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## Torts

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# ***Torts***

by *Frederick J. Moreau\**

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preciation to Robert E. Jensen, student at Golden Gate College, School of Law, for his invaluable assistance in the preparation of this article. Aside from making many useful suggestions and furnishing materials most effectively, Mr. Jensen is the sole author of the section on Interspousal Imputation of Negligence.

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#### **I. Introduction**

"Law must be stable, and yet it cannot stand still" (Holmes). Here is the great antinomy confronting us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison. All depends on the wisdom with which the joinder is effected. . . . Fusion in due proportion is the problem of the ages. [Cardozo, *The Growth of the Law*, 1924, pp. 2 and 3.]

## II. Duty

### A. Overview of Developments in Duty

In last year's survey we noted the great extension of legal duties exacted in a variety of relationships: *Dillon v. Legg*,<sup>1</sup> finding liability on the part of a driver to a parent who sustained mental disturbance, and resulting injuries, from witnessing injury to and death of her child caused by a breach of duty to exercise care towards the child; *Rowland v. Christian*,<sup>2</sup> increasing the duty of the possessor of realty by predicated liability on Civil Code section 1714, which creates a duty of *ordinary care or skill in the management* of property, without reference to the old common-law classifications of trespasser, licensee, or business invitee; *Brockett v. Kitchen Boyd Motor Co.*,<sup>3</sup> finding a duty to refrain from placing a person in his own car, knowing of his inebriation and incapacity to drive, with resulting injuries to others; and *Connor v. The Great Western Savings and Loan Association*,<sup>4</sup> creating a duty on the part of a savings and loan association that financed an addition to a city to see to it that the homes built therein were not defectively constructed, and holding such savings and loan association jointly liable with the builder for damages resulting to purchasers of such homes.

The *Connors* decision is a landmark case. The fact that the State Supreme Court split four to three is indicative of its impact. The builders were actively negligent. The majority found that the builders and the financing association were joint venturers, with a community of interest, a joint interest, sharing profits and control. Both had a duty to guard against defective plans and both were required to make due inspections. Thus the later negligence of the builder was not a superseding cause of injury, and privity between the home-

1. 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316 (1968); this case and the two that follow were discussed in greater detail in Moreau, TORTS, *Cal Law—Trends and Developments* 1969, pp. 374–392.

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2. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

3. 264 Cal. App.2d 69, 70 Cal. Rptr. 136 (1968).

4. 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).

owners and the loan association was not required. Another citadel of privity has fallen;<sup>5</sup> as Cardozo put it, "The assault on the citadel of privity is proceeding apace."<sup>6</sup>

The minority, headed by Justice Burke, emphasized that there is a great difference between the duties of a supplier of capital and the entrepreneur. The former owes its duty to its stockholders and there is a complete lack of any agency or joint venture between the builder and the lender on which to base a duty to the homeowners.

The case of *Rowland v. Christian*<sup>7</sup> was recognized and approved in *Dixon v. St. Francis Hotel*.<sup>8</sup> Plaintiff was at a hotel for lunch, and when she walked toward the dining room she stumbled on a plank that was laid on the floor for a painting job. The verdict was for plaintiff, but the court granted a new trial on the theory that the evidence did not justify the verdict. There was no trap nor inconspicuous danger. *Rowland* was relied on as modifying the common-law dependence on plaintiff's status to establish the standard of care owed. Since plaintiff could see the situation, a warning would not be necessary; she was as well informed as the defendant as to the hazardous condition, yet she was a business invitee.

Again, we find the *Rowland* case considered in *Beauchamp v. Los Gatos Golf Club*.<sup>9</sup> Plaintiff, a woman golfer, was an invitee. She slipped on cement with her worn golf-shoe spikes and fell. The court non-suited her and the reviewing court reversed. The Court points out that defendant's duty was to exercise ordinary care, as required by Civil Code section 1714, and *Rowland*. The status of plaintiff as a trespasser, licensee, or invitee is no longer determinative, but is still helpful. Here, as in the hotel case, there was no trap or concealed peril and there was no liability for what was plain and observable. Breach of a duty is an indispensable factor, and

5. Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. p. 791 (1965-66).

6. *Ultramares Corporation v. Touche*, 255 N.Y. 170, 174 N.E. 441, 445, 74 A.L.R. 1139, 1145 (1931).

7. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968).

8. 271 Cal. App.2d 739, 77 Cal. Rptr. 201 (1969).

9. 273 Cal. App.2d —, 77 Cal. Rptr. 914 (1969).

although it was doubtful a breach had occurred, the Court, in reversing, held defendant's breach a question of fact for jury determination.

In *Holliday v. Miles, Inc.*,<sup>10</sup> the holding of *Rowland* was extended to a case involving the condition of personal property that caused damage to Holliday. Holliday was employed by Apex, a subcontractor, in erecting a large department store. He was using scaffolds owned by his employer but, desiring to work in another location where scaffolds had been set up by another subcontractor, Miles, he used the latter scaffold and was injured when a plank, cross-grained and knotty, broke and he fell. Holliday sued Miles, alleging his negligence in maintaining such a defective scaffold. Holliday had received medical and disability payments from his employer's workmen's compensation insurer who intervened in the action against Miles, seeking to recover its payments. The trial court nonsuited both Holliday and the insurance carrier, viewing Holliday as a mere licensee to whom no duty of ordinary care was owed. Only the insurer appealed. In affirming, the Court recognized that Holliday and the insurer were not in the same position and had Holliday appealed there might have been a reversal as to him only. Appellant's claim was not difficult to reject since the insurer stood in the shoes of Holliday's employer, that had a nondelegable statutory duty to provide its employees with a safe place to work; hence, the very defect that would create a liability on the part of Miles to Holliday would work to bar the insurer's (employer's) right to recover. Both Miles and Apex (Holliday's employer) had a duty of care towards Holliday. The same defect was a breach as to both. Miles' duty was predicated on *Rowland* and Civil Code section 1714. The court rejected the trial court's characterization of Holliday as a mere licensee, discussing the custom among contractors to allow other contractors to use scaffolds already set up. Such custom reveals a mutual advantage or common interest under which circumstance Holliday's status would have been that of an invitee;

10. 266 Cal. App.2d 396, 72 Cal. Rptr. 96 (1968).

although such status is no longer determinative in establishing the degree of care owed, it remains a consideration in the assessment of liability.

### B. *Duty of the Lawyer to Clients and Third Parties*

Shortly after Warren E. Burger became Chief Justice of the United States, he addressed the convention of the American Trial Lawyer's Association. His remarks on that occasion have been published in various legal publications. The *Wisconsin State Bar Journal*, October, 1969, carried the remarks under the title "A Sick Profession." It carries a bad image. He states that medical doctors rank at the top, and lawyers about 15th, in popularity, that the majority of lawyers are poorly trained, and they are not performing their professional work properly. Seventy-five percent of lawyers appearing in court are deficient because of poor preparation, inability to frame questions and inability to prove a case properly. Fortunately, there are movements in the field of legal education that aim to remedy the deficiencies.

Recent California cases involving the work of lawyers indicate that the deficiencies are not only apparent in the courtroom; the same thing is sometimes true in office work.

In *Heyer v. Flaig*,<sup>11</sup> Doris, an unmarried widow, asked attorney Flaig to prepare her will. She told him that she intended to marry Glen Kilburn, but that she wanted to leave her estate equally to her two daughters. On December 21, 1962, Doris executed her will, and ten days later she married Glen Kilburn. Flaig failed to mention the status of the future husband as a legatee, although he named him as executor as Doris had requested. On July 9, 1963, Doris Kilburn died, and her husband claimed a share of the estate as a post-testamentary spouse. Under section 70 of the Probate Code his rights are well established. The daughters, of course, objected to his participation, as being contrary to their mother's intention, and sought recovery of their loss from attorney

11. 70 Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969). For further discussion of this case, see Hill, TRUSTS AND ESTATES, in this volume.

Flaig. Suit was filed June, 1965. Defenses set up included that the statute of limitations had rendered him immune, and that the daughters were not in privity with him and therefore he owed them no duty. He interposed a demurrer to the complaint and the trial court sustained it, presumably on the theory that the action was barred under the statute, two years having elapsed since the will had been drawn, but less than two years had lapsed since Doris' death. The Court of Appeal affirmed in an opinion by Justice Bishop.

Plaintiffs appealed to the State Supreme Court, relying on *Lucas v. Hamm*,<sup>12</sup> which gives an intended beneficiary a cause of action for malpractice against an attorney who negligently fails to follow the directions of his client. In rejecting the statute of limitations defense, the Court held that such cause of action accrued when the testatrix died, since at that time the negligent act of the attorney became irremediable and the injury actually occurred; in fact, the wrongful act was a continuing one until the death of the testatrix. The error could have been corrected until her death. The Court agreed that privity is unnecessary to establish a duty on the part of attorney Flaig. The beneficiaries' right of action against counsel arises out of public policy; a duty of care on the part of the attorney accrues directly to the third-party beneficiaries, and they need not sue in contract as third-party beneficiaries. The Court explained that the interests of the beneficiaries are different from those of the testatrix. The duty owed to the beneficiaries is distinct from the duty owed the testatrix, and consequently the remedies are different. Hence, the Supreme Court reversed and remanded for trial.<sup>13</sup>

12. 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961) Cert. Den. 368 U.S. 987, 7 L.Ed.2d 525, 82 S.Ct. 603.

13. This decision clearly eliminates further reliance on the old tragic case of *Bulkley v. Gray*, 110 Cal. 339, 42 P. 900, 52 A.S. 88, 31 L.R.A. 862 (1895) overruled in 49 Cal.2d 647, 651, 320 P.2d 16, 19, 65 A.L.R.2d 1358, 1363 and in 56 Cal.2d 583, 588, 15 Cal. Rptr. 821, 823, 364 P.2d 685, 687, which has

been so difficult to defend on any theory. The lawyer used a principal beneficiary as an attesting witness, thus making it impossible for him to take under the will. Yet he had no remedy under the "lack of privity" doctrine, a legacy to our law from Lord Abinger in 1842, who said in *Winterbottom v. Wright*, 10 Meeson and Wellsby 109, that to allow persons not in contractual privity to sue would result ". . . in the most ab-



It will be interesting to watch future developments in *Heyer v. Flaig*. It is being sent back to the trial court for further action. What will a jury do on being instructed to find whether defendant has exercised the ordinary care and skill possessed by the profession? Justice Tobriner indicates how he feels about what was done by attorney Flaig. He states, "a reasonably prudent attorney should appreciate the consequences of a post testamentary marriage and advise the testator of such consequences."<sup>14</sup> Justice Tobriner has written a great opinion, a monument to efficiency.

Another recent case that points out the invulnerability of lawyers is *Yandell v. Baker*.<sup>15</sup> A firm of attorneys was consulted by businessmen who felt that they were paying too much in taxes. They wanted to know if any changes in their business arrangement could remedy their tax situation. The attorneys agreed to do something about it in consultation with an accounting firm. They advised radical changes in their clients' financial structure. Six months after the changes had been made, the government advised the clients that they were liable for an additional assessment of \$80,000. The changes had accomplished nothing. They sued the attorneys and were met with the defense that a one-year limitation on the action had run. The suit had been brought shortly after the government's notification of the failure of the defendants' advice. But the defendants had completed their work some six months

surd and outrageous consequences, to which there would be no limit."

In *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958), the Supreme Court, without requiring privity, imposed liability upon a notary who had negligently failed to have a will properly attested. *Biakanja* was followed by *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961) Cert. Den. 368 U.S. 987, 7 L.Ed. 2d 525, 82 S.Ct. 603, which, as already indicated, held that the attorney owed a duty of care to the beneficiaries as well as the testatrix. Thus the old inflexible requirement of privity has

been abandoned in this state. The *Lucas* decision did, however, leave us with a monument to carelessness on the part of a lawyer; he could safely violate the rule against perpetuities with immunity from liability. It seems to give carte blanche to lawyers to go ahead without worrying about what they are doing. Some things are just too difficult. Yet the rule against perpetuities figures in most family trusts whether testamentary or inter vivos.

<sup>14</sup>. 70 Cal.2d 223, 229, 74 Cal. Rptr. 225, 229, 449 P.2d 161, 165 (1969).

<sup>15</sup>. 258 Cal. App.2d 308, 65 Cal. Rptr. 606 (1968); hearing denied.

earlier, which was more than a year before the suit had been brought.

The simple question was, when did the statute begin to run? If the government had waited a little longer in advising the clients, the cause of action for the negligence would have been lost before they had any idea of the uselessness of what had been done for them. This would have been clearly a wrong without a remedy.<sup>16</sup> In fraud cases the statute does not begin to run until the fraud is discovered,<sup>17</sup> and in medical malpractice cases the courts use similar thinking in preserving the cause of action until the patient finds out about the injury caused by the treatment.<sup>18</sup> The Court indicated that it wished that it could have followed the rule established in medical cases, but thought that it had to take the law as handed down by the State Supreme Court. The lawyers were immune. The Supreme Court denied a hearing in this case.

Another case that emphasizes the duties of lawyers is *Ishmael v. Millington*,<sup>19</sup> in which attorney Millington represented both husband and wife in a divorce case. Millington had been the husband's lawyer for some time, and it was decided that he alone should put the case through the court. It is always dangerous for anyone to place himself in a situation where he may be required to serve two masters. Mrs. Ishmael signed the complaint and property settlement, relying on what

16. Chief Justice Marshall once stated that it was the boast of the law that there was no wrong without a remedy. This was in the famous case of *Livingston v. Jefferson*, 15 Fed. Cas. 660, 665 (1811). Yet he found it impossible to give Livingston the remedy for Jefferson's trespass on his lands in Louisiana "which produces the inconvenience of a clear right without a remedy." It is odd indeed to refer to such a denial as a mere inconvenience. We are still some distance from the day when all wrongs will be remedied.

