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THE MANY PROBLEMS OF SOVEREIGN LIABILITY

Stanley Mosk*

It is rare indeed when a contemporary legal concept can be traced to a single source. Yet it is clear that the trend toward abolition of sovereign immunity began with a three-part law review article by Professor Edwin Borchard back in 1924.¹ His scathing denunciation of governmental immunity fell on deaf ears for some time. This is remarkable, for a cursory reading of his rationale renders it difficult to understand why courts and legislatures throughout the country took so long to reach the conclusion of Muskopf v. Corning Hosp. Dist.²

Borchard wrote in part:

... it requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all the risks of a defective, negligent, perverse or erroneous administration of the State’s functions, an unjust burden which is becoming graver and more frequent as the Government’s activities become more diversified and as we leave to administrative officers in even greater degree the determination of the legal relations of the individual citizen. Obviously the Administration cannot be held to the obligation of guaranteeing the citizen against all errors or defects, for life in an organized community requires a certain number of sacrifices and even risks. The unexampled expansion of the police power in the United States daily illustrates the uncompensated sacrifices to which the individual is exposed by the rightful operation of the State’s public powers. Yet there is no reason why the most flagrant of the injuries wrongfully sustained by the citizen, those arising from the torts of officers, should be allowed to rest, as they now generally do, in practice if not in theory, at the door of the unfortunate citizen alone. This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice. When Justice Miller of the United

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² 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In Muskopf Justice (now Chief Justice) Traynor, speaking for a majority of the court, held that the common law rule of governmental immunity from tort liability must be discarded as mistaken and unjust. Thus, the plaintiff was held to have a valid cause of action against the defendant for alleged negligent treatment causing further injury to the broken hip for which she was being treated.
States Supreme Court remarked in *Gibbons v. United States* that 'no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents,' his horizon was extremely limited, for he overlooked the fact that practically every country of western Europe has long admitted such liability. There seems no sound reason why the English-speaking countries, where the public service is usually in less professional hands than on the continent, should not adopt modern social and legal relations between the Government in its administration of the public services, the officers and agents whom it employs for this service, and the individual members of the community. It was Lord Macaulay who remarked that 'the primary end of Government is the protection of the persons and property of men.'

The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong,' which without sufficient understanding was introduced with the common law into this country, and has survived mainly by reason of its antiquity. The facts that the conditions which gave it birth and that the theory of absolutism which kept it alive in England never prevailed in this country and have since been discarded by the most monarchical countries in Europe, have nevertheless been unavailing to secure legislative reconsideration of the propriety and justification of the rule that the State is not legally liable for the torts of its officers.

Undaunted by his earlier cry in the wilderness, Professor Borchard continued his writings, including the following in 1942:

The present issue is therefore no longer one of proving the impropriety of old rules which purported to discharge a societal obligation by throwing liability on a negligent but often financially irresponsible officer or body, but of distributing effectively and justly the costs of official maladministration due to the inevitable consequences of human deficiencies in the operation of the governmental machine. On the one hand, it is now recognized as unfair to allow the unfortunate victim of official negligence to sustain alone the burden of his loss; on the other hand, it is poor administration to purport to make the officer alone responsible. Foreign systems had

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3 75 U.S. (8 Wall.) 269, 274 (1868).

4 The basis of sovereign immunity was an opinion of Lord Somers in 1175, quoted at length by Justice Iredell in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437-41 (1793).

5 Borchard, *supra* note 1, at 1-2. That the conditions "never prevailed in this country" is not entirely accurate. In *The Federalist* No. 81, at 602 (Hamilton ed. 1892). Hamilton wrote: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the union."
long reached the conclusion that the employing governmental unit should stand behind its erring official and assume responsibility for the community as a whole for certain types of flagrant defects in administration.6

Only one jurisdiction rose to the challenge. New York was the first state to waive sovereign immunity against suit and it has done so more completely than any other American jurisdiction, including the United States. It must be noted that New York, to its credit, did so back in 1919 before the movement favoring abolition had achieved any considerable momentum.7 The State of Illinois has been subject to tort liability since 1945.8 When California joined the group in 1961 with the Muskopf case and Lipman v. Brisbane Elementary School Dist.,9 the three most populous states recognized that the sovereign could do wrong, and that when it did, its citizens were entitled to redress. I suspect the factor of population—more people in government and more people subject to contact with government—impelled action by the three areas of concentrated humanity. On the other hand, it should be noted that Alaska, Hawaii, Kentucky, and North Carolina also have imposed broad tort liability upon state government.10

