature is exceedingly broad. In 1927, for example, the Supreme Court flatly announced that "No question can arise as to the power of the legislature to modify or abrogate a rule of the common law."⁶ In 1948, the same point was stated in somewhat different words, to the effect that the Legislature "has complete power to determine rights of individuals. It may create new rights or provide that rights which have previously existed shall no longer arise."⁷

⁵ It appears to be settled that for tort liability purposes governmental entities may reasonably be classified differently from private persons, see *Dias v. Eden Township Hosp. Dist.*, 57 Cal.2d 502, 20 Cal. Rptr. 630, 370 P.2d 334 (1962); *Powers Farms v. Consolidated Irr. Dist.*, 19 Cal.2d 123, 119 P.2d 717 (1941); *Von Arx v. City of Burlingame*, 16 Cal. App.2d 29, 60 P.2d 305 (1936), and that all types of public entities need not be classified alike or exposed to identical tort responsibility. See *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547 (1935) (holding Public Liability Act valid notwithstanding fact that it imposed tort liability upon cities, counties and school districts but not upon State or other public entities).

⁶ *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 67, 259 Pac. 444, 449 (1927).

⁷ *Modern Barber College v. California Employment Stabilization Comm'n*, 31 Cal.2d 720, 726, 192 P.2d 916, 920 (1948).

In accordance with these principles, the courts have sustained the validity of a number of statutes which altered common law rules of tort liability. In 1939, for example, the Legislature enacted Section 43.5 of the Civil Code, which abolished causes of action for alienation of affection, criminal conversation, seduction of a person over the age of legal consent, and breach of promise of marriage. Although it was recognized that this legislation radically altered the common law tort rules, it was uniformly sustained as constitutional as against the contention that it has unreasonably deprived injured parties of a basic right to redress for serious personal wrongs.⁸ Another relatively recent illustration is found in decisions sustaining the constitutionality of legislation curtailing the common law rules governing liability for libel or slander by conditioning the recovery of general damages in certain cases to instances in which the plaintiff has, without avail, made a proper and timely demand for retraction.⁹ Even the simple common law negligence action has not escaped legislative attention; thus, the so-called "guest statute," which eliminates the right of an injured guest in a motor vehicle to recover damages resulting from the negligence of the operator of the vehicle, has been held to be well within the constitutional power of the Legislature.¹⁰

Perhaps the most striking illustration of a legislative overhauling and revision of common law tort rules is in the system of workmen's compensation which was enacted a half-century ago as a substitute for the then-prevailing common law rules governing the tort liability of employers for injuries sustained by their employees. Although the California Supreme Court, in considering the constitutionality of this legislation, recognized that it was "radical, not to say revolutionary" in its elimination of the settled rules of negligence, contributory negligence, assumption of risk and negligence of a fellow servant, as well as of measure of damages, it could find no basis for concluding that the new procedure constituted a deprivation of due process of law or of any other constitutional right.¹¹ Pointing out that the rules of the common law "are not necessarily expressions of fixed and immutable principles, inherent in the nature of things," the Court quoted approvingly from a decision of the United States Supreme Court which declared:

'A person has no property, no vested interest, in any rule of the common law. That is only one form of municipal law, and is no more sacred than any other. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance.'¹²

In the light of the cited authorities, it appears that the Legislature is competent to alter or modify the rules of common law liability ad-

⁸ *Ikuta v. Ikuta*, 97 Cal. App.2d 787, 218 P.2d 854 (1950); *Langdon v. Sayre*, 74 Cal. App.2d 41, 168 P.2d 57 (1946). Similar results were reached in New York, where a comparable statute also was enacted. See *Fearon v. Treanor*, 272 N.Y. 268, 5 N.E.2d 815 (1936), *appeal dismissed for want of substantial federal question*, 301 U.S. 667 (1937); *Hanfarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47 (1937), *appeal dismissed for want of substantial federal question*, 302 U.S. 641 (1937).

⁹ *Werner v. Southern Cal. Associated Newspapers*, 35 Cal.2d 121, 216 P.2d 825 (1950) (opining that "the Legislature may attack the evils of unfounded litigation by abolishing causes of action altogether." *Id.* at 126, 216 P.2d at 828).

¹⁰ *Forsman v. Colton*, 136 Cal. App. 97, 28 P.2d 429 (1933).

¹¹ *Western Indem. Co. v. Pillsbury*, 170 Cal. 686, 692, 151 Pac. 398, 401 (1915).

¹² *Id.* at 696, 151 Pac. at 402, quoting approvingly from *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

versely to private persons injured as a consequence of governmental activities. This view is confirmed also by the statutory provisions discussed in the present study in which a measure of immunity from tort liability has been granted to public entities and public personnel,¹³ thereby indicating substantial legislative understanding that such power does exist.¹⁴

There is likewise little doubt that the Legislature may impose new liabilities upon public entities, thereby modifying existing immunities and establishing remedies in favor of private persons injured by actions or omissions of public entities. Prior to *Muskopf*, the cases were numerous in which the courts declared that any enlargement of tort liability of public entities should come from the Legislature¹⁵—statements which presumably would not have been made had there been any doubt as to the power of the Legislature to constitutionally enact such changes in the then-prevailing rule of governmental immunity. Moreover, as the study points out,¹⁶ there are numerous statutes which expressly impose liability upon public entities in situations where the immunity doctrine would otherwise be applicable; and such statutes, when challenged on constitutional grounds, have been uniformly sustained as within the legislative power.¹⁷ The only reservations which have been judicially expressed on this score relate solely to the question whether enlargement of the tort liability of public entities beyond the level of private common law tort liability might constitute a forbidden gift of public funds.¹⁸ Such intimations, however, must be evaluated against more recent decisions establishing the modern rule that liabilities unknown to the common law may be imposed upon public entities without violating the “gift” clause if a rational public purpose would discernably be served by the expenditures thereby required.¹⁹ So considered, it would seem that the “gift” clause is not a significant deterrent to the fullest expression of legislative policy regarding public entity tort liability, for the public purpose to be served by compensating persons injured as a result of governmental functions, together with the incentives to accident prevention which such liability would provide, is broad and pervasive.

¹³ See the text at 109-93 *supra*.

¹⁴ The long-continued legislative interpretation of the constitution is generally deemed to have persuasive influence on the courts in doubtful cases. See cases cited in MCKINNEY, NEW CALIFORNIA DIGEST *Constitutional Law* § 35 (Recomp. 1961).

¹⁵ See, e.g., *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22 (1953); *Madison v. City & County of San Francisco*, 106 Cal. App.2d 232, 234 P.2d 995 (1951).

¹⁶ See the text at 35-108 *supra*.

¹⁷ See *Bosqui v. City of San Bernardino*, 2 Cal.2d 747, 43 P.2d 547 (1935) (affirming constitutionality of Public Liability Act); *Heron v. Riley*, 209 Cal. 507, 289 Pac. 160 (1930) (affirming constitutionality of predecessor to CAL. VEH. CODE § 17001).

¹⁸ *Brindamour v. Murray*, 7 Cal.2d 73, 59 P.2d 1009 (1936).

¹⁹ See, e.g., *Dittus v. Cranston*, 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959); *State v. Industrial Acc. Comm'n*, 49 Cal.2d 354, 317 P.2d 8 (1957). It is noteworthy that the case of *Brindamour v. Murray*, *supra* note 18, was recently cited by the California Supreme Court for the proposition that, unlike a private person, a public entity is not liable for an automobile accident caused by the negligence of one of its employees operating such vehicle outside the course of his employment but with the entity's consent. *Jurd v. Pacific Indem. Co.*, 57 Cal.2d 699, 21 Cal. Rptr. 793, 371 P.2d 569 (1962). The result reached in this case, however, actually is consistent with the view that such liability would not be a forbidden gift. The Court held that an insurance carrier is liable on its policy of liability insurance issued to a school district, where a district employee has been adjudged personally liable for negligence in operating a district vehicle with the consent of the district although not in the course of his employment, since such employee is an “additional insured” under the omnibus coverage clause of the policy. In effect, the Court assumed the propriety of statutory authorization for

Finally, there appears to be no constitutional reason why the legislatively prescribed rules of governmental tort liability (or immunity) cannot be applied to all public agencies in the State. Most governmental entities are simply creatures of the Legislature and hence subject to its plenary legislative powers.²⁰ Even charter cities, which have constitutional "home-rule" powers with respect to municipal affairs and hence are independent of legislative control in such matters,²¹ are well within the ambit of legislative control so far as their tort liability is concerned. It is settled law that the conditions and limitations of tort liability are not municipal affairs but questions of statewide concern with respect to which the "home-rule" powers of charter cities are subordinated to state statutory control.²²

For similar reasons, legislatively prescribed rules of tort liability would also appear to be fully applicable to the University of California, notwithstanding its quasi-independent status as conferred by Section 9 of Article IX of the California Constitution. The appellate courts have uniformly recognized that in respect to matters not within the constitutional independence given by the cited provision to the Board of Regents of the University as to "organization and government," the University is subject to the operation of general legislative measures on matters of statewide concern enacted in the exercise of the police power. For example, a state statute regulating an aspect of the public health (such as a compulsory vaccination law) "would be paramount as against a rule of the Regents in conflict therewith."²³ Even in dealing with such internal administrative matters as the employment of teaching personnel for the University, the supremacy of state statutes over conflicting university policy has been sustained. In the words of the Supreme Court, speaking through Mr. Chief Justice Gibson, "It is well settled . . . that laws passed by the Legislature under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively university affairs."²⁴ Since the matter of governmental tort liability has been uniformly regarded as a matter of statewide concern,²⁵ it appears that the University of California enjoys no special constitutional immunity from legislative regulation in this field.

the district to purchase such insurance coverage out of public funds, even though the district was not itself liable under common law principles. Manifestly, this decision undercuts the rationale of the *Brindamour* case, for there is little save a purely technical distinction between liability directly imputed to a public entity and liability which, although not so imputed, the entity may nonetheless assume in the form of insurance premium payments. The propriety of construing the policy as including the employee acting with consent was justified by the Court on the ground of the strong public purpose to protect the public in cases of permissive use of motor vehicles, as reflected in the statutory provisions governing omnibus coverage clauses in liability policies. The same public purpose argument, it is submitted, would apparently support a direct imposition of imputed liability upon public entities as owners of vehicles used with permission, comparable to the statutory liability of private owners in such cases. See CAL. VEH. CODE § 17150.

²⁰ See, e.g., *Allied Amusement Co. v. Bryam*, 201 Cal. 316, 256 Pac. 1097 (1927); *In re East Fruitvale Sanitary Dist.*, 158 Cal. 453, 111 Pac. 363 (1910); *Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal. App.2d 127, 233 P.2d 732 (1955).

²¹ See, e.g., *West Coast Advertising Co. v. City & County of San Francisco*, 14 Cal.2d 516, 95 P.2d 138 (1939).

²² *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 558 (1947); *Department of Water & Power v. Inyo Chemical Co.*, 16 Cal.2d 744, 108 P.2d 410 (1940); *Kelso v. Board of Educ.*, 42 Cal. App.2d 415, 109 P.2d 29 (1941).

²³ *Wallace v. Regents of the Univ. of Cal.*, 75 Cal. App. 274, 278, 242 Pac. 892, 894 (1925). *Accord*, *Williams v. Wheeler*, 23 Cal. App. 619, 138 Pac. 937 (1913).

²⁴ *Tolman v. Underhill*, 39 Cal.2d 708, 712, 249 P.2d 230, 232 (1952). See also *Fraser v. Regents of the Univ. of Cal.*, 39 Cal.2d 717, 249 P.2d 283 (1952).

²⁵ Cases cited *supra* note 22.

Validity of Retrospective Legislation

It is well established that retrospective legislation is not inherently bad,¹ and that the Legislature is competent to enact laws which look to the past as well as the future provided constitutional rights are not abridged. The law which pertains to the issues of constitutional abridgement, however, is in a state of considerable uncertainty.² Part of the uncertainty is the result of the interaction of statutory interpretation and constitutional adjudication. It is often said, for example, that statutes will be given a purely prospective interpretation unless it is clearly evident that the Legislature intended them to operate retrospectively.³ As a rule of interpretation, this principle should give no trouble; but the courts often attempt to justify a prospective interpretation by suggesting that any retrospective application would involve grave constitutional difficulties.⁴ Not only do opinions written along these lines convey a strong, but possibly delusive, implication as to constitutional issues not actually decided by the court, but they sometimes are exceedingly obscure with respect to the basis of the implication. Since cases dealing with expressly retrospective statutes are relatively few in number, however, the implications drawn from the ambiguous decisions referred to must be taken into account in assessing the present status of the law.

Any legislative solution to the problem of governmental tort liability should, of course, seek to avoid interpretative problems as to retrospective application by making the legislative intent in that connection crystal clear. For present purposes, therefore, it will be assumed that the proposed legislation will be expressly declared to be retrospective in effect. Could the statute be successfully challenged, then, on the ground that additional tort liabilities are being unconstitutionally imposed upon public entities, arising from already completed factual events, than were applicable at the time of their happening under the common law rules made applicable by the *Muskopf* decisions? A similar contention might be made with respect to changes arising from possible amendments to existing public liability statutes, insofar as such amendments liberalize the basis of liability retrospectively. Again, entities which were previously protected against adjudications of tort liability by absence of statutory consent to be sued may, by the new legislation, be subjected to suit with respect to past events. Or, perhaps a statutory immunity in effect at the time of plaintiff's injury may be repealed with retrospective intent. In each of these possible situations, the issue arises whether the resulting increased liability upon public entities violates any applicable constitutional limitation.

¹ *Rosenblatt v. State Bd. of Pharmacy*, 69 Cal. App.2d 69, 158 P.2d 199 (1945); *American States Water Serv. Co. v. Johnson*, 31 Cal. App.2d 606, 88 P.2d 770 (1939). See also *Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 259 Pac. 444 (1927).

² Compare Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960), with Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960). See also Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U. L. REV. 540 (1956).

³ *Douglas Aircraft Co. v. Cranston*, 58 Cal.2d —, 24 Cal. Rptr. 851, 374 P.2d 819 (1962); *DiGenova v. State Bd. of Educ.*, 57 Cal.2d 167, 18 Cal. Rptr. 369, 367 P.2d 865 (1962).

⁴ See, e.g., *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962); *Calliet v. Alioto*, 210 Cal. 65, 290 Pac. 438 (1930); *Baldwin v. City of San Diego*, 195 Cal. App.2d 236, 15 Cal. Rptr. 576 (1961).

Public entities, unlike private persons or private corporations, ordinarily are not deemed to have standing to assert any claims of personal or property rights as against the State,⁵ for such entities as creatures of the State are subject to legislative control. As the Supreme Court stated more than fifty years ago:

In the absence of any constitutional restriction, the legislature has absolute power over the organization, the dissolution, the extent, the powers, *and the liabilities* of municipal and other public corporations established as agencies of the state for purposes of local government. [Emphasis added.]⁶

In the exercise of this plenary legislative power, for example, it has been held that the Legislature may divest a public entity of title and control over part of its property without compensation,⁷ and may even authorize the uncompensated destruction of, or damage to, public buildings and other assets of a public entity in order to implement the Legislature's conceptions of sound public policy.⁸

Imposition of increased tort liability retrospectively (*i.e.*, with respect to factual events occurring subsequent to *Muskopf*, for example) would not seem to pose insurmountable constitutional problems in the light of the cited cases. The constitutional protection occasionally vouchsafed to contracts of public entities as against impairment by legislative action⁹ would of course have no direct application to the present problem of tort liability. Nor would charter cities find any protection in their constitutionally granted "home-rule" powers in light of the settled law that tort liability is a matter of statewide concern and hence not within the sphere of municipal "home-rule" autonomy.¹⁰

It might be contended, however, that retroactive imposition of tort liability constitutes a forbidden gift of public funds in violation of Section 31 of Article IV of the Constitution. To be sure, a casual *obiter dictum* in a Supreme Court opinion of thirty-two years ago would appear to support such a contention,¹¹ while additional support is found in several older cases.¹² The more recent (and hence more authoritative) decisions, however, have underscored the modern view that an authorized expenditure of public funds is not a forbidden gift if supported by reasons of public policy serving a public purpose deemed

⁵ *Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481 (1955).

⁶ *In re East Fruitvale Sanitary Dist.*, 158 Cal. 453, 457, 111 Pac. 368, 370 (1910). To the same effect, see *Allied Amusement Co. v. Bryam*, 201 Cal. 316, 256 Pac. 1097 (1927); *Oakdale Irr. Dist. v. County of Calaveras*, 133 Cal. App.2d 127, 283 P.2d 732 (1955).

⁷ See *Pass School Dist. v. Hollywood City School Dist.*, 156 Cal. 416, 105 Pac. 122 (1909). *Cf. Reclamation Dist. v. Birks*, 159 Cal. 233, 113 Pac. 170 (1911).

⁸ *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 154 Pac. 845 (1916).

⁹ *Miller v. McKenna*, 23 Cal.2d 774, 147 P.2d 531 (1944); *Birkhofer v. Krumm*, 27 Cal. App.2d 513, 81 P.2d 609 (1938). See also *Coombes v. Getz*, 285 U.S. 434 (1932), *reversing decision of California Supreme Court sub nom.*, *Coombes v. Franklin*, 213 Cal. 164, 1 P.2d 992, *rehearing denied*, 4 P.2d 157 (1931).

¹⁰ *Eastlick v. City of Los Angeles*, 29 Cal.2d 661, 177 P.2d 553 (1947).

¹¹ *Heron v. Riley*, 209 Cal. 507, 517, 289 Pac. 160, 164 (1930), where, in referring to the fact that the liability of public entities for vehicular torts, as enacted in 1929, was expressly declared to be prospective only, the Court remarked: "The legislature has not attempted to create a liability against the state for any past acts of negligence on the part of its officers, agents or employees—something it could not do, and the doing of which would, in effect, be the making of a gift . . ."

¹² See *Chapman v. State*, 104 Cal. 690, 38 Pac. 457 (1894); *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951 (1892).

beneficial to the entity expending the funds.¹³ In *Dittus v. Cranston*,¹⁴ for example, the Legislature authorized the payment of some \$350,000 to fishermen and fish processing companies to reimburse them for losses previously sustained when certain boats, nets and other fishing equipment had been rendered practically valueless as the consequence of enactment of certain fish conservation laws. The Supreme Court rejected a contention that since there was no legal liability upon the State for such losses, the expenditure would be an illegal gift of public funds. The Court reasoned that the Legislature could reasonably have determined that the expenditure would result in more efficient and less burdensome enforcement and administration problems for conservation officers, through the elimination of noncomplying equipment and the encouragement of voluntary compliance with the law by fishermen. This purpose, being a public one, saved the appropriation from being a prohibited gift, notwithstanding that there was no legal liability upon the State to make it, or that it was in effect a retrospective assumption of liability.¹⁵

By analogy to *Dittus*, strong arguments can be made that at least a limited form of retrospective imposition of liability in tort would also serve a public purpose, in that it would tend to relieve injured persons from burdens caused by public functions, would eliminate invidious discriminations which would otherwise exist between persons who were injured in the past (*e.g.*, during the moratorium period established by Section 22.3 of the Civil Code and related legislation) and those injured in the future, and would tend to simplify the administration and settlement of claims. Moreover, such limited retrospective imposition of liability would appear to be not inconsistent with and possibly even to implement the reasonable expectations of persons and public entities affected by the legislative moratorium. As the Supreme Court has recognized,¹⁶ the purpose of that moratorium was to afford an opportunity to the Legislature to study the entire problem of governmental immunity and liability and to develop a legislative program consistent with its findings. Private persons and public entities alike were, in effect, placed on notice that tort claims subject to the moratorium would be governed by common law principles, although some legislative changes were to be anticipated. It would appear to be consistent with this view to anticipate that the courts would sustain the validity of a legislative decision to make any legislative enlargement of tort liability fully applicable to factual occurrences during the moratorium as well as to events transpiring after the effective date of the legislation embodying such enlargement. The occasion for the legislative study urgently arose with the *Muskopf* decision; hence, it should not be difficult to identify a sufficient public purpose to sustain the legislative program so far as it retrospectively grants additional rights to private persons with respect to events subsequent to *Muskopf*. To this extent, at least, it would seem that, by analogy to the rule that the

¹³ *Cf.* *State v. Industrial Acc. Comm'n*, 39 Cal.2d 83, 244 P.2d 889 (1952) (additional compensation for injured employee based on previous accident, in part, sustained as valid). To the same effect, see *State v. Industrial Acc. Comm'n*, 49 Cal.2d 354, 317 P.2d 8 (1957); *California Employment Stabilization Comm'n v. Payne*, 31 Cal.2d 210, 187 P.2d 702 (1947).

¹⁴ 53 Cal.2d 284, 1 Cal. Rptr. 327, 347 P.2d 671 (1959).

¹⁵ See, to the same effect, *Patrick v. Riley*, 209 Cal. 350, 287 Pac. 455 (1930).

¹⁶ *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

state may constitutionally surrender rights of action or remedies existing in its favor without violating the "gift" clause¹⁷ it may also surrender existing defenses against tort liability.

To extend the retroactivity of the enlarged liability to a period earlier than the date of the *Muskopf* decision, however, would greatly attenuate the public purpose rationale, possibly to the point of unconstitutionality. Like most questions of constitutional law, the gift problem involves questions of degree; and it is conceivable that the date of the *Muskopf* decision may be held to constitute the most pertinent and appropriate operative fact to mark the boundary between permissibility and invalidity. It is concluded, therefore, that the legislative program would in all likelihood survive attack on constitutional grounds insofar as it created new or additional tort liabilities for public entities arising from factual events transpiring during the period following the effective date of *Muskopf*.

It should be noted at this point, however, that the analysis just advanced would not necessarily sustain a retrospective elimination or diminution of tort liability, thereby wiping out previously accrued causes of action to the detriment of injured private plaintiffs. Private persons, it must be borne in mind, are within the protection of constitutional limitations which do not apply to public entities and hence may be in a position to challenge impairments of their tort claims against public entities, even though such entities may have no reciprocal basis for challenging enlargements of their tort liabilities.