Anyone interested in this litigation may find it analyzed most interestingly in Beveridge's *Life of John Marshall*.

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Marshall saw no way of holding Jefferson liable for trespass as the trespass was made in Louisiana and Jefferson was not likely to go there to be sued for that which he could not be sued for at his home in Virginia.

17. Code of Civ. Proc. § 338.

18. *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463, 27 A.L.R.3d 884 (1967); in malpractice actions the statute of limitations does not commence to run until patient discovers his injury or in exercise of reasonable diligence should have discovered it.

19. 241 Cal. App.2d 520, 50 Cal. Rptr. 592 (1966).

her husband told her about the extent of the community property, and she received \$8,807 as her share; it was discovered later that the value of community property totaled \$82,500.-00. Ascribing her loss to the failure of attorney Millington to make inquiries as to the true value of the community property, she brought suit to recover the loss sustained. The attorney assumed that she knew what she was doing, and believed she was getting what she was entitled to receive but made no effort to ascertain whether his belief was correct. The trial court entered summary judgment for the defendant.

The Court of Appeal reversed the judgment on the basis that there were definite factual issues to be tried. Justice Friedman wrote a very significant opinion. There was a duty to exercise reasonable care. The representation of both parties by counsel is allowed only in "exceptional" situations. In such situations, the attorney must disclose all facts which would be required by another lawyer. Legal malpractice may consist of a negligent failure to act, and such failure need not be the sole cause of the client's loss. Here he failed to advise, to investigate, and to disclose. The case was sent back for trial.

Justice Friedman's observations on the state of the practice in this area of law are worthy of note. He wrote,

Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation, the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband.<sup>20</sup>

<sup>20</sup>. 241 Cal. App.2d 520, 527, 50 Cal. Rptr. 592, 596.

### C. Products Liability

In last year's study of this subject, we examined *Elmore v. American Motors Corporation*,<sup>1</sup> in which parts of the Elmore automobile seemed to have fallen from underneath, causing Mrs. Elmore to lose control, wrecking the car, killing her, and injuring the Waters family, which was traveling in the opposite direction. The case seemingly raised the question whether the strict liability of the manufacturer would extend to third-party non-users if liability were established as to the users. The Court of Appeal held that the case for strict liability had not been proved, so the rights of non-users were not considered. We intimated that this was a wrong decision, and, as the article went to press, the Supreme Court reversed the Court of Appeal, deciding that it was a case for application of the doctrine. A footnote reporting the reversal was included in our text, pointing out that the Court decided that liability would extend to the Waters family as third-party non-users.

The story is now complete. Privity had long been eliminated from the ordinary cases charging negligence on the part of manufacturers; *MacPherson v. Buick Company*<sup>2</sup> and *Henningsen v. Bloomfield Motors*<sup>3</sup> settled that. The question here was simply whether the more rigid doctrine of strict liability would be extended under similar circumstances. That it will is now clearly settled in California. The following case decided during the past year applies the new ruling. In *Johnson v. Standard Brands Paint Co.*,<sup>4</sup> Johnson, an independent contractor, was killed when he fell from a ladder while working in a building. He was standing on his own ladder and near him was an aluminum extension ladder on which another man was working. The aluminum ladder next to Johnson's had been purchased from the defendant, Standard Brands Paint Co.

1. 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969). For further discussion of this case, see Bernhardt, REAL PROPERTY, in this volume. Moreau, TORTS, *Cal Law—Trends and Developments* 1969, pp. 392-402.

2. 217 N.Y. 382, 111 N.E. 1050, CAL LAW 1970

Ann. Cas. 1916 C. 440, L.R.A.1916 F. 696 (1916).

3. 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

4. 274 Cal. App.2d —, 79 Cal. Rptr. 194 (1969).

This ladder had been defectively designed, and the defect caused its legs to slip or slide away from the wall and it fell against the ladder on which Johnson was standing, causing him to fall to his death. Plaintiff secured a favorable verdict at trial which was affirmed. On appeal, defendants sought to distinguish a ladder case from an automobile case. The Court indicated that it was simply a question whether injury to a person in the position of the deceased was foreseeable. Strict liability is not limited to products that are inherently dangerous. In fact, in *Elmore*, the Court thought that bystanders should be entitled to even greater protection than users when injury to them is foreseeable. In these cases, privity thinking plays no part. Foreseeability of harm to bystanders is an issue for the trier of fact. It is immaterial that the precise manner in which the injury came about was not clearly foreseeable, because the exact or particular chain of events in the occurrence does not overthrow the end result if it was reasonably foreseeable. The bystander, however, must supply the same proof as the user. He must show that the product was used normally and for its intended use. It did appear that the ladder was upright, but with its rails more than four feet from the wall against which it stood. Everyone knows that ladders will slide away from the wall if used at an improper angle. There was conflicting evidence on the question of improper use which, being a question of fact, was solely within the province of the jury. Improper use would not necessarily be effective to bar the right to recover if it were shown such use most probably resulted from a failure to warn, and that the method of use was reasonably foreseeable. Here, the Court emphasizes that no warnings were given.<sup>5</sup>

The doctrine was extended to a lessor of personal property in the case of *McClafflin v. Bayshore Equipment Rental Co.*<sup>6</sup> This was another ladder case where death resulted. Decedent was a self-employed installer of draperies. There were some

5. The failure to warn as a defect was also emphasized in *Barth v. B. F. Goodrich Tire Co.*, 265 Cal. App.2d 228, 71 Cal. Rptr. 306 (1968). In fact,

the failure to warn about the danger of overloading the tires was the defect.

6. 274 Cal. App. 2d —, 79 Cal. Rptr. 337 (1969).

vertical cracks in one of the step-bearing legs of the ladder, which caused the ladder to collapse while plaintiff was using it. Defendants claimed that the cracks were caused by plaintiff's improper use of the ladder and, alternately, that if the cracks existed at the time of rental, plaintiff knew about them and therefore assumed the risk. Plaintiffs sought an instruction on strict liability that was refused, and defendant prevailed. On appeal, the Court agreed with plaintiff's contention that the refusal to so instruct was improper and reversed. The Court took the position that *Greenman v. Yuba Power Products, Inc.*<sup>7</sup> overthrew the doctrine of warranty as a basis to impose liability on a purveyor of a defective chattel. Warranty is now overboard, so that the liability is no longer based on contract. Strict liability can now rest on a liability entirely free of the contractual relationship or privity. Reliance was placed on *Elmore*<sup>8</sup> and *Barth v. B. F. Goodrich Tire Co.*<sup>9</sup> Defendants sought to make the decedent a lessee-bailee, and as such not entitled to the benefit of strict liability. The Court pointed out that strict liability had been extended to a retail buyer, a buyer's employee, and a mere bystander, unconnected with the chattel's purveyor except as an ultimate victim. Lessors are engaged in distributing goods to the public, and are an integral part of the overall marketing enterprise, therefore they should bear the cost of injuries resulting from the proper use of the defective products that they place in the stream of commerce.<sup>10</sup>

The stream of commerce is being enlarged to include all those who participate in the marketing of a product. The previously mentioned *Goodrich* case held that installers of the tires were also subject to strict liability even though they were not true sellers.

In last year's article, we asked the question whether *res ipsa loquitur* could be used in connection with establishing strict

7. 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

8. *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

9. 265 Cal. App.2d 228, 71 Cal. Rptr. 306 (1968).

10. *Citrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

liability.<sup>11</sup> It was thought that some cases mentioned that this was a possibility.<sup>12</sup> In such cases, inferences as to the liability of the manufacturer could be made from the circumstances as well as by *res ipsa loquitur*, but, of course, *res ipsa* could be limited to proving ordinary negligence.

In the case of *Tresham v. Ford Motor Co.*,<sup>13</sup> this possible uncertainty was resolved. Inferring a defect in design and manufacture from circumstances is different from inferring negligence when applying the doctrine of *res ipsa loquitur*. In strict liability cases, the liability is not based on negligence at all. Strict liability evolved from the warranty concept with which *res ipsa loquitur* has no connection.<sup>14</sup> It follows that when a plaintiff seeks to impose strict liability, the requirement of showing a defect cannot be satisfied by reliance on *res ipsa loquitur*. But the fact remains that inferences are made in both strict liability and in negligence cases. *Tresham* is a good opinion clarifying the issues in both types of cases. It indicates that the *res ipsa loquitur* doctrine is limited to the negligence issue only.<sup>15</sup>

#### D. Nondelegable Duty

In *Maloney v. Rath*,<sup>16</sup> a simple set of facts led to clarification of an automobile owner's obligation to maintain his car in such condition that it satisfies all statutory requirements, and thereby assures the safety of other road users. Plaintiff stopped in the left lane of a highway and waited to make a left turn. Defendant came from behind and, because of a sudden unexpected failure of her brakes, rear-ended plaintiff's car and caused injuries to the plaintiff and to plaintiff's car. Plaintiff sued for damages. After a verdict for defendant, because the explanation showed defendant was not at fault, plaintiff

11. Moreau, TORTS, *Cal Law — Trends and Developments* 1969, p. 405.

12. *Ghera v. Ford Motor Co.*, 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1966).

13. 275 Cal. App.2d —, 79 Cal. Rptr. 883 (1969).

14. See *Trust v Arden Farms Co.*, 50 Cal.2d 217, 324 P.2d 583, 81 A.L.R.2d 332 (1958).

15. 275 Cal. App.2d —, 79 Cal. Rptr. 883 (1969).

16. 69 Cal.2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968).

moved for judgment notwithstanding the verdict; the court denied it. Plaintiff appealed.

Defendant explained the accident occurred because of a rubbing of a wheel on the brake line, weakening it, allowing it to rupture suddenly on application of the brakes and causing an immediate loss of braking power. She had had the brakes fully overhauled three months earlier by a good mechanic, and they were examined again two weeks before the accident. Defendant was assured by her mechanic, an independent contractor, that her brakes were in excellent condition. She also explained that she had no notice of the impending failure, as it occurred suddenly without prior indication of malfunction. On the theory that this negated failure to exercise care with reference to the requirements of the then existing Vehicle Code section 26300, and section 26453, as to brakes and equipment, defendant was not held liable. The defendant argued that she had done all that could be expected of a person of ordinary prudence. Defendant was relying on *Alarid v. Vanier*,<sup>17</sup> which refused to apply strict liability under similar circumstances. Plaintiff asked the Court to reconsider its decision in *Alarid* and impose strict liability on the defendant. Chief Justice Traynor, speaking for the Court, adhered to the *Alarid* decision, refusing to apply the strict liability rule to such cases, but nevertheless held the defendant liable on the theory that she was under a nondelegable duty to keep her automobile equipped as required by the Vehicle Code. The opinion is documented with some seven situations where California has held parties liable under duties which were not delegable.<sup>18</sup>

Sections 423 and 424 of the Restatement of Torts support

<sup>17</sup> 50 Cal.2d 617, 327 P.2d 897 (1958).

<sup>18</sup> These include (a) where a party is given a franchise by public authority; (b) a condemning agent must protect a severed parcel from damage; (c) a general contractor has a nondelegable duty to construct a building safely; (d) an owner retains a duty when hiring an in-

dependent contractor if there is danger of injury to others unless great precaution is taken; (e) landlords have a duty to maintain their premises in a reasonably safe condition and (f) to comply with safety ordinances; (g) employers have a duty to comply with safety requirements of the Labor Code.



the holding in this case, especially section 423.<sup>19</sup> Under this section the statutory duty is not delegable; the owner of the car remains liable. Such a duty is of the utmost importance to the public.

There is, of course, considerable difference between this holding and one that would place defendant under a strict liability. Probably the most important difference is that defenses applicable to a negligence action will remain; both contributory negligence and assumption of risk are available to the defendant. Also, no doubt, if defendant pays, she will be entitled to indemnity from her contractor for his breach of contract or for his negligent failure to discover what a reasonable inspection would have revealed.

This is a policy decision highly beneficial to the public. As between the plaintiff, who has not been at fault at all, and the defendant, whose defective equipment caused the damage, it is more just that defendant should make the plaintiff whole, even though the defendant was not actively at fault.

The nondelegable duty is well grounded in our law. It is not new. In 1935, a New York court noted the general rule that one who hired a contractor to do work for him was not liable for the negligence of such independent contractor.<sup>20</sup> It added, however, that there are so many exceptions to the rule that the rule itself no longer exists. It originated prior to the industrial revolution. The opinion of the Court in *Maloney* proves that the exceptions practically nullify the rule. And we can expect more such exceptions. Probably the best study of the problem was made by Professor Steffen in his study titled "*Independent Contractor and the Good Life*,"<sup>1</sup> made in

19. Section 423 of the Restatement of Torts states:

"One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain those instrumentalities is subject to the same liability for physical harm

caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer himself had done the work of construction and maintenance."

20. *Kuhn v. P. J. Carlin Const. Co.*, 154 Misc. 892, 278 N.Y.S. 635 (1935).

1. 2 Univ. Chicago L. Rev. pp. 501-532 (1934-35).

1933. His capacity to dissect and lay bare so-called well accepted doctrine is refreshing indeed.

In the later case of *Clark v. Dziabas*,<sup>2</sup> another case involving defective brakes, the State Supreme Court clarified the holding of the *Maloney* case. The Court stated that in order to establish a defense to liability for damages caused by a brake failure, the owner must establish two things: (a) that he did what would be expected of a reasonably prudent person under the circumstances and (b) that the employees or independent contractors to whom the inspection was delegated were not negligent. In other words, the *Maloney* case does not impose an absolute liability. In *Maloney* the contractors were negligent. If neither the owner nor his agents are negligent there is no liability. In *Clark*, the defendant had rebutted his own negligence, but not that of his agents. For this reason, the trial court committed error in denying plaintiff's motion for judgment notwithstanding a verdict for the defendant. Plaintiff was granted a new trial. On retrial, the defendant will have an opportunity to establish that the defect in the brakes was there when he purchased the car and that a careful inspection by his agents would not have revealed the defect. In that event, the breach of the nondelegable duty would not be proved.