The New York act provided that "The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations."11 Only one express limitation is contained and that relates to torts committed by the organized militia. As stated in Jackson v. State,12 "The State thus provides for four things..."
which shall result from the infliction of personal injuries due to
the negligence of its officers and employees while acting as such
officers or employees. It waives immunity from liability, . . . and it
confers jurisdiction upon the Court of Claims to hear and determine
such claims of liability." A new Court of Claims Act, now in effect,
was adopted in 1939.18

At first blush that would seem to be a clear and unequivocal
waiver of all immunity. Yet the legal mind immediately discerned
a problem. The state is to be liable in accordance with the rules of
law applicable to "individuals or corporations." That leaves no doubt
of the state's liability for torts when it engages in activities in which
private individuals and corporations engage. But it is also clear that
the state performs many functions which are not performed by pri-
ivate persons and corporations, and by their intrinsic nature cannot
be performed by such persons.

Thus arose the distinction between "governmental" and "propri-
etary" functions. It has been said that generally no liability accrues
for strictly governmental functions.14

But in that regard, it must be conceded that many activities carried
on by government are of a nature so unique, and in some instances
so inherently dangerous, that no private industry would undertake
the administrative risk involved. Certainly this is true of law enforce-
ment, firefighting, care of mental patients, maintenance of juvenile
detention facilities, operation of jails, and control and treatment of
communicable diseases.

Prior to 1961 California law regarding the liability of a public
entity for the torts of a public employee was determined by the same
factors. An entity was deemed liable for proprietary activities and
immune from liability for strictly governmental activities.15 An em-
ployee was liable for ministerial actions and immune from liability
for discretionary acts. Without exception the protection granted to
the employee for torts resulting from discretionary acts or omissions
extended also to the employer.16

13 N.Y. CT. OF CLAIMS ACT §§ 1-29.
2d 603, 604, 250 P.2d 643, 644 (1952); Oppenheimer v. City of Los Angeles, 104 Cal.
App. 2d 545, 548, 232 P.2d 26, 28 (1951); Norton v. Hoffman, 34 Cal. App. 2d 189,
194, 93 P.2d 250, 253 (1939); Wood v. Cox, 10 Cal. App. 2d 652, 653, 52 P.2d 565
(1935).
15 Brindamour v. Murray, 7 Cal. 2d 73, 59 P.2d 1009, 1011 (1936); Johnson v.
Fresno County, 64 Cal. App. 2d 576, 149 P.2d 38 (1944).
16 See Kennedy and Lynch, Some Problems of a Sovereign Without Immunity, 36
Both Muskopf and Lipman left untouched the "discretionary act" rule to the extent that it protected the employee. However, the protection formerly available to the public entity was abolished. Muskopf imposed general liability upon the public entity, thereby eliminating the need to determine whether the activity involved was proprietary or governmental. Lipman suggested that the liability of the entity would not be coextensive with the liability of the employee-tortfeasor, but would depend upon various other factors, such as the importance of the public functions, the extent to which liability might impair free exercise of these functions, and the presence of remedies other than tort suits for damages. Under Lipman a finding that the employee's act was discretionary would not protect the entity. It would have been necessary to show in addition that some vital public interest would be threatened if immunity were denied the entity. But legislative action in 1963 forecloses this possibility by providing that a public entity is not liable for an injury resulting from an act or omission of its employee where the employee is immune from liability. 17

Under the liability provisions of the new legislation, the employee is liable as a private person for his tortious conduct unless otherwise provided, and he is accorded the defenses normally available to private persons. The primary exception is for discretionary acts. Now the entity is liable if the employee is liable and is immune if the employee is immune. The entity is liable as a private person, therefore, except where immunity has been granted by statutory exception. The question that will of necessity be presented to California courts hereafter is whether the act or omission was discretionary or ministerial.

The 1963 legislation restated the pre-existing law on discretionary immunity. A brief review of the California decisions indicates that the doctrine of discretionary immunity, like the concept of the reasonable and prudent man, is often mentioned but only vaguely understood. 18 A need to protect public officials from damage suits when injuries result from the exercise of official judgment and discretion has long been recognized. But there has been little uniformity in applying the doctrine to specific cases. The modern trend seems to protect public employees who act in good faith in exercising discretion, but to withhold protection when bad faith is encountered.