The problem of retrospective application is most acute where private rights are affected. It may be anticipated, for example, that the legislative program governing governmental tort liability will expressly seek to eliminate some, if not all, classes of liabilities based upon factual events occurring before its effective date. For the purpose of analysis, it should be noted that four different classes of claims might conceivably be involved in any such proposal:

(a) Causes of action recognized under pre-*Muskopf* law. The abolition of sovereign immunity by judicial decision in *Muskopf* did not directly affect any existing statutory or common law liabilities of public entities. Facts recognized before *Muskopf* as supporting a tort action against a public entity have continued to be so recognized subsequent thereto.¹ Moreover, the 1961 moratorium legislation did not impair any such previously recognized claims, whether accrued or not, for that legislation only declared a temporary ban on suits which would have been barred, prior to *Muskopf*, by the immunity doctrine. That doctrine was expressly declared to be applicable only "to the same extent that it was applied in this State on January 1, 1961," thereby incorporating by reference "any modifications" made by statutes or by judicial decisions of the appellate courts of California on or before the designated January 1 date.² For purposes of analysis, such causes

¹⁷ *California Employment Stabilization Comm'n v. Payne*, 31 Cal.2d 210, 187 P.2d 702 (1947), expressly disapproving contrary view expressed in *California Employment Stabilization Comm'n v. Chichester Co.*, 75 Cal. App.2d 899, 172 P.2d 100 (1946).

¹ See *Thon v. City of Los Angeles*, 203 Cal. App.2d —, 21 Cal. Rptr. 398 (1962), and cases cited therein at note 2.

² Cal. Stat. 1961, ch. 1404, § 1, p. 3209, adding section 22.3 to the Civil Code. See *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

of action will be referred to herein as "previously recognized causes of action."

(b) Causes of action not recognized under pre-*Muskopf* law and which accrued prior to the date on which the *Muskopf* decision became final, namely February 27, 1961. Claims in this category would be grounded chiefly upon common law principles of tort liability; but possibly some such claims would be predicated upon a more liberal interpretation which, it might be argued, is required to be given to some of the existing statutory liabilities in order to harmonize such statutes with the new general rule of governmental liability.³ The Supreme Court, it will be recalled, has construed the 1961 moratorium legislation as preserving the existence of such causes of action, subject to the presentation of claims and the commencement of action thereon within the periods of time required by applicable statutes, although they may not be brought to trial within the two-year moratorium period.⁴ For convenience, causes of action in this category will be referred to as "newly recognized pre-*Muskopf* causes of action."

(c) Causes of action not recognized under pre-*Muskopf* law but which accrued during the interim between the effective date of *Muskopf* (i.e., February 27, 1961) and the effective date of the moratorium legislation (i.e., September 15, 1961). At the time such causes of action accrued, it will be noted, the moratorium legislation was not applicable thereto; and such legislation can be regarded as applicable only by giving it retrospective effect. It is significant, therefore, that in *Corning Hospital District v. Superior Court*,⁵ the Supreme Court, in what must for present purposes be regarded as dictum, treated the moratorium act as retroactively applicable to such causes of action so as to bar them from being brought to trial during the moratorium period (although claims were required to be presented, and actions could be commenced together with appropriate discovery proceedings). The Court in the cited case, however, considered the moratorium statute only insofar as it had a procedural impact, and, as so considered, held it to be constitutional. It did not consider—and indeed, had no reason so to do—whether the moratorium legislation had any retrospective substantive effect on such causes of action, or whether, if it purported to have any such effect, it would be constitutional. For convenience, causes of action in this category will be referred to as "newly recognized interim period causes of action."

(d) Causes of action not recognized under pre-*Muskopf* law, which accrued between the effective date of the moratorium legislation (i.e., September 15, 1961) and the effective date of the proposed legislative program (presumably the 91st day after the final adjournment of the 1963 Regular Session of the California Legislature). As to these causes of action, the moratorium legislation, of course, would have no retroactive effect but would be wholly prospective in operation. Any sub-

³ See, e.g., the discussion in the text, pp. 56-59 *supra*, relating to the possible impact of the *Muskopf* decision upon the interpretation of the Public Liability Act and other statutes.

⁴ *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962); *Flournoy v. State*, 57 Cal.2d 497, 20 Cal. Rptr. 627, 370 P.2d 331 (1962); *Lattin v. Coachella Valley County Water Dist.*, 57 Cal.2d 499, 20 Cal. Rptr. 628, 370 P.2d 332 (1962). See also *Thelander v. Superior Court*, 58 Cal.2d —, 26 Cal. Rptr. 643, 376 P.2d 571 (1962).

⁵ 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

stantive impact attributable to the moratorium act would thus, in light of the preceding analysis,⁶ appear to be fully constitutional as applied to these causes of action. For convenience, they will be referred to as "newly recognized infra-moratorium causes of action."

It will be assumed for present purposes that at least some types of claims within each of the foregoing four categories will be attempted to be eliminated by express legislative action which becomes effective on the termination date of the existing moratorium period. The issue to be examined is whether such legislation would survive attack on constitutional grounds.

The basic principle which constitutes the starting point for analysis declares that retrospective legislation is a violation of the due process clauses of the state and federal constitutions if it cuts off or deprives any person of a previously "vested" right.⁷ The key to decision obviously resides in the identification of what types of interests are "vested" and what types are not.⁸ The Supreme Court of California has candidly recognized the latitude of judicial discretion involved in this question, by defining a "vested right" as "an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts."⁹ Many cases document the point that contract rights,¹⁰ and traditionally recognized interests in real or personal property,¹¹ are "vested" within the meaning of the rule against retrospective legislation. For present purposes, the issue would seem to be whether accrued tort causes of action, not yet reduced to judgment, against public entities are such interests as would be regarded as "vested" by the courts.

A good starting point, in seeking the answer to the question just posed, is found in the case of *Callet v. Abioto*,¹² decided in 1930. This was an action for personal injuries in which a guest in a motor vehicle had recovered a judgment against the operator of the vehicle on the basis of simple negligence. The injury occurred in 1925, and an appeal from the judgment for the plaintiff was apparently pending but undecided when, in 1929, the Legislature enacted the "guest statute," under which ordinary negligence was eliminated as a ground of recovery in such cases. In the Supreme Court, the defendant contended that the statutory change had wiped out the basis of the trial court's judgment and thus required a reversal. The Court rejected this position and affirmed the judgment. Its analysis included the following significant points: (1) All purely statutory rights are declared by Section 327 of the Political Code (now Section 9606 of the Government Code) to be pursued in contemplation of the power of repeal; hence, as a general

⁶ See the text at 516-19 *supra*.

⁷ *E.g.*, California Employment Stabilization Comm'n v. Payne, 31 Cal.2d 210, 187 P.2d 702 (1947); Wells Fargo & Co. v. City & County of San Francisco, 25 Cal.2d 37, 152 P.2d 625 (1944); Wexler v. City of Los Angeles, 110 Cal. App.2d 740, 243 P.2d 868 (1952).

⁸ The tendency of the "vested rights" approach to be reduced to a circular and uninformative rationalization of conclusions reached on other grounds has been generally recognized by the commentators. See, *e.g.*, Smith, *Retrospective Laws and Vested Rights* (Part I), 5 TEXAS L. REV. 231, 245-48 (1927).

⁹ Miller v. McKenna, 23 Cal.2d 774, 783, 147 P.2d 531, 536 (1944), quoted with approval in Wall v. M. & R. Sheep Co., 33 Cal.2d 768, 205 P.2d 14 (1949).

¹⁰ See Birkhofer v. Krumm, 27 Cal. App.2d 513, 81 P.2d 609 (1938), reviewing many cases in point.

¹¹ See, *e.g.*, Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228 (1897); Gordon v. Nichols, 86 Cal. App.2d 571, 195 P.2d 444 (1948).

¹² 210 Cal. 65, 290 Pac. 438 (1930).

rule, "A cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute."¹³ (2) However, the same rule does not apply to common law causes of action or to actions arising by virtue of statutes codifying the common law, for an accrued cause of action in these categories "is a vested property right which may not be impaired by legislation."¹⁴ (3) Since the plaintiff's cause of action founded upon negligent operation of the vehicle by defendant was a common law (and hence "vested") cause of action, the 1929 guest statute had no application thereto.

The distinction adverted to in the *Callet* case, between statutory causes of action and common law causes of action, seems exceedingly formal. Manifestly, if a person can be deemed to pursue a statutory right in contemplation of possible repeal of the statute, by the same token he may be taken to pursue any common law right in contemplation of a possible abrogation of that right by legislation. In any event, even the statutory foundation for the court's position that statutory rights are distinguishable from common law rights does not support the distinction. Section 9606 of the Government Code expressly declares that:

Any statute may be repealed at any time, *except when vested rights would be impaired*. Persons acting under any statute act in contemplation of *this* power of repeal. [Emphasis added.]

Taken at face value, this provision simply means that persons acting in pursuit of statutory rights act in contemplation of the fact that the Legislature has power to repeal the statute provided it does not thereby destroy any rights which have become "vested." To rely upon this section as a basis for the distinction noted in *Callet* is surely specious, since it really begs the question as to what are the identifying characteristics of a "vested" right.

Notwithstanding the apparent fallacy in the judicial reasoning just referred to, the distinction between "unvested" statutory rights and "vested" common law rights has been approved by the courts on many occasions.¹⁵ For example, the implied repeal of the usury law by a subsequent constitutional amendment was held to have eliminated the plaintiff's right to recover under the statute as to usury which allegedly occurred prior to the repealing act, even though the plaintiff's action instituted in reliance on the statute was actually pending undecided when the repeal took place.¹⁶ Similarly, the statutory liability of corporate directors to shareholders for corporate debts incurred in excess of the corporation's subscribed capital stock was held to have been wiped out by repealing legislation which became effective after the plaintiff's cause of action had been reduced to judgment, where that judgment was not yet final on the date of the repeal.¹⁷ Again, a 1939 statute expressly abolishing all causes of action and terminating all

¹³ *Id.* at 67, 290 Pac. at 440.

¹⁴ *Id.* at 68, 290 Pac. at 440.

¹⁵ In addition to the cases cited *infra*, notes 16-20, see *Penziner v. West American Fin. Co.*, 10 Cal.2d 160, 74 P.2d 252 (1937); *Lemon v. Los Angeles Terminal Ry.*, 38 Cal. App.2d 659, 102 P.2d 387 (1940).

¹⁶ *Fenton v. Markwell & Co.*, 11 Cal. App.2d Supp. 755, 52 P.2d 297 (1935), *disapproved on other grounds* in *Penziner v. West American Fin. Co.*, *supra* note 15.

¹⁷ *Moss v. Smith*, 171 Cal. 777, 155 Pac. 90 (1916), *appeal dismissed*, 246 U.S. 654 (1918).

pending litigation to recover taxes illegally levied under an erroneously computed, and thus excessive, tax rate was held constitutionally valid with respect to causes of action which had accrued in 1933 and 1934.¹⁸ In all of these cases, the courts grounded the results reached upon the position that the causes of action which had been wiped out were purely statutory in nature and were unknown to the common law.

Along the same lines, but more directly relevant to the problems of tort liability, is a recent decision of the United States Court of Appeals for the Ninth Circuit,¹⁹ involving a wrongful death action instituted under the Federal Tort Claims Act on behalf of the heirs of a federal employee killed in the course of firefighting duties as a "smoke jumper." After the cause of action had accrued, Congress enacted an amendment to the Federal Employees Compensation Act declaring that the remedies under that Act were the exclusive remedies available in the case of employment connected injuries. The court found no difficulty in dismissing the Tort Claims Act action, notwithstanding that the plaintiffs' cause of action had accrued before the enactment of the abolishing legislation.

Another application of the noted distinction in a tort context is found in the case of *Krause v. Rarity*,²⁰ decided by the California Supreme Court in 1930. The Court here reached the conclusion that the enactment of the "guest statute" had not effected an implied repeal of the statutory authorization to sue for wrongful death. In purposeful dictum, however, the Court declared that wrongful death was purely a statutory right unknown to the common law, and hence could be retroactively abolished in light of the rule that "the repeal of the statute destroys the right unless the the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation."²¹ On the other hand, the Court pointed out that if the plaintiff were suing for personal injuries during his life, the right of action would be grounded upon common law principles and, hence, "would be a vested right and survive a repeal of the statute."²²

One might readily conclude from the foregoing cases that a legislative program which curtailed or abolished purely statutory causes of action against public entities in a retrospective manner would be constitutional. Unfortunately, such a conclusion cannot be reached with any degree of confidence. Other decisions can be found—some of them much more recent than those cited above—which squarely hold that even purely statutory causes of action which have accrued cannot be abolished by statute.¹

One decision of the district court of appeal, for example, flatly declares that even statutory rights become "vested" when they accrue; "While statutory remedies," announced the court, "are said to be pursued with full realization that the legislature may abolish the right to recover . . . , this rule does not apply to an existing right of action

¹⁸ *Southern Serv. Co. v. County of Los Angeles*, 15 Cal.2d 1, 97 P.2d 963 (1940), appeal dismissed, 310 U.S. 610 (1940).

¹⁹ *Thol v. United States*, 218 F.2d 12 (9th Cir. 1954).

²⁰ 210 Cal. 644, 293 Pac. 62 (1930).

²¹ *Id.* at 652, 293 Pac. at 65.

²² *Id.* at 653, 293 Pac. at 65.

¹ In addition to the cases cited *infra*, notes 2-3, see *LaForge v. Magee*, 6 Cal. 650 (1855) (holding that the Legislature could not divest an accrued cause of action for payment of a county warrant).

which has accrued.”² A more authoritative pronouncement is found in a Supreme Court decision less than twenty years ago.³ The Court there held that the 1933 amendment to Section 583 of the Code of Civil Procedure, requiring a dismissal of actions for failure to bring them to trial within five years after commencement thereof, could not be constitutionally applied (although the Legislature had expressly declared the amendment applicable to “any action heretofore commenced”) to pending actions commenced more than five years before the effective date of the amendment. Under previous law, such actions were not subject to dismissal unless not brought to trial within five years after the defendant’s answer was filed; hence many pending actions (including the cited one) would, under such previous law, still be viable unless wiped out by the amendment by reason of the fact that more than five years had elapsed since their commencement. The Court’s basis of decision resides in its statement, in a unanimous decision by Mr. Justice Traynor, to the effect that, “Since a statute cannot cut off a right of action without allowing a reasonable time after its effective date for the exercise of the right . . . the new statute cannot constitutionally apply to plaintiff’s actions.”⁴ The significance of this decision lies in the fact that the plaintiff was suing for recovery of taxes paid under protest, a type of action which had repeatedly been declared to be purely statutory in nature.⁵ The rule laid down in the cases discussed above, under which such statutory causes of action could be abolished at will, was neither mentioned nor considered by the court in its opinion.

Even more directly in point, so far as the validity of retrospective abolition of tort causes of action are concerned, are two cases involving actions brought under the authority of the Public Liability Act for injuries resulting from dangerous or defective conditions of public property. Since each of the cases was decided at a time when the doctrine of governmental tort immunity was the prevailing common law rule, it would seem that the causes of action sued upon were purely statutory in nature and hence, under the rules announced in such cases as *Callet* and *Krause*, discussed above, subject to being eliminated by legislation at any time before final judgment.

In the first case,⁶ the Supreme Court ruled that the 1931 statute which established a ninety-day claims presentation procedure as a prerequisite to suit under the Public Liability Act “could not attach” to a claim which had accrued more than ninety days before the effective date of the statute. To hold that the ninety-day limit was applicable would, of course, have totally wiped out plaintiff’s cause of action retrospectively, for the ninety-day period following the accrual of the cause of action had expired long before the effective date of the claims statute. The Court’s refusal to apply the ninety-day requirement to this purely statutory claim, although not clearly explained in the opinion, appears to be rooted in the principle that procedural changes “may be applied to pending actions or to causes of action not yet sued upon

² *Coast Sur. Co. v. Municipal Court*, 136 Cal. App. 186, 28 P.2d 421 (1934).

³ *Wells Fargo & Co. v. City & County of San Francisco*, 25 Cal.2d 37, 152 P.2d 625 (1944).

⁴ *Id.* at 41, 152 P.2d at 627.

⁵ See, e.g., *Southern Serv. Co. v. County of Los Angeles*, 15 Cal.2d 1, 97 P.2d 963 (1940), *appeal dismissed*, 310 U.S. 610 (1940).

⁶ *Norton v. City of Pomona*, 5 Cal.2d 54, 53 P.2d 952 (1935).

provided that vested rights are not destroyed."⁷ Apparently the plaintiff's statutory cause of action was regarded as "vested."

The second case referred to was for wrongful death under the Public Liability Act.⁸ It was thus purely statutory in a double sense, for the wrongful death action was also of purely statutory origin.⁹ At the time of the fatal injury to plaintiff's decedent, plaintiff (the decedent's mother) was authorized to bring the action in her own name alone; but a subsequent amendment to the Code of Civil Procedure, which was in effect at the time of the trial, required the natural father (from whom the mother had been divorced for several years) to be joined as a party. His residence being unknown, the father had not been joined; and defendant city moved to dismiss on the basis of this absence of an alleged indispensable party. The denial of the motion by the trial court was approved on appeal. In the words of Mr. Justice Drapeau:

Respondent's right of action for the wrongful death of her minor child vested in her on the date of his death and it is not within the power of the Legislature to impair such vested right.¹⁰

It seems impossible, on a purely doctrinal level, to reconcile these last cited cases with the decisions previously discussed in which statutory causes of action were held to be subject to elimination at any time by retrospective legislation. The absence of express reference in the opinions to the earlier line of authority might even suggest that the judicial classification of statutory rights as "vested" in the later cases was inadvertent.¹¹ A more plausible explanation is that the courts were convinced that the kinds of causes of action involved in the later cases represented sufficiently significant interests of the respective plaintiffs that they deserved judicial protection against legislative annulment. Although little support for this analysis is found in the written opinions cited, it is consistent with the view that the retrospective legislative policy being invoked was manifestly of subordinate importance in a comparative balancing of the interests at stake.¹² Undoubtedly, the courts were influenced also by the unanimity with which common law causes of action have been treated as "vested" interests beyond the scope of legislative impairment,¹³ for the analogy between a common law negligence action and a negligence action grounded upon the Public Liability Act, for example, is a demonstrably close one.

In view of the preceding analysis, certain preliminary conclusions may be attempted.

⁷ *Id.* at 66, 53 P.2d at 957. For dictum to the same effect, implying that an accrued cause of action under the Public Liability Act is a "vested" interest, see *Thompson v. County of Los Angeles*, 140 Cal. App. 73, 35 P.2d 185 (1934).

⁸ *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868 (1952).

⁹ *Cf. Krause v. Rarity*, 210 Cal. 644, 293 Pac. 62 (1930).

¹⁰ *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 747, 243 P.2d 868, 872 (1952).

That this statement was not inadvertent but deliberate appears to be supported by the fact that respondent's brief on appeal in this case, at page 15, asserts without avail the rule that purely statutory rights may be eliminated by subsequent legislation.

¹¹ *But cf.* note 10 *supra*.

¹² Several commentators, after studying the relevant decisions, have reached the conclusion that the validity of retrospective legislation is ordinarily determined by a judicial assessment of the respective importance and strength of the public interest to be served by the statute, as contrasted with the degree of unfairness occasioned to the private interests affected thereby. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

¹³ Cases cited *infra* notes 19-24.

There would appear to be no constitutional infirmity in legislation which eliminates retrospectively (and according to some rational scheme which comports with the constitutional prohibitions against arbitrary discriminations) various types of newly recognized infra-moratorium causes of action. By definition, all such causes of action accrued during the period of the two-year statutory moratorium established and effective on September 15, 1961. The legislation establishing this moratorium expressly declared that such a cause of action could be maintained after the moratorium had terminated "if and only if . . . the bringing of the action . . . is not barred by any other provision of law enacted subsequent to the enactment of this act."¹⁴ Thus, in effect, the Legislature reserved the right to change the law in the future even to the point of destroying any causes of action arising during the moratorium period. Accordingly, it seems reasonably certain that any such cause of action would not be regarded as a "vested" one protected against impairment by constitutional limitations.

It is exceedingly doubtful, however, whether the Legislature could constitutionally impair or destroy retrospectively most other tort causes of action previously accrued. To be sure, a few statutory liabilities of public entities would appear to be of purely statutory creation (such as the liability created by the mob violence statute)¹⁵ and, hence, possibly within the power of the Legislature to abolish retrospectively. Most of the governmental tort liabilities embodied in statutory form, however, are more accurately characterized as statutory waivers of sovereign immunity. The Legislature, by enacting such statutes, simply made applicable to public entities substantially the same rules of tort law as were applicable to private persons in the factual circumstances envisaged by the legislation.¹⁶ In this sense, then, liability under such statutory provisions may be regarded as not "purely" statutory in origin, and the cases discussed above¹⁷ which recognize that the constitution precludes retrospective elimination of accrued statutory claims would seem to be applicable. It is believed to be unlikely, in other words, that the courts would here observe any distinction for constitutional purposes between statutory and common law claims.

It might be argued that newly recognized interim period causes of action are subject to legislative abrogation, just as are newly recognized causes of action which accrue during the moratorium period. Although the moratorium legislation contains language expressly purporting to reserve the Legislature's right to abrogate these interim claims,¹⁸ such reservation is clearly retrospective as to claims which accrued before September 15, 1961, the effective date of the moratorium act. Since it

¹⁴ Cal. Stat. 1961, ch. 1404, § 4, p. 3210. See *Thelander v. Superior Court*, 58 Cal.2d —, 26 Cal. Rptr. 643, 376 P.2d 571 (1962).

¹⁵ See CAL. GOV'T. CODE § 50140, discussed in the text pp. 72-73 *supra*. Other "purely" statutory liabilities are illustrated by the livestock indemnity statute, CAL. AGRIC. CODE § 439.55, discussed in the text, pp. 73-74 *supra*, and the statutory authorization for payment of damages to persons erroneously convicted of a felony, CAL. PENAL CODE §§ 4900-4906 discussed in the text, pp. 74-75 *supra*.

¹⁶ See, e.g., *American Can Co. v. City & County of San Francisco*, 202 Cal. App.2d —, —, 21 Cal. Rptr. 33, 37 (1962) (stating that the purpose of the Public Liability Act "was not to impose additional burdens on a governmental agency as compared to any other defendant in a tort action, but was to remove the immunity which had previously absolved the local agencies of any liability whatever").

¹⁷ See cases cited *supra*, notes 1-10, and related text.

¹⁸ The moratorium legislation, cited *supra* note 14, in terms is applicable as a reservation of the Legislature's right to change the law with respect to "any cause of action which arose on or after February 27, 1961, and before the 91st day after the final adjournment of the 1963 Regular Session"

is hardly conceivable that the reservation under these circumstances could confer any greater authority upon the Legislature than would be present without it, the retrospective elimination of these newly recognized interim period claims would appear to demand independent constitutional justification. Although it might be possible to contend that retrospectivity back to the effective date of the *Muskopf* decision should be permitted in the interest of uniformity of policy and simplicity of administration of claims, little support for any such contention has been found in the cases.¹⁹ Accordingly, newly recognized interim claims would probably be favored with the same constitutional protections which surround previously recognized causes of action accruing during the same interim period.