### III. Interspousal Imputation of Negligence

#### A. In General

Interspousal imputation of negligence in California has undergone so many judicial and legislative modifications that a developmental overview is perhaps the best method of bringing this subject up to date.

The effect of imputation of negligence is either to create a liability or to impose a disability. That portion of the doctrine which creates a vicarious liability, as in the case of the master being responsible for the torts of his servant, has found

2. 69 Cal.2d 449, 71 Cal. Rptr. 901, 445 P.2d 517 (1968); *Dutcher v. Weber*, 275 Cal. App.2d —, 80 Cal. Rptr. 378.

favor in modern tort law as a means of allocating risk to those in a more favorable position to either bear the financial burden or pass it on to the community at large.<sup>3</sup> On the other hand, that branch of the doctrine which imposes a disability by imputing contributory negligence to defeat the claim of an otherwise innocent person has generally been viewed with disfavor by both the courts and legislatures.

The community property system, which generally works to protect and preserve the property rights of the wife, has traditionally posed special problems in the area of tort recovery. The fault rationale of tort law and the concepts of community property combined to deny recovery to an innocent wife injured as a result of the concurring negligence of her husband and a third party, since a wrongdoing spouse would otherwise be unjustly enriched by his community share of the recovery. Consequently, both the cause of action and damages recovered for personal injury to either the husband or wife were held to be community property, and the negligence of one spouse was imputed to the other to bar recovery.<sup>4</sup> Past legislation, by dealing with specific inequities without affecting the source of these problems, has been much like plugging holes in a dike, merely suppressing a particular symptom only to have it reappear in a different form. It now appears a new and better dike has been built.

### B. *A Brief Historical Perspective*

Since a wrongdoer sharing in a recovery offended traditional negligence thinking, dissolution of the community provided a logical basis for refusing to impose the doctrine. Consequently, in 1952, it was held that where the negligent spouse had died and could no longer benefit from his own wrong, the imputation of negligence rule would not apply.<sup>5</sup> Four years later, a similar rule was announced where the community was dissolved by divorce, the court holding that a spouse's entire

3. Prosser, *Law of Torts*, 3d ed., p. 471. en, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R. 2d 461 (1949).

4. Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257 (1954); Zaragosa v. Crav- 5. Flores v. Brown, 39 Cal.2d 622, 248 P.2d 922 (1952).

cause of action vested by operation of law and could not be dealt with by a divorce court.<sup>6</sup> An effort to achieve a similar result by the negligent spouse's release of his community property interest in any recovery, making such the separate property of the innocent spouse, was held ineffective to prevent application of the doctrine where such agreement was reached *after* the cause of action arose.<sup>7</sup> However, where the wife was living separate from the husband when the cause of action arose, with no intention of resuming the marital relationship, it was held that the then existing Civil Code section 169 makes such cause of action the separate property of the wife.<sup>8</sup>

In 1957, the legislature attempted to remedy the inequities created by the clash of tort and community property concepts by adding section 163.5 to the Civil Code, which made "all damages, special and general, awarded a married person in a civil action for personal injuries . . . the separate property of such married person."<sup>9</sup> The effect of this statutory change was far from being as pervasively corrective as intended and, as subsequently demonstrated, it wrought its own brand of injustice.

Vehicle Code section 17150, which imputed the negligence of the permissive user of an automobile to its owner,<sup>10</sup> was perhaps the most significant reason why Civil Code section 163.5 had only limited success. The term *owner*, by definition, extends beyond the limitations of record title. Since most vehicles acquired during the marriage are community property, a strict construction of Vehicle Code section 17150 would, in the majority of instances, result in the imputation of negligence of husband-driver upon the injured wife-passenger. This contention was rejected in *Shepardson v. McLellan*<sup>11</sup> where the automobile, although admittedly community prop-

6. *Washington v. Washington*, 47 Cal. 2d 249, 302 P.2d 569 (1956).

7. *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954).

8. *Christiana v. Rose*, 100 Cal. App. 2d 46, 222 P.2d 891 (1950).

9. Civ. Code § 163.5, Stats. 1957,

Ch. 2334; repealed Stats. 1969, Ch. 1608, § 3.

10. Vehicle Code § 17150, Stats. 1957, Ch. 3.

11. 59 Cal.2d 83, 27 Cal. Rptr. 884, 378 P.2d 108 (1963).

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erty, was registered solely to the husband whose contributory negligence the defendant sought to impute to the wife-passenger to bar the recovery she was seeking for her injuries. The Court in explaining its refusal to impute the husband's negligence to the wife stated:

. . . because the husband has control and management of the community property, no consent of the wife, express or implied, to his use of the community vehicle registered in his name, can add anything to his existing right to use the vehicle; . . .<sup>12</sup>

Imputation of negligence could be found when title to the vehicle was recorded in both names because of the presumption of Civil Code section 164 that property acquired by an instrument in writing by a married woman is her separate property.<sup>13</sup> In *Cooke v. Tsipouroglou*<sup>14</sup> the trial court's denial of recovery sought by an injured passenger-wife was affirmed even though both plaintiff and her husband had testified that it was their intention to hold the vehicle as community property. The certificate of ownership listed the registered owner as "Cooke, Jack or Margaret." The Court found the testimony of plaintiff and her husband merely created a conflict which the trial court was free to resolve against plaintiff. In other words, following the presumption created by Civil Code section 164, in the absence of any specific designation on the certificate of ownership as to how title was held, the Court accepted the trial court's finding that the automobile was *not* community property but rather that it was held by a tenancy-in-common. The consequence of this form of ownership is a right of management and control existing in the wife which would not exist if the vehicle were held as community property. It is the right of management and control which carries with it the burden of imputation of negligence under Vehicle Code section 17150. Hence, a determination of the nature of own-

12. 59 Cal.2d 83, 87, 27 Cal. Rptr. 884, 887, 378 P.2d 108, 111.

14. 59 Cal.2d 660, 31 Cal. Rptr. 60, 381 P.2d 940 (1963).

13. Civ. Code § 164, amended by Stats. 1927, Ch. 487, § 1; p. 826; repealed Stats. 1969, Ch. 1608, § 3.

ership is vital where a defendant seeks to impute the contributory negligence of the driver-spouse to the passenger-spouse. Of the four types of ownership—separate, community, tenancy-in-common, and joint tenancy—only community ownership is free of the burden of imputation of negligence where the accident occurred prior to 1967.<sup>15</sup>

Shifting their attention to the Vehicle Code, the legislature made two more attempts to complete the task they started in 1957. In 1965, they added section 17150.5, which made the presumptions created by Civil Code section 164 inapplicable to an action based on Vehicle Code section 17150 with respect to the ownership of a motor vehicle by a married woman and her husband.<sup>16</sup> This attempt to remedy the situation which arose in *Cooke* fell short of its intended mark and negligence was still imputed where the ownership was clearly other than community. The same section was again amended in 1967,<sup>17</sup> for the express purpose of preventing the imputation of the driver's contributory negligence to an otherwise innocent owner in order to defeat the owner's claim for damages against a negligent third party.<sup>18</sup> This was accomplished by deleting the words “. . . shall be imputed to the owner for all purposes of civil damages.” This amendment does, however, preserve the protection afforded those damaged by the negligence of permissive users by imposing financial liability on the owners of vehicles without the necessity of resorting to the artifice of imputing negligence.

In 1968, the legislature made two particularly significant statutory changes. First, Civil Code section 163.5, now repealed, was amended to again return personal injury recoveries

15. *Hooper v. Romero*, 262 Cal. App. 2d 574, 68 Cal. Rptr. 749 (1968).

16. Vehicle Code § 17150.5, added by Stats. 1965, Ch. 1598, § 1.

17. Vehicle Code § 17150, amended by Stats. 1967, Ch. 702, § 1.

18. *Legislative Committee Comment in Senate* makes this intent abundantly clear: “. . . The last clause of § 17150 has been deleted because it, together with § 17158, prevented an innocent vehicle owner from recovering any damages for a personal injury caused by the concurring negligence of his driver and a third person. Instead of barring an owner's cause of action in such a case, § 17150 as amended permits him to recover his damages from the negligent third person.” Vehicle Code § 17150, Supp. p. 218.

gether with § 17158, prevented an innocent vehicle owner from recovering any damages for a personal injury caused by the concurring negligence of his driver and a third person. Instead of barring an owner's cause of action in such a case, § 17150 as amended permits him to recover his damages from the negligent third person.” Vehicle Code § 17150, Supp. p. 218.

by either spouse to community property status.<sup>19</sup> Second, in order to prevent a return to the interspousal imputation of negligence originally dictated by the community property status of such recoveries, Civil Code section 164.6 was enacted, though now repealed, eliminating the concurring negligence of the other spouse as a defense to an action brought by the injured spouse against a third party except “. . . in cases where such concurring negligent or wrongful act or omission would be a defense *if the marriage would not exist*.”<sup>20</sup>

The earlier legislative preoccupation with negating the effect of imputing negligence to the innocent spouse had, perhaps, limited its vision as to the ultimate reach of Civil Code section 163.5, now repealed, which extended beyond the situation involving the other spouse's contributory negligence. Personal injuries frequently mean large medical bills paid from community resources and an impairment of earning capacity, often the most significant community asset. Section 163.5 made no allowance for reimbursement to the community for these losses, even in situations where the other spouse was in no way involved in causation of the injury. Consequently, although the injury might result in a substantial depletion of community assets, the recovery, being the separate property of the injured spouse, was subject to that spouse's unrestricted disposition. The hardship imposed on the marital partner became particularly apparent in the division of property on dissolution of the marriage by death or divorce.<sup>1</sup>

Civil Code section 163.5, as amended, provided that personal injury recoveries were separate property *only* when paid by the other spouse. This had the effect of preserving the right of one spouse to sue the other for civil wrongs. All other recoveries are community property.

Although neither Vehicle Code section 17150 as amended in 1967, nor Civil Code section 164.6 as added in 1968, but

19. Stats. 1968, Chs. 457, 458, pp. 1077-1080.

20. Stats 1968, Ch. 457, § 3.

1. For a more detailed discussion of these sections and others relating to re-

cent changes in community property law, see Sammis, COMMUNITY PROPERTY AND FAMILY LAW, *Cal Law — Trends and Developments* 1969, pp. 347-371.

now repealed, have been tested at the appellate level, it would appear that the legislature has, at last, achieved success by the simple, direct approach of restricting the use of the doctrine of imputation of negligence rather than further attempts at restructuring the community property system.

### C. *A Brief Summary*

Prior to 1957, the contributory negligence of the husband could be imputed to an otherwise innocent wife to defeat her personal injury cause of action, because the recovery she might obtain would be shared by the community. From 1957 through 1967, although personal injury recoveries became the separate property of the injured spouse, the contributory negligence of the husband in an automobile accident could still be imputed to the wife to defeat her claim if her ownership of the vehicle could be shown to be other than ownership as community property. In other words, if she held separate title or held as a tenant-in-common or in joint tenancy with her husband, negligence had to be imputed by operation of Vehicle Code section 17150. The *defendant's* burden of showing separate ownership was easier prior to 1965, when he could invoke the presumptions of now repealed Civil Code section 164. The exceptions to the pre-1957 dictates of imputing contributory negligence because of the community property status of the recovery were: (1) dissolution of the marriage by death or divorce, (2) the wife living separate from her husband when the cause of action arose and (3) possibly an agreement, making personal injury recoveries the separate property of each spouse, executed *before* the cause of action arose.<sup>2</sup> In 1968, Vehicle Code section 17150, as amended, became effective, preventing imputation of the permissive user's contributory negligence to defeat the claim of an otherwise innocent owner.

In 1969, Civil Code section 164.6, although already repealed, was to have become effective and expressly forbid defeasance of the injured spouse's third-party action based on the

2. This is the implication of *Kesler* (1954). There have been no subsequent cases directly on this point.



contributory negligence of the other spouse, except where such concurring negligence or wrongful act or omission would be a defense *if the marriage did not exist*.

#### IV. Workmen's Compensation v. Tort Liability Under *Respondeat Superior*

##### A. *The Going and Coming Rule*

If an employee injures a third person while driving to and from the job site, it is often difficult to decide whether the employee was in the course of his employment so as to make the employer, as well as the employee, liable to the injured party. This was the situation in *Harris v. Oro-Dam Constructors*.<sup>3</sup> The jury returned a verdict against the defendant driver Byers, but in favor of the defendant employer, on the basis that the employee was not on the job. The plaintiff appealed.

Byers, the employee, lived 23 miles from the job site and received a daily stipend of \$6.00 as a transportation allowance, but the allowance did not cover travel time. The so-called going and coming rule limits liability under *respondeat superior* to on-site liability of the employer. The employer-employee relationship is suspended when the employee leaves for home, for it is said that he is no longer in the scope of his employment. The Court affirmed on the basis that the driving was principally for the *benefit* of the employee and only tangentially for the benefit of the employer, and further that the employer had no *control* over the employee during the driving. These two words then, *benefit* and *control* form the basis of the decision. The opinion emphasizes that in this type of a case the question is one of fault, and is therefore distinguishable from the workmen's compensation cases where the question is one of compensation, and is a matter that involves whether the injury occurs or arises "out of and in the course of employment."