18 People v. Superior Court, 29 Cal. 2d 754, 178 P.2d 1 (1947); Green v. State, 73 Cal. 29, 11 Pac. 602 (1887); Alameda County v. Chambers, 35 Cal. App. 537, 170 Pac. 650 (1917).
The pre-existing law on discretionary immunity may be summarized as follows: first, any exercise of judgment may be construed as discretionary; second, scope of authority includes anything collateral or incidental to the main duty of the office of the person acting; and third, the employee who acts within the scope of his authority in performing a discretionary duty will be immune from liability, even—and this is not unanimous—if motivated by malice, dishonesty, corruption or carelessness.\(^{19}\)

The 1963 Legislature did not define discretionary immunity. The scope of employment, however, has been clarified by provisions dealing with activities which the case law protected as discretionary. The scope of immunity includes the following types of activities:\(^{20}\) execution or enforcement of any law, or enforcement of enactments which are unconstitutional, invalid, or inapplicable; adoption or failure to adopt enactments; issuance, revocation or denial of licenses, permits and certificates of authorization; health and safety inspections of private property; injuries caused by other persons; prosecution of judicial or administrative proceedings; authorized entries upon private property; money stolen from official custody; misrepresentation.

This raises the additional question of the standard of care required of the employee. This appears to vary with the type of activity. Due care is required in the execution of a law; good faith for acting under an enactment which is invalid, inapplicable or unconstitutional; good faith and probable cause for instituting or prosecuting a judicial or administrative proceeding. The employee must indemnify the public entity for recoveries made against the entity for the acts of the employee involving actual fraud, corruption or malice. While this would seem to apply only to malicious prosecution and possibly to action under an invalid enactment, this may suggest a minimum standard bearing upon other types of tortious conduct.\(^{21}\)

The Lipman case, as mentioned before, suggested three factors that helped to furnish a means of deciding whether the agency in a particular case should have immunity. These include the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function,

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\(^{19}\) Downer v. Lent, 6 Cal. 94 (1856); see Van Alstyne, Government Tort Liability: A Public Policy Prospects, 10 U.C.L.A. L. Rev. 463, 474-75 (1963).  


and the availability to individuals affected of remedies other than tort suits for damages.  

A Minnesota Law Review article criticized Lipman for its discussion of the deterrent effect of state liability. The article argued that personal immunity has been given because it is thought that the financial consequences attendant to suit and liability would stifle official action. But when the pocketbook touched by liability is the state's, rather than the individual's, the more valid assumption may be that the only deterrent effect would be a fear on the part of officials that a trial would disclose personal, rather than public, motives for the particular action. It seems such an effect would not hamper the exercise of discretionary power, but would merely tend to insure the competence and propriety of that exercise. 

However, the Minnesota author concedes that "at some point the courts should refuse to allow juries to second-guess legislative, executive, and judicial discretionary decisions." The only solution it suggests, however, is a case-by-case adjudication.

This is probably inevitable at this point in our all-too-brief history of sovereign liability. To date, only one case has reached the California Supreme Court since the 1963 legislative enactments: County of Los Angeles v. Superior Court, decided in June, 1965. The question involved was whether the legislature had the power to retroactively abrogate what the real party in interest contended was a vested right, arising as the result of injuries allegedly sustained in the Los Angeles County Hospital. The California Supreme Court held that although the legislature normally legislates prospectively, it can provide for retroactive application of a statute if it has a reasonable basis for doing so. It was pointed out that the legislature responded to our court's abrogation of the common-law doctrine of governmental immunity by enacting comprehensive legislation regarding governmental liability for the acts of public employees and public officers. The court held it was not unfair to apply the statute retroactively since retroactivity in this instance serves to clarify the fiscal responsibilities of public entities. The court pointed out that persons injured prior to the Muskopf case could not have achieved

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22 55 Cal. 2d 224, 230, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961). Lipman, however, concedes: "it may not be possible to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials."

23 46 Minn. L. Rev. 1143, 1151 (1962).