Subject to certain qualifications to be discussed, therefore, it would seem to follow that causes of action (whether recognized by statute or grounded in common law doctrine) accruing before September 15, 1961, may not be validly abolished in connection with enactment of a general legislative program relating to governmental tort liability. In view of the position previously taken—that the courts probably would not here distinguish between statutory and common law claims—it is worthy of note that the decisions appear to uniformly invoke the classification of “vested rights” when considering the validity of retrospective application of statutory changes to previously accrued common law causes of action.²⁰

The substantive law applicable to personal injuries arising from negligent automobile driving, for example, has been held to be fixed or “vested” as of the time of the injury, so that the cause of action is unaffected by subsequent legislation, such as a statutory change from negligence to wilful misconduct as the basis of liability,²¹ or a statutory change in the applicable speed law in effect at the time of the accident.²² The general rule, where common law causes of action are concerned, seems to be accurately epitomized in a statement to the effect that the Legislature has no constitutional power to “cut off the right to prosecute an action which is already pending,” since to do so would amount to “absolutely cutting off a property right.”²³ That there might be no mistake on the point, the district court of appeal in one case, after articulating the same view, pointedly announced that “the principles herein discussed are applicable alike to cases of tort or

¹⁹ Although the Supreme Court uses broad language in *Thelander v. Superior Court*, *supra* note 14, suggesting that the Legislature may validly make governmental immunity applicable to *any* causes of action subject to the moratorium statute, it is not clear from the opinion itself whether the claim there in litigation accrued before or after the effective date of the 1961 moratorium legislation. In addition, the court's attention was not directed specifically to the constitutional problems with which the present analysis is concerned.

²⁰ In addition to the cases cited *infra*, notes 20-21, see *Rosefield Packing Co. v. Superior Court*, 4 Cal.2d 120, 47 P.2d 716 (1935); *Rossi v. Caire*, 186 Cal. 544, 199 Pac. 1042 (1921); *Crim v. City & County of San Francisco*, 152 Cal. 279, 92 Pac. 640 (1907); *Masonic Mines Ass'n v. Superior Court*, 136 Cal. App. 298, 28 P.2d 691 (1934); *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.2d 673 (1933).

²¹ *Callet v. Alioto*, 210 Cal. 65, 290 Pac. 438 (1930). See also *Krause v. Rarity*, 210 Cal. 644, 293 Pac. 62 (1930).

²² *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082 (1909). *Cf. Morris v. Pacific Elec. Ry.*, 2 Cal.2d 764, 43 P.2d 276 (1935).

²³ *Coleman v. Superior Court*, 135 Cal. App. 74, 78, 26 P.2d 673, 675 (1933). See also, to the same effect, *Krause v. Rarity*, 210 Cal. 644, 653, 293 Pac. 62, 66 (1930) (describing a common law negligence cause of action as a “vested right,” and declaring that in such a case, “upon the wrongful infliction of the injury a vested right accrues to the party injured freed from any disturbance by subsequent legislative enactment”).

actions arising *ex delicto* as well as to those sounding in contract.”²⁴ The fact that the defendant is a public entity, it should be noted, apparently makes no difference in result, for the constitutionally “vested” nature of a common law cause of action has been squarely affirmed in such cases.²⁵

The general principle seemingly supported by the case law here reviewed—that retrospective elimination of previously accrued tort claims, whether statutory or common law in origin, would be of doubtful constitutionality—does not necessarily dispose of the problem under consideration. Attention also should be given to possible special limitations upon the general conclusion thus expressed, as well as to possible alternative methods whereby a legislative policy to eliminate previously accrued claims might be accomplished at least in part.

First, there may be a feasible basis for distinguishing between newly recognized tort causes of action which accrued prior to the effective date of the *Muskopf* decision and those which accrued thereafter. Most of the commentators on the problem of retrospective legislation have recognized that the “vested rights” rationale is simply a doctrinal formulation employed by courts to support decisions grounded on other more pragmatic considerations.¹ Among considerations usually identified as relevant, the element of action in reliance is often mentioned. Where a person has made commitments or engaged in a change of position in reliance on existing law, only to be confronted later on with a newly formulated rule of law which operates to his detriment and which he had no opportunity to anticipate or guard against, sound public policy ordinarily will favor implementation of his reasonable expectations and mitigation of the detrimental consequences of the “surprise” change in the law.² As to common law tort causes of action arising prior to *Muskopf*, the element of reliance is practically non-existent so far as retroactive abolition of such causes is concerned. Not only is reliance generally at a minimum where torts are concerned,³ but abolition would merely reinforce the then reasonable expectation, thoroughly grounded in the case law, that no such causes of action existed. (It is to be understood, of course, that the present discussion relates only to newly recognized claims for which public entities were immune before *Muskopf*—“newly recognized pre-*Muskopf* causes of action”—and does not relate to either statutory or common law liabilities then recognized to exist.)

Perhaps of equal importance in the judicial equation is the weighing of the public interest to be served by the retrospective statute against

²⁴ *James v. Oakland Traction Co.*, 10 Cal. App. 785, 798, 103 Pac. 1082, 1088 (1909).

²⁵ *Crim v. City & County of San Francisco*, 152 Cal. 279, 92 Pac. 640 (1907) (holding that common law nuisance action against city could not be eliminated retrospectively by adoption of new claim presentation requirement).

¹ See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 251 (1960); Smith, *Retroactive Laws and Vested Rights* (Part I), 5 TEXAS L. REV. 231, 245-48 (1927).

² See Brown, *Vested Rights and the Portal-to-Portal Act*, 46 MICH. L. REV. 723, 753 (1948), suggesting that the test of constitutionality is whether the statute defeats claims based on the reasonable expectations of the parties at the time the legal transactions occurred; Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30, 37-38 (1939), suggesting that the common characteristic of cases invalidating retroactive legislation “is the element of surprise.” See also Smith, *Retroactive Laws and Vested Rights* (Part II), 6 TEXAS L. REV. 409, 418-19 (1928).

³ Cf. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U. L. REV. 540, 567 (1956).

the unfairness to private interests which will result from giving it retrospective effect.⁴ In this view, for example, "windfall" benefits are entitled to relatively little judicial solicitude;⁵ and several significant federal cases have concluded that such windfalls may be retrospectively eliminated without violence to constitutional principles.⁶ Newly recognized pre-*Muskopf* causes of action, it may be plausibly argued, are much like windfalls since a right of action, not believed to exist at the time of the injury, suddenly arose thereafter. Causes arising after *Muskopf*, however, do not so snugly fit within the windfall rationale; and, since many such causes will have been acted upon by engagement of counsel, filing of formal claims, institution of law suits, and conduct of discovery proceedings,⁷ the element of action in reliance cannot be said to be wholly absent.

It would seem to follow from the foregoing analysis that there is a substantially greater possibility that the courts would sustain a retrospective elimination of pre-*Muskopf* tort claims for which public entities were then immune, than is the case with respect to post-*Muskopf* claims. A principal difficulty with this approach to legislative drafting, however, is the fact that any general elimination of newly recognized pre-*Muskopf* causes of action necessarily would eliminate the claim of plaintiff *Muskopf* herself, a result which would appear to be particularly unfair in view of the substantial time and effort expended by this litigant in the successful attempt to overthrow the immunity doctrine. Perhaps this difficulty could be surmounted by carefully drafting general legislative language designed to preserve *Muskopf*'s right of action together with others then pending in litigation, relying upon the uniqueness of the situation and the reasonableness of the exception to save it from being invalidated as discriminatory or special legislation. Another difficulty, however, would be that such retrospective voiding of claims would apparently be permissible only with respect to common law causes of action for which public entities were immune prior to *Muskopf*. It would not be effective, if the foregoing analysis of the case law is accurate, with respect to accrued statutory causes of action (e.g., causes founded on the Public Liability Act) nor as to causes of action founded upon nuisance or "proprietary" negligence, for such causes would probably be regarded as fully "vested" before *Muskopf*. Hence, any legislative modifications curtailing the latter types of

⁴ See *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 96-99 (2d Cir. 1953) (concurring opinion of Learned Hand, J.); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 727 (1960), concluding that "the two major factors to be weighed in determining the validity of a retroactive statute are the strength of the public interest it serves, and the unfairness created by its retroactive operation"; Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 226 (1960).

⁵ See *Brown, Vested Rights and the Portal-to-Portal Act*, 46 MICH. L. REV. 723 (1948).

⁶ See *Moss v. Hawaiian Dredging Co.*, 187 F.2d 442 (9th Cir. 1951) (sustaining validity of federal "Overtime-on-Overtime" Act, which retroactively abrogated claims for overtime pay under wage law as previously interpreted by Supreme Court decisions); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (sustaining constitutionality of federal "Portal-to-Portal" Act, which retroactively abrogated wage claims under federal wage law as construed by Supreme Court). Numerous other similar cases are collected in the court's opinion in *Moss v. Hawaiian Dredging Co.*, *supra*. But cf. *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

⁷ Such preliminary preparations for litigation were held by the California Supreme Court to be perfectly permissible notwithstanding the pendency of the statutory moratorium imposed by CAL. CIV. CODE § 22.3 upon the trial of such cases. See *Thelander v. Superior Court*, 58 Cal.2d —, 26 Cal. Rptr. 643, 376 P.2d 571 (1962); *Corning Hosp. Dist. v. Superior Court*, 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325 (1962).

claims could not be made effective with respect to pre-*Muskopf* injuries. As a consequence, it would seem that any legislative program which incorporates, either in whole or in part, a substantive diminution of governmental tort liability below the level which obtained before the *Muskopf* decision may be given prospective effect, but constitutionally may not be applied, in the interest of uniformity, to all previously accrued claims.

Second, consideration should be given to the possibilities inherent in the general rule that procedural changes ordinarily may be given retrospective effect without violence to constitutional rights.⁸ To be sure, the courts have often insisted that this rule cannot be permitted to operate in such a way as to destroy vested rights.⁹ It has been authoritatively declared, for example, that "the legislature may not, under the pretense of regulating procedure or rules of evidence, deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore."¹⁰ However, some room for legislative action would still appear to be available notwithstanding the comprehensiveness of the quoted language.

It will be recalled that one of the theoretical reasons underlying the rule of governmental immunity is that there is no right to sue a governmental entity without its consent.¹¹ This doctrine was not discarded by the *Muskopf* decision, and in fact was expressly stated to still be in effect as part of the law of California.¹² Only the rule of substantive immunity was abrogated by the Supreme Court in that case. Accordingly, the possibility exists that the Legislature could effectively control liabilities in tort arising before the enactment of the statute purporting to do so, by the simple expedient of revoking the State's consent that public entities be sued except in cases expressly permitted by law. Such a statutory provision, it will be noted, would in theory recognize the continued existence of the substantive causes of action in question, but would simply deny to them any judicial remedy.

The decision of the Supreme Court in the case of *Pacific Gas & Electric Co. v. State*,¹³ decided in 1931, lends support to the suggested device. The plaintiff had commenced an action on implied contract against the State, relying upon an 1893 statute in which the State consented to be sued on claims "on contract or for negligence." The State contended that this consent statute did not extend to implied contracts, but included only express contracts. The trial court sustained the State's position, and dismissed the action on demurrer. While the plaintiff's appeal was pending, the Legislature (in 1929) enacted a new measure, repealing the 1893 statute and consenting, so far as material to the particular problem, solely to be sued on *express* contract. The

⁸ *Hogan v. Ingold*, 38 Cal.2d 802, 243 P.2d 1 (1952); *Feckenschner v. Gamble*, 12 Cal.2d 482, 85 P.2d 835 (1938); *County of San Bernardino v. Industrial Acc. Comm'n*, 217 Cal. 618, 20 P.2d 673 (1933); *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 283 Pac. 298 (1929).

⁹ See *Rosefield Packing Co. v. Superior Court*, 4 Cal.2d 120, 47 P.2d 716 (1935), relying upon *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.2d 673 (1933), for proposition that procedural provision requiring dismissal of actions not timely brought to trial cannot be applied to wipe out previously accrued causes of action until a reasonable time for compliance with the new requirements has elapsed. Cf. other cases cited *supra*, p. 531, note 20.

¹⁰ *Morris v. Pacific Elec. Ry.*, 2 Cal.2d 764, 768, 43 P.2d 276, 277 (1935).

¹¹ See text, pp. 17-33 *supra*.

¹² See *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

¹³ 214 Cal. 369, 6 P.2d 78 (1931).

State contended in the Supreme Court that this 1929 statute had withdrawn the State's consent to be sued on implied contract, thereby requiring an affirmance of the dismissal of the case without regard for the proper construction of the repealed 1893 statute. The Supreme Court expressly concurred in the validity of this contention, stating that it was a correct rule of law "that the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal."¹⁴ Only because the Legislature had then changed its mind and subsequently, before decision of the appeal, had again authorized suits on implied contract, was the action held to continue and require decision on the merits.

Support for this view also is found in the decision of the United States Supreme Court in the case of *Lynch v. United States*,¹⁵ decided by a unanimous opinion written by Mr. Justice Brandeis in 1934. Plaintiffs in this litigation had sued to cover sums due them as beneficiaries under term policies of War Risk Insurance issued during World War I. The government's defense was that subsequent to the accrual of plaintiffs' claim, consent of the United States to be sued on such policies had been abolished by a 1933 statute expressly repealing all laws pertaining to such term policies. The Court squarely held that insofar as the Congress had attempted to abrogate its contractual obligations on the policies in question, the 1933 statute constituted an unconstitutional taking of property without due process of law. However, this holding only went to the plaintiffs' substantive rights. As to their remedies, the Court pointed out that:

The rule that the United States may not be sued without its consent is all embracing. . . . Although consent to sue was . . . given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not a grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. . . . The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. . . . The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.¹⁶

In conclusion, the Court pointed out that even the withdrawal of all remedies, legal or administrative, would be distinguishable from a repudiation of the underlying contractual obligation. A later decision contains the pertinent remark of Mr. Chief Justice Hughes, explaining the *Lynch* case by declaring:

The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no

¹⁴ *Id.* at 373, 6 P.2d at 80.

¹⁵ 292 U.S. 571 (1934).

¹⁶ *Id.* at 581-82.

duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.¹⁷

A legitimate inference from the cited decisions, of course, is that the Legislature could simply eliminate the right to sue public entities on any previously accrued causes of action which it deemed undesirable to expose to adjudication. By the same reasoning, in order to achieve uniformity in the application of its legislative program for disposition of tort liabilities of public entities, the Legislature could apparently utilize the simple expedient of withdrawing its consent to being sued on any previously accrued causes of action (in effect denying the courts any jurisdiction in actions founded thereon) except to the extent that the defendant entity would be liable under the rules of tort liability declared applicable prospectively.¹⁸ However, one cannot predict with full assurance that techniques such as these would be given effect. In the *Muskopf* decision, there are intimations that the right of the sovereign to withhold its consent to be sued may also be in judicial disfavor with the California Supreme Court, at least insofar as it may constitute a barrier to governmental responsibility in tort.¹⁹ Moreover, cutting off the judicial remedy by withdrawing consent to be sued is not unlike the creation of a retrospective procedural requirement which, in practical effect, likewise cuts off the right to litigate a previously accrued claim. Yet, as we have already seen, the courts have refused to permit such requirements to operate in derogation of accrued causes of action, even as against public entities.²⁰ By analogy, the same judicial disposition might attend a withdrawal of consent to be sued. Such withdrawal, no matter how artfully formulated to preserve the theoretical continued recognition of the substantive underlying cause of action, would in most cases amount to a practical repudiation of that underlying obligation, for public entities cannot be expected to voluntarily accept responsibility for damage claims which are unenforceable in the courts.

A suggestion by Mr. Justice Brandeis may point the way to a feasible solution of the difficulty. In the *Lynch* case, he amplifies his conclusion that elimination of all remedies, judicial or administrative, would not necessarily imply repudiation of the underlying obligation by pointing out that "So long as the . . . obligation is recognized, Congress may direct its fulfillment without the interposition of either a court or an administrative body."²¹ In line with this thought, the Legislature of California might accompany its withdrawal of consent to be sued (*i.e.*, abolition of all judicial remedies) with the establishment of an express statutory duty upon the governing body of any public entity against which such judicially nonenforceable claims are asserted to consider and evaluate their merits, and to settle those which, in the absence of the withdrawal of judicial remedies, would have been actionable by payment of such sums as the governing body finds to be fair and

¹⁷ *Perry v. United States*, 294 U.S. 330, 354 (1935).

¹⁸ This approach to the drafting problem was actually utilized in the Portal-to-Portal Act, sustained in *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948).

¹⁹ See *Muskopf v. Corning Hosp. Dist.*, *supra* note 12, as analyzed in the text, pp. 14-15 *supra*.

²⁰ See cases cited *supra*, pp. 528-32, notes 3-25, and related text discussion.

²¹ *Lynch v. United States*, 292 U.S. 571, 582 (1934).

equitable.²² Additional procedural incidents to such duty also might be necessary in order to provide for the enforcement of any award made by the governing body, as well as to bring such award within the reach of any available insurance coverage and of procedures for funding of liabilities and distributing losses over periods of time. The principal value of the provision would lie in its recognition of the continued existence of the underlying liability as one to be determined conclusively by the governing body rather than by the courts.

Third, at least part of the legislative purpose to eliminate previously accrued causes of action might be achieved by devising substantial, but not insurmountable, procedural requirements applicable thereto. For example, it seems reasonably clear from the cases that the Legislature constitutionally could provide that all such previously accrued causes of action would be totally barred unless action thereon were commenced within a relatively short period of time following the enactment of the statutory bar.²³ A short prospective period of limitations of this type would probably reduce the volume of actions in some degree. Again, the Legislature might impose a requirement that the plaintiff post a substantial good faith undertaking to ensure payment of costs and expenses incurred by the defendant entity in the event the plaintiff did not prevail. Requirements of this nature have been sustained as merely procedural incidents which may thus be validly applied to previously accrued causes of action.²⁴ Such a device would presumably help to reduce the number of doubtful or unfounded actions which are prosecuted. Finally, there appears to be some room, the exact contours of which are not entirely clear, for the Legislature to prescribe specially restrictive rules of damages applicable to such previously accrued actions; for it has been held that "no one has a vested right in a measure of damages."²⁵

Summary

The general conclusions reached on the basis of the preceding analysis may be summarized as follows:

The Legislature appears to have ample constitutional authority to alter or eliminate common law tort liabilities of public entities, and to

²² A possible implication that some such alternative remedy may be constitutionally essential is found in the language of the Supreme Court decisions sustaining the validity of statutes abrogating judicial remedies and substituting therefor a prescribed alternative remedy. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 342-43 (1937); *Burrill v. Locomobile Co.*, 258 U.S. 34, 38 (1922). See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 439, 439 (1934) (dictum treating a "denial of means to enforce" contractual obligations as tantamount to unconstitutional "repudiation" of them). In the language quoted from Mr. Justice Brandeis' opinion in *Lynch v. United States*, *supra* note 21, and related text, he very likely had in mind the prevalence of the "private bill" technique under which Congress legislatively settles unadjudicable claims against the United States.

²³ See, e.g., *Baldwin v. City of San Diego*, 195 Cal. App.2d 236, 15 Cal. Rptr. 576 (1961), and cases there cited; *Coleman v. Superior Court*, 135 Cal. App. 74, 26 P.2d 673 (1933); *Rhoda v. County of Alameda*, 134 Cal. App. 726, 26 P.2d 691 (1933).

²⁴ *Hogan v. Ingold*, 38 Cal.2d 802, 243 P.2d 1 (1952) (sustaining validity of provision requiring stockholder in derivative suit to post undertaking for costs, as applied to cause of action which accrued before provision was enacted).

²⁵ *Feckenscher v. Gamble*, 12 Cal.2d 482, 85 P.2d 885 (1933) (sustaining validity of legislative change, effective after cause of action for fraud had accrued, substituting "out-of-pocket" basis for computation of damages for previous "benefit-of-bargain" rule, and thereby resulting in recovery of \$4,000 less damages by plaintiff). To the same effect, see *Tulley v. Tranor*, 53 Cal. 274 (1878) (sustaining validity of retrospective application of statutory change in measure of damages for conversion, where result was to substantially reduce the amount of plaintiff's recovery). Cf. *United States v. Standard Oil Co.*, 21 F.Supp. 645 (S.D. Cal. 1937), *aff'd*, 107 F.2d 402 (9th Cir. 1940); *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 233 Pac. 298 (1929).

create new statutory liabilities or modify or eliminate existing ones, when such legislation is applied prospectively only.

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

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

The Legislature apparently could not constitutionally abolish or curtail the range or application of previously recognized statutory or common law causes of action which arose between the date of the *Muskopf* decision and the effective date of the abolishing or curtailing legislation.

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

A possibility exists that, without attempting to curtail or abrogate the substantive obligations of tort liabilities previously accrued, the Legislature could constitutionally withdraw its statutory consent to be sued thereon, thus eliminating only the judicial remedies for enforcement of such liabilities. Since there are some indications that total abrogation of *all* remedies would meet with judicial disfavor, such withdrawal of consent to be sued would be more likely to be regarded as constitutional if accompanied by a provision imposing upon the affected governmental entities an affirmative duty, together with adequate power, to consider and settle by administrative action any claims as to which judicial remedies are foreclosed.

Some of the objectives which would be involved in any legislative attempt to retrospectively eliminate some or all previously accrued causes of action appear to be susceptible of realization through the imposition of procedural requirements, such as a short statute of limitations, a requirement that the plaintiff post a substantial undertaking for costs, and prescription of special rules governing damages.

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

This table includes all of the *California* constitutional and statutory provisions cited in this study. City and county charter provisions are listed separately from citations to session laws and codified sections.