Plaintiff relied on those compensation cases which recognize certain exceptions to the going and coming rule. If the

3. 269 Cal. App.2d 911, 75 Cal. Rptr. 544 (1969).

employer expects the employee to drive his own car to work, any injury during the driving to and from work is employment-connected and is therefore compensable. The trip is indirectly beneficial to the employer, and so the suspension of the relationship is not indicated.

The most recent case on the workmen's compensation exception to the going and coming rule is *Zenith National Insurance Co. v. Workmen's Compensation Appeals Board*.<sup>4</sup> Here the employee sustained serious injuries while enroute to the job site 130 miles from his home. Justice Tobriner points out that California has no statute on the subject matter which would deny compensation, but that the decisions have applied a similar rule.<sup>5</sup> The rule is premised on the theory that the relationship of employer and employee is suspended from the time he leaves his work. Justice Tobriner then indicates that the relationship may be found to continue on particular facts. Here the facts consisted of (a) the great distance—130 miles, (b) the employer's compensating the employee \$10 a day to cover transportation costs and living expenses, (c) the employer's furnishing transportation when the employee was unable to arrange it and (d) the extra payment as an inducement to the worker to take the job. These facts were deemed to justify the conclusion that the injuries arose "out of and in the course of employment."

Certainly these two cases bring the problem of creating a liability to third parties by *respondeat superior*, and of compensating employees for injuries received during travel time, into an interesting contrast. Tort liability is one thing, but compensation for an employee quite another. Tort requires fault, but compensation for work-incurred injury is usually made irrespective of fault. Fault is almost always immaterial in workmen's compensation cases. Yet if the employer is at fault also, what he pays his employee under the dictates of the Workmen's Compensation Act is deductible from any recovery as damages from any third person who happens to

4. 66 Cal.2d 944, 59 Cal. Rptr. 622, 428 P.2d 606 (1967).

5. *Kobe v. Industrial Acc. Com.*, 35 Cal.2d 33, 215 P.2d 736 (1950).

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be liable also.<sup>6</sup> Yet the employer, if not at fault, gets indemnity for his payments from the wrongdoer.<sup>7</sup>

It will be interesting to observe whether the workmen's compensation exception to the going and coming rule will eventually be extended to encompass liability to third parties.

## V. Indemnity

### A. In General

As observed in last year's article,<sup>8</sup> indemnity is a *shifting* of an entire liability from one party to another. It differs from contribution, which is a *sharing* of liability between parties held jointly liable. Generally, there are two types of indemnity, contractual and noncontractual; the former is based on the agreement of the parties, the latter is implied by law. The extent of liability in contract cases is governed basically by contract law although such contracts are often connected with tort cases.

### B. Contractual Indemnity

Within the policy limits, the standard automobile liability insurance policy provides for indemnity to be paid by the insurance carrier to the assured for whatever amounts are due from the assured to an injured party. Cases like *Davidson v. Welch*<sup>9</sup> demonstrate how complex these relationships can become. Welch owned and operated an automobile repair shop which he leased to Davidson, and agreed with Davidson to continue its operation, as Davidson's employee. As such, Welch became an owner-lessor-employee, and Davidson became a lessee-employer. The lessee had agreed to save the lessor harmless in his relationship with the public in conducting the business. So when Welch, the lessor-employee, had

6. *De Cruz v. Reid*, 69 Cal.2d 217, 70 Cal. Rptr. 550, 444 P.2d 342 (1968).

7. Lab. Code § 3852.

8. Moreau, TORTS, *Cal Law—Trends and Developments* 1969, pp. 414–420.

9. 270 Cal. App.2d 220, 75 Cal. Rptr.

676 (1969); also see *Price v. Shell Oil Company*, 272 A.C.A. 420, 77 Cal. Rptr. 475 (1969); rehearing granted. For further discussion of the former case, see Rohwer, CONTRACTS, in this volume.

an altercation with a customer and the customer sued Welch, Welch, in his capacity as lessor of the business, was entitled to have Davidson and his insurer defend the suit unless, of course, Welch, in his capacity as an employee, was guilty of a wilful act in striking the customer. If what he did was in the course of the employment, the insurance contract would inure to the benefit of Welch. Here tort and contract went hand in hand. The Court observed that generally the employer is entitled to indemnity from his employee if he has to pay damages for the negligence of his employee. Here, however, the situation was reversed, for the employee was seeking indemnity from the employer and his insurer on the basis of the lease agreement. The Court allowed the indemnity, since the conduct of the employee was found to be in the course of the employment.

For an extreme case allowing indemnity or subrogation on a contractual basis, see *Meyer Koulish Co. v. Cannon*.<sup>10</sup> Here jewelry was consigned to defendants under an agreement which placed all loss on defendants. The jewelry was stolen without any fault of the defendants. Koulish's insurer paid the loss and then Koulish and the insurer sued defendants for indemnity and recovered. Ordinarily, a paid insurer is not entitled to reimbursement from someone not at fault.<sup>11</sup> The *Koulish* case is severely criticized in a more recent case,<sup>12</sup> in which the Supreme Court denied a hearing, thus reaffirming *Meyers v. Bank of America*,<sup>13</sup> which refused to allow an insurer for a fee to be subrogated to the rights of its insured against a party who, though innocent of fault, was technically liable (i.e., as in the case of an innocent purchaser for value from a thief—in such cases the courts treat the paid insurer and the innocent converter as having equal equities, thus refusing to aid either one). *Koulish* indicates that contractual indemnity, regardless of fault, can lead to inequitable results.

10. 213 Cal. App.2d 419, 28 Cal. Rptr. 757 (1963).

11. *Meyers v. Bank of America Nat. Trust & Savings Assn.*, 11 Cal.2d 92, 77 P.2d 1084 (1938).

12. *Patent Scaffolding Co. v. William Simpson Construction Co.*, 256 Cal. App.2d 506, 514, 64 Cal. Rptr. 187, 193 (1967).

13. 11 Cal.2d 92, 77 P.2d 1084 (1938).

### C. Implied Indemnity

In tort, we are primarily concerned with noncontractual indemnity, that is, the implied indemnity created by equity and brought about by or obtained by subrogation or an action seeking indemnity. These cases usually arise where there is a special relationship between the indemnitor and the indemnitee, such as principal and agent, employee and employer, partner and partner, or a party who when under a nondelegable duty employs a contractor to do the work for him, and also where a party permits someone to drive his car who injures a third person. When the permittor (owner) pays the injured person he is entitled to indemnity from the permittee (driver). These cases are simple enough. The party paying the loss must do so not because of any personal negligence, but because the law dictates his responsibility either by statute, imputation of negligence or the nondelegable duty. The relationship of the party paying the loss to the one whose active negligence caused the loss dictates that restitution should be granted. The one seeking indemnity has simply conferred a benefit on the indemnitor in having paid an obligation of such person. Removing a liability is clearly a benefit.

In *City and County of San Francisco v. Ho Sing*,<sup>14</sup> decided in 1958, a case not involving an employer-employee situation nor any relationship between the parties was presented. The City of San Francisco is required to keep its streets safe for the public. Ho Sing, a businessman, made changes in the street paving in front of his place of business, and rendered the street unsafe for pedestrians. A pedestrian was injured and sued both the city and Ho Sing, securing a joint judgment against both. The city paid half of the judgment and sued to recover its payment from Ho Sing, thus seeking to place the whole loss on Ho Sing. The Court allowed the suit for indemnity on the basis that the change of the condition of the street was made solely for the benefit of the private owner, and therefore the party who created the condition should indemnify

14. 51 Cal.2d 127, 330 P.2d 802 (1958); this case was also discussed in last year's article. Moreau, TORTS, 334

Cal Law—Trends and Developments 1969, p. 415.

the city, which became liable for failure to remove the danger when it had notice of the condition. At the same time, the Court recognized that the duty of the city was not dependent on, nor derivative from, the liability of the private owner as in the employer-employee cases. The city was jointly and severally liable with the private owner. What the Court did here was to distinguish positive wrongdoing from negative wrongdoing, or rather active conduct from mere failure to act, sins of commission from those of omission.

This is the point where the two dissenting justices, Schauer and McComb, departed from their brethren, like Episcopalians who repeat the confession of having not only done the things they should not have done, but also having not done things they should have done. The latter is just as bad as the former. Both types of wrongdoing are equal before the law; therefore, the dissenters argued, the parties were liable jointly and severally, and were equally liable for the injuries that resulted. The majority recognized the strength of the argument, but still allowed indemnity. Perhaps the real basis for the holding was equitable considerations; without indemnity there would have been enrichment of the private owner at the expense of the city or the public. Such enrichment was unjust, and gave rise to an implied promise to make payment of all the damage suffered.

Contribution and implied indemnity are both remedies for achieving substantial justice between those who are, in the eyes of the law, wrongdoers. As between the two remedies, indemnity is by far the more drastic. Whereas contribution spreads the loss between two or more tortfeasors, indemnity shifts the entire loss from one to the other. At common law there was no right of contribution between persons jointly or severally liable. It was not until 1957 that our legislature enacted a contribution statute.<sup>15</sup> The *Ho Sing* case, decided in 1958, recognized the right to implied indemnity. Whereas the remedy of contribution is restricted statutorily,<sup>16</sup> the right

15. Code of Civ. Proc. § 875, et. seq.

16. Part (a) of C.C.P. § 875 requires a “ . . . money judgment . . . rendered jointly against two or more

*defendants* . . .” (emphasis added) as a condition precedent to an action for contribution. This perpetuates the victim’s power under common law to

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to implied indemnity is not confined by statute, and consequently has enjoyed a general liberalization of availability.

Since *Ho Sing*, those whose liability was only secondary have routinely been allowed indemnity from those primarily liable, as have those whose negligence was characterized as only passive been granted recovery from those whose active negligence created the harm.<sup>17</sup> Although distinguishing between active and passive negligence has given our courts no small amount of difficulty,<sup>18</sup> such is not the focus of our present case analysis. Recent decisions have directed our attention to the question of whether a difference in the degree of negligence or a disparity of culpability between tortfeasors is to be accepted in California as a basis for granting implied indemnity.

Section 96 of the Restatement of Restitution, allows indemnity to one who *without personal fault* has been compelled to defray expenses caused to a third person by the unauthorized and wrongful conduct of another. The underlying reasons are stated in other language by Professor Prosser, as involving (a) the community feeling or opinion as to whether justice dictates the restitution to one tortfeasor as against another, or (b) because of the relation of the parties to one another or (c) *perhaps* because there is a real difference in the degree of culpability of the parties.<sup>19</sup>

choose where to place the entire loss in circumstances where two or more wrongdoers would be jointly or severally liable for the victim's damage; the statute makes no provision for a defendant to interplead another wrongdoer whom plaintiff has either overlooked or knowingly chose not to sue.

Part (c) requires discharge of the joint judgment by the party seeking contribution.

Part (d) denies the right of contribution to the tortfeasor who has intentionally injured another.

17. See *Herrero v. Atkinson*, 227 Cal. App.2d 69, 38 Cal. Rptr. 490, 8 A.L.R. 3d 629 (1964); *Pierce v. Turner*, 205 Cal. App.2d 264, 23 Cal. Rptr. 115

(1962); *Cahill Bros., Inc. v. Clementina Co.*, 208 Cal. App.2d 367, 25 Cal. Rptr. 301 (1962); *American Can Co. v. City and County of San Francisco*, 202 Cal. App.2d 520, 21 Cal. Rptr. 33 (1962).

18. For an excellent discussion of this area of the problem, see *Cahill Bros., Inc. v. Clementina Co.*, 208 Cal. App.2d 367, 381, 25 Cal. Rptr. 301, 309 (1962).

19. Prosser, *Law of Torts*, 3rd ed., p. 281. See also Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Corn. L.Q. 552 (1935-36); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 Texas L. Rev. p. 150 (1947-48).

In the 1961 Wisconsin case of *Jacobs v. General Accident Fire & Life Assurance Corp.*,<sup>20</sup> the Court held that a tortfeasor guilty of only simple negligence could not get indemnity from another tortfeasor who was grossly negligent. The Court held there was no injustice in imposing *some* of the burden of compensation on one whose negligence had directly contributed to the loss suffered.

We now consider two California cases concerning whether the degree of culpability is a sound basis for shifting losses where the losses were paid by one whose degree of culpability was less than that of the other wrongdoer. In *Atchison, Topeka & Santa Fe Ry. Co. v. Lan Franco*,<sup>1</sup> a collision occurred between a Santa Fe passenger train and a truck owned by Whitehead Construction Company and driven by Lan Franco. Plaintiff, a passenger on the train, was injured and sued three parties: the Santa Fe Railway, the Whitehead Construction Company and the estate of the decedent driver of the truck. Santa Fe filed a cross complaint against the construction company for indemnity in the event it was held liable. The Court dismissed the cross complaint and an appeal was taken from the dismissal. As stated by Justice Kerrigan of the Court of Appeal, the issue was where to allocate the loss.

Here, as between Santa Fe and the construction company, there was no relationship, contractual or otherwise, so it was a clear case of implied indemnity if there were to be indemnity at all. Santa Fe sought indemnity on the basis that its duty towards the injured parties was of a different character and degree from the duty owed by the construction company. The duty of Santa Fe, as a common carrier, was to exercise the highest degree of care, whereas that of the construction company was to exercise ordinary care. The duty of the railway was higher and therefore it was liable if it breached its duty of utmost care. On the other hand, the construction company was liable if it failed to exercise ordinary care. Accordingly, Santa Fe argued that its liability derived from technical fault. They claimed to be only passively negligent, while the con-

<sup>20</sup> 14 Wis.2d 1, 109 N.W.2d 462, 88 A.L.R.2d 1347 (1961).