24 Id. at 1153.

any vested rights for they certainly could not have anticipated the
decision in view of the previous state of the law. Having achieved
no vested rights the plaintiff there suffered no abrogation of vested
rights by retroactive application of the 1963 act.26

The logical question in this year of 1966 is: Where do we go
from here? What problems may we anticipate, legal, governmental,
and fiscal? For example, a number of textwriters on the subject of
public liability have expressed the fear that claims may cause public
entities to come perilously close to bankruptcy. The County Counsel
of Los Angeles has itemized the claims against the County of Los
Angeles filed between 1947 and 1962.27 For all of those years he
lists claims totaling $123,000,000. But significantly, of that sum
almost half consisted of two specific claims, one for $50,000,000 for
alleged wrongful taking of oil and gas rights in property occupied
by the sheriff's honor farm, and $9,500,000 for landslide damage in
the Portuguese Bend area. While the County of Los Angeles is only
one governmental entity, certainly it is a significantly large agency
and, I might add irreverently, it exists in a particularly litigious
community. It has not yet been demonstrated that sovereign liability
endangers governmental solvency.

For legal authority on the broad range of future problems, I sug-
gest that courts in California and in other new sovereign liability
states may well look to New York state cases, since New York, as
previously indicated, was the first to impose governmental liability.
As possible guidelines, therefore, let us cursorily glance at some
decisions of New York courts. I do not dogmatically cite these as
the final word, but only as some indicia of what may be anticipated
in a number of areas.

**LEGISLATIVE ACTS**

As long ago as 1917 New York held in *Barrett v. State*28 that the
state is not liable for damages resulting from a legislative act, as
distinguished from a failure to execute a legislative policy with due
care. In the *Barrett* case, trees belonging to the claimants had been
destroyed by beaver, and the claimants contended this was due to the

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fact that the legislature had passed certain laws prohibiting the hunting of beaver. The statutes had been enacted because beaver had become virtually extinct in New York. The lower courts held for the claimants and the intermediate appellate court affirmed. But the Court of Appeals determined there could be no recovery since the legislature, in enacting the protecting statute, was exercising a governmental function, and a cause of action could not lie for any resulting incidental damage. The court added that even if the statute had been unconstitutional, that would not have created any liability since then the claimants could have disregarded the unconstitutional statute with impunity and directly protected their own property by destroying beaver.

The Barrett case is still considered law in New York a half-century later. The basic theory is that a court cannot find the state liable on the basis of harm created by a legislative act without in essence holding that its judgment as to what is reasonable is to be preferred to the judgment of the legislature. This would constitute a violation of the principle of separation of powers.

In 1952 the United States Court of Claims adopted the same rule in expressly holding that no liability may be imposed upon the United States Government because of the enactment of a congressional act where due care has been used in its execution.29

I would suggest there is one fundamental limitation on the foregoing basic rule. If a legislative act amounts to an actual taking of private property, of course under the fourteenth amendment to the United States Constitution compensation must be paid. This suggests the possibility of seeking redress for a loss in the form of asserting appropriation of private property rather than alleging commission of a tort.

JUDICIAL ACTS

It has been clear in common law since 1810 that a judge is not liable for acts which he performs in a judicial capacity.30

There being no liability on the judge as an original wrongdoer, it would seem that the state cannot be held liable for judicial acts since its liability is wholly derivative. And in addition it has been

urged that state liability based upon respondeat superior cannot be applicable as between the state and judicial officers since they are not subject to any effective administrative control.\(^{31}\)

With an understandably sanctimonious and self-serving air, courts themselves have held that this principle is so necessary to insure judicial independence that it "obtains in all countries where there is any well ordered system of jurisprudence."\(^{32}\)

While that may be an oversimplification—as a matter of fact there is such liability for judicial acts in modern Germany and Austria—it does seem that a withdrawal of immunity for judicial acts would probably open the door for disgruntled litigants to relitigate decided issues.

**Quasi-Judicial Acts**

Somewhat less rigid, but nonetheless persistent, are holdings by New York courts that administrative agencies acting in a quasi-judicial capacity are immune from liability. Since it is frequently difficult to distinguish between a genuinely judicial function when performed by an administrative agency and an action which is merely ministerial in character, there has been a tendency on the part of courts to extend the state's immunity into this entire area for policy reasons.