CONSTITUTION AND CODES

CONSTITUTION

Art. I, Sec. 8 (1849).....	102
Art. I, Sec. 14.....	13, 27, 89, 90, 102, 105, 106, 107, 186, 226, 233, 436
Art. IV, Sec. 24.....	50
Art. IV, Sec. 25.....	60
Art. IV, Sec. 31.....	17, 19, 65, 521
Art. VI, Sec. 1a.....	322
Art. VI, Sec. 1b.....	322, 323
Art. IX, Sec. 9.....	519
Art. XI, Sec. 6 (1959).....	127
Art. XI, Sec. 7½.....	214, 241
Art. XI, Sec. 18.....	210
Art. XII, Sec. 23.....	85
Art. XII, Sec. 23a.....	85
Art. XX, Sec. 6.....	14

AGRICULTURAL CODE

86 (a).....	22
92.....	207
115.....	75
129.....	113
139.5.....	113
153.....	75
153.2.....	75, 76
160.....	75
200.....	113
207.....	75
207.7.....	75
239.....	75, 76
240.....	76
264.....	75, 76
264.1.....	76
276.2.....	113
276.4.....	75
276.5.....	75
311.1.....	75
324.....	113
439.55.....	73, 74, 274, 530
439.56.....	74
439.80.....	74
442.....	113
740.....	201
748.....	148, 214
762.6.....	113
783.....	113
841.1.....	113
872 (a).....	113
897.....	113
994.....	113
1012 (a).....	113
1098.2.....	113
1106 (b).....	113
1117.1.....	113
1149.....	113
1267.....	113
1300.10.....	201
1300.15.....	323
1300.19 (n).....	113
1300.21.....	148
2022.....	201
2091.....	113
2185.....	148
2916.....	148
3407.....	148
4200.....	201
4243.....	114
5025.....	201
5084.....	148, 214
5300.....	201
5312.....	148, 214
5400.....	201
5406.....	148, 214
5571.....	148

BUSINESS AND PROFESSIONS CODE

500-4905 (Div. 2).....	68
1000.....	69
1200 <i>et seq.</i>	68
1226.....	118
1600 <i>et seq.</i>	68
2000.....	68
2144.....	150, 158, 383
2550 <i>et seq.</i>	68
2600 <i>et seq.</i>	68
2650.....	68
2700 <i>et seq.</i>	68
2788.....	118
2840 <i>et seq.</i>	68
2883.....	118
2900 <i>et seq.</i>	69
3000 <i>et seq.</i>	68
4000 <i>et seq.</i>	68
4012.....	114
4500 <i>et seq.</i>	69
4532.....	118
4800 <i>et seq.</i>	68
4809.5.....	118
6509.....	114
7607.....	114
9533.5.....	114
19200.....	114
19433.....	114
21716.....	114
21880.....	114
21930.....	114
25753.....	118
36000.....	69

CIVIL CODE

18.....	363
22.3.....	12, 267, 515, 522, 523, 533
43.5.....	517
48a.....	259
1714.5.....	153, 154, 159, 160, 161, 162, 164, 165, 167, 168, 179, 180, 181, 375
1714.6.....	168
2332.....	49
3342.....	155
3479.....	227
3482.....	229

CODE OF CIVIL PROCEDURE

340.....	326
352 (3).....	423
389.....	373
583.....	528
830-836.....	258
875.....	372
875-876-877-878-879-880.....	324
875 <i>et seq.</i>	372
1095.....	67
1238-1238.5.....	85
1242.....	111
1242.5.....	110
1248 (6).....	83
1248a.....	83
1335.....	174, 192
1378.....	174, 192
1379.....	174, 192
1963 (4).....	367

EDUCATION CODE

903	15, 27, 40, 41, 42, 130, 151, 152, 154, 235, 268, 311, 333, 486, 505	
904	284, 285,	302
904(b)		213
1041	147, 151,	152
1042	146, 147,	151
1044	154, 294, 295,	409
1045	154, 295,	297
1953		130
8112		295
8151-8156		486
13007.1		313
13101-13570		147
13551	146, 147,	153
13557		504
13580-13756		147
15511-15516		42
15512	129, 151,	152
15513	129,	152
15514	129,	152
15515	129,	152
15516	129, 136,	152
16638		295
16645.25		295
16651-16664	486,	488
16959(b)		24
20751		218
22254		295
27151-27165		216
27575		22
27872		22
28111		22
31801	153,	154

FISH AND GAME CODE

1013		97
1121		97
1300-1375		488
6021		114
7702		114

GOVERNMENT CODE

2		137
600-624		17
600-625		313
600-655		78
600-730		196
600 <i>et seq.</i>		19
624		295
640-655		17
641		314
641-654		27
643		326
644		326
646		326
647		258
700		31
700-720		17
700-730 (Tit. 1, Div. 3.5, Ch. 2)		64
710	31,	314
715		314
716	326,	327
718		208
719	31,	326
800-803		196
801	70,	312
803	70,	312
1281	294, 383,	428
1402		191
1407		191
1408	191,	404
1458		155
1480		300
1480-1481		299
1481	155,	321
1481.1		321
1504		301
1550	298, 299,	300, 301
1553		298
1661	299,	321

1652		299
1950		136
1950-1959 (Tit. 1, Div. 4, Ch. 6, Art. 1)		43
1950-2002.5 (Tit. 1, Div. 4, Ch. 6)		136
1951		198
1952		43
1953	70, 120, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 139, 152, 162, 362, 372, 373, 374	122, 136, 123,
1953(e)		364, 373
1953.5	70, 154,	155, 162
1953.6	121, 131,	133,
1954	134, 135, 136, 138, 139, 162, 418 43, 70, 136, 137, 138, 139, 147, 151, 152, 162, 418	418
1955		70,
1956	121, 155, 156, 157, 162, 172, 437	409
1956.5	121, 157, 294, 295,	296
1957	294, 295,	158
2000		157,
2001		43
2002		259, 294,
2002.5	68, 313, 383, 401, 405,	313
3100		259
3100		428
6305		153
3101		97
6500-6513		153
6500-6578		99, 241
6506		214
6507		293
6507		241
6508	22, 241,	293, 323
9604	61, 137,	144
9605		152
9606		525, 526
11156		299
12301		298
12401		298
13003		298
13008		298
13075		299
13401		298
14003		298
16041 <i>et seq.</i>		20
23004 (a)		21
23006		17
24000		133
24150	298, 321,	421
24350		134
25208.5		488
25210.1-25210.98		216
25210.4		292
25210.4(c)		488
25210.50-25210.57		459
25210.60-25210.68		488
25351		488
25351.3		488
25353		488
25550-25557		488
25558-25562		488
25660-25662		488
28020		289
28151		134
29909		291
29916		291
31469.3(b)		474
31470.4		474, 475
32204		475
34501		21
36513		299, 421
37209		299, 421
38409-38414		97
38607		299
38611	459, 464,	474
39560(b)		473
39586	64, 65,	461
43068		213
43610		291
43720-43747		213
50001		72
50140	15, 72, 274, 405, 451,	530
50140-50145		72
50142		73
50170-50175		213, 284, 302

51300-51800	223
53021	476
53023	478
53050	64, 473
53050 (b)	44
53050 (c)	43, 56, 334
530151	15,
41, 42, 43, 44, 49, 54, 55, 56, 57,	
58, 59, 63, 122, 123, 126, 127, 139,	
235, 268, 311, 333, 334, 339, 351,	
363, 405, 460, 461, 486	
53056	295
53057	64, 65, 295, 307, 461, 473
53200.3	320
53800-53855	290
5400	178
54002	177, 178, 375, 493, 494
54150-54161	88
54300-54700	290
54462	295
55600-55605	476
55606-55609	476
55632	476
55634	477, 478
58300-58308	286
58306-58307	286
58950-58965	287
58950-58980	286
61000-61934	292
61245	299
61600 (d)	459
61600 (e)	487, 488
61600 (h)	434
61610	80
61612	24
61627	70, 138
61633	66, 434, 461, 487
61737.04	299
61742-61749	303
61752	290
61850-61881	286
61890	286
69390-70148	321
68206	321
68540	322
68540 (b)	321
68540.5	322
68541	322
68542	322
68543	322
68703	322
69947	134
71220	321
71266	134

HARBORS AND NAVIGATION CODE

651 (f), (j)	38
661	38
1906	200, 202
3354	295
5700-5784	216
5900.1	22
6072	22
6079	207
6090-6092	207
6093	207
6093.4	207
6292	22
6362	212
6406	201
6612	24
6892	22
6901.1	97
6942	212
7000-7340	488
7073	299
7142	24
7262	212

HEALTH AND SAFETY CODE

936 (b)	24
1400-1422	402
1405	402
1411	402
1415	402
1417	402
1422	402
1440-1475	386
1662	114
2200-2398	32
2270 (e)	98
2270 (f)	114
2300	207
2302.1	212
2853 (e)	98
2853 (f)	22
2853 (g)	114
2871	212
3114	400
4008	114
4050-4055	488, 489, 494
4100-4163	32
4100-4165.7	290
4170-4197	32
4188	212
4471	507
4600-4639	216
4614.1-4614.15	32
4659-4671	31
4700 <i>et seq.</i>	89
4730	322
4733	322
4738	22
4850-4856	286
4860-4926	216
4891	206
4927	286
4950-4997	290
5500-5656	31
5990 (b)	28
5998	80
6400 <i>et seq.</i>	89
6511	22
6518	92
6523.2	114
6695	212
6697	207
6935	21
8890-9677	290
8960	22
8981	212
13050	475
13051	476
13052	476
13052.5	476, 477
13053	476
13054	476
13055	473
13100-13169	459
13109	114
13814	201
13821	459
13852 (a)	22
13853-13854	474
13855	476, 478
13867	473
13879	476
13941	476
13942	476
13970	286
14010	459
14092 (a)	22
14093-14094	474
14095	476, 478
14106	473
14201	476
14202	459, 476
14325-14375	32

14400-14598.5	32
14406	476
14408	476
14444.1	474
14455.5	476, 478
14455.8	295, 474
14462.5	473
14480	206
14600-14791	32
14690	476
14704	212
14825-14860	474
14875 (b)	473
14875 (e)	473
18897	507
18897.2	507
18897.4	508
20000-20352	290, 292
20025	201
20077	22
20111	212
20300-20349	216
24100	506
24100.1	506, 507
24101.4	506, 507, 510
24155-24159	507
24198-24341	290
24199	201
24209	208
24212 (b)	24
24346.1	201
24354 (b)	25
24370.1	212
25820	114
26327	114
26548	114
28012	114
28703	114
32000-32492	14
32121 (b)	14, 24
32125	381
32202	206
32203	206, 212
33200-33333	216
33261	200
33262 (a)	22
33979	200, 204
34310	200, 202
34311 (a)	22
34321	207-208
34350	207-208
35493	200
INSURANCE CODE	
2071	469, 482
6010	469
LABOR CODE	
1174 (b)	114
1302	114
2422	114
3000	321
3201-6002 (Div. 4)	294
3211.92	153, 159, 161
3211.93	153, 159
3211.93a	159
3300	101
3351	101, 166
3352	101
3352.94	101
3601 (a)	164
3700-3703	297
3850-3863	163
4155	101
4351	165
4351-4386	101, 163
4352	165
4354.5	101
4458.5	454, 474
6314	114

MILITARY AND VETERANS CODE	
120	166
121	166
122	166
125	166
128	167
340	101
392	166, 167, 168
520	101
562	101
1190 (a)	24
1191	488
1500-1600 (Div. 7, Ch. 1)	77, 159
1501	159
1502.5	159
1505	153, 159, 160, 167
1505.5	159
1518.3	159
1575	167
1580	159, 167
1585	77
1586	78
1587	77, 160, 161, 164, 167, 383
1591	160, 162, 163
1591 (a)	165
1591 (b)	160, 164, 165, 166, 167
1599-1599.3	163

PENAL CODE	
142	407
147	416, 423
149	416
150	452, 454
404	73, 452
673	425, 426, 428
835	416
835a	416
836	406, 408, 410, 446
838	407
839	407
847	407, 408, 410
849	408
2000-2002	432
2035-2042	432
2045-2045.6	432
2046-2046.6	432
2048-2048.6	432
2054	432
2600-2604	423
2650	422
2652	416, 423, 425, 426, 428
2690	426, 428
2700	422
2760-2774	432
2766	422
2780-2792	432
4007	425
4011	264, 425, 426, 428
4011.5	264, 426, 428
4012	264, 426, 428, 429
4015	425
4019.5	264, 423, 425
4023	426, 428
4100-4135	432
4100.5	427
4125.1	422, 474
4200-4227	432
4900-4901	74
4900-4906	74, 257, 304, 405, 530
4902-4904	74
4904	75
5061	193
5062	193
5065	174, 193
6202	474

POLITICAL CODE	
688	20
1623	40, 151, 152
3464	59

PROBATE CODE

707 312

PUBLIC RESOURCES CODE

2208 114
 4000-4015 459
 4004 98, 295, 461
 4006 459, 464
 4006.6 113
 4008 474
 4009 474
 4010 454, 474
 4050 459, 464, 476
 4160 474
 5001-5092 488
 5120-5132 488
 5135-5138 488
 5157 488
 5301-5304 488
 5400-5428 31
 5431-5467 31
 5500-5595 286, 488
 5539(b) 28
 5545 212
 5545 21
 5662 28
 5718(b) 488
 5780-5787.4 22
 5782.5(a) 488
 5801-5882 186
 6002 187
 6201-6302 186
 6203 188
 6204 188
 6205 188
 6297 188
 7555 188
 7812 188
 9167-9169 300
 9255 22
 9364 212
 9404 208
 10018 459
 10409 299
 10410 300
 11201 201
 11202 459
 11206 114
 11270-11271 94
 11301 27
 11349 459
 12070-12086 285
 13000-13233 32

PUBLIC UTILITIES CODE

771 115
 1202 97
 1202.5 97
 1203 97
 6201-6302 79
 6294 95
 6296 306
 6297 95, 187
 7556 186
 7804 186
 7901 84
 10001-10060 85
 10101 92
 10102 92
 11936 299
 12702 28
 12801 127
 12808 92
 12816.5 488
 12891 207
 15968-15969 300
 16402 28
 16463 459, 488
 16466 92
 16574 208
 16641 206
 18000-18004 287
 21252 201

21634 85, 86
 21635 119
 22443 299
 22553(a) 28
 22907 212
 25702 28
 25703 80
 25805 92
 25841-25844 303
 28500 *et seq.* 300
 28951 29
 28953 80
 29123 212
 29230-29234 303

STREETS AND HIGHWAYS CODE

124 376
 526.2 98
 680 88, 89, 95, 187
 700-707.5 88
 700-711 187, 189
 941 175, 176, 375
 942.5 191, 192, 375
 943 176, 177, 178, 376
 944 178
 954 176, 177, 375
 969.5 175, 176
 1160-1197 216
 1550-1554 216
 1550.1-1550.3 216
 1806 176, 375
 5005 44, 126, 127
 5024(1) 307
 5640 44, 125,
 126, 127, 128, 181, 182, 183, 184
 5641 125, 126, 127, 128
 5820-5854 216
 8145(a) 22
 11127 200
 18000-18193 216
 18300-18404 217
 18600-18781 217
 19000-19312 290
 19130 32
 19131 22
 19271-19273 286
 24025 300
 25027 322
 25030 322
 25050(h) 22
 25071 322
 25101 299
 26084 299
 26113(a) 21
 27161 24
 27186 299
 27260-27261 95
 30058 23
 31500-31933 32
 31823 213
 32500-33550 216
 32501 200
 32801(a) 22
 32950.5 85
 33969 295
 35100-35707 32
 35400-35431 290

VEHICLE CODE

415 36
 650 37
 670 36, 37
 16451 295
 17000 36
 17001 15, 36, 38, 39, 40, 41, 131, 149,
 152, 153, 160, 166, 169, 177, 178,
 180, 186, 205, 235, 240, 268, 311,
 314, 405, 417, 434, 460, 470, 518
 17003 157, 295
 17004 39, 158, 162,
 166, 167, 256, 405, 433, 460, 470
 17004.5 478
 17150 38, 519

17150-17153	38
17151	420
17158	38, 158
21051	37
21053	39
21055	39, 460, 470
21056	39
21352	442
21354	442
21356	442

WATER CODE

2	144
1243	489, 494
1245-1248	97
1257	489, 494
5901	115
8502	173
8503	23, 173, 185
8535	174, 184, 185, 186, 375
8550	173
8576	172, 173, 174
8590 (d)	98
8605	173
8617	98
8617.5	88
8618	98
8645-8647	97
8750-8890	185
11590	88
11900-11925	488
12627.3	97
12641	98
12642	98
12655	99
12672	99
12677	99
12683	99
12686	99
12695	99
12705	99
12712	98
12751	98, 100
12828	98
12878-12878.45	216
13000	201
20513	203
20570	200, 203
21143	300
21146	300
22229	115
22431	94
22650-22651	27
22725	66, 70, 138, 141, 142, 143, 144, 194
22725-22732 (Div. 11, Pt. 5, Ch. 4, Art. 4)	143
22726	138, 142, 194
22727	60, 194
22730	67, 71, 143, 144, 194, 195, 196, 211
22731	71, 143, 144, 194, 195, 196, 197, 199
22732	294
23195	99
24250	208, 211
25652	206, 207
30561	289
31060	94
31080	28
31083	138, 194
31084	194
31085	194
31086	194
31087	194
31088	194
31089	71, 194, 195, 196, 199
31090	66, 71, 194, 196, 461, 487
31091-31096	213, 302
31120	459, 461

31150	99
31161	487, 488
31702	207
32850-32914	286
32910-32914	286
35150-35155.1	291
35404	115
35407	27
35603	94
35750	138, 141, 142, 144
35750-35757 (Div. 13, Pt. 5, Ch. 4)	144, 197
35751	138, 142
35755	67, 71, 143, 197
35756	71, 144, 197
35757	294
35875	99
39059	201
43152 (d)	115
43154	94
43700	27
44000	99
44400	208
47100-47157	285
47101	207
47180-47185	285
50152	60, 61, 62, 268, 333
50603	22, 59
51320-51349	285
51360-51365	285
51480	63, 206, 285
55000-55991	32
55000 <i>et seq.</i>	89
55377	95
55700	207
55930-55935	287
55955	286
56041	85
56041 (a)	22
56041 (d)	85
56060	85
56115	213
60200	138, 139
60202	66
60230	99
60230 (2)	28
60230 (8)	80
60230 (12)	115
60251	207
70000 <i>et seq.</i>	89
70093	27

WELFARE AND INSTITUTIONS CODE

166	193
166.1	193
166.4	174, 193
1015	193
1016	193
1019	174, 193
1760.4	474
5050.3	170
6000-6005 (Div. 6, Pt. 3, Ch. 1)	168
6002	168
6002.5	168
6003	168
6005	168, 171, 383
6610-6612 (Div. 6, Pt. 4, Ch. 1, Art. 3.5)	169
6610.2	170
6610.3	169, 170, 171, 383
6610.4	169
6610.5	169
6610.7	170
6610.9	171, 383
6611.9	171
6624	172, 383
7503	403

SESSION LAWS

Year	Chapter	Sec.	Year	Chapter	Sec.
1867-68	344		1933	345	1
1873-74	349		1933	924	2(2)
1880	63		1933	924	39
1880	63	5-11	1933	924	41
1880	63	18	1933	924	49
1883	49	37	1935	27	402
1883	49	376	1935	78	
1885	123		1935	285	15a
1885	153	23	1937	140	2
1885	158		1939	73	2(2)
1891	161	5	1939	73	2(10)
1893	45		1939	89	45(a)
1895	201		1939	89	45(g)
1895	201	21	1939	151	1
1903	238		1939	589	15a
1903	238	14	1939	1124	
1903	238	40	1941	52	3(2)
1903	238	52	1941	1253	24
1903	238	56	1941	1253	30
1903	238	97.1	1941	1253	138
1905	310		1943	71	
1907	25		1943	545	5(2)
1907	25	54	1943	545	5(12)
1909	222	8	1944		
1911	67	12(14)	(4th Ex.)	44	7(2)
1911	397		1944		
1911	411	2	(4th Ex.)	44	7(9)
1911	593		1944		
1911	593	1	(4th Ex.)	44	7(10)
1911	671	12(2)	1945	670	1
1911	671	12(7)	1945	939	6(2)
1911	671	12(7a)	1945	939	6(8)
1911	671	19	1945	939	6(9)
1911	671	21	1945	939	7
1911	671	22	1945	939	30
1913	99	5	1945	1040	4.2
1913	195	2	1945	1122	9(3)
1915	361	5	1945	1122	9(12)
1915	361	7	1945	1294	5(2)
1915	755	2(2)	1945	1294	5(8)
1915	755	15	1945	1294	6
1915	755	16	1945	1372	
1917	617	1	1945	1372	17
1919	282		1945	1501	3.3
1919	312	1	1945	1501	3.4
1919	332	6(2)	1945	1501	4.7
1919	354		1945	1501	9
1919	354	24c	1947	508	2
1919	360		1947	699	4
1919	480	5	1947	699	5(2)
1923	102	15	1947	699	5(8)
1923	145		1947	699	6
1923	328		1947	804	1
1923	328	1	1949	81	1
1923	328	2	1949	846	3
1923	452	9(2)	1949	994	3(b)
1923	452	26	1949	994	3(g)
1925	5		1949	994	11
1927	91	2(b)	1949	995	3(b)
1927	91	2(e)	1949	995	3(g)
1927	91	24	1949	995	11
1927	91	28	1949	1275	
1927	429		1949	1275	5
1927	429	5(2)	1949	1275	5(2)
1927	429	5(6)	1949	1275	5(8)
1927	429	5(9)	1949	1275	5(14)
1927	723	2(2)	1949	1275	12(1)
1927	723	16	1951	46	
1927	808	2(b)	1951	62	19
1927	808	20	1951	62	22
1927	808	22	1951	303	41
1929	725	6	1951	336	
1931	47		1951	681	5
1931	56		1951	681	43
1931	491	1	1951	931	14
1931	641	7(2)	1951	931	16
1931	641	10	1951	931	17
1931	641	11	1951	931	26(2)
1931	715	1	1951	931	26(17)
1931	1020	2(2)	1951	931	27
1931	1178		1951	931	37
					182, 184
					29
					95
					209
					141, 142
					38
					216
					98
					24, 93, 99
					26
					116
					24
					115
					207
					98
					21
					25
					115
					95
					209
					41
					24
					99
					26
					99
					117
					24, 99
					25
					111
					99
					81
					83
					23
					26
					116
					26
					111
					83
					32
					208
					29
					82, 83
					94
					209
					207
					489
					25
					111
					83
					184
					43
					207
					26
					88
					210
					25
					88
					209
					286
					81
					22
					111
					489
					213
					21
					93
					139
					23
					59
					60
					60
					140
					198
					67
					29
					99
					93
					213

Year	Chapter	Sec.	Year	Chapter	Sec.
1951	1251	1	1955	1075	7
1951	1405	5(2)	1955	1075	12
1951	1405	5(8)	1955	1102	2
1951	1405	6	1955	1259	1
1951	1449	5(2)	1955	1280	2
1951	1449	5(8)	1955	1289	21(2)
1951	1449	6	1955	1289	21(5)
1951	1449	13	1955	1289	44
1951	1544	5(2)	1955	1318	6
1951	1544	5(7)	1955	1489	22
1951	1544	5(12)	1955	1489	25
1951	1544	13	1955	1489	37
1951	1617	5(2)	1955	1489	49
1951	1617	5(8)	1955	1489	193
1951	1617	5(9)	1955	1641	1
1951	1617	5(13)	1955	1641	1
1951	1617	18.5	1956		
1951	1629		(1st Ex.)	32	1
1951	1635	42	1956		26, 111
1951	1656	3.3	(1st Ex.)	46	5(2)
1951	1656	3.4	1956		23
1951	1656	4.5	(1st Ex.)	46	5(8)
1951	1656	4.6	1956		111
1951	1656	9	(1st Ex.)	46	5(13)
1951	1657	3(b)	1956		82
1951	1657	3(g)	(1st Ex.)	56	2
1951	1657	3(m)	1956		160
1951	1657	3(t)	(1st Ex.)	60	1
1951	1657	11	1957	101	1
1951	1708		1957	357	221
1951	1708	58	1957	357	277
1952			1957	518	9(1)
(1st Ex.)	10	3.3	1957	518	10
1952			1957	518	12
(1st Ex.)	10	3.4	1957	518	23
1952			1957	531	1
(1st Ex.)	10	4.6	1957	547	3.7
1952			1957	547	4.2
(1st Ex.)	10	9	1957	547	4.4
1952			1957	547	5.1-5.40
(1st Ex.)	17	2(b)	1957	921	2
1952			1957	1036	2
(1st Ex.)	17	17	1957	1106	1
1952			1957	1234	3.3
(1st Ex.)	20	3	1957	1234	3.4
1953	524	1	1957	1234	4.7
1953	666	5(2)	1957	1234	7.2
1953	666	5(8)	1957	1234	7.3
1953	666	5(13)	1957	1234	7.4
1953	666	28	1957	1234	13
1953	770	53	1957	1280	3(b)
1953	1019	1	1957	1280	3(g)
1953	1023	1	1957	1280	3(t)
1953	1058	1	1957	1280	3.1
1953	1139	1	1957	1280	3.2
1953	1439	1	1957	1280	16
1953	1532	5(2)	1957	1435	1
1953	1532	5(6)	1957	1502	1
1953	1532	7	1957	1512	1
1953	1598	6(2)	1957	1512	41
1953	1598	6(8)	1957	1512	49
1953	1598	8	1957	1512	56
1953	1771	3	1957	1512	66
1953	1771	3(b)	1957	1512	75
1953	1771	3(g)	1957	1512	91
1953	1771	3(q)	1957	2165	1
1954			1957	* 202	
(1st Ex.)	62	24	1958		
1955	166	6(2)	(1st Ex.)	32	
1955	166	6(8)	1958		294
1955	166	7	(1st Ex.)	32	1
1955	503	8(2)	1959	2	
1955	503	9	1959	380	3
1955	503	12	1959	388	
1955	503	26	1959	388	1
1955	549	42	1959	567	1
1955	565		1959	788	3.3
1955	1057	5(2)	1959	788	3.4
1955	1057	5(7)	1959	788	4.6
1955	1057	5(12)	1959	788	4.7
1955	1057	30	1959	788	7.2
1955	1075		1959	788	7.3
1955	1075		1959	788	7.3

* Resolution Chapter.