<sup>1</sup> 267 Cal. App.2d 881, 73 Cal. Rptr. 660 (1968).



struction company was actively negligent. In other words, the railroad sought to ground its right of indemnity on the basis of comparative fault, that is, the relative responsibilities of the parties.

Santa Fe relied for authority on the federal court case of *United Airlines v. Wiener*.<sup>2</sup> There two aircraft collided, one an Air Force jet and the other a commercial airliner. The argument was made that the commercial airline company owed the same high degree of care to its passengers as Santa Fe, and that the Air Force jet owed a duty of ordinary care to the passengers in the plane. In the airline case the United States Court of Appeals allowed indemnity to the airline from the United States. The Court said,

In view of the *disparity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances, . . . we hold that there are such differences in the contrasted character of fault as to warrant indemnity in favor of United [Airlines] . . .*<sup>3</sup>

Although the Court was sitting in California, it applied Nevada law, and as such, was only secondary authority when offered to support Santa Fe's position.

The Court of Appeal, in an excellent opinion by Justice Kerrigan, took the position that the argument was based on the doctrine of comparative negligence, a doctrine not recognized at common law and not favored today except by law professors. This is different from our doctrine of primary and secondary negligence. The railroad company could not be held liable for Whitehead's wrongdoing, but would be liable for its own failure to exercise the care that the law exacted of it. The Court cited *King v. Timber Structures, Inc.*,<sup>4</sup> and concluded that differences in the degree of negligence or comparative negligence are inconsequential under the law of equitable indemnity.

2. 335 F.2d 379 (1964) Cert. Dis. in 379 U.S. 951, 13 L.Ed.2d 549, 85 S.Ct. 452.  
379 U.S. 951, 13 L.Ed. 2d 549, 85 S.Ct. 452.

4. 240 Cal. App.2d 178, 49 Cal. Rptr.

3. 335 F.2d 379, 402 Cert. Dis. in 414 (1966).

It is significant that another case arose out of this same collision that was reviewed by the Court of Appeal, Second District, in which Justice Wood came to the same conclusion as did Justice Kerrigan in the Fourth District.

We may hope to wrestle with a similar situation arising under our guest statute. If a guest is riding in an automobile which collides with another vehicle, and the driver of the car in which the guest is riding is intoxicated, making him liable under the guest statute, and the driver of the other car is guilty of only failing to exercise ordinary care, and a joint judgment is recovered against both—will the third party driver be entitled to indemnity from the intoxicated driver on the basis of the comparative degrees of culpability? If we can look from the highest degree of care to ordinary negligence, why not look from ordinary negligence to the lowest degree of care? No doubt this issue will eventually be decided by the State Supreme Court. We will then know whether disparity of culpability will eventually form an acceptable basis for indemnity.

How can we justify the total shifting of a liability when we restrict the sharing of liability as we do? This complete shift finds similar thinking in our refusal to adopt a rule of comparative negligence. Under our present system, a plaintiff who is only slightly negligent sustains the burden of his losses. It resembles the doctrine of last clear chance, too, whereby a negligent person recovers all his damages from a defendant who was careless towards the negligent plaintiff by not preventing injury when he has a clear chance to do so. And this is true, also, where a superseding cause terminates the liability of a negligent actor completely, and shifts it to a later tortfeasor. It is a philosophy of "all or nothing." There is no sharing of burdens although equity has long considered that equality is equity.

We can hope that the denial of indemnity where the degree of culpability varies will result in the adoption of the rule of contribution. The party who exercised the lesser degree of fault will then, at least, have the satisfaction of not having to pay all the loss.

A recent case that imposes a limitation on the law of indemnity is *Pearson Ford Co. v. Ford Motor Co.*<sup>5</sup> Generally a retailer who becomes strictly liable, being in the chain of transfers in the sale of a defectively manufactured machine, is entitled to indemnity from the manufacturer for such payments as the retailer is required to pay to persons injured while properly using the machine. Here a new Ford automobile was put on the market with a faulty brake linkage system. Mrs. Schultz was seriously injured and a judgment for \$150,000 was recovered against the manufacturing company and the dealer. The dealer cross complained for indemnity. The dealer had worked on the car to put it in condition and had failed to notice the defect while repairing a brake light switch located adjacent to the pin that was missing in the brake assembly. The Court of Appeal held that this failure on the part of the dealer made it an active tortfeasor and disentitled to indemnity.

In conclusion, it seems advisable to point out that in all these indemnity cases there is one unifying principal, whether the claim is made pursuant to a contract or is based on implication. The one against whom indemnity is sought has been enriched by the payment. The question simply is whether he is unjustly enriched. If the thinking of society is that restitution should be made, the party seeking indemnity should win. Does the contract call for payment? Does the relation of the parties indicate that plaintiff paid the debt of another? Should the degree of culpability make a difference? Does the quality of the act call for repayment? The cases demonstrate judicial thinking on the matter.

## VI. Abuse of Process

In *Templeton Feed and Grain Co. v. Ralston Purina Co.*,<sup>6</sup> a clear picture of "abuse of process" was painted by Justice Tobriner. Both plaintiff and defendant were successful poultry feed vendors who expanded their operations by financing

5. 273 Cal. App.2d —, 78 Cal. Rptr. 279 (1969).

6. 69 Cal.2d 461, 72 Cal. Rptr. 344, 446 P.2d 152 (1968).

food producers such as the Livingstons who were large producers of turkeys on two ranches, the Santa Margarita and the Arroyo Grande. For several years the Purina Company had been financing the Livingstons in their Margarita operation in sums in excess of \$50,000, all secured by a mortgage on some 17,000 turkeys together "with replacements, increase, things confused therewith, and things of the same kind afterwards acquired." These turkeys were said to be located on the Margarita ranch in Margarita township. This stated location was made pursuant to former Civil Code section 2977, which was repealed when California enacted the Commercial Code. The prior statute controlled this case. The turkey operations were unsuccessful for several years, and the Livingstons were in debt to the Purina Company in an amount in excess of \$50,000.

In 1964, Purina refused to continue the financing operations, so the Livingstons turned to the Templeton Company, which agreed to finance the raising of turkeys on the Livingston's Arroyo Grande ranch. Purina was informed of the new arrangement. In fact, representatives of both companies had agreed upon the arrangements. On this basis, Templeton, in early 1964, delivered 110,000 poults to the Livingstons on their Arroyo ranch. In midsummer, Purina was casting longing eyes towards the large number of turkeys the Livingstons had on their Arroyo ranch. Yet they knew that their mortgage of 1962, covered only turkeys located on the Margarita ranch.

On November 4, just when the market for turkeys was approaching the crucial Thanksgiving period, and there being turkeys on hand worth over \$150,000, Purina filed suit in claim and delivery for the possession of some 35,000 turkeys pursuant to sections 509–511 of the Code of Civil Procedure. In order to do this, it had to file an affidavit setting forth its right to possession. It did so relying on the after-acquired clause in its 1962 chattel mortgage. Pursuant to this process, it directed the sheriff to take possession of all the turkeys on the Arroyo ranch. Templeton, being thereby stymied in its purposes to sell on a market which would exist only for a

limited time, protected itself by paying off Purina's suit against Livingston in the sum of \$53,098, and thus obtained a release of the claim on its turkeys. These are the facts which were presented to counsel for Templeton.

The problem involved a matter of restitution; to obtain the return of the money paid to Purina. Abuse of process was just one of the remedies available. No doubt, counsel considered a suit for rescission of the contract made to obtain the release of the turkeys from the claim of Purina, on the theory that plaintiff's consent to the agreement was not freely given,<sup>7</sup> and also that Purina really gave nothing for the money paid as there was no right to those turkeys, there being thus a failure of consideration.<sup>8</sup> It was a clear case of economic duress as that term is described in *Sistrom v. Anderson*,<sup>9</sup> and also of legal compulsion for the protection of its interests as in *Wake Development Co. v. O'Leary*.<sup>10</sup> Similar relief would have been available by a simple suit in quasi-contract, for money had and received.<sup>11</sup> There was really nothing to be undone, as the release given did not give up anything of value which would have to be returned. Hence, there was no basis for going into equity, and a suit for money had and received, an action at law in form but equitable in substance, was quite adequate to do justice between the parties.

All these remedies would have allowed the plaintiff to recover the money paid. However, viewing the facts as indicating elements of intentional, unlawful conduct, bad faith, and malice, the attorney possibly or probably realized he might recover exemplary damages. What remedies would enable counsel to make this claim? Money had and received would

7. Civ. Code §§ 1566, 1567.

8. Civ. Code § 1689.

9. 51 Cal. App.2d 213, 124 P.2d 372 (1942).

10. 118 Cal. App. 131, 4 P.2d 802 (1931). This case is quite similar to Templeton in that the defendant obtained a lien by levying execution, instead of bringing a claim and delivery suit, and the execution was preventing

a sale of property, as in Templeton the sale of the turkeys was being delayed. The suit was for legal compulsion, however, instead of abuse of process, but the facts could have supported abuse of process.

11. Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635, 95 A.L.R. 990 (1934).

not do; nor would economic duress, unless it was extreme; nor would rescission unless pursuant to three recent cases which had not been decided while this case was being planned.<sup>12</sup> [Under those cases, construing the amendments to the rescission statutes<sup>13</sup> enacted in 1961, it is now possible to recover both consequential and even punitive damages.] Under the circumstances, the remedy of “abuse of process” seemed to be the best basis on which to rest a claim for such damages, if the evidence pointed to the defendant’s use of the claim and delivery process to coerce or extort money payments or other collateral advantages. Such a use is a perversion of a process.

Accordingly, counsel brought suit for abuse of process, and also for money had and received, indicating that restitution was contemplated. Following the trial, the jury brought in a verdict for \$110,000, thus obviously being impressed with the bad state of mind of the defendant in view of (a) the limited reach of defendant’s mortgage to the Margarita ranch, (b) the knowledge on the part of the defendant that plaintiff was financing the operations on the Arroyo ranch, (c) knowledge that its mortgage did not cover the subject turkeys, and (d) knowledge that plaintiff possessed an interest in the turkeys. From these facts the jury could infer that the process was used wilfully and for an ulterior purpose. The trial court, however, had not instructed on the allowance of punitive damages, and with this in mind it granted defendant’s motion for a new trial unless plaintiff agreed to accept only \$67,000. Plaintiff agreed to this condition (that gave it the return of its money but disallowing other damages). Defendant, however, insisted on appealing the judgment, feeling perhaps that any claim for punitive damages had been set at rest by the plaintiff’s acceptance of the condition. When defendant continued its appeal, refusing to go along with the trial court’s judgment, plaintiff considered its acceptance as no longer

**12.** *Horn v. Guaranty Chevrolet Motors*, 270 Cal. App.2d 477, 75 Cal. Rptr. 871 (1969); *Millar v. James*, 254 Cal. App.2d 530, 62 Cal. Rptr. 335 (1967); *Topanga Corporation v. Gentile*, 249

Cal. App.2d 681, 58 Cal. Rptr. 713 (1967).

**13.** Civ. Code § 1692, added by Stats. 1961, Ch. 589, § 3.

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operative and appealed on the issue of punitive damages, thus laying the foundation for an instruction on the matter at the retrial.

The Supreme Court opinion by Justice Tobriner gives us a complete review of the tort of abuse of process. He reviews old basic cases<sup>14</sup> and quotes Prosser on torts,<sup>15</sup> concluding that there was ample evidence on which the jury could find that process was used for an improper purpose, in that defendant knew it was not entitled to possession of the turkeys, and that their seizure was made to coerce Templeton to discharge the debt of the Livingstons. The court further held that the refusal of the defendant to accept the judgment of the trial court in toto rendered the acceptance of the condition by plaintiff of no effect and, therefore reopened the question of punitive damages. The Court further held that it was error for the trial court not to have instructed on the issue of punitive damages. Of course, punitive damages are allowed pursuant to Civil Code section 3294, which requires oppression, fraud, or malice; malice may be either express, or implied from the defendant's conduct. In other words, the requisite state of mind constituting malice may be shown or found objectively.<sup>16</sup>

The final disposition of this case following the decision of the Supreme Court is interesting. It was not retried: plaintiff's counsel advised the author that defendant agreed to a settlement of \$120,000, which exceeds the full verdict of the jury in the first trial. The case certainly brings forth the responsibility of lawyers in evaluating the pros and cons of a factual situation, choosing the remedy which will be most productive for their client, and using discretion in rejecting the trial court's modification of the jury's verdict.

14. *Spellens v. Spellens*, 49 Cal.2d 210, 317 P.2d 613 (1957); *Kyne v. Eustice*, 215 Cal. App.2d 627, 30 Cal. Rptr. 391 (1963); *Tellefsen v. Key System Transit Lines*, 198 Cal. App.2d 611, 17 Cal. Rptr. 919 (1961).

15. Prosser, *Law of Torts*, 2d ed, p. 667.

16. *Spellens v. Spellens*, 49 Cal.2d 210, 230, 317 P.2d 613, 625 (1957).

## VII. Conversion

Defining conversion has been said to be difficult, if not impossible; Baron Bramwell said, "I am not very confident as to what is and what is not a conversion."<sup>17</sup> More often, we are told what it is not, rather than what it is. For example, several California cases indicate that "Neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance" are the gist of the cause of action.<sup>18</sup> Nor is mistake about some phase of a factual situation of any significance.<sup>19</sup> On the affirmative side, we frequently find that it is a wilful interference with a chattel without legal justification, depriving one who is entitled to the chattel of the use and possession of it.<sup>20</sup> Also, it has been said that the wrongful exercise of dominion over another's personal property is the gist of conversion.<sup>1</sup> Yet it is clear that not every exercise of such dominion is sufficient, unless it is a substantial interference.<sup>2</sup> Section 222a of the Restatement of Torts, points out that an interference that will amount to a conversion is one that is so serious that the actor may justly be required to pay the other the full value of the chattel. The protected interest must be at least the right to possession and use of the chattel. In this respect the interest is the same as in a trespass action.