For example, in *Toyos v. State*\(^{33}\) the court declined to relitigate questions of law or fact decided by the state Liquor Authority in the case of a person whose liquor license had been revoked. Similarly, in *Chikofsky v. State*,\(^{34}\) the court refused to permit one to recover after injury in a motor vehicle accident on the ground that the license of the driver causing the injury should have been revoked before the accident. The court held that this would unduly burden the Bureau of Motor Vehicles and impair its discretionary functions. Similarly, New York courts have refused damages to an unsuccessful applicant for a position with a state department or agency who challenged the discretion of the appointing authority where the evidence indicated


\(^{33}\) 181 Misc. 761, 47 N.Y.S.2d 322 (Ct. Cl. 1944); see also Yereshefsky v. State, 180 Misc. 191, 40 N.Y.S.2d 270 (Ct. Cl. 1943); Muller v. State, 178 Misc. 360, 34 N.Y.S.2d 275 (Ct. Cl. 1942).

the civil service laws had been respected. Here again the rationale is that appointing officers must have necessary independence of judgment.

New York has generally absolved its public employees even where a serious mistake was made. In Bertch v. State the claimant was compelled by state troopers to turn over his driver’s license and registration plates. Later it developed that the order had been addressed to the claimant by mistake and that another individual was involved. The Court of Claims declined to hold the state liable for this mistake. It seems difficult to justify a conclusion of this kind, however, since it clearly was a ministerial error and in no way could be deemed a judicial or quasi-judicial function. On the other hand, in New York the state has consistently been held liable for the erroneous posting of traffic signs that have been responsible for accidents.

**INSPECTION SERVICES**

There is somewhat of a conflict in New York cases regarding the state’s liability for negligent issuance of licenses and for failure to properly inspect either persons or premises subsequently involved in an accident. It appears that a cause of action arises only if the applicable statute creates a “duty” toward the particular claimant, and therefore the cases seem to turn essentially on a question of general tort law.

Thus, a claimant injured as the result of a failure to inspect or of a negligent inspection will, as a general rule, be within the ambit of the risk created by the state’s negligent act. If that were not the case, there would be little purpose served by an inspection statute.

On the other hand, this state liability has not been held applicable

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36 193 Misc. 239, 85 N.Y.S.2d 814 (Ct. Cl. 1948).
where reformatories, jails, or similar institutions are involved. There are other notable exceptions. In *Rosensweig v. State* a claim was dismissed where an effort was made to hold the state liable for the death of a prizefighter on the ground that the state Athletic Commission physician who examined him before the bout was negligent in not recognizing that the boxer was physically unfit to fight. Similarly, where a person purchased a car which later was discovered to have been stolen, on the faith of a state-issued registration certificate, the state was not held liable.

**Preservation of Public Peace and Safety**

In New York a distinction is drawn between municipal activities relating to public peace and safety and those of the state. Municipal agencies are held liable for negligent acts of commission but not for negligent acts of omission. On the other hand, New York imposes no liability for any acts of the National Guard on the theory that the Guard engages in a function which is peculiarly governmental in nature and is not susceptible to an analogy with the functions of any private person or corporation.

In the field of handling of criminals, New York imposes liability on the state for negligence resulting in injury to a prison inmate, but it does not impose liability for damages caused to third persons by an escaped convict whose flight was permitted by the negligent conduct of prison guards. While this distinction is difficult to rationalize, it appears that the reason is wholly pragmatic. In one instance the injury is restricted to one particular individual whereas in the other liability for acts of an escaped prisoner could affect innumerable persons.

It was held in *Warner v. State* that "agents of the state, as well as private citizens, are bound to observe the requirements of the law before an individual may justifiably be held in a mental institution and subjected to its impact and stigma; failure to do so renders the state liable for the wrong." It was also held in the same case that

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41 See 14 Syracuse L. Rev. 79, 81 (1962).
this applies to "illegal or improper procedure as well as for acting upon an insufficient or improper basis."\textsuperscript{40}

California has provided state immunity for injuries sustained in mental institutions.\textsuperscript{47} Challenged as an unreasonable classification by the plaintiff in \textit{County of Los Angeles v. Superior Court}\textsuperscript{48} the court held "in limiting governmental liability for the operation of mental institutions, the legislature could appropriately consider the special problems of diagnosis and treatment in the field of mental illness, the problems of excessive patient load in public mental institutions that must take all patients committed to them, and the problems that may arise with respect to the competency of the mentally ill as witnesses."