Year	Chapter	Sec.		Year	Chapter	Sec.	
1961	1932	3.5	322	1962			
1961	1932	3.27	322	(1st Ex.)	40	11(2)	29
1961	1932	6.2	29	1962			
1961	1932	6.3	81	(1st Ex.)	40	11(9)	81
1961	1932	6.5	98	1962			
1961	2213	1	489	(1st Ex.)	40	24	93
1962				1962			
(1st Ex.)	28	15(2)	30	(1st Ex.)	40	26	66, 138, 139
1962				1962			
(1st Ex.)	28	15(7)	82	(1st Ex.)	67	23	23
1962				1962			
(1st Ex.)	28	22	94	(1st Ex.)	67	33	488
1962				1962			
(1st Ex.)	28	24	67, 138, 139	(1st Ex.)	67	87(5)	488

CITY AND COUNTY CHARTERS

	Article	Section	
Arcadia		1405(c)	306
Arcadia		1405(d)	189
Bakersfield		38	134
Burbank		5	134
Chico City		1004	323
Chula Vista		1405(d)	189
Compton		1506(d)	189
Culver City		1505(c)	306
Culver City		1505(d)	189
Dairy Valley		1005(c)	306
Dairy Valley		1005(d)	188, 189
Eureka City		406	134
Eureka City		600	213
Fresno	I	5	184
Fresno		1300	188
Grass Valley	XII	8(d)	189
Hayward		1502	188
Huntington Beach	XIV	6(d)	189
Inglewood City	XXXVI	33	126, 183
Los Angeles	XXXIII	454(19)	189
Merced		1405(d)	189
Needles		1305(d)	189
Newport Beach		600	134
Newport Beach		1305(d)	189
Oakland		147	189
Pacific Grove	XLVII		188
Riverside		1400	188
Roseville		9.05	188
Sacramento		41a	134
San Bernardino		24	134
County of San Diego		17	134
San Diego		40	134
San Francisco	I	5	184
San Francisco		35	134
San Francisco		35.4	134
San Francisco	* 56	113	184
San Luis Obispo		1305(d)	189
Santa Ana		1304(d)	189
Santa Monica		1605(c)	306
Santa Monica		1605(d)	189
Stockton	VI	7-1	134
Watsonville City		405	323

*Resolution Chapter.

TABLE OF CASES

This table includes all of the *California* cases cited in this study. Cases from other jurisdictions are not listed. Phrases such as "City of" and "County of" are omitted from case names, and abbreviations are freely used.

A	
Abrahamson v. Ceres	131, 137, 416, 419
Ackers v. Los Angeles	44, 126, 182
Acosta v. Los Angeles	47, 53, 192, 340, 341, 343, 376
Adams v. Modesto	225, 227
Adams v. San Joaquin	74
Adams v. San Jose	48, 51, 347, 353
Adams v. Southern Pac. Co.	346, 373
Affonso Bros. v. Brock	76
Agnew v. Schwartz	135
Agudo v. Monterey	73
Aguirre v. Los Angeles	51, 53, 346
Ahern v. Livermore Union H.S. Dist.	27, 41
Airways Water Co. v. Los Angeles	79
Aitkenhead v. San Francisco	45, 48, 54, 347
Akers v. Palo Alto	57, 335
Alameda v. Chambers	20
Alameda County Flood Control & Water Conservation Dist. v. Stanley	60
Albany v. U.S. Fid. & Guar. Co.	190
Albertson v. Raboff	414
Alisal Sanitary Dist. v. Kennedy	372
Allen v. McCoy	407
Allen v. Superior Court	249, 250
Allied Amusement Co. v. Bryam	519, 521
Alvarez v. Los Angeles	355
Ambrosini v. Alisal Sanitary Dist.	13, 21, 192, 203, 207, 226, 227, 229, 232
American Can Co. v. San Francisco	372, 530
American States Water Serv. Co. v. Johnson	90, 520
Anaheim Sugar Co. v. Orange	33, 215, 216
Anderson v. Ocean Sport Fishing, Inc.	502
Anderson v. San Joaquin	366, 367
Anderson v. Santa Cruz	48, 229, 350
Ansell v. San Diego	137
Appier v. Hayes	416
Archer v. Los Angeles	79, 104, 105, 232
Argenti v. San Francisco	233
Argyle Dredging Co. v. Chambers	185
Armstrong v. Belmont	221, 225, 231, 253, 260, 261
Arnold v. San Jose	238
Arthur v. Horwege	287
Arthur v. Los Angeles	36
Artukovich v. Astendorf	329
Atchison, T. & S.F. Ry. v. Public Util. Comm'n	97
Atkinson v. Clark	401
Austin v. Riverside Portland Cement Co.	498
Azcona v. Tibbs	121
B	
Bacich v. Bd. of Control	13, 17, 90, 102, 103, 105
Bacigalupi v. Bagshaw	44, 176
Bady v. Detwiler	44, 55, 369, 370, 441
Baisley v. Henry	130, 419
Baldwin v. San Diego	520, 537
Balkwill v. Stockton	346, 347
Ball v. Stephens	191
Ballerino v. Mason	249
Balmer v. Beverly Hills	51, 347
Barker v. Los Angeles	351, 352
Barkett v. Brucato	182
Barlow v. Los Angeles County Flood Control Dist.	43, 56, 60, 124, 178, 335
Barnett v. Contra Costa	183, 238, 239, 265
Barr v. Matteo	251
Barrett v. Claremont	48, 51, 338, 346, 347, 350
Barrett v. San Jose	45, 53, 57, 199, 219, 220, 221, 222, 223, 224, 485, 486, 491
Barsom v. Reedley	44, 55, 70, 123, 124, 132, 367
Bartlett v. State	122, 123
Bates v. Escondido Union H.S. Dist.	41
Bauer v. Ventura	13, 33, 44, 48, 70, 79, 105, 106, 112, 122, 123, 176, 185, 186, 215, 216, 229, 292, 324, 364, 436
Baugh v. Beatty	392
Baugh v. Rogers	163
Bauman v. San Francisco	45, 49, 50, 55, 346, 485, 486, 491
Beals v. Los Angeles	103
Beard v. San Francisco	219, 222, 226, 381
Beck v. Palo Alto	48, 347, 350, 353
Beckley v. Reclamation Bd.	185
Beckwith v. Stanislaus	214, 323
Beeson v. Los Angeles	46, 341, 342
Behling v. Los Angeles	36, 37, 39
Behr v. Santa Cruz	227, 229
Belcher v. San Francisco	339, 439
Bellman v. San Francisco H.S. Dist.	486, 513
Benton v. Santa Monica	485, 486
Bertz v. Los Angeles	33
Bertone v. San Francisco	193, 231, 233
Bettencourt v. Industrial Acc. Comm'n	101
Bettencourt v. State	69, 221, 261
Betts v. San Francisco	46, 341, 342, 343, 485, 486
B.F.G. Builders v. Wisner & Coover Co.	373
Bigelow v. Ontario	54, 351, 370, 373
Birkhofer v. Krumm	521, 525
Black v. Southern Pac. Co.	123, 231, 232
Blaylock v. Jensen	52, 54
Blevins v. Mullally	147
Bloom v. San Francisco	222, 226, 228
Blumenstein v. Long Beach	103, 107
Boothby v. Yreka City	57
Bosqui v. San Bernardino	43, 369, 516, 518
Boucher v. American Bridge Co.	51
Bourn v. Hart	521
Boyes v. Evans	416
Bradley v. Fisher	251
Brandenburg v. Los Angeles County Flood Control Dist.	20, 24, 60, 100, 102, 104, 124, 228
Brandenstein v. Hoke	156, 437
Bridges v. Los Angeles	855
Brigden v. Dodge	215
Bright v. East Side Mosquito Abatement Dist.	31, 37, 192, 207, 220, 227, 228, 229
Brindamour v. Murray	36, 37, 38, 518
Broward v. Scott Lumber Co.	417

Brown v. Fifteenth Dist. Agricultural Fair Ass'n	13, 21, 43, 44, 56, 207, 220, 222, 333, 485, 486, 491
Brown v. San Francisco Bail Club, Inc.	499, 501
Brownell v. Fisher	110, 232
Brunson v. Santa Monica	50, 120
Bryant v. Monterey	221, 231, 261, 264, 404, 422, 427
Burnett v. San Diego	222, 223, 225, 485, 486, 491
Buras v. American Cas. Co.	293
Butte v. Superior Court	381
Buzzard v. East Lake School Dist.	504, 511

C

Caccamo v. Swanston	420
Cannon, <i>Ex parte</i>	182
Calaveras v. Calaveras County Water Dist.	91, 92
Cal. Employment Stabilization Comm'n v. Chichester Co.	523
Cal. Employment Stabilization Comm'n v. Payne	522, 523, 525
Cal. Highway Comm'n v. Industrial Acc. Comm'n	422
Calkins v. Newton	245, 380, 382, 386, 387
Callens v. Orange	106
Callet v. Alioto	520, 525, 531
Cameron v. Gilroy	362
Campbell v. Santa Monica	55, 261, 343, 439, 443
Cantor v. Santa Clara	122, 124
Carpena v. Los Angeles	221
Carr v. Crowell Co.	39
Carr v. San Francisco	199, 219, 222, 224, 485
Caruso v. Abbott	250
Cary v. Long	210, 284
Castro v. Sutter Creek Union H.S. Dist.	58, 340
Ceinar v. Johnston	248, 254
Chafar v. Long Beach	13, 120, 199, 220, 223, 226, 239, 486
Chamon v. San Francisco	73
Chapman v. State	14, 17, 19, 521
Chappelle v. Concord	199, 221, 231, 404, 406
Charonnat v. San Francisco Unified School Dist.	504, 505, 511
Chavez v. Sprague	325
Chayney v. Los Angeles	364
Chilcote v. San Bernardino	37
Childs v. Gross	144
Chope v. Eureka	238
Churchman v. Sonoma	121
Clark v. Berkeley	48, 50, 347
Clary v. Hale	411, 412
Clear Lake Water Works Co. v. Lake Cleland v. Superior Court	73, 133
Clement v. State Reclamation Bd.	100, 105, 106, 174, 185
Clements v. T.R. Bechtel Co.	68
Coast Sur. Co. v. Municipal Court	528
Coffey v. Berkeley	260, 261, 264
Cole v. Johnson	406, 407
Colegrove Water Co. v. Hollywood	79
Coleman v. Oakland	44, 220
Coleman v. Superior Court	531, 534, 537
Collenburg v. Los Angeles	45, 253
Conlin v. Bd. of Supervisors	17
Connell v. Clark	452
Conniff v. San Francisco	226, 232, 233
Continental Ins. Co. v. Pacific Greyhound Lines	36
Contra Costa v. American Toll Bridge Co.	186, 190
Contra Costa v. Central Contra Costa Sanitary Dist.	79, 82, 276
Contra Costa v. Cowell Portland Cement Co.	110
Coombes v. Franklin	521

Corning Hosp. Dist. v. Superior Court	267, 515, 520, 522, 523, 524, 533
Coulter v. Pool	121, 133
Courtell v. McEachen	321, 341
Coverstone v. Davies	75, 407, 411, 413
Crawford v. Imperial Irr. Dist.	99
Crim v. San Francisco	531, 532
Crone v. El Cajon	263, 485, 503, 510
Cross v. Tustin	137, 249, 250, 254
Crowell v. Sonoma	228

D

Dalzell v. Los Angeles	364
Danley v. Merced Irr. Dist.	99
Davidson v. Marin	39
Davie v. Bd. of Regents	254, 379
Davis v. Kendrick	67
Davis v. Sacramento	226
Davis v. State	19
Davoust v. Alameda	200, 220, 239
Dawson v. Martin	249, 250, 412, 413
Dawson v. Rash	170, 249, 250, 413
Dawson v. Tulare Union H.S.	44, 152
DeBaker v. Southern Cal. Ry.	232
De Courcey v. Cox	254
Demmer v. Eureka	46, 340, 341
Denio v. Huntington Beach	234
Denman v. Broderick	156, 437
Denman v. Pasadena	263
Denning v. State	14, 20
Dep't of Nat. Resources v. Industrial Acc. Comm'n	454, 474
Dep't of Water & Power v. Inyo Chemical Co.	519
De Stackelberg v. Lamb Transp. Co.	373
Devens v. Goldberg	51
Dias v. Eden Township Hosp. Dist.	516
Dick v. Los Angeles	227
DiGenova v. State Bd. of Educ.	520
Di Giulio v. Rice	37
Dillwood v. Riecks	253, 381
Dineen v. San Francisco	221, 223, 240
Dittus v. Cranston	17, 65, 76, 80, 100, 156, 320, 518, 522
Dobbins v. Arcadia	122
Doctors Gen. Hosp. v. Santa Clara	320
Dodge, <i>In re</i>	134
Doeg v. Cook	120
Doherty v. Cal. Nav. & Improvement Co.	158
Douglas Aircraft Co. v. Cranston	520
Douglass v. Los Angeles	43, 102, 120, 184, 373
Downer v. Lent	248, 251
Dragna v. White	254, 407, 408, 411
Dudum v. San Mateo	44, 45, 439, 441
Dunbar v. San Francisco	245, 480
Dunn v. Pacific Gas & Elec. Co.	52, 54
Dunn v. Wagner	48, 347
Duran v. Gibson	48, 50, 54, 176, 376
Durst v. Colusa	56, 346, 380
Dynamic Indus. Co. v. Long Beach	234

E

Eachus v. Los Angeles Consol. Elec. Ry.	102, 103, 106
East Fruitvale Sanitary Dist., <i>In re</i>	519, 521
Eastlick v. Los Angeles	56, 126, 184, 287, 346, 369, 519, 521
Eddy v. Los Angeles	36
Edwards v. Brockway	182
Edwards v. Hollywood Canteen	502
El Camino Irr. Dist. v. El Camino Land Corp.	284
Electrical Prods. Corp. v. Tulare	53, 54, 374, 376
Elliott v. Los Angeles	120, 185, 215, 216, 239
Ellis v. Los Angeles	45, 48, 49, 338, 350, 353, 369, 370
Estrada v. Indemnity Ins. Co.	67

F

Fackrell v. San Diego	50, 51, 54, 123, 139, 175, 312, 345, 346, 352
Fairchild v. Adams	412
Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp.	516, 520
Farber v. Olkon	400
Farmers Auto. Inter-Ins. Exch. v. Calkins	460
Farnsworth v. Cote	407, 413
Farrell v. Long Beach	199, 220, 485
Feckenschner v. Gamble	534, 537
Fenton v. Markwell & Co.	526
Fernelius v. Pierce	130, 132, 135, 137, 139, 145, 254, 298, 299, 300, 418, 421, 423
Fewel v. Pewel	240
Fields v. Saunders	246
Flavio v. McKenzie	191
Fleischhauer v. Fabens	414
Flick v. Ducey & Attwood Rock Co.	58, 342
Flora v. Bimini Water Co.	502
Florez v. Groom Dev. Co.	497
Flournoy v. State	506, 508, 515, 524
Foley v. Martin	130
Ford v. Riverside City School Dist.	46, 343
Forgnone v. Salvador Union Elem. School Dist.	504, 505, 511
Forsman v. Colton	517
Fountain v. Sacramento	233
Foxen v. Santa Barbara	242, 245
Fraser v. Regents of the Univ. of Cal.	519
Frazier v. Moffatt	248, 251, 254
Free v. Furr	58
Frisbie v. O'Connor	293
Fry v. Bank of America	412

G

Gallipo v. Long Beach	46, 50, 53, 58, 339, 340
Gallup v. Sacramento & San Joaquin Drainage Dist.	173, 185
Garcia v. Santa Monica	37, 417
Garcia v. Soogian	341
Gardner v. Stroever	191
Geimann v. Bd. of Police Comm'rs.	329
General Petroleum Corp. v. Los Angeles	200, 220, 222, 243
Gentekos v. San Francisco	45, 48, 49, 50, 346, 347, 353
George v. Los Angeles	48, 53
Ghiozzi v. South San Francisco	106
Gibson v. Mendocino	50, 53, 54, 56, 58, 340, 342, 345
Gibson v. State	39
Gilbert v. Pessin Grocery Co.	58
Gill v. Oakland	215, 216, 233
Gillespie v. Los Angeles	20, 43, 44, 124, 221, 261, 264, 335, 439
Goff v. Doctors Gen. Hosp.	400
Golden Gate Bridge & Highway Dist. v. Felt	156, 437
Good v. State	202, 203, 220
Goodall v. Britte	382, 386
Goodman v. Pasadena City H.S. Dist.	41
Goodman v. Raposa	221, 260, 439, 441
Gordon v. Nichols	525
Gorlack v. Ferrari	408
Gorman v. Sacramento	122, 364, 366
Gove v. Lakeshore Homes Ass'n	53
Gray v. Reclamation Dist. No. 1500	102, 104
Green v. State	18
Greenberg v. Los Angeles	28, 37, 158, 261
Gregoire v. Biddle	251, 258
Gregory v. Hecke	190
Gridley School Dist. v. Stout	249
Griffin v. Colusa	150, 158, 380, 381
Griswold v. Griswold	411

Grove v. Purity Stores, Ltd.	414
Grove v. San Joaquin	56, 260, 422
Guerkink v. Petaluma	227
Guidi v. State	13, 57, 199, 202, 220, 221, 223, 253, 381, 485

H

Haase v. Gibson	248
Ham v. Los Angeles	122, 253, 364, 368
Hamilton v. Oakland School Dist.	319, 320
Hancock v. Burns	249, 250
Handler v. Bd. of Supervisors	241
Hanson v. Los Angeles	63, 112, 219, 220
Hardy v. Vial	42, 137, 170, 246, 249, 250, 251, 254, 258, 413, 421
Hargro v. Hodgeon	191
Harper v. Vallejo Housing Authority	43, 44, 56, 124, 202, 333, 485, 486
Harpham v. Bd. of Supervisors	215
Hassell v. San Francisco	225, 227, 229
Hatfield v. Levy Bros.	55, 58
Hawk v. Newport Beach	43, 45, 46, 54, 352, 369, 486, 491, 496, 498, 501
Hayashi v. Alameda County Flood Control & Water Conservation Dist.	60, 78, 106
Hayes v. Richfield Oil Corp.	497
Head v. Wilson	37
Healdsburg v. Mulligan	154
Healdsburg Elec. Light & Power Co. v. Healdsburg	242, 243
Healy v. Industrial Acc. Comm'n.	101
Heath v. Manson	120, 121, 122
Hedlund v. Sutter Medical Serv. Co.	400
Heimann v. Los Angeles	102, 103, 107, 110, 232
Henry v. Los Angeles	221, 416
Hensley v. Reclamation Dist. No. 556	15, 59, 62, 205
Hernandez v. Barton	67
Heron v. Riley	36, 37, 518, 521
Herzo v. San Francisco	233, 245
Hession v. San Francisco	220
Heyman v. Bath	100
Hillman v. Garcia-Ruby	392
Hilton v. Oliver	132
Hinton v. State	121
Hiroshima v. Pacific Gas & Elec. Co.	417
Hirsch v. Rand	130
Hoagland v. Sacramento	238
Hoel v. Los Angeles	45, 49, 261, 352, 439
Hoffman v. Perrucci	288
Hoffman v. San Joaquin	238
Hogan v. Ingold	534, 537
Hollander v. Wilson Estate Co.	49
Holloway v. Purcell	436
Holman v. Santa Cruz	69
Holman v. State	103
Hook v. Sacramento	346
Hopping v. Redwood City	36
House v. Los Angeles County Flood Control Dist.	78, 79, 104, 105, 106
Housing Authority of Los Angeles v. Dockweiler	200, 202
Howard v. Fresno	46, 342, 485, 486
Howard v. San Francisco	456
Hoyt v. Bd. of Civil Service Comm'rs	18
Huff v. Compton City Grammar School Dist.	45
Huffaker v. Decker	329
Hughes v. Oreb	407
Humphreys v. State	325
Hunt v. Authier	104, 228
Hunt Bros. Co. v. San Lorenzo Water Co.	466
Hunter v. Adams	79, 103, 104, 105, 190, 200, 204, 436