In the recent case of *Itano v. Colonial Yacht Anchorage*,<sup>3</sup> Itano owned a boat which he kept in moorage at the defendant's wharf. Itano was in arrears in his rental payments and considerable discussions went on between the parties. Defendant would have liked Itano to move his boat elsewhere, and told him that unless he paid the past due rent the boat would be moved out of the regular slip to another spot

17. *National Merchants v. Lumme*y, 44 L.T. 767, 1 Can. L. Rev. p. 145.

18. *Poggi v. Scott*, 167 Cal. 372, 139 P. 815, 51 L.R.A. N.S. 925 (1914); *Newhart v. Pierce*, 254 Cal. App.2d 783, 62 Cal. Rptr. 553 (1967).

19. *Newhart v. Pierce*, 254 Cal. App. 2d 783, 62 Cal. Rptr. 553 (1967); *Baer v. Slater*, 261 Mass. 153, 158 N.E. 328, 54 A.L.R. 1328 (1927).

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20. *Newhart v. Pierce*, 254 Cal. App. 2d 783, 62 Cal. Rptr. 553 (1967).

1. *Newhart v. Pierce*, 254 Cal. App. 2d 783, 62 Cal. Rptr. 553 (1967).

2. *Zaslow v. Kroenert*, 29 Cal.2d 541, 176 P.2d 1 (1946).

3. 267 Cal. App.2d 84, 72 Cal. Rptr. 823 (1968).



less desirable but which was locked. Defendant moved the boat and secured it by a lock and cable across the opening of the slip. Somehow the boat sank, due to a faulty engine hose that let water into the boat. Many items such as tools, kitchen utensils, food, and fishing gear were lost. Itano brought suit for damages resulting from the moving of the boat and its sinking. Plaintiff received verdict for \$9,150.00, and defendant appealed from the denial of its motion for judgment notwithstanding the verdict. The reviewing court reversed and directed the entry of judgment for defendant. The suit was for damages resulting from conversion or negligence. No attempt was made to recover on the theory of eviction, unlawful detainer, or forcible detainer. Moving the plaintiff's boat from one place to another did not interfere with plaintiff's use and possession of his boat. There was no claim that defendant intended to exercise ownership or made any use of the boat. The moving of the boat was not a conversion under *Zaslow v. Kroenert*<sup>4</sup> nor under *Jordan v. Talbot*,<sup>5</sup> since both cases require a substantial interference with plaintiff's possession. Moreover the plaintiff knew that the boat was likely to be moved, and also the approximate place to which it was to be moved. The court then examined the possibility of a cause of action for negligence, and found no basis for that recovery, even though the original assertion of a cause of action for negligence was abandoned prior to trial. As to trespass, there could be no recovery because there was no showing that the sinking of the boat was *caused* by the moving of the boat.

Two cases purport to consider whether the tort of conversion can be applied to mere ideas. Prosser suggests that there are no good reasons for not extending the tort to ideas,<sup>6</sup> but under today's rules it is required that the ideas should inhere in some document. Milk, bakery, or newspaper routes are *not* subject to conversion.<sup>7</sup> Several cases have involved the submission of ideas to movie companies for their use. In

4. 29 Cal.2d 541, 176 P.2d 1 (1946).

5. 55 Cal.2d 597, 12 Cal. Rptr. 488, 361 P.2d 20, 6 A.L.R.3d 161 (1961).

6. Prosser, *Law of Torts*, 3d ed., p. 82.

7. *Supra*, note 6.

California special provisions are made for the protection of the products of the mind.<sup>8</sup> Under Civil Code section 980, the author or proprietor of any composition in letters or art has an exclusive ownership “. . . in the representation or expression thereof as against all persons except one who originally and independently creates the same or a similar composition.” In *Minniear v. Tors et al.*,<sup>9</sup> it was held such an author has protectable property. In the absence of such property, one who submits an idea to one who uses it is entitled to compensation if the circumstances of the disclosure are such that an agreement to pay may fairly be implied. So a contract, express or implied, is necessary. And an inference of a promise to pay may result from conduct as well as words. But in the absence of a statutorily protectable property or a contract, there can be no conversion of an idea.

## VIII. Fraud

### A. In General

In California, statutes<sup>10</sup> clearly set forth acts constituting fraud. Fraud may be (a) suggesting a false fact not believed to be true, (b) asserting a fact not warranted by information at hand though actually believing the same, (c) suppressing a true fact known or believed true or (d) promising to do something without the intention to perform. Inherent in these provisions is the state of mind necessary to constitute fraud.<sup>11</sup> The usual requirements are a representation, coupled with an intent that the representation be relied on by the person entitled to rely and actual reliance. Damage must result from the reliance.

The remedies for fraud are also detailed by statute.<sup>12</sup> In general, the person relying is entitled only to his out-of-pocket

8. Civ. Code §§ 980–985.

9. 266 Cal. App.2d 495, 72 Cal. Rptr. 287 (1968); see also *Liability for the Use of Submitted Ideas*, 13 Business Lawyer p. 90 (1957).

10. See Civ. Code §§ 1572 and 1710.

11. The intent to defraud need not

be specific and may be found, if necessary, objectively. See *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941). See also the later appeal, in the *Seeger v. Odell* case, 64 Cal. App.2d 397, 148 P.2d 901 (1944).

12. See Civ. Code § 3343.

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damage.<sup>13</sup> But fraud may be a basis for the recovery of punitive damages.<sup>14</sup> Generally, negligence of the victim is no defense to actionable fraud.<sup>15</sup>

### *B. Opinions by Persons Holding Themselves Out as Qualified*

When is an alleged opinion a statement of fact and therefore an actionable fraud? In *Harazim v. George Lynam*,<sup>16</sup> the plaintiffs claimed that defendants obtained money from them by representing that plaintiff's payments were for "interests in an enterprise established by defendants", when defendants knew such enterprise was a sham or merely a pretended business. Plaintiffs actually received a fraudulent promissory note. Defendants referred to "memberships," "contributing associates," "pure trust indentures" or "certificates" as the consideration given. They claimed these were not misrepresentations of fact, but were legal opinions made by laymen. They were merely making plaintiffs "contributing associates."

The Court stated that "misrepresentations of law or legal opinions expressed by laymen are insufficient" to constitute fraud, as are opinions as to future profits to be realized.<sup>17</sup> But the rule is otherwise where the declarant, as here, holds himself out to be specially qualified, that is, where he assumes to possess superior knowledge.<sup>18</sup>

13. *Bagdasarian v. Gragnon*, 31 Cal. 2d 744, 192 P.2d 935 (1948).

14. Civ. Code § 3294.

15. *Hobart v. Hobart Estate Co.* 26 Cal.2d 412, 437, 159 P.2d 958, 972 (1945); *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941); *Oakes v. McCarthy Co.*, 267 Cal. App. 2d 231, 261, 73 Cal. Rptr. 127, 145 (1968).

16. 267 Cal. App.2d 127, 72 Cal. Rptr. 670 (1968).

17. 267 Cal. App.2d 127, 131, 72 Cal. Rptr. 670, 672.

18. *Haserot v. Keller*, 67 Cal. App. 659, 228 P. 383 (1924). This holding is

supported by § 539 of the Restatement of Torts, which holds that an opinion is actionable if it is based on undisclosed facts as an implied statement that the maker knows of no facts incompatible with his opinion. Here defendants actually knew the facts were incompatible with their stated opinions.

Section 542 of the Restatement states that persons like these plaintiffs may rely on opinions of a party contracting them if he holds himself out as having special knowledge of the matter which the recipients do not have or, knows that the recipients will rely on his opinion.

### C. Holding a Principal for the Fraud of his Agent.

What is necessary to bind a principal for the fraud of his agent on alleged ostensible authority? In *Hartong v. Partake Inc.*,<sup>19</sup> the Partake Company had area directors who had specific duties entitling them to hire assistants and to receive advertising materials for Partake. One such director, Werry, went beyond his authority by organizing businesses of his own along Partake lines, and telling his customers he was the west coast branch of Partake. In doing so, Werry associated himself with one Raub and introduced him to Mr. Melvin, Vice President of Partake. Werry and Raub, operating as their own "Western Way Company," made franchise contracts with plaintiffs, representing that they had the backing of the large and financially stable Partake.

Plaintiffs lost considerable money when their franchises failed. They recovered judgments against Werry and Partake, which were affirmed on appeal.

The Court laid down the following basic principles as a basis for holding a principal liable on the ostensible authority of his agent:

1. The agency cannot be established by the representations or conduct of the purported agent alone.
2. Liability is always based on an estoppel.
3. There must be representations by the principal.
4. These representations must lead to a reasonable belief of the party dealing with the agent that the agent has authority to represent the principal.
5. The relying party must not be guilty of negligence.

Here, the belief in the existence of the authority of the agent was based on the following facts and conduct by the defendants:

1. Werry's duty as area director included the creation of such new businesses as the Western Way Company.

<sup>19</sup> 266 Cal. App.2d 942, 72 Cal. 79 Cal. Rptr 816 (1969); modified in Rptr. 722 (1968); see also *Meyer v. Ford Motor Co.*, 275 Cal. App.2d —,

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2. Werry had authority to hire Raub, and Partake knew about Raub's being hired.
3. Both Werry and Raub made extensive use of Partake's facilities.
4. Partake knew of the use of Partake advertising, office, and program.
5. Plaintiffs signed their contracts after Mr. Melvin of Partake had visited the office and was presumed to have seen what was going on.

#### D. Duty to Speak Out as a Fiduciary

When is there a duty to speak? In *Black et al v. Shearson, Hammill and Co.*,<sup>20</sup> Dunbar was a partner in defendant's brokerage firm, and was also a director in a private corporation whose stock the brokerage firm was selling to its customers, including plaintiffs. A campaign was developed to finance the private corporation with "plans that represented the corporation in glowing terms." Plaintiffs paid \$20,000 for \$2000 face value stock in the corporation—while the brokerage firm knew, through the knowledge of Dunbar, that the corporation was in serious financial straits. Of course, as a fiduciary, it was under an obligation to speak.

Dunbar claimed, however, that as he was a fiduciary of the corporation, as a director, he could not divulge his information to the plaintiffs. The Court properly ruled against him and affirmed a verdict for \$20,000 in compensatory damages and \$5000 in punitive damages. The Court concluded that knowledge of the falsity of the statements, or scienter, is an essential element of fraud, and that there was substantial evidence of the elements of fraud present.<sup>1</sup> In fact, the partners made the sales by explaining that Dunbar was an insider, and they were therefore in a position to know the facts, indicating that the element of malice was in evidence.

The big fact here was the fiduciary relation. This relationship imposed a duty to make full disclosure, and it was no

20. 266 Cal. App.2d 362, 72 Cal. Rptr. 157 (1968).

1. Krause v. Apodaca, 186 Cal. App. 2d 413, 9 Cal. Rptr. 10 (1960).

excuse that Dunbar was under two inconsistent fiduciary relationships. No one can put himself in a position to serve two masters, and then use his dual position to the damage of one of his cestuis que trustent.

### E. Damages

In *Holder v. Home Savings and Loan Assn.*,<sup>2</sup> it is indicated that if a buyer of land is induced to purchase through the fraud of the vendor, and the vendee later defaults on his contract, such default alone will not defeat the claim of the vendee for damages occasioned by the fraud. This is true even after the vendor has foreclosed trust deeds following the purchaser's default.<sup>3</sup> We have noted that both compensatory and punitive damages are available in fraud cases.

In *Horn v. Guaranty Chevrolet Motors of Santa Ana*,<sup>4</sup> the Court allowed both consequential and punitive damages in a rescission suit. For many years in fraud cases, damages were not allowed where the defrauded person sought rescission. The remedies were felt to be inconsistent. A suit for damages affirmed the contract, but a suit for rescission disaffirmed it. With the amendment of the rescission statute in 1961, this distinction was abandoned.<sup>5</sup> In *Horn*, three types of recovery were allowed in the fraudulent sale of the Chevrolet car: restitutional payments of \$842.72, disbursements of \$500, and exemplary damages of \$5000. This decision has eased the expansion of remedies and thereby removed many pitfalls for the practitioner.

In *Oakes v. McCarthy Co. et al*,<sup>6</sup> the Oakes were the purchasers of a home in the Palos Verdes area of Los Angeles. The McCarthy Company had purchased the area, subdivided

2. 267 Cal. App.2d 91, 72 Cal. Rptr. 704 (1968).

3. Garrett v. Perry, 53 Cal.2d 178, 346 P.2d 758 (1959). This is an important case, as the cause of action for fraud survived the procedure of foreclosure by the vendor.

4. 270 Cal. App.2d 477, 75 Cal. Rptr. 871 (1969). For further discussion of

this case, see York, REMEDIES, in this volume.

5. Civ. Code § 1692, added Stats. 1961, Ch. 589, § 3, p. 1734. The recovery of punitive damages was foreshadowed in Millar v. James, 254 Cal. App.2d 530, 62 Cal. Rptr. 335 (1967).

6. 267 Cal. App.2d 231, 73 Cal. Rptr. 127 (1968).

it, and constructed home sites and homes thereon. In the course of the development, other companies did work on the lots; the Thompson Corporation did the cutting, filling, and grading according to plans submitted by an engineering service company. This was to be done in the presence of an inspector supplied by the Warren Company. The Warren Company was to supervise the work done by Thompson. The inspector was discharged because he did not make the required compaction tests. But Warren made the tests and issued its reports to McCarthy, the FHA, the County of Los Angeles and McCarthy's architect.