California has also provided statutory immunity in the field of fire protection.\textsuperscript{49} Thus, failure to provide fire protection service or failure to maintain sufficient personnel will not give rise to a cause of action. Although the California Supreme Court has granted a hearing and will supercede the existing opinion, the 1965 case of \textit{Heieck & Moran v. City of Modesto}\textsuperscript{50} is worth noting. There it was held that a cause of action would lie for the negligence of a city employee in turning off a water valve without notice to persons who had a reasonable right to rely on the water controlled by that valve for fire protection. The court discussed the legislative intent from the Law Revision Commission's comment and recommendation to the legislature that:

\begin{quote}
The community is entitled to no greater level of fire protection and water service than it determines through its responsible public officials to acquire, and the threat of tort liability should not be interposed to insist that the system be wholly adequate to all present and future demands made upon it. A negligently conceived or mediocre system may well be better than no system at all. But the community, having determined as a matter of policy to adopt a
\end{quote}

\textsuperscript{40} \textit{Id.} at 404, 79 N.E.\textsuperscript{2d} at 462.
\textsuperscript{47} \textit{Cal. Gov. Code}, § 854.8. New York reached a contrary conclusion in \textit{Scolavino v. State}, 297 N.Y. 460, 74 N.E.\textsuperscript{2d} 174 (1947), on the theory that the state was aware of the bad feeling between Scolavino and the patient who assaulted him. A similar result was reached in \textit{Martindale v. State}, 269 N.Y. 554, 199 N.E. 667 (1935), on the theory that the state was aware the decedent was possessed of a desire and propensity to escape; see also \textit{Daley v. State}, 298 N.Y. 880, 84 N.E.\textsuperscript{2d} 801 (1942) (state was aware of decedent's suicidal tendencies); \textit{Curley v. State}, 148 Misc. 336, 265 N.Y.S. 762 (Ct. Cl. 1933) (state was aware of the assultive nature of the individual and nevertheless placed him in a room with 63 other patients with inadequate supervision).
\textsuperscript{48} \textit{Id.} at 404, 79 N.E.\textsuperscript{2d} at 462.
\textsuperscript{49} \textit{Id.} at 404, 79 N.E.\textsuperscript{2d} at 462.
\textsuperscript{50} See \textit{Cal. Gov. Code} §§ 850.2, 850.4.
\textsuperscript{62} \textit{Id.} at 404, 79 N.E.\textsuperscript{2d} at 462.
system having a planned level of performance, should be entitled to rely upon the personnel in charge of that system to maintain and operate it with reasonable prudence and diligence.\textsuperscript{51}

An interesting and developing corollary of the right to recovery against the state is the right of a state peace officer to recover against a property owner for injuries sustained on his property while investigating a crime. \textit{Scheurer v. Trustees of Open Bible Church}\textsuperscript{52} permitted no recovery, but the dissent was praised in the 1964 Annual Survey of American Law at page 430. Dissenting Justice Gibson stated that "the common law rule labeling firemen [and policemen] licensees is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, and should not be perpetuated in the name of 'stare decisis' . . . ."\textsuperscript{63}

\textbf{FOREIGN IMMUNITY}

One word about foreign sovereign immunity, that is, claims against another national government. It is now clearly established that State Department policy is controlling, and under the distinction between "public" and "private" acts announced in the Tate Letter and approved by the Supreme Court\textsuperscript{54} a certification of immunity by the State Department is deemed to be controlling upon federal courts.

Through the Tate Letter\textsuperscript{55} the executive branch of the federal government has implied that it will not be hampered in its conduct of foreign relations if a court employs a conception of commercial transactions rooted in the American free enterprise attitude toward commerce. Thus, in contract the court will attempt to discern whether the matter is commercial in nature. If in tort, the test is whether the tort resulted from an act pursued from an economic motive or purpose. The rule, then, seems to be that a nation will not have the risks of its acts weighed against their importance or utility by a foreign jurisdiction unless the transaction in question is motivated by profit.\textsuperscript{56}

\textsuperscript{52} 175 Ohio St. 163, 192 N.E.2d 38 (1963).
\textsuperscript{63} \textit{Id.} at 178, 192 N.E.2d at 47 (quoting from \textit{Dini v. Naiditch}, 20 Ill. 2d 406, 416, 170 N.E.2d 881, 883 (1960)).
\textsuperscript{55} 26 DEP'T STATE BULL. 984 (1952). This was an open letter from the State Department to the Attorney General declaring the policy of the United States Executive Department to be that sovereign immunity would apply to public acts of a foreign state but not to its private or commercial acts; \textit{e.g.}, chartering a ship to transport grain would be in the latter category.
\textsuperscript{56} 17 STAN. L. REV. 501 (1965).
HIGHWAY ACCIDENTS

This, of course, is the area in which most claims against public entities arise. Again we look to New York cases.