I	
Ikuta v. Ikuta.....	517
Imperial Irr. Dist. v. Riverside.....	68
Inderbitzen v. Lane Hosp.....	401
Ingram v. Glenn.....	381
Ingram v. Gridley.....	227
Inos v. Winspear.....	254
Inouye v. Pacific Gas & Elec. Co.....	498
Irvin v. Padelford.....	45, 369, 370, 441
Irvine v. Bossen.....	284
Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County.....	110
Isaacs v. San Francisco.....	38
Ivanhoe Irr. Dist. v. All Persons.....	100
J	
Jackson & Perkins Co. v. Byron-Bethany Irr. Dist.....	20
Jacobsen v. Superior Court.....	110, 112
James v. Oakland Traction Co.....	531, 532
Janssen v. Los Angeles.....	60
Jardine v. Pasadena.....	227
Jensen v. Southern Pac. Co.....	132
Johnson v. Fontana County Fire Protection Dist.....	36, 205, 214, 215, 221, 324, 456, 460
Johnson v. Oakland.....	325
Johnson v. Palo Alto.....	48, 346, 347
Johnson v. San Leandro.....	45, 347
Johnson v. Southern Pacific Co.....	412
Joiner, <i>In re</i>	151
Jones v. Czapkay.....	55, 170, 221, 225, 249, 250, 254, 260, 346, 394, 397
Jones v. Los Angeles.....	45, 55, 345
Jones v. Richardson.....	249
Jones v. South San Francisco.....	44, 126, 127, 182
Jurd v. Pacific Indem. Co.....	38, 293, 295, 518
K	
Kadow v. Los Angeles.....	37
Kambish v. Santa Clara Valley Water Conservation Dist.....	43, 105, 333, 335
Kangieser v. Zink.....	135
Kaufman v. Tomich.....	231, 232
Keifer & Keifer v. Reconstruction Fin. Corp.....	31
Kellar v. Los Angeles.....	219, 221, 224, 485, 508
Kelso v. Bd. of Educ.....	519
Kennedy v. Ross.....	241
Kerby v. Elk Grove Union H.S. Dist.....	510, 511
King, <i>In re</i>	401
King v. Lennen.....	42, 52, 54, 341
Kirack v. Eureka.....	53
Knapp v. Newport Beach.....	221, 225, 231, 249
Knight v. Kaiser Co.....	58
Knight v. Los Angeles.....	48, 229
Knowles v. Roberts-at-the-Beach Co.....	499, 500
Kotronakis v. San Francisco.....	57, 335, 355
Kramer v. Los Angeles.....	227, 229
Krause v. Rarity.....	527, 529, 531
Kubach Co. v. Long Beach.....	284
L	
LaForge v. Magee.....	527
Langazo v. San Joaquin Light & Power Co.....	52, 54
Langdon v. Sayre.....	517
Latham v. Santa Clara County Hosp.....	245, 380, 386
Lattin v. Coachella Valley County Water Dist.....	56, 71, 195, 198, 204, 312, 333, 335, 486, 491, 515, 524
Lavine v. Jessup.....	249, 250, 258
Leach v. Dinsmore.....	233, 239, 241
Legg v. Ford.....	199, 221, 225, 246, 249
Lehmann v. Los Angeles City Bd. of Educ.....	41, 506, 508
Lehmuth v. Long Beach Unified School Dist.....	41
Lemon v. Los Angeles Terminal Ry.....	526
Lertora v. Riley.....	76, 231, 244, 253
Leverone v. Weakley.....	191
Lewis v. Contra Costa.....	261
Lilienthal v. San Leandro Unified School Dist.....	41
Lind v. San Luis Obispo.....	227
Lindsey v. De Vaux.....	502, 503, 507, 508, 509
Linggi v. Garovotti.....	85
Lipman v. Brisbane Elem. School Dist.....	15, 42, 72, 109, 125, 173, 235, 242, 246, 247, 249, 250, 251, 254, 278, 399, 421
Litch v. White.....	121
Loewen v. Burbank.....	46, 341, 342, 353
Loftus v. Dehall.....	53
Long Beach v. Industrial Acc. Comm'n.....	454
Long Beach v. Lisenby.....	210, 211
Long Beach v. Pacific Elec. Ry.....	83
Longuy v. La Societe Francaise de Bienfaisance Mutuelle.....	400
Lorah v. Biscailuz.....	131, 134, 300
Lorenz v. Rosseau.....	49
Los Angeles v. Byram.....	63, 100, 156, 210
Los Angeles v. Cox Bros. Constr. Co.....	305
Los Angeles v. Ford.....	241
Los Angeles v. Gage.....	435
Los Angeles v. Geiger.....	102, 103
Los Angeles v. Hammel.....	134
Los Angeles v. Lelande.....	156
Los Angeles v. Oliver.....	534, 537
Los Angeles v. Payne.....	63
Los Angeles v. Southern Cal. Tel. Co.....	187
Los Angeles Brick & Clay Prods. Co. v. Los Angeles.....	232, 233
Los Angeles County Flood Control Dist. v. Southern Cal. Edison Co.....	30, 78, 79, 82, 83, 89, 92, 96, 103, 112, 145, 186, 188, 190, 211
Los Angeles Gas & Elec. Corp. v. Los Angeles.....	18
Lossman v. Stockton.....	36
Lowe v. San Diego.....	364
Lozano v. Pacific Gas & Elec. Co.....	52
Lucas v. Los Angeles.....	39
Luis v. Orcutt Town Water Co.....	466
Luning Mineral Prods. Co. v. East Bay Water Co.....	467
Lyle v. Disneyland, Inc.....	499
M	
Maben v. Rankin.....	401
Madison v. San Francisco.....	222, 245, 381, 383, 386, 387, 518
Maede v. Oakland H.S. Dist.....	41
Magnuson v. Stockton.....	46, 367, 485, 486, 491
Mallon v. Long Beach.....	521
Malloy v. Fong.....	382, 401
Malloy v. Hibernia Sav. & Loan Soc.....	52
Malone v. Carey.....	248, 254
Mann v. Nutrilite, Inc.....	499
Manney v. Housing Authority of Richmond.....	202
Manning v. Pasadena.....	221
Marin v. Duffey.....	133
Marin Municipal Water Dist. v. Dolge.....	156
Marin Municipal Water Dist. v. Peninsula Paving Co.....	232
Marin Water & Power Co. v. Sausalito.....	284
Marino v. Tuolumne.....	374
Mariposa County v. Merced Irr. Dist.....	126
Marlowe v. Los Angeles.....	496, 499

TABLE OF CASES

553

Marr v. Southern Cal. Gas Co. 33,
215, 216

Marsh v. Sacramento 45, 53

Marshall v. Los Angeles 37,
38, 130, 131, 137, 149, 261, 419

Martelli v. Pollock 249, 250

Martin, *In re* 401

Martin v. Stone 498

Martin v. Superior Court 240

Martinovich v. Wooley 125

Masonic Mines Ass'n v. Superior
Court 531

Mass. Bonding & Ins. Co. v. Indust-
rial Acc. Comm'n 166

Masterson v. Pig'n Whistle Corp. 412

McAtee v. Marysville 362

McBean v. Fresno 211

McBoyle v. United States 37

McCain v. Oakland 122

McCalla v. Grosse 420

McCandless v. Los Angeles 102, 103

McCarthy v. Manhattan Beach 435

McCauley v. Weller 156, 437

McClain v. South Pasadena 435

McCullough v. Langer 132

McDonald v. Foster Memorial Hosp. 400

McDonough v. Goodcell 435

McGee, Estate of 126

McKay v. Riverside 203-204

McKinney v. San Francisco 222,
223, 341, 343, 485

McNeil v. Bd. of Retirement 240

McNeil v. Montague 106

Meek v. Fowler 38

Megowan v. Los Angeles 37

Melvin v. State 14, 19

Menlo Park v. Artino 85

Mercado v. Pasadena 56, 227,
228, 260, 346, 439

Merritt v. McFarland 127

Metropolitan Life Ins. Co. v. Deasy
63, 210, 213, 284

Metropolitan Water Dist. v. Riverside
68, 126, 127

Metzenbaum v. Metzenbaum 411

Meyer v. San Francisco 222, 223, 485

Meyer v. San Rafael 43, 347

Michel v. Smith 130, 131, 407

Miller v. Berman 37

Miller v. Glass 254, 407

Miller v. McKenna 521, 525

Miller v. McKinnon 234, 244, 373

Miller v. Palo Alto 106, 199

Miller v. San Francisco 249

Miller v. Schoene 76

Miller v. Turner 298, 299

Mills v. Houck 63

Miramar Co. v. Santa Barbara 104

Mitchell v. Hartman 152

Mitchell v. County Sanitation Dist.
68, 208

Modern Barber College v. Cal. Em-
ployment Stabilization Comm'n 516

Molnieux v. State 19

Monterey v. Industrial Acc. Comm'n 454

Monterey County Flood Control &
Water Conservation Dist. v.
Hughes 489, 494

Monty v. Orlandi 39, 246

Moore v. Burton 121, 123

Morris v. Pacific Elec. Ry. 531, 534

Morrison v. Smith Bros., Inc. 13,
20, 68, 126, 127, 207

Mortimer v. Acquisition & Improve-
ment Dist. No. 36 33, 215, 216

Morton v. Cal. Sports Car Club 498

Moss v. Smith 526

Mulloy v. Sharp Park Sanitary Dist.
207, 227, 229

Municipal Bond Co. v. Riverside 233, 300

Muntz, Estate of 127

Murphy v. Murray 406, 416

Muses v. Housing Authority 13, 20,
21, 127, 202, 207, 221, 222, 223

Muskopf v. Corning Hosp. Dist. 11,
13-14, 14, 15, 21, 24, 35, 57, 63,
199, 205, 219, 225, 234, 251, 258,
262, 379, 382, 436, 465, 482, 534,
536

N

Nagle v. Long Beach 56

National City v. Fritz 85

Neff v. Imperial Irr. Dist. 106, 204

Nelsen v. Jensen 495

Ness v. San Diego 48, 347

Newberry v. Evans 232, 233

Newman v. San Mateo 48, 346

Ngim v. San Francisco 57, 335

Nicholl v. Koster 240

Nicholson v. Los Angeles 43, 49,
51, 347, 350, 353, 374

Niehaus Bros. Co. v. Contra Costa
Water Co. 467

Nissen v. Cordua Irr. Dist. 20, 27,
60, 203

Noel v. Lewis 240

Norton v. Hoffmann 112, 231, 249,
251, 413

Norton v. Pomona 528

Nourse v. Los Angeles 220, 223

O

Oakdale Irr. Dist. v. Calaveras 519, 521

Oakland v. Hogan 96

Oakland v. Oakland Water Front Co. 320

Oakland v. Pacific Coast Lumber Co. 107

Oakland v. Williams 214, 323

Obrien v. Fong Wan 58, 342

O'Brien v. Olson 139

O'Dea v. San Mateo 103

Oettinger v. Stewart 58, 495

Ogando v. Carquinez Grammar School
Dist. 504, 505

Old Homestead Bakery, Inc. v.
Marsh 31

Onick v. Long 110, 118, 407

Oppenheimer v. Arnold 137, 249, 254

Oppenheimer v. Arroyo Grande 261

Oppenheimer v. Ashburn 75

Oppenheimer v. Los Angeles 112,
221, 231, 261, 404, 406, 407, 422

Oppenheimer v. Tamblin 411

Orange v. Backs 156

Osborn v. Whittier 48, 55, 63, 221, 229

Osborne v. Imperial Irr. Dist. 121,
122, 139, 364, 368

Owen v. Los Angeles 56, 496

P

Pacific Fin. Co. v. Lynwood 234

Pacific Gas & Elec. Co. v. Shasta Dam
Pub. Util. Dist. 89, 112, 145, 211

Pacific Gas & Elec. Co. v. State 534

Pacific Tel. & Tel. Co. v. San Fran-
cisco 79, 84, 188

Palermo v. Stockton Theatres, Inc. 61

Palmer v. Long Beach 48, 50, 346

Palmquist v. Mercer 54, 59, 178, 495

Panhandle Eastern Pipe Line Co. v.
State Highway Comm'n 79, 80, 89, 90

Parcher v. Los Angeles 56, 367, 496

Parsons v. San Francisco 184

Pasadena v. Railroad Comm'n 85

Pasadena Park Improvement Co. v.
Lelande 33, 215, 216

Pasadena Univ. v. Los Angeles 149

Pass School Dist. v. Hollywood City
School Dist. 521

Patrick v. Riley 17, 65, 76, 80, 200, 522

Pauline v. Bray 248

Paxton v. Alameda 56, 370

Payne v. Bennion 130, 131, 134, 135, 145

Pearson v. Reed 249, 254

Peccolo v. Los Angeles 37, 38, 57, 223

Peck v. Modesto	325	Ravettino v. San Diego	220, 242
Peerless Laundry Servs., Ltd. v. Los Angeles	39, 166, 460	Raynor v. Arcata	36, 38, 39, 166
Penziner v. West American Fin. Co.	526	Reams v. Cooley	244
People v. Al G. Smith Co.	107	Reardon v. San Francisco	102
People v. American Auto Ins. Co.	288	Reclamation Dist. v. Birks	521
People v. Armstrong	427	Reclamation Dist. v. Superior Court	521
People v. Ayon	79, 103, 110	Redevelopment Agency of San Francisco v. Hayes	200
People v. Bundte	452	Reed v. Molony	69, 131
People v. Corte Madera	30	Reed v. San Diego	37, 417
People v. Dobbins	152	Reel v. South Gate	45, 50, 175, 339
People v. Gianni	106	Reilly v. Cal. St. Cable R.R.	37
People v. Henderson	191	Reinach v. San Francisco	45, 50, 51
People v. Reedley	227	Reithardt v. Bd. of Educ.	505, 510, 511
People v. Ricciardi	102, 103, 106, 107	Reynolds v. Barrett	435
People v. Russell	79, 103	Reynolds v. Lerman	131, 193
People v. Sayig	103, 106	Reynolds v. Willson	341
People v. Standard Acc. Ins. Co.	293	Rhoda v. Alameda	537
People v. Superior Court	13, 14, 18, 20, 27, 199, 200, 203, 220, 221, 224, 381	Rhodes v. Palo Alto	50, 57, 202, 223, 224, 352, 485, 486
People v. Supervisors of San Francisco	320	Rice v. Cal. Lutheran Hosp.	400
People v. Symons	79, 107, 436	Richardson v. Eureka	227
People v. Thomas	103, 107	Rideout v. Eich	320
People v. Wright	110, 118	Riechhold v. Sommarstrom Inv. Co.	110
Perkins v. Blauth	120, 231, 232, 239	Rippe v. Los Angeles	55
Perry v. D.J. & T. Sullivan, Inc.	158	Ritterbusch v. Pittsburg	220, 223
Perry v. First Corp.	498	Robbins v. Yellow Cab Co.	58
Perry v. Meikle	248, 254	Rocha v. Hulén	158
Perry v. San Diego	51, 485, 486, 491	Rock Creek Water Dist. v. Calaveras	68, 126, 127
Perry v. Santa Monica	56, 438, 441	Rodkey v. Esccondido	43, 342, 346
Peters v. San Francisco	48, 50, 51, 55, 56, 139, 265, 352, 370, 372	Rodrigues v. San Jose Unified School Dist.	504, 506
Peterson v. Santa Rosa	227	Rodriguez v. Los Angeles	48, 345, 369, 376
Phillips v. Pasadena	13, 225, 227	Rogers v. Marlon	413
Pianka v. State	13, 57, 199, 202, 220, 221, 222, 260, 485	Rose v. Orange	53, 54, 441
Pickens v. Johnson	240	Rose v. State	13, 27, 90, 102, 103, 105, 107
Pickett v. Wallace	248	Rosefield Packing Co. v. Superior Court	531, 534
Pico v. Collmas	110	Rosenblatt v. State Bd. of Pharmacy	520
Pignet v. Santa Monica	220	Ross v. Atchison, T. & S.F. Ry.	439
Pike v. Archibald	380	Rossi v. Caire	531
Pimentel v. San Francisco	233	Rovegno v. San Jose Knights of Columbus Hall Ass'n	502
Pirkle v. Oakdale Union Grammar School Dist.	41, 486	Rowland v. Pomona	351, 374
Pittam v. Riverside	53, 55	Roylance v. Doelger	373
Placer v. Aetna Cas. & Sur. Co.	131, 132, 154, 298	Rubell v. Santa Clara	50
Platz v. Marlon	248, 254	Rubinow v. San Bernardino	249, 254, 446
Plaza v. San Mateo	55, 57, 202, 219, 222, 223, 224, 485, 486	Ruppe v. Los Angeles	231, 246, 417
Plum v. State Bd. of Control	75		
Podesta v. Linden Irr. Dist.	102, 103, 105	S	
Postal Telegraph-Cable Co. v. San Francisco	91	Sacramento v. Pacific Gas & Elec. Co.	191
Potts v. Crafts	502	Sacramento & San Joaquin Drainage Dist. v. Riley	174, 185
Powell v. Jones	51	Sacramento & San Joaquin Drainage Dist. v. Superior Court	240
Powell v. Los Angeles	245	Saeter v. Harley Davidson Motor Co.	498
Powell v. Phelan	17	St. Helena v. San Francisco, N. & C. Ry.	190
Powers Farms, Inc. v. Consol. Irr. Dist.	20, 28, 71, 195, 516	Sale v. San Diego	45, 55, 176, 376
Pratt v. Browne	240	Sample v. Eaton	502
Prentice v. Bertken	248, 249, 250, 254	San Bernardino v. Industrial Acc. Comm'n	534
Prescott v. Ralphs Grocery Co.	496, 497, 498, 500	San Diego v. Kerckhoff	188
Primm v. Joyce	50	San Diego v. Milotz	134
Pritchard v. Sully-Miller Contracting Co.	50, 54, 123, 265, 352, 362	San Diego v. Ferrigo	210
Pritchit v. Waldron	72	San Diego v. Southern Cal. Tel. Co.	188
Pumpelly v. Green Bay Co.	233	San Francisco v. Boyd	156, 241
		San Francisco v. Ho Sing	53, 370, 372
Q		San Francisco v. Linares	156
Quinn v. Recreation Park Ass'n	499	San Francisco Gas Co. v. Brickwedel	211
		San Francisco Sav. Union v. Reclamation Dist. No. 124	208
R		San Francisco Unified School Dist. v. Cal. Bldg. Maintenance Co.	305
Rafferty v. Marysville	43, 184	San Gabriel Valley Country Club v. Los Angeles	105
Ratcliff v. San Diego Baseball Club	502	San Vicente Nursery School v. Los Angeles	243
Rauschan v. State Compensation Ins. Fund	20		
Ravettino v. Los Angeles	243		

Sanders v. Long Beach-----57, 223,
333, 486
Sandoval v. Southern Cal. Enter-
prises-----417
Sandstoe v. Atchison, T. & S.F. Ry.
53, 350, 373
Santa Barbara County Water Agency
v. All Persons-----68, 127
Sarafini v. San Francisco-----131, 419
Schmidt v. Market St. & W.G. R.R.-----190
Schmidt v. Vallejo-----485, 486
Schnider v. State-----103
Schwerdtfeger v. State-----202, 220, 221
Scott v. Long Beach-----503
Selby v. Sacramento-----44, 48,
123, 229, 352
Sels v. Greene-----59, 205
Seybert v. Imperial-----56, 221, 225,
260, 261, 439, 485, 502
Shannon v. Fleishhacker-----121, 122,
139, 364, 367, 368
Shea v. San Bernardino-----54
Sheehan v. Hammond-----351
Sheldon v. Burlingame-----36, 37
Shell Oil Co. v. Superior Court-----258
Sherbourne v. Yuba-----237, 379
Shields v. Oxnard Harbor Dist.-----36, 207
Shipley v. Arroyo Grande-----55, 261,
439, 443
Shurman v. Fresno Ice Rink, Inc.
499, 500
Sievers v. San Francisco-----120, 238
Siler v. Industrial Acc. Comm'n.-----68
Silva v. MacAuley-----253
Silva v. Providence Hosp.-----382, 400, 401
Simon Hardware Co. v. Pacific Tire
& Rubber Co.-----373
Simpson v. Richmond-----58
Sincereney v. Los Angeles-----223
Sinclair v. Pasadena-----49, 346
Singleton v. Bonnesen-----67, 101
Singleton v. Singleton-----414
Sischo v. Los Banos-----347
Smellie v. Southern Pac. Co.-----122
Smith v. Cloud-----319, 320
Smith v. Los Angeles-----102, 105
Smith v. San Mateo-----45, 58,
485, 486, 491, 508
Sobey v. Molony-----147
Sonoma County v. Stofen-----154
Sorensen v. Hutson-----502
South v. San Benito-----249
Southern Cal. Gas Co. v. Los Angeles
65, 78, 80, 82, 89, 90, 91, 92, 96,
103, 104, 186, 189, 190
Southern Cal. Gas Co. v. Los Angeles
County Flood Control Dist.-----80,
83, 89, 90, 103
Southern Pac. Co. v. Railroad
Comm'n-----182
Southern Serv. Co. v. Los Angeles
527, 528
Souza & McCue Constr. Co. v. Su-
perior Court-----234
Spalding v. Vilas-----251
Spangler v. San Francisco-----227, 229
Spencer v. Los Angeles-----233
Spreckels v. Spreckels-----525
Spring Valley Water Works v. San
Francisco-----21
Stanford v. San Francisco-----227, 232,
233
Stang v. Mill Valley-----28, 45, 56,
221, 223, 265, 277, 456, 457, 466
Starkweather v. Eddy-----411
State v. Industrial Acc. Comm'n.-----518, 522
State v. Marin Municipal Water Dist.
79, 84, 88, 89, 95, 126, 187, 190
State v. Superior Court-----31, 36
Stedman v. San Francisco-----406
Steiger v. San Diego-----102
Stevens v. Truman-----240
Stevenson v. Alta Bates, Inc.-----400
Stevenson v. Colgan-----17
Stockton Auto. Co. v. Confer-----121, 127