September 7, 1956, the Oakes moved into their home. They were given a certificate guaranteeing workmanship and materials. It said the house was constructed under the Los Angeles Building Code, and that the county FHA inspectors had inspected the grounds and "these inspections are your assurance that this building has been properly constructed."<sup>7</sup>

Plaintiff was never told his house was on fill and salesmen were told not to say anything about the fill unless specifically asked about it. By 1958, the house had moved with the downward slide of the fill and the house was seriously damaged. The house would have to be removed and rebuilt.

The jury returned verdicts against both the Warren Company and McCarthy for \$14,825 as compensatory damages, and against McCarthy Company for \$77,500 punitive damages.

The Court of Appeal affirmed. It held that Warren owed a duty of care to plaintiffs although there was no privity between them.<sup>8</sup> When Warren undertook to supervise and inspect the cutting, filling, and grading, it assumed a duty toward plaintiffs to exercise due care. If it had given only

7. 267 Cal. App.2d 231, 245, 73 Cal. Rptr. 127, 135.

8. The court relied upon *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958). This case can well be compared to *Connor v. Great Western Savings and Loan Assn.*, 69

Cal.2d 850, 23 Cal. Rptr. 369, 447 P.2d 609 (1968), holding a lender of money for the financing of land development liable to a purchaser of a defective home on the land developed, even though there was no privity.

professional advice to McCarthy, then it would not be liable to plaintiffs. The jury evidently found that Warren was supervising and inspecting, and therefore held it liable.

The liability of McCarthy, on the other hand, was for fraud. There was no disclosure (a) that the house was on filled land or (b) the drainage was towards the rear without proper outlets. There were positive assertions that the premises were constructed (a) in good workmanlike manner and (b) in compliance with FHA inspection regulations, such inspections being plaintiffs' assurance of proper grading. The intent to conceal the fill could be inferred from the instructions to salesmen not to mention this fact unless asked about it. Even negligence on the plaintiffs' part would not have been a defense.<sup>9</sup> Hence all the punitive damages of \$77,500 were recoverable from McCarthy, whose net worth was shown to be in excess of \$2,000,000. Such net worth evidence is always probative evidence in the assessment of punitive damages.

This case rounds out the protective duties owing to purchasers of tract homes in projects where there is massive building: (a) institutions financing the project are liable to homeowners who suffer losses from defective plans or construction, and there is a duty of ordinary care towards the then unknown owner; (b) there is a similar duty to exercise ordinary care on the part of those who supervise the cutting, filling, and grading of sites; (c) the promoters are held liable for misrepresentations as to the nature of the soundness of the site and the construction of the building itself, and this includes the failure to reveal latent conditions. Such suggestions, assertions, and suppressions constitute fraud under Civil Code sections 1572 and 1710, and justify the recovery of punitive damages under Civil Code section 3294. These damages can be quite high if defendants happen to have substantial net worths.

## **IX. Interference with Contractual Rights**

This tort, while relatively new, is important; it is related to other areas of the law such as labor, equity, and restitution,

<sup>9</sup> Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941).



**Torts**

as well as contract law. In fact, much labor law, before the advent of the federal acts relating thereto, was in the tort field. As a result of the federal acts, we now talk about "unfair labor practices" instead of tortious acts, but the subject is still important. Prosser devotes twenty-five pages of his text and some twenty pages of his casebook to it. Yet it is seldom covered in a course on torts. The material is at the end of the book, and we rarely get to it. Bar examinations usually avoid the subject. However, general principles of tort law are applicable.

A tort involves an act or conduct by a person which damages a legally protected interest of another. The state of mind of the actor is often quite important. The tort of contractual interference usually requires a bad state of mind. The conduct must be done knowingly or intentionally. If the conduct is carried out without knowledge of the existing contractual relationship, there is no actionable wrong. Yet the damages may be just as serious.

Since *Lumley v Gye*,<sup>10</sup> it has been a tort for a person to knowingly induce a third person to breach a valid and existing contract. In such cases, the guilty party usually profits from the breach and his own wrongful conduct. The wronged person may sue in tort for damages, in assumpsit or in quasi-contract for the benefits realized. If no benefit is realized, the remedy is limited to the tort action.

The case which prompts us to mention this tort is *Friedman v. Jackson*,<sup>11</sup> which is particularly interesting since it involved a contract that was not enforceable; the contract was not in writing as required by the statute of frauds.<sup>12</sup> Plaintiff was a real estate dealer or broker. Owners of real estate entered into an oral contract with plaintiff whereby plaintiff agreed to find a purchaser for the property, and it was agreed that a commission of 5% of the purchase price would be paid to plaintiff for his services. Plaintiff showed the property to fourteen prospective buyers, the defendant being one. Defend-

10. 118 Eng. Rep. 749 (1853).

12. Civ Code § 1624(5).

11. 266 Cal. App.2d 517, 72 Cal. Rptr. 129 (1968).

ant then informed plaintiff that the price was too high and that he was no longer interested. But defendant then told the owners that he had heard of their property being for sale from a friend, not from plaintiff, and proceeded to buy the property.

The plaintiff sued defendant for the real estate commission on the basis of the wrongful interference with the unenforceable contract. Could defendant take advantage of this statute by stepping into the shoes of the seller, who would have had a good defense if he had refused to pay the commission? The trial court decided that the defense was available. The trial court presumably decided in defendant's favor in reliance on two cases that merely hold that a broker cannot recover his commission from a seller or owner who knowingly sells property notwithstanding his contract with the broker.

There is a strong policy behind the statute of frauds and, if the broker's contract is not in writing, he cannot recover either on the oral contract or in quasi-contract for the benefit conferred.<sup>13</sup> He may conceivably recover on the basis of an estoppel, but such an estoppel is difficult to establish.<sup>14</sup> But a case against a third party wrongdoer, such as defendant, is an entirely different matter. There is no policy reason to protect him, he being an intentional wrongdoer acting with full knowledge of the interest of the broker.

The important fact or question here is whether plaintiff broker has such an interest in an unenforceable contract that it is protected against invasions by third persons having knowledge thereof. The Supreme Court of California, at a rather early date, spoke quite strongly about the valuable nature of the interests of parties to unenforceable contracts:<sup>15</sup>

Although the statute declares a parol contract for the sale of land void, it does not make it illegal. It is not a corrupt or wicked agreement; nor does it violate any principle of public policy. Parties are at liberty to act under such contracts if they think proper. Many such

<sup>13</sup>. Colburn v. Sessin et al., 94 Cal. App.2d 4, 209 P.2d 989 (1949); Sweeley v. Gordon, 47 Cal. App.2d 381, 118 P. 2d 14 (1941).

<sup>14</sup>. Augustine v. Trucco, 124 Cal. App.2d 229, 268 P.2d 780 (1954).

<sup>15</sup>. Hill v. Den, 121 Cal. 42, 53 P. 642 (1898).

have been carried into complete effect by payment of the price and the conveyance of the land.<sup>16</sup>

This favorable attitude is further evidenced by the fact that if a vendee makes a down payment on such an unenforceable contract, and then decides that he does not desire to go through with it, he cannot recover his down payment so long as the seller is willing to perform.<sup>17</sup> So long as the seller does not repudiate, equity will not require restitution of the down payment. Moreover, it is hornbook law that a purchaser of real estate who has performed an oral contract in improving the property and making substantial payments is entitled to specific performance from the vendor.<sup>18</sup> Even if the promise is to leave property by will to someone who is to render services to a particular member of the family, the court will often compel the promisor, his representatives or other heirs, to convey the property to the promisee who has rendered long and faithful service in reliance on the oral promise. A new will cannot be written, but a constructive trust can be declared.<sup>19</sup>

Thus there is a real legal basis for finding that a person who has entered into an unenforceable contract has a valuable right that must be respected and protected against intentional and unprivileged interferences. The court in *Friedman* quotes from the 1963 New Jersey case of *Harris v. Perl*.<sup>20</sup>

One who unjustifiably interferes with the contract of another is guilty of a wrong. And since men usually

16. 121 Cal. 42, 45, 53 P. 642, 643.

17. *Noel v. Dumont Builders, Inc.*, 178 Cal. App.2d 691, 3 Cal. Rptr. 220 (1960); *Maddox v. Rainoldi*, 163 Cal. App.2d 384, 329 P.2d 599 (1958); *Lafey v. Kaufman*, 134 Cal. 391, 66 P. 471, 86 A.S. 283 (1901).

18. *Engasser v. Jones*, 88 Cal. App. 2d 171, 198 P.2d 546 (1948).

19. Justice Traynor explained why this is done in *Monarco v. Lo Greco*, 35 Cal.2d 621, 626, 220 P.2d 737, 741 (1950):

"In reality it is not the representa-

tion that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it. Moreover, a party who has accepted the benefits of an oral contract will be unjustly enriched if the contract is not enforced whether his representations related to the requirements of the statute or were limited to affirmations that the contract would be performed."

20. 41 N.J. 455, 197 A.2d 359 (1964).

honor their promises no matter what flaws a lawyer can find, the offender should not be heard to say the contract he meddled with could not have been enforced.<sup>1</sup>

And as stated in *Zimmerman v. Bank of America*:<sup>2</sup>

The nature of the tort does not vary with the legal strength, or enforceability, of the relation disrupted. The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.<sup>3</sup>

Justice Herndon goes on to state: “. . . a purchaser may not by fraudulent means, cause a seller unwittingly to so change his position that thereafter he cannot reasonably be required to fulfill his commitment to his agent.”<sup>4</sup>

The Court then pointed out that the California decisions referred to are in accord with the provisions of the *Restatement of Torts* on the matter. An analysis of section 766 of the *Restatement* is effectively done. Section 766 provides:

One who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

The greater definiteness of the right under clause (a) than the right under clause (b) indicates that there would be a greater privilege to induce a party not to enter into the relationship than to induce a breach of a definite contractual relationship, as was the situation in Friedman.

## X. Governmental Accountability

Accountability, of course, is the opposite of immunity. Immunity gives one a valuable position; it is one of the four

1. 41 N.J. 455, 197 A.2d 359, 363.

2. 191 Cal. App.2d 55, 12 Cal. Rptr. 319 (1961).

3. 191 Cal. App.2d 55, 57, 12 Cal. Rptr. 319, 320.

4. 266 Cal. App.2d 517, 520, 72 Cal. Rptr. 129, 131 (1968).

fundamental legal relationships.<sup>5</sup> It is a comforting position to be in, knowing that no one has the power or right to bring a suit for damages against the immune person. Very often, persons who have caused someone damage watch the passing of the statute of limitations with a feeling of great relief; such a person has suddenly become immune. Fortunately, injured persons can feel a sense of relief from the fact that immunities are on the way out. Charitable institutions, formerly immune from liability, are now losing this desired and valued status.<sup>6</sup> Likewise, interspousal immunity is on the way out; in California it is gone both in intentional<sup>7</sup> and negligent wrongdoing<sup>8</sup> by one spouse against the other. Where children are involved, that too is being changed, especially where the parent is insured.<sup>9</sup>

Immunity of governments has been the rule dating back to kingship days when people were "subjects" of kings. The word "subject" in this sense is foreign to our understanding. And this is probably why Chief Justice Traynor said in *Muskopf v. Corning Hospital District*.<sup>10</sup>

How [this rule of sovereign immunity] became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts has been called 'one of the mysteries of legal evolution.'<sup>11</sup>

5. Professor Hohfeld of Yale named these four as right, privilege, power, and immunity. Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal pp. 16-59 (1913-14).

6. *Edwards v. Hollywood Canteen* 27 Cal.2d 802, 167 P.2d 729 (1946); *Phoenix Assurance Co. v. Salvation Army*, 83 Cal. App. 455, 256 P. 1106 (1927).

7. *Self v. Self*, 58 Cal.2d 683, 26 Cal. Rptr. 97, 376 P.2d 65 (1962).

8. *Klein v. Klein*, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962).

9. See 19 Hastings L.J. 201 (1967-68); see also 1963 A.S. 376.

10. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) modified in 57 Cal. 2d 488, 20 Cal. Rptr. 621, 370 P.2d 325.

11. 55 Cal.2d 211, 214, 11 Cal. Rptr. 89, 90, 359 P.2d 457, 459; modified in 57 Cal.2d 488, 20 Cal. Rptr. 621, 370 P.2d 325. For an historical perspective, see *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, 2 S.Ct. 419 (1792). It was decided that a citizen could sue a state in the federal courts. Only Justice Iredell dissented, arguing that the principle of immunity is fundamental. Significantly, the Court was immediately overruled by the first "post adoption of the Constitution" amendment, the eleventh. It provided that the judicial

Immunity being the rule and liability the exception, citizens injured by the tortious conduct of governmental employees acting in the course and scope of their employment were left to seek their redress in the mercy of the legislature by submission of a private bill for compensation. Legislative and judicial exceptions to this cumbersome and uncertain remedy became more numerous, as legislatures found that the growth of governmental activity was occasioning a proportionate increase in the volume of private bills seeking compensation for governmental wrongs. Early judicial exceptions predicated liability on an often tenuous and illusory distinction in the nature of the activity, liability being imposed when the sovereign acted in a proprietary capacity and denied when functioning in a governmental activity. Legislative modifications to the doctrine were often narrow and limited in the kinds of public entities within the statutory purview, resulting in illogical and serious inequalities; recovery often depended upon which particular governmental agency committed the wrong.<sup>12</sup>

The adoption of the Federal Tort Claims Act<sup>13</sup> in 1946, creating tort liability of the federal government for losses and injuries caused by the negligent acts or omissions of its employees while acting within the scope of their employment, was a great step forward, setting the direction for other jurisdictions to follow. Immunity was retained for official acts involving discretion (acts involving the exercise of judgment) and also for torts involving a specific intent or high degree of culpability. Much of the litigation under the Act concerned the meaning of the “discretion” conduct clause. *Dalehite v.*

power of the United States should not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by one of the citizens of another state or by citizens or subjects of a foreign state. Thus, it became federal policy that an individual cannot sue a state without its consent, either in its own or in federal courts. See Borchard, *Government Liability in Tort*, 34 Yale L. J. p. 6.