Stockton Gas & Elec. Co. v. San
Joaquin-----90
Sunset Tel. & Tel. Co. v. Pasadena-----138
Sunter v. Fraser-----299
Surocco v. Geary-----77, 78, 480, 481
Sutter Basin Corp. v. Brown-----515

T

Taltzin v. Oak Creek Riding Club-----392
Talley v. Northern San Diego County
Hosp. Dist.-----13, 20, 24, 199,
221, 332, 333, 518
Tankersley v. Low & Watson Const.
Co.-----376
Taylor v. Los Angeles-----43
Taylor v. Manson-----122, 183
Taylor v. Oakland Scavenger Co.-----41
Teilhet v. Santa Clara-----47
50, 53, 54, 63, 176, 229, 350, 373
Tenney v. Brandhove-----251
Tevis v. San Francisco-----18
Thelander v. Superior Court-----515,
524, 530, 531, 533
Thomas v. Studio Amusements, Inc.-----502
Thompson v. Los Angeles-----529
Thon v. Los Angeles-----56, 57, 221,
265, 335, 456, 457, 465, 466, 523
Thurman v. Ice Palace, Inc.-----499
Title Guar. & Trust Co. v. Long Beach-----284
Tolman v. Underhill-----519
Tomlinson v. Pierce-----249, 254, 446
Tomson v. Kischassey-----37
Torkelson v. Redlands-----46,
340, 341, 342, 344, 364
Torres v. Los Angeles-----39, 40, 166, 460
Touchard v. Touchard-----234
Towel v. Matheus-----416
Tranter v. Sacramento-----238
Trombley, *In re*-----144
Trower v. San Francisco-----233
Tulare v. Dinuba-----90
Tulley v. Tranor-----537
Turlock Irr. Dist. v. White-----126
Turpen v. Booth-----75, 248
Tyler v. Tehama County-----102, 227, 243
Tymkowicz v. San Jose Unified School
Dist.-----504, 505, 511
Tyree v. Los Angeles-----70

U

Underhill v. Alameda Elem. School
Dist.-----503, 505, 510
Union Bank & Trust Co. v. Los An-
geles-----131, 132,
154, 155, 193, 233, 239, 241, 301
Union Transp. Co. v. Sacramento-----44, 175
Upton v. Antioch-----243
Uttley v. Santa Ana-----122

V

Van Dorn v. San Francisco-----43, 50, 373
Van Pelt v. Littler-----130
Van Vorce v. Thomas-----130, 131, 419
Van Winkle v. King-----58, 341, 342
Vargas v. Ruggiero-----417
Varney & Green v. Williams-----106
Vater v. Glenn-----20, 23, 60, 71,
192, 195, 204, 226, 227, 228, 312
Ventura v. Barry-----126
Verdier v. Verdier-----412
Vilardo v. Sacramento-----149
Villanazul v. Los Angeles-----38, 240, 320
Von Arx v. Burlingame-----36, 70, 516

W

Walker v. Dep't of Public Works-----20
Wall v. M. & R. Sheep Co.-----525
Wallace v. Der-Ohanian-----508
Wallace v. Regents of the Univ. of
Cal.-----519

Ward Concrete Prods. Co. v. Los Angeles County Flood Control Dist. 105, 106, 436	
Warren v. Los Angeles	351
Waterman v. Los Angeles County Gen. Hosp.	380
Watson v. Alameda	49, 53
Weissband v. Petaluma	227, 232
Welch v. Dunsmuir Joint Union H.S. Dist.	513
Weldy v. Oakland H.S. Dist. 41, 510, 525, 528	511
Wells Fargo & Co. v. San Francisco	
Welsbach v. State	17
Werner v. Southern Cal. Associated Newspapers	517
West v. San Diego	38, 39, 460
West Coast Advertising Co. v. San Francisco	519
Western Assur. Co. v. Sacramento & San Joaquin Drainage Dist. 20, 60, 106, 173, 185	
Western Indem. Co. v. Pillsbury	517
Westinghouse Mfg. Co. v. Chambers	284
Wexler v. Los Angeles 45, 48, 485, 486, 525, 529	
Whaley v. Jansen	170, 395, 406, 407
White v. Brinkman 75, 249, 250, 254, 352, 370, 376	413
White v. Cox Bros. Constr. Co.	55,
White v. Towers	75,
Whiteford v. Yuba City Union H.S. Dist.	170, 246, 249, 250, 251, 412, 413
Whiteman v. Anderson-Cottonwood Irr. Dist.	53, 346
Whiting v. National City 43, 48, 183, 346, 347, 350, 353	20, 60, 142, 203
Whitney v. Butterfield	130
Wiley v. Berkeley	97
Wilkerson v. El Monte	351
Williams v. Alhambra	485
Williams v. Wheeler	519
Williamson, <i>In re</i>	151
Willmon v. Powell	127
Willoughby v. Zylstra	36
Wilson v. Beville 13, 103, 126, 287,	301
Winbigler v. Los Angeles	238
Wing Chung v. Los Angeles	73
Wolfsen v. Wheeler	130, 253
Womar v. Long Beach	227
Wong Him v. San Francisco	182
Wood v. Cox	231, 261, 427
Wood v. Lehne	254, 298, 299
Wood v. Samaritan Inst., Inc.	389, 401
Wood v. Santa Cruz 50, 176, 352,	355
Woodman v. Hemet Union H.S. Dist. 38, 46	
Woodsmall v. Mt. Diablo Unified School Dist.	41, 510
Wright v. San Bernardino H.S. Dist.	510
Wurzbarger v. Nellis	120, 121
Wyatt v. Arnot	248
Y	
Yarrow v. State	36, 37, 39, 40, 221
Yolo v. Modesto Irr. Dist.	203, 207
Young v. Ventura	44, 178
Young, <i>Ex parte</i>	106
Youngblood v. Los Angeles	105
Z	
Zeppi v. State	221, 227, 228
Ziegler v. Santa Cruz City H.S. Dist. 41, 46, 49, 346, 493, 511	

INDEX *

AGRICULTURE

See *Animals; Plants*
 Liability of advisory board members,
 see *Statutory Immunization from
 Tort Liability*

AMUSEMENT FUNCTIONS

See *Park, Recreation, Cultural and
 Amusement Functions, Liability of
 Public Entity, Policy Resolution
 Problem for Legislature*

ANIMALS

Destruction to halt disease, see *Stat-
 utory Provisions Governing Sub-
 stantive Tort Liability of Govern-
 mental Entities*
 Reimbursement for livestock killed
 by dogs, see *Statutory Provisions
 Governing Substantive Tort Liabil-
 ity of Governmental Entities*
 Stock trails used by vehicles, see
*Statutory Immunity from Tort Li-
 ability*

ARREST

False arrest and imprisonment, see
*Police Protection and Law En-
 forcement, Liability of Public En-
 tity, Policy Resolution Problem for
 Legislature*
 Wrongful, or restraint of persons sus-
 pected of mental illness or conta-
 gious disease, see *Medical Treat-
 ment and Hospital Care, Liability
 of Public Entity, Policy Resolution
 Problem for Legislature*

ASSESSMENT, SPECIAL

To satisfy judgment against entity,
 see *Policy Determination by Legis-
 lature, Relevant Considerations*

ASSUMPTION OF RISK

As defense in cases of dangerous or
 defective recreational and park
 property, see *Park, Recreation,
 Cultural and Amusement Func-
 tions, Liability of Public Entity,
 Policy Resolution Problem for Leg-
 islature*
 Under Public Liability Act, see *Con-
 ditions of Public Property, Dan-
 gerous and Defective, Policy Reso-
 lution Problem for Legislature*

ATTORNEYS

Statutory limit on fees of, if entities
 liable, see *Policy Determination by
 Legislature, Relevant Considera-
 tions*

AUTHORITIES, PUBLIC

See throughout this Index

AWARD

Statutory limit on under Public Li-
 ability Act, see *Conditions of Public
 Property, Dangerous and Defec-
 tive, Policy Resolution Problem for
 Legislature*

BLAWIE, JAMES L.

Index preparation, footnote----- 557

BLAWIE, MARILYN B.

Index preparation, footnote----- 557

BONDS

Issuance of to avoid consequences of
 entity liability, see *Policy Deter-
 mination by Legislature, Relevant
 Considerations*
 Required of public officers to avoid
 public entity liability, see *Policy
 Determination by Legislature, Rel-
 evant Considerations*

BRIDLE TRAILS

Accidents on, see *Statutory Immuni-
 zation from Tort Liability*

CARE, STANDARD OF

Under Public Liability Act, see *Con-
 ditions of Public Property, Danger-
 ous and Defective, Policy Resolu-
 tion Problem for Legislature*

CHARTERS, CITY

See *Statutory Immunization from
 Tort Liability*

CITIES

See throughout this Index

CITY CHARTERS

See *Statutory Immunization from
 Tort Liability*

CIVIL DEFENSE

See *Statutory Immunization from
 Tort Liability*

CLAIMS

Audit, see *Policy Determination by
 Legislature, Relevant Considera-
 tions*
 Simplified procedures recommended
 for claims against entities, see *Pol-
 icy Determination by Legislature,
 Relevant Considerations*

CONDEMNATION

See *Inverse Condemnation*

CONDITIONS OF PUBLIC PROP- erty, DANGEROUS AND DE- FECTIVE, POLICY RESOLUTION PROBLEM FOR LEGISLATURE

Analysis and comment-----	333
Public Liability Act, actionable de- fect, what constitutes	
—Analysis-----	345
—California law-----	345
—Other jurisdictions, experience	348
—Study author's recommendation---	351
—Summary and conclusions-----	350
Public Liability Act, assumption of risk as defense discussed later in text-----	369

* This index was prepared by Professors Marilyn Beyerle Blawie of Alameda County State College and James L. Blawie of the University of Santa Clara School of Law.

Public Liability Act, contributory negligence, shifting of burden of proof to plaintiff	
—Analysis	364
—California law	364
—Other jurisdictions, experience	365
—Study author's recommendation	369
—Summary and conclusions	367
Public Liability Act, entities covered	
—Analysis	334
—California law	334
—Other jurisdictions, experience	335
—Study author's recommendation	338
—Summary and conclusions	338
Public Liability Act, entity's standard of care	
—Analysis	338
—California law, status of plaintiff, analysis	339
—California law, status of plaintiff, suggested legislative modifications	341
—Other jurisdictions, experience	338
—Study author's recommendation	344
—Summary and conclusions	344
Public Liability Act, liability for defective property, exceptions	
—Analysis	375
—California law	375
—Other jurisdictions, experience	375
—Study author's recommendation	377
—Summary and conclusions	376
Public Liability Act, liability for defective property, limits, reasonableness of entity action after notice of defect	
—Analysis and comment	373
—California law	373
—Other jurisdictions, experience	374
—Study author's recommendation	374
—Summary and conclusions	374
Public Liability Act, liability for defective property, limits, third party negligence	
—Analysis and comment	369
—California law	369
—Other jurisdictions, experience	371
—Study author's recommendation	373
—Summary and conclusions	371
Public Liability Act, prior knowledge or notice requirement	
—Analysis and comment	352
—California law	352
—Other jurisdictions, experience	353
—Study author's recommendation	363
—Summary and conclusions	361
Public Liability Act, statutory limit on recovery	
—Analysis and comment	377
—Other jurisdictions, experience	377
—Study author's recommendation	378
—Summary and conclusions	378
CONSENT TO SUIT, STATUTORY	
See <i>Statutory Consent to Suit</i>	
CONSTITUTION, CALIFORNIA	
See <i>Constitutionality of Legislative Solution, Problems</i>	
CONSTITUTIONALITY OF LEGISLATIVE SOLUTION, PROBLEMS	
—Analysis	515
—Common law, legislative competence to alter	516
—Retrospective legislation, validity	
—Analysis	520
—Claims against public entities, four types involved	523
—Constitutional discussion	525
—Summary and conclusions	537

CONTENTS, TABLE OF ----- 5

CONTRACT

- Assuming liability, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*
- Public entity liability for fraud, see *Nonstatutory Law of Governmental Tort Liability Before 1961*

CONTRIBUTORY NEGLIGENCE

- Under Public Liability Act, see *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

CONTROLLER, STATE

- Audit function in approving claims against state ----- 17

CONTROL, STATE BOARD OF

- Audit function in approving claims against state ----- 17

COUNTIES

- See throughout this Index

CONVERSION

- Public entity liability for, see *Nonstatutory Law of Governmental Tort Liability Before 1961*

CULTURAL FUNCTIONS

- See *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*

DAMAGES

- Statutory limit under Public Liability Act, see *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

DANGEROUS AND DEFECTIVE PUBLIC PROPERTY

- See *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*
- See *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*
- See *Statutory Immunization from Tort Liability*
- See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

DENTISTS

- See *Medical Practitioners*

DISTRICTS

- See throughout this Index

DOCTORS

- See *Medical Practitioners*

DRAINAGE

Sacramento and San Joaquin district and state reclamation board, see *Statutory Immunization from Tort Liability*

EMBEZZLEMENT

Moneys stolen from custody of public officers, see *Statutory Immunization from Tort Liability*

EMINENT DOMAIN

See *Inverse Condemnation*

EMPLOYEES, PUBLIC

See *Public Officers and Employees*

FALSE ARREST

See *Arrest*

FEDERAL CIVIL RIGHTS ACT

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

FELONIES

Erroneous conviction or imprisonment for, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

FINANCIAL ADMINISTRATION OF ENTITY LIABILITY

See *Policy Determination by Legislature, Relevant Considerations*

FIREFIGHTING AND PREVENTION, LIABILITY OF PUBLIC ENTITY, POLICY RESOLUTION PROBLEM FOR LEGISLATURE

Analysis	
—California law, cases	456
—California law, statutes	460
—Fire insurance, private, considerations	462
—Other jurisdictions, experience	456
—Summary and conclusions	463
Conflagration, property destruction to avert	
—Analysis	480
—California law	480
—Other jurisdictions, experience	480
—Study author's recommendation	481
Firefighting and prevention, aid to or from other entities, liability	
—Analysis	475
—California law	475
—Other jurisdictions, experience	477
—Study author's recommendation	479
Firefighting and prevention, failure to provide adequate	
—Analysis	464
—Other jurisdictions, experience	464
—Study author's recommendation	465
Firefighting and prevention, negligent conduct	
—Analysis	470
—California law	472
—Other jurisdictions, experience	470
—Study author's recommendation	473
Firefighting facilities, negligent maintenance, or water failure	
—Analysis	466

—California law	466
—Other jurisdictions, experience	466
—Study author's recommendation	469
Fire protection, failure to provide	
—Analysis	464
—California law	464
—Other jurisdictions, experience	464
—Study author's recommendation	464

FIREMEN

Immunity in emergency, see *Statutory Immunization from Tort Liability*

FLOOD CONTROL DISTRICTS

Negligent torts, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

FORESTRY DIVISION

Employees not liable when operating emergency vehicle, see *Statutory Immunization from Tort Liability*

FRANCHISES

Immunity of governmental entity which causes franchise holder to relocate facilities, see *Statutory Immunization from Tort Liability*

FRAUD

Public entity liability, see *Nonstatutory Law of Governmental Tort Liability Before 1961*

GOOD SAMARITAN STATUTE

See *Statutory Immunization from Tort Liability*

GOVERNMENTAL IMMUNITY

See throughout this Index
See *Statutory Consent to Suit*
See *Waiving of Governmental Immunity*
Prior to 1961, see *Muskopf v. Corning Hospital District*

HEALTH AND SAFETY CODE

Interpreted, see *Muskopf v. Corning Hospital District*

HOSPITALS AND HOSPITAL DISTRICTS

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*
See *Muskopf v. Corning Hospital District*

"INHERENTLY WRONG" ACTIONS

Public entity liability for, see *Nonstatutory Law of Governmental Tort Liability Before 1961*

INMATES

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*

INSANE

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*

INSURANCE

Fire, see *Firefighting and Prevention, Liability of Public Entity, Policy Resolution Problem for Legislature*
 Liability of public entities, see *Policy Determination by Legislature, Relevant Considerations*

**INTRODUCTION TO STUDY—
CAVEATS**

Analysis ----- 11
 Problems excluded deserve further study ----- 12
 Selective and limited nature of study ----- 11
 Study author's recommendations not necessarily those of Law Revision Commission, footnote ----- 11

INVERSE CONDEMNATION

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*
 Prior to *Muskopf*, see *Muskopf v. Corning Hospital District*

JAILS

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

JUDGMENTS

Installment payment to lighten impact of entity liability, see *Policy Determination by Legislature, Relevant Considerations*
 Satisfaction of tort judgments, see *Policy Determination by Legislature, Relevant Considerations*
 Size of tort judgments if entities liable, see *Policy Determination by Legislature, Relevant Considerations*
 Statutory limit, to lighten burden of entity liability, see *Policy Determination by Legislature, Relevant Considerations*
 Statutory limits on financial ability of entity to satisfy, see *Statutory Immunization from Tort Liability*

JURY

Elimination in auditing tort claims against entities, see *Policy Determination by Legislature, Relevant Considerations*

LARCENY

Moneys stolen from custody of public officers, see *Statutory Immunization from Tort Liability*

LAW ENFORCEMENT

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

LEGISLATURE

See *Constitutionality of Legislative Solution, Problems*
 See *Policy Determination by Legislature, Relevant Considerations*

LEGISLATURE, POLICY RESOLUTION PROBLEMS FOR

See *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*
 See *Firefighting and Prevention, Liability of Public Entity, Policy Resolution Problem for Legislature*
 See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*
 See *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*
 See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

LIABILITY OF GOVERNMENTAL ENTITIES, TORT

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*
 Prior to *Muskopf*, see *Muskopf v. Corning Hospital District*
 Theory of, see *Policy Determination by Legislature, Relevant Considerations*

MALFEASANCE

See throughout this Index; see particularly *Nonstatutory Law of Governmental Tort Liability Before 1961*

MALICIOUS PROSECUTION

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

MEDICAL AID

Negligence or failure to provide to prisoner, see *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

MEDICAL MALPRACTICE

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*

MEDICAL PRACTITIONERS

Immunity if service rendered during disaster, see *Statutory Immunization from Tort Liability*
 Immunity under Good Samaritan statute, see *Statutory Immunization from Tort Liability*

MEDICAL TREATMENT AND HOSPITAL CARE, LIABILITY OF PUBLIC ENTITY, POLICY RESOLUTION PROBLEM FOR LEGISLATURE

Analysis ----- 379
 —California law ----- 379
 —Other jurisdictions, experience 383
 Inadequate supervision of mentally ill
 —Accidental injury
 Analysis ----- 389
 Study author's recommendation 389
 —Injury inflicted on fellow inmate
 Analysis ----- 389
 Study author's recommendation 390
 —Self-inflicted harm
 Analysis ----- 387
 Study author's recommendation 388
 —Torts of escaped patients
 Analysis ----- 390
 Study author's recommendation 391
 Injuries sustained by reason of administration of public health functions
 —Analysis ----- 397
 —Study author's recommendation 399
 Injury to patient or inmate from assault committed by hospital employee
 —Analysis ----- 395
 —Study author's recommendation 396
 Medical malpractice
 —Analysis ----- 385
 —California law ----- 386
 —Other jurisdictions, experience 385, 386
 —Study author's recommendation 387
 Study author's recommendation, general 404
 Summary and conclusions ----- 399
 Torts of mentally ill persons discharged from hospital
 —Analysis ----- 392
 —Study author's recommendations 394
 Wrongful arrest or restraint of persons suspected of being mentally ill or afflicted with contagious disease
 —Analysis ----- 394
 —Study author's recommendation 395

MENTALLY ILL

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*

Immunity of health officer seeking admission of person to mental hospital, see *Statutory Immunization from Tort Liability*

Sterilization of, see *Statutory Immunization from Tort Liability*

MILITIAMEN

Acts done in performance of duty, see *Statutory Immunization from Tort Liability*

MISFEASANCE

See throughout this Index; see particularly *Nonstatutory Law of Governmental Tort Liability Before 1961*

MOB VIOLENCE

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

MORATORIUM

Following *Muskopf*, see *Muskopf v. Corning Hospital District*

MOTOR VEHICLES

See *Vehicles*

MUNICIPALITIES

See throughout this Index

MUSKOPF v. CORNING HOSPITAL

Governmental-proprietary distinction, prior to ----- 13
 Inverse condemnation, prior to ----- 13
 Legislative inroads upon governmental immunity, prior to ----- 15
 Limitations ----- 11, 14, 15
 Moratorium period following ----- 12
 Nuisance, liability resulting from, prior to ----- 13
 Statutory waiver of immunity, prior to ----- 13
 Summary of prior law ----- 13
 Statutory provisions prior to, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

NONFEASANCE

See throughout this Index; see particularly *Nonstatutory Law of Governmental Tort Liability Before 1961*

NONINDEPENDENT ENTITIES

Functional immunity of, see *Statutory Immunity from Tort Liability*

NONSTATUTORY LAW OF GOVERNMENTAL TORT LIABILITY BEFORE 1961

Analysis ----- 219
 Governmental-proprietary distinction 219
 Intentional torts, public entities immune to suit, confusion in cases noted ----- 231
 —Conversion, public entities liable 233
 —Fraud, public entities liable under fraudulent contract breach theory 234
 —"Inherently wrong" acts, public entities not immune ----- 231
 —Summary and conclusions ----- 234
 —Trespass by corporate act, public entity not immune in governmental activity, doctrine refuted ----- 232
 Nonliability, bases other than governmental ----- 237
 —Analysis ----- 237
 —Discretionary acts, public officers not liable ----- 246
 —Nonfeasance, not distinguished from misfeasance in California cases ----- 260
 —"Servant of the Law," *respondet superior* inapplicable when public officer acting as ----- 237
 —*Ultra vires* torts, public entities not liable ----- 242
 Nuisance, public entity liable even in governmental activity ----- 225

NOTICE

Public Liability Act as requiring, see *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

NUISANCE

Liability resulting from, see *Muskopf v. Corning Hospital District*
Public entity liability for, see *Non-statutory Law of Governmental Tort Liability Before 1961*

NURSES

See *Medical Practitioners*

PARK, RECREATION, CULTURAL AND AMUSEMENT FUNCTIONS, LIABILITY OF PUBLIC ENTITY, POLICY RESOLUTION PROBLEM FOR LEGISLATURE