12. For extensive historical back-  
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ground of both national and state immunity see: Jaffe, *Suits Against Governments and Officers*, 77 Harv. L. Rev., p. 1 (1963–64); Borchard, *Government Liability in Tort*, 34 Yale L.J., p. 1; VanAlstyne, *Governmental Tort Liability: Judicial Law Making in a Statutory Milieu*, 15 Stan. L. Rev., p. 163 (1962–63); *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457.

13. 28 U.S.C. §§ 2671 et seq.

*United States*<sup>14</sup> set the pattern. Where there is room for policy judgment and decision, there is discretion. So acts of subordinates carrying out such policies according to plan are not actionable.

Early cases in California followed the rule of immunity, basing the immunity on a lack of consent to be sued.<sup>15</sup> A statute enacted in 1893, providing that those having claims for negligence against the state were authorized “. . . to bring suit thereon . . .” was subsequently held not to be a waiver of sovereign immunity but a mere grant of a procedural right.<sup>16</sup> Other bases for preserving immunity and rejecting liability were: lack of consent to substantive liability,<sup>17</sup> lack of power to respond in damages,<sup>18</sup> and inapplicability of the doctrine of respondeat superior to municipal officers charged with a duty prescribed and limited by law.<sup>19</sup> Early exceptions to the rule of sovereign immunity were found in the constitutional requirement to pay just compensation for private property taken for public use,<sup>20</sup> liability for obligations assumed under a contract,<sup>1</sup> and what became known as the “nuisance exception.”<sup>2</sup> *Muskopf*<sup>3</sup> and *Lipman v. Brisbane Elementary School District*<sup>4</sup> discarded the rule and pressured the adoption of the state Tort Claims Act in 1963.

With enactment of the California Tort Claims Act, “. . . all common law or judicially declared forms of liability, except for such liability as may be required by state or federal constitution . . .”<sup>5</sup> were abolished. Government Code section

14. 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).

15. *Bourn v. Hart*, 93 Cal. 321, 28 P. 951, 27 A.S. 203, 15 L.R.A. 431 (1892).

16. *Denning v. State*, 123 Cal. 316, 55 P. 1000 (1899).

17. *Melvin v. State*, 121 Cal. 16, 53 P. 416 (1898).

18. *Hensley v. Reclamation Dist. No. 556*, 121 Cal. 96, 53 P. 401 (1898).

19. *Perkins v. Blauth*, 163 Cal. 782, 127 P. 50 (1912).

20. *Chicago, B. & Q. R. R. v. City of*

*Chicago*, 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581 (1897).

1. *Chapman v. State*, 104 Cal. 690, 38 P. 457, 43 A.S. 158 (1894).

2. *Conniff v. City and County of San Francisco*, 67 Cal. 45, 7 P. 41 (1885).

3. 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) modified in 57 Cal. 2d 488, 20 Cal. Rptr. 621, 370 P.2d 325.

4. 55 Cal.2d 224, 11 Cal. Rptr. 97, 359 P.2d 465 (1961).

5. Gov. Code, § 815. See *Legisla-*

815 limits liability to the extent provided by statute. Section 815(b) provides that the only immunities are those provided by statute. Under the same section, the liability of a public entity is subject to any defenses that would be available if it were a private person. Section 815.2(a) makes the state agency liable for injuries caused by an employee in the course of his employment if the employee is liable apart from this section, while part (b) of the same section provides that the agency is not liable if the employee or official is immune. Thus the immunity of the state agency and the official are co-extensive. The general rule is that liability exists, while immunity rests on exceptions. This reverses the old attitude toward governmental accountability.

Thus to get immunity we must look to the statutory exceptions. To begin with, we find that a state agency cannot be liable for punitive damages awarded under section 3294 of the Civil Code.<sup>6</sup> Government Code sections 818.2, 818.6, and 818.8, are specific exceptions to liability for acts such as those that indicate a high degree of culpability or intentional wrongdoing. Government Code section 820.2 sets forth the exception for acts involving discretion, much as set forth in the Federal Tort Claims Act, and the exception covers such acts whether or not the discretion is abused. How are discretionary acts to be separated from so-called ministerial ones?

In *Johnson v. State*,<sup>7</sup> William Bear, as placement officer of the State Youth Authority, had a young parolee, sixteen years of age, whom he wished to place in a foster home. The Johnsons had expressed a desire to give a poor boy a home and Bear arranged to place young Chemlouski with them. He had homicidal tendencies and had a background of violence and cruelty towards animals and humans.

A few days after he arrived in the Johnson home, he assaulted Mrs. Johnson with a butcher knife. Bear never warned the Johnsons about the known tendencies of the youth.

*tive Committee Comment—Senate*, p. 119.

7. 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

6. Gov. Code § 818.



Suit was brought against the state; the state filed a motion for summary judgment and it was granted, on the state's argument that the parole officer was immune while exercising discretion and so the state was immune. The state, trying to bring itself within the misrepresentation exception, also argued that Bear had told the Johnsons that there was nothing in Chemlouski's background indicative of violent or criminal tendencies, and as such he had misrepresented the facts to them. Government Code section 818.8, grants immunity to the public entity where injury is caused by a misrepresentation by an employee whether or not such misrepresentation be negligent or intentional. This is one of the few exceptions to the general principle of *respondeat superior*, which prevails throughout the act. A question of immunity is also raised by section 845.8, which precludes liability from attaching to either the public entity or the employee in determining whether to parole or release a prisoner.

The Court of Appeal affirmed the summary judgment. Justice Tobriner, speaking for the Supreme Court regretted to some extent that the act makes the immunity of the agency coextensive with that of the employee, for that compels the Court to proceed with a determination, or an interpretation of the statutory language. He indicated that the problem would have been simpler if it were recognized that there may be different reasons for granting immunity to the agency than for doing so for the employee. In dealing with the grant of immunity under section 845.8, Justice Tobriner viewed this immunity as terminating with the decision to parole or release. Negligence occurring after the decision to parole is subject to redress unless there is immunity under some other section. He also refused to consider granting immunity on the basis that a misrepresentation was made pursuant to section 818.8. The same word appears in the federal Act, and in *United States v. Neustadt*,<sup>8</sup> misrepresentation was limited to its general meaning in the law of deceit, which refers to finan-

8. 366 U.S. 696, 6 L.Ed.2d 614, 81 S.Ct. 1294 (1961); F.H.A. misrepresented the property value on which Neustadt, a purchaser, relied. Held, the government not liable.

cial losses rather than personal injuries. The failure to give warning to the Johnsons cannot be referred to as a misrepresentation. The Court stated that there was a duty to reveal the fact of the boy's criminal record, if known. So the question narrowed itself to whether the revealing of facts, if known, is a matter of discretion. If it is a matter of discretion, the immunity is given whether or not discretion was abused.<sup>9</sup>

The choice was whether to use dictionary definitions of the word "discretionary" or to consider policy considerations. When should there be a blanket rule not to entertain a tort action alleging that careless conduct contributed to the governmental decision? The Court recognized that line-drawing difficulties would arise constantly, but decided that there is no plausible reason for allowing immunity here. In thinking about statutory interpretation, this writer likes to return to the language of Judge Learned Hand:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing: be it statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.<sup>10</sup>

The Court here reviewed the dictionary approach and then refused to enmesh itself in such a semantic thicket, and instead pursued the quest for the legislative intent and purpose. It had its own decision in *Ham v. County of Los Angeles*,<sup>11</sup> pointing to the impossibility of doing anything without some discretion being involved, ". . . even if it is only the driving of a nail." Nearly everything involves ministerial as well as discretionary elements. A line must be drawn somewhere. Certainly the case stands for a separation between making a deci-

9. Gov. Code § 820.2.

326 U.S. 404, 90 L.Ed. 165, 66 S.Ct. 193.

10. *Cabell v. Markham*, 148 F.2d 737, 739 (1945) cert. granted 325 U.S. 847, 89 L.Ed. 1969, 65 S.Ct. 1409 affd.

11. 46 Cal. App. 148, 162, 189 P. 462, 468 (1920).

sion and carrying it out. The exception for immunity terminates when the decision is made, and the liability in tort takes over in the performance of the task.

The thinking in the case of *Johnson v. State*,<sup>12</sup> is affirmed in the case of *McCorkle v. City of Los Angeles*.<sup>13</sup> Here a police officer answered a call about a collision at an intersection within the city limits. While investigating the accident, he carelessly directed the plaintiff, who had been slightly injured in the collision, to go into the traffic and show him just where the impact had taken place. No flares were set out, as generally required in such situations at night. Another driver did not see the officer and plaintiff standing together and struck plaintiff, causing him serious injury. The Supreme Court by Justice Tobriner, again, held for the plaintiff, affirming the decision of the lower court. The city relied on section 820.2 of the Government Code, and as in *Johnson* claimed that what the officer did involved discretionary elements. The Court reviewed the dictionary semantic approach and then concluded that classifying the act of a public employee as *discretionary* will not produce immunity under section 820.2, if the injury to another results, not from the discretion in undertaking the act, but from the employee's negligence in performing it, citing *Johnson v. State*<sup>14</sup> and *Sava v. Fuller*.<sup>15</sup> The Court added further that in this instance discretion was not causal; it was negligence in carrying out the assignment that was causal. Thus, the separation of negligence in performance from the discretionary assignment is now firmly rooted in our jurisprudence. These cases show the trend; immunity is limited by statutory interpretation.

The riots in the Watts area of Los Angeles in 1965, caused severe losses to many property owners in the area. Assembled crowds destroyed valuable properties and businesses. Police and governmental agencies did nothing to prevent the destructions and losses. A number of those sustaining losses claimed

12. 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

13. 70 Cal.2d 252, 74 Cal. Rptr. 389, 449 P.2d 453 (1969).

14. 69 Cal.2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

15. 249 Cal. App.2d 281, 57 Cal. Rptr. 312 (1967).

damages from city authorities and officers who had failed to take any steps to stop the riots. In *Susman v. City of Los Angeles*,<sup>16</sup> eleven causes of action were stated against the city. The action sought to charge the City of Los Angeles and the State of California, by and through their employees, with negligently and carelessly causing and aggravating the rioting, thereby causing the losses. All the causes were stated in similar language. The trial court sustained demurrers to all these causes; plaintiffs appealed therefrom.

The Court of Appeal affirmed the decisions. These claims were based entirely on the alleged *inaction* of the city's officers. The Court pointed out that the liability of governmental agencies is now governed by the State Tort Liability Act.<sup>17</sup> Section 818.2 of the Government Code provides that: "A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." Likewise, section 845, provides that: "Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." The Law Revision Commission has stated that: "Whether such police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to policy-making officials of government."<sup>18</sup> Courts cannot assume the making of such decisions. Certainly those decisions involve the exercise of discretion, which is definitely within the range of immunity under section 820.2.

This decision is certainly to be contrasted with the *Johnson* case. Perhaps if police officers had attempted to act *after* a decision to act had been made, their methods of carrying out the policy decided on might have been said to be ministerial and have required them to be performed with due care. It seems pertinent to inquire whether governmental agents can

16. 269 Cal. App.2d 803, 75 Cal. Rptr. 240 (1969).

17. Gov. Code §§ 810 et seq

18. Gov. Code § 845. See *Law Revision Commission Comment*, p. 270.

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always protect themselves by remaining inactive and doing nothing.

In *Flournoy v. State of California*,<sup>19</sup> the state was charged with maintaining a long bridge in a negligent and dangerous condition, in that it became covered with ice and no warning notice was posted. This bridge, 565 feet long, is on highway 89 in Shasta County. The southbound approach, on which decedent was traveling, is three miles long, level, and well paved. There was ice only on the bridge, formed by mist from the flowing stream. Decedent was followed by a truck. Decedent's car slid out of control on the ice; the truck did likewise and crashed into decedent's car. As indicated above, the Government Code now sets the guidelines for the government's liabilities and immunities. Section 835 makes the state liable for a dangerous condition of public property.

Liability may attach where the government created the dangerous condition, or where it had notice of the condition and failed to take protective measures to warn travelers. There are again statutory exceptions. There is immunity where (a) there is a failure to put up traffic signals prescribed by the Vehicle Code,<sup>20</sup> (b) for injuries caused by the *approved* plans or designs of public works,<sup>1</sup> (c) for accidents caused by reasonably apparent weather conditions<sup>2</sup> and (d) for accidents due to reasonable government acts.<sup>3</sup>

Basic here is whether the formation of ice on the bridge was part of its design; was this an ice-prone bridge for which the state would be liable? Also, there could be liability because of the state's knowledge of the condition, which a reasonably careful driver would not recognize and of which the state failed to warn. The first theory involves the creation of a dangerous condition, and the second passive negligence in failing to warn. The state, of course, set up all arguments pointing to immunity. The trial court entered summary judgment for defendant, which the Court of Appeal reversed on

19. 275 Cal. App.2d —, 80 Cal. Rptr. 485 (1969).

20. Gov. Code § 830.4.

1. Gov. Code § 830.6.

2. Gov. Code § 831.

3. Gov. Code § 835.4.

the theories indicated. The trial and future appeals may make more clear the principles determining the liability and immunity of the state for dangerous conditions of public property.

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