Analysis	
—California law	485
—Other jurisdictions, experience	482
—Parks and recreation, deemed of lesser importance	489
—Parks and recreation, defined	487
—Parks and recreation, entities involved	488
—Study author's recommendation	491
—Summary and conclusions	486
Recreational or park property, absence or inadequacy of supervision	
—Analysis	502
—California law, general	502
—California law, school districts	504
—Other jurisdictions, experience	503
—Proximate cause as factor	510
—Study author's recommendation	509
Recreational and park property, defective or dangerous condition	
—Analysis	491
—California law	491
—Other jurisdictions, experience	491
—Study author's recommendation, defense of assumption of risk	496
—Study author's recommendation, exemption from liability	493
—Summary and conclusions	492
Recreational or park property, negligent supervision and other tortious conduct	
—Analysis	511
—California law	511
—Other jurisdictions, experience	511
—Study author's recommendation	512
—Summary and conclusions	512

PHYSICIANS

See *Medical Practitioners*

See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*

PLANTS

Destruction to halt disease, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

Injury in course of weed abatement, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

POLICE

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

See *Public Officers and Employees*
Immunity in case of special state policemen, see *Statutory Immunity from Tort Liability*

Immunity in case of emergency or hot pursuit, see *Statutory Immunization from Tort Liability*

POLICE PROTECTION AND LAW ENFORCEMENT, LIABILITY OF PUBLIC ENTITY, POLICY RESOLUTION PROBLEM FOR LEGISLATURE

Analysis	404
—California law	404
—Policy considerations, general	405
Citizens aiding law enforcement, injuries sustained	
—Analysis	452
—Other jurisdictions, experience	452
—Study author's recommendation	453
Escape, negligence of prison or jail officials in permitting	
—Analysis	430
—Other jurisdictions, experience	430
—Study author's recommendation	432
—Summary and conclusions	431
Existing law, failure to enforce	
—Analysis	443
—California law	443
—Other jurisdictions, experience	443
—Study author's recommendation	447
—Summary and conclusions	445
False arrest and imprisonment	
—California law	406
—Other jurisdictions, experience	408
—Study author's recommendation	410
—Summary and conclusions	410
Federal Civil Rights Act, violations	
—Analysis	454
—Federal decisions	454
—Study author's recommendation	455
—Summary and conclusions	455
Jail and prisoners, inadequate supervision	
—Analysis	421
—California law	422
—Other jurisdictions, experience	422
—Study author's recommendation	426
—Summary and conclusions	425
Malicious prosecution	
—Analysis	411
—California law	411
—Other jurisdictions, experience	412
—Study author's recommendation	414
—Summary and conclusions	413
Medical aid to prisoner, negligence or failure to provide	
—Analysis	426
—California law	426
—Other jurisdictions, experience	429
—Study author's recommendation	429
—Summary and conclusions	429
Peace officer negligently retained in public employment though known unfit, injuries inflicted by	
—Analysis	418
—California law	416
—Other jurisdictions, experience	419
—Study author's recommendation	421
—Summary and conclusions	420
Police regulations, adoption and enforcement	
—Analysis	434
—California law	435

- Other jurisdictions, experience..... 435
- Study author's recommendation... 436
- Policemen's torts in course of employment
 - Analysis..... 433
 - California law..... 434
 - Other jurisdictions, experience..... 433
 - Study author's recommendation... 434
 - Summary and conclusions..... 433
- Prisoner or suspect, infliction of physical injuries to
 - Analysis..... 415
 - California law..... 417
 - Other jurisdictions, experience..... 416
 - Study author's recommendation... 418
- Safety regulations or precautions, failure to adopt
 - Analysis..... 433
 - California law..... 437
 - Other jurisdictions, experience..... 440
 - Study author's recommendation... 443
 - Summary and conclusion..... 440
- Third parties, failure by police to protect claimant against
 - Analysis..... 447
 - Mob violence statutes, relevance... 451
 - Other jurisdictions, experience..... 447
 - Study author's recommendation... 451
- POLICY DETERMINATION BY LEGISLATURE, RELEVANT CONSIDERATIONS**
 - Analysis..... 267
 - Financial administration of liability
 - Analysis..... 283
 - Financial consequences to public entities, adverse, problems
 - Alternatives to minimize or escape liability open to some public entities, not to others... 291
 - Public entities differ in financial position..... 289
 - Tort judgments becoming larger and more unpredictable..... 288
 - Financial consequences to public entities, means of avoiding
 - Attorney's fees, statutory limit... 305
 - Bonding public officers..... 297
 - Contract, public entities may shift liability by indemnity agreements..... 305
 - Installment payment of judgments..... 302
 - Insurance..... 293
 - Issuing bonds or evidences of debt..... 303
 - Limit on judgment, statutory... 304
 - Satisfaction of tort judgment, suggested statutes
 - Collapsible public entity, provision for case of..... 286
 - Empowering public entities dependent on larger entities to satisfy judgment from funds available and requiring larger entity to appropriate for dependent entity..... 285
 - Empowering public entities raising funds by lien assessment for benefit to do same to satisfy judgment..... 285
 - Empowering public entities to levy tax or assessment..... 284
 - Liability limits based on current income or revenue, elimination..... 287
 - Liability limits caused by statutes forbidding expense not expressly authorized, elimination..... 287
 - Summary and conclusions..... 306
 - Governmental tort liability, mechanisms for orderly evolution
 - Continuing advisory body recommended by study author..... 330
 - Procedure in auditing tort claims
 - Administrative or judicial procedure..... 313
 - Assumption of judgment or direct liability..... 311
 - Jury, elimination of..... 328
 - Simplified procedure
 - Analysis..... 316
 - Claim against dependent entity not suable transferred automatically to larger responsible entity..... 324
 - Curtailing of unjustified technical defenses: presentation of claim as condition precedent to suit..... 327
 - Curtailing of unjustified technical defenses: statutory time limits..... 325
 - Entities immune to suit, loss of immunity if claimant follows proper administrative procedure..... 324
 - Power of public entities to settle small or disputed claims..... 317
 - Presumption, entity which pays compensation is employer..... 320
 - Substantive liability..... 267
 - Courses of action open to Legislature..... 267
 - Tort liability, theory..... 271
 - Alternatives to liability, liability may differ with practical..... 274
 - Existing law, liability formulated on basis..... 282
 - Fault, differences in degree..... 273
 - Interference with desirable government activities, liability may vary with possibility..... 281
 - Risk of harm, differences in degree..... 273
 - Sources of litigation and uncertainty..... 283
 - Waiver of governmental immunity, logic of selective approach..... 271
 - Waiver of governmental immunity, objections to blanket approach... 269
 - POLICY RESOLUTION PROBLEMS FOR LEGISLATURE**
 - See *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*
 - See *Firefighting and Prevention, Liability of Public Entity, Policy Resolution Problem for Legislature*
 - See *Medical Treatment and Hospital Care, Liability of Public Entity, Policy Resolution Problem for Legislature*
 - See *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*
 - See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*
 - PRIDHAM ACT**
 - See *Statutory Immunization from Tort Liability*

PRISONS

See *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

Erroneous conviction or imprisonment for felony, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

PRIVATE PROPERTY

See *Property*

PROCEDURE

Simplified recommended in claims against entities, see *Policy Determination by Legislature, Relevant Considerations*

PROPERTY

Destruction of to avert conflagration, see *Firefighting and Prevention, Liability of Public Entity, Policy Resolution Problem for Legislature*

Emergency destruction of, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

Entry on private to perform official duty, see *Statutory Immunization from Tort Liability*

Injury in course of weed abatement, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

Private, unclaimed, see *Statutory Immunization from Tort Liability*

Unclaimed, see *Statutory Immunization from Tort Liability*

PROPERTY, PUBLIC

See *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

See *Property*

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

See *Statutory Immunization from Tort Liability*

PROPRIETARY FUNCTIONS

See *Introduction*

See *Muskopf v. Corning Hospital District; Nonstatutory Law of Governmental Tort Liability Before 1961*

PROSECUTION

See *Malcious Prosecution*

PROXIMATE CAUSE

Definition under Public Liability Act, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

Factor in cases of absence or inadequacy of supervision of recreational or park property, see *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*

PUBLIC HEALTH

Injuries sustained by reason of administration, see *Medical Treatment and Hospital Care, Public Entity, Policy Resolution Problem for Legislature*

PUBLIC LIABILITY ACT

See *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

See *Statutory Immunization from Tort Liability*

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

PUBLIC OFFICERS AND EMPLOYEES

See throughout this Index; see particularly *Nonstatutory Law of Governmental Tort Liability Before 1961*

See *Statutory Immunization from Tort Liability*

Entry on private property to perform official duty, see *Statutory Immunization from Tort Liability*

Limited liability of in cases of defective public property, see *Statutory Immunization from Tort Liability*

PUBLIC PROPERTY

See *Property, Public*

PUBLIC UTILITIES

Immunity of public entities for causing franchise holders to relocate facilities, see *Statutory Immunization from Tort Liability*

Relocation of as part of public improvement project, liability of entity for, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

RAPID TRANSIT LINES

See *Statutory Immunization from Tort Liability*

RECLAMATION DISTRICTS

Board members, liability of, see *Statutory Immunization from Tort Liability*

Sacramento and San Joaquin, see *Statutory Immunization from Tort Liability*

RECOVERY, TORT

Statutory limit under Public Liability Act, see *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

RECREATION FUNCTIONS

See *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*

Bridle trail accidents, see *Statutory Immunization from Tort Liability*

RESPONDEAT SUPERIOR DOCTRINE

See *Nonstatutory Law of Governmental Tort Liability Before 1961*

RETROACTIVE LEGISLATION

Validity, see *Constitutionality of Legislative Solution, Problems*

RETROSPECTIVE LEGISLATION

Validity, see *Constitutionality of Legislative Solution, Problems*

RIOTS

See *Mob Violence*

SAFETY REGULATIONS OR PRECAUTIONS

Failure to adopt, see *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

SCHOOL DISTRICTS

See *Statutory Immunization from Tort Liability*

Recreational property, absence or inadequacy of supervision, see *Park, Recreation, Cultural and Amusement Functions, Liability of Public Entity, Policy Resolution Problem for Legislature*

Torts of officers and employees, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

SIDEWALKS

Defective, see *Statutory Immunization from Tort Liability*

Disrepair, see *Statutory Immunization from Tort Liability*

SOVEREIGN IMMUNITY

See throughout this Index
See *Statutory Consent to Suit*
See *Waiving of Governmental Immunity*
Prior to 1961, see *Muskopf v. Corning Hospital District*

SPECIAL DISTRICTS

See throughout this Index

STATUTORY CONSENT TO SUIT

Analysis	17
California law, general	17
Consent to suit, entities lacking statutory consent	
—Analysis	30
—California law, cases	31
—California law, statutes	32
Qualified or limited consent to suit, statutes	
—Analysis	27
—California law, cases	27
—California law, statutes	28
Summary and conclusions	33
Unqualified consent to suit	
—Analysis and comment	27
—California law, statutes, comprehensive consent statutes listed	24
—California law, statutes, general consent statutes listed	21

STATUTORY IMMUNIZATION FROM TORT LIABILITY

Analysis	
—California law, assumptions re	109
—Derivative immunity defined	110
—Study based on validity of <i>Muskopf</i> and <i>Lipman</i> decisions	109
Defective public property, personal liability of public officers limited	
—Analysis	120
—California law	
Cases, effect of <i>Muskopf</i> and <i>Lipman</i>	123
Pridham Act, Government Code § 1953	120, 122, 123
Public Liability Act of 1923, Government Code § 53051	120, 122, 123
Summary and conclusions	125
—School buildings, defective, school board members exempted, Education Code §§ 15512-15516	
Analysis	129
Relation to other statutes	129
Summary and conclusions	129
—Street and sidewalk defects, Streets and Highways Code §§ 5640, 5641	
Analysis	125
Relation to other statutes	128
Summary and conclusions	128
Entry on private property to perform official duty	
—Analysis	110
—California law, cases	110
—California law, statutes	
Entry for designated purpose, no unnecessary damage to be done	119
Entry for designated purposes, liability specifically preserved	110
Entry for designated purposes, liability not mentioned	113
Entry pursuant to duty imposed on public officers which implicitly requires	117
—Study author's recommendation	119
—Summary and conclusions	119
Express statutory immunities of public entities	
—Analysis	174
—Defective public property, injuries resulting from	
Analysis	174
Bomb shelters and other civil defense facilities, Civil Code § 1714.5(1)	179
Bridle trails, accidents, Government Code § 54002	177
Drainage works and facilities, Sacramento and San Joaquin District and State Reclamation Board, Water Code § 8535	184
Franchise holders, immunity for relocating facilities of	186
Franchise holders, public utility, relocation of facilities, Public Utilities Code § 6297	187
Franchises and public utility facilities affecting public streets, miscellaneous city charter provisions	188
Miscellaneous, analysis	191
Miscellaneous, county highway, restriction or closing by board of supervisors, Streets and Highways Code § 942.5	191
Miscellaneous, special policemen, state, Government Code § 1408	191
Miscellaneous, Unclaimed Property Act	192
Public service company lines, tracks, poles and other facilities, relocation, Streets and Highways Code § 680	187

Public way or place in disrepair, special provision for City of Inglewood, City Charter art. XXXVI, § 33, ineffective	183	—Liability of special district personnel limited to instances of actual notice of incompetence, or employment or retention after such notice	
Road not part of county road system, failure to maintain, Streets and Highways Code § 941(2)	175	Analysis	137
Stock trails, use by vehicles, Streets and Highways Code §§ 943, 954	175	Statutes listed	138
Streets not part of city street system, failure to maintain, Streets and Highways Code § 1806	176	Summary and conclusions	138
Street or sidewalk in disrepair, liability of city, Streets and Highways Code § 5640, superseded	181	—Miscellaneous statutory immunities of public personnel	
Street railroads, right of city to construct, maintain and repair street or substreet installations and improvements with reference to, Public Utilities Code § 7812	188	Analysis	149
Functional immunity of nonindependent entities		Civil defense workers granted same immunity as county or city officer or employee performing same task, Military and Veterans Code § 1591(a)	162
—Analysis	214	Department of Mental Hygiene, its officers, employees or agents not liable civilly or criminally for sterilizing patients pursuant to law, Welfare and Institutions Code § 6624	172
—Nonindependent entities, listed	216	Disaster service worker in extreme emergency liable only for willful acts, Civil Code § 1714.5(2)	159
—Nonindependent entity, defined	215	Good Samaritan statute, medical practitioner who gives aid in emergency not liable, Business and Professions Code § 2144	150
—Summary and conclusions	217	Local health officer or employee who seeks admission of a person to a state mental hospital believing it to be in best interest of person, not civilly or criminally liable, Welfare and Institutions Code § 6610.3(2)	169
Immunity by implication from statutory language		Medically-trained person who renders service on official request during disaster liable only for willful act or omission, Military and Veterans Code § 1587(2) and Civil Code § 1714.5	161
—Analysis	193	Member of public police or fire department, highway patrol or Forestry Division employee not liable for injury to person or property when operating emergency vehicle responding to emergency or in hot pursuit, Vehicle Code § 17004	166
—Statutory declaration of nature of entity's function	199	Militia men in active California service not civilly or criminally liable for acts done in performance of duty, Military and Veterans Code § 392	166
—Statutory disclaimers of intent to enlarge liability	193	Officer or employee of fire protection or prevention unit or Division of Forestry not liable for injury or expenses occasioned in transporting or securing medical services for person injured in fire or related situation, Government Code § 1957	157
—Statutory limitations upon financial ability of entity to satisfy judgments	205	Psychopathic hospital officer or public officer, employee or physician who aids in proper delivery and detention of a person, not civilly or criminally liable, Welfare and Institutions Code § 6005	168
Immunity of public officials for acts of subordinates		Public entities, officers, employees, agents, volunteers or conscripts not liable for injury to volunteer or conscript in disaster or training therefor, Military and Veterans Code § 1591(b)	163
—Analysis	130		
—California law	130		
—City, county and school district officers			
Board members immune, Government Code § 1954	136		
Officers with fixed salary immune, Government Code § 1935.6	133		
—Liability of advisory board members in agricultural affairs limited to own dishonesty or crime			
Analysis	148		
Statutes, list	148		
Summary and conclusions	149		
—Liability of school district board's officers and employees limited to own negligence			
Analysis	146		
Statutes listed and interpreted	147		
Summary and conclusions	147		
—Liability of special district directors limited to instances of actual notice of incompetence, or employment or retention after such notice			
Analysis	139		
Statutes listed	140		
Summary and conclusions	140		
—Liability of special district directors, officers, employees and agents limited to own negligence, misconduct or willful violation of duty			
Analysis	145		
Statutes listed and interpreted	145		
Summary and conclusions	145		
—Liability of special district officers limited to own negligence, misconduct or willful violation of duty			
Analysis	141		
Statutes listed and interpreted	141		
Summary and conclusions	143		

Public officer, employee or agent who acts in good faith without malice under unconstitutional law not liable, Government Code § 1955 ----- 155

Public officer or employee who aids in proper delivery or detention of person believed mentally ill liable only if he acts maliciously or if his negligence results in bodily injury, Welfare and Institutions Code § 6610.9 ----- 171

Public officers not liable for moneys stolen from custody unless due care not exercised, Government Code § 1953.5 ----- 154

Reclamation Board members not liable for failure to carry out statutory provisions, Water Code § 8576 ----- 172

Reclamation Board members not liable for injuries caused by drainage facilities or installations, Water Code § 8535 ----- 174

School board members immune for accidents to school children, Education Code § 1041 ----- 151

School district officers or employees or assistants to officers or employees not liable for injury or death in disaster, civil defense activity, fire drill or required test except for negligence or wilful act, Education Code § 31301, Civil Code § 1714.5 ----- 153

Unclaimed private property, custodians who proceed according to law immune, Code of Civil Procedure §§ 1335, 1378, 1379, Penal Code § 5065, Welfare and Institutions Code §§ 166.4, 1019 ----- 174

STATUTORY PROVISIONS GOVERNING SUBSTANTIVE TORT LIABILITY OF GOVERNMENTAL ENTITIES

Role of Legislature in eroding immunity doctrine prior to *Muskopf* decision ----- 35

Statutes authorizing governmental liability

—Agreements to indemnify or hold harmless, special or limited statutory provisions, specified public agencies may assume such liability by contract ----- 97

—Assumption of liability for private torts, special or limited statutory provisions, specified public agencies must pay judgment debt incurred by public officer or employee for act or omission in official capacity ----- 65

—Emergency destruction of private property, state liable for private property or personnel used, damaged, commandeered or destroyed by Governor's order ----- 77

—Emergency destruction or damage to property of local governmental unit, claim may be filed for property damaged or destroyed outside unit's limits ----- 77

—Erroneous conviction or imprisonment for felony, state to reimburse persons ----- 74

—Inverse condemnation ----- 102

—Livestock killed by dogs, owners to be reimbursed from dog license fees and fines, Agricultural Code § 439.55 ----- 73

—Livestock or plants ordered destroyed to halt disease, state to pay indemnity to owners ----- 75

—Mob or riot damage, local government agency liable for, within its borders ----- 72

—Motor vehicle torts, public agencies liable under Vehicle Code § 17001 ----- 36

—Negligence of officers and employees of flood control and water conservation districts, Water Code § 50152, districts liable as private corporations ----- 60

—Negligent torts of school district officers and employees, school districts liable, Education Code § 903 ----- 40

—Public improvement projects, special or limited statutory provisions, damages from projects to be compensated ----- 78

 Analysis ----- 96

 Miscellaneous provisions ----- 79

 Relocation of utility facilities ----- 96

 Restoration of crossings and intersextions ----- 42

—Public Liability Act of 1923, Government Code § 53031, local government agencies liable for torts resulting from condition of public premises after notice and failure to act ----- 42

 Analysis ----- 44

 Definition, dangerous or defective condition ----- 53

 Definition, failure to remedy defect or protect public ----- 43

 Definition, local agency ----- 49

 Definition, notice or knowledge of defect ----- 55

 Definition, proximate cause ----- 44

 Definition, public property ----- 64

—Weed abatement, city general fund liable for city officer's or employee's negligent injury to property ----- 101

—Workmen's compensation, public entities liable to employees for injuries in scope of employment ----- 101

STERILIZATION

Immunity for performing upon patients, see *Statutory Immunization from Tort Liability*

STREET RAILROADS

See *Statutory Immunization from Tort Liability*

STREETS AND HIGHWAYS

See *Statutory Immunization from Tort Liability*

City charter provisions affecting public streets and franchise and public utility facilities, see *Statutory Immunization from Tort Liability*

Closing or restriction of county highways by board of supervisors, see *Statutory Immunization from Tort Liability*

Crossing and intersections, restoration of in public improvement projects, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

Defects, see *Statutory Immunization from Tort Liability*

SUBSTANTIVE TORT LIABILITY OF GOVERNMENTAL ENTITIES

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

SUIT, CONSENT TO, STATUTORY

See *Muskopf v. Corning Hospital District*
See *Statutory Consent to Suit*

TAXATION

To satisfy judgment against entity, see *Policy Determination by Legislature, Relevant Considerations*

THEFT

Moneys stolen from custody of public officers, see *Statutory Immunization from Tort Liability*

THIRD PARTIES

Police failure to protect claimant against, see *Police Protection and Law Enforcement, Liability of Public Entity, Policy Resolution Problem for Legislature*

THIRD PARTY NEGLIGENCE

Under Public Liability Act, see *Conditions of Public Property, Dangerous and Defective, Policy Resolution Problem for Legislature*

TORTS

See throughout this Index
Ultra vires, see *Nonstatutory Law of Governmental Tort Liability Before 1961*

TRANSMITTAL LETTER ----- 3**TRESPASS**

See *Tort Liability of Governmental Entities*

TORT LIABILITY OF GOVERNMENTAL ENTITIES

See throughout this Index
See *Muskopf v. Corning Hospital District*
See *Nonstatutory Law of Governmental Tort Liability Before 1961*
See *Statutory Immunization from Tort Liability*
See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

ULTRA VIRES TORTS

See *Nonstatutory Law of Governmental Tort Liability Before 1961*

VAN ALSTYNE, PROF. ARVO

Recommendations, opinions, conclusions, see throughout this Index
Study author, footnote----- 5

VEHICLES

Torts re, see *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

WAIVING OF GOVERNMENTAL IMMUNITY

See *Governmental Immunity*

WATER

Conservation districts, see *Flood Control Districts*
Failure of, in firefighting, see *Firefighting and Prevention, Liability of Public Entity, Policy Resolution Problem for Legislature*

WORKMEN'S COMPENSATION

See *Statutory Provisions Governing Substantive Tort Liability of Governmental Entities*

O