The state’s duty with respect to highways was described in Boyce Motor Lines v. State\(^\text{57}\) in these words:

It had a duty to construct and maintain its highways in a reasonably safe condition, in accordance with the terrain encountered and traffic conditions to be reasonably apprehended. But even so, a certain risk was unavoidable. Roads cannot always be straight and level, and curves with descending grades are always potentially dangerous. A highway may be said to be reasonably safe when people who exercise ordinary care can and do travel over it safely.

While it is clear that the state owes to users of its highways the duty of so constructing and maintaining not only the traveled portion of the road but also the shoulders so that they are in a reasonably safe condition for use by the prudent driver travelling at a reasonable speed in an emergency,\(^\text{68}\) the state does not owe to users of its highways the duty of constructing and maintaining shoulders so that they may be used for general travel.\(^\text{59}\) Where the construction and reconstruction of a highway and an adjoining gutter were contrary to the state’s own specifications and good engineering practices, the state has been held liable.\(^\text{60}\)

Cases are legion in holding the state liable for holes, heaves, and humps in the highway of which it had actual or constructive knowledge. As stated in Camuglia v. State,\(^\text{61}\) "It was the duty of the state not to leave the area in question for use by the public unless it was reasonably certain that it could be safely used." But one word of caution is indicated in Lurie v. State\(^\text{62}\) in which it was pointed out that "proof of the condition of a highway over a considerable distance is generally double-edged because while it may show notice to the state that the highway is in need of repair it also shows that the claimant driver should have been on guard for his own safety."

New York cases are clear that the mere proof of skidding on a highway will not result in holding the state liable even if there is proof of prior accidents at the same locality. On the other hand, if it can be shown that the skidding was caused by a “fatty” or “bleeding” pavement—one in which there is an excess amount of asphalt or bituminous material which renders the surface slick or slippery—liability may result. The state may be liable for the failure to erect a guard rail or barrier “wherein the situations were such as to deceive persons traveling on the highway into thinking that the road was straight.” Liability has been found where a barrier had been broken in a previous accident and had not been replaced. On the other hand, it is clear that the duty of the state to erect adequate barriers where the location and condition of the highway creates an unusual danger or foreseeable hazard to careful travel, does not include the erection of guard rails “at points normally not hazardous.”

Cases have held that where the state knew or should have known from the appearance of a tree—such as lack of foliage, decay, exposed roots, dead branches, the way it leaned—that such tree was a source of danger to users of the highway, a user of the highway who without fault was struck by a branch falling from a tree may recover damages from the state. Clearly, however, the state is not liable if there was no evidence from which it could be found that the public agency knew or should have known that a tree limb was defective.

Burning leaves by state employees causing smoke that obscured the vision of a driver might be the basis for state liability under certain circumstances. Since the smoke is clearly visible however, it is difficult for the claimant to justify continuing to drive and thus avoid a charge of contributory negligence.

The state has frequently been held liable for falling rocks and landslides on the theory that “if the highway could not be made safe for travel, it should have been closed.”

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New York has a manual of uniform traffic control devices which constitutes the rules and regulations of the state traffic commission with respect to traffic signs, signals and markings. Thus, generally, the state has been found not liable where warning signs are posted or omitted in accordance with the manual. On the other hand, if the signs are posted or omitted contrary to the rules, or negligently posted, then liability has generally followed.

It has been held that the state also has a duty to provide pedestrians with a safe place for walking, not only in cities but on shoulders of rural highways.

It is abundantly clear, of course, that the state is liable for injuries sustained by a claimant struck by a state-owned automobile being negligently driven. A state employee has the same obligation to obey the rules of the road as does a private driver.

The last paper prepared by the late Roscoe Pound dealt with governmental immunity. As was true of everything he did, his thesis was penetrating and incontrovertible. “Our task,” said Pound, “is to find a reasoned solution of the problem of adjusting demands of officials and agents of officials and those of citizens in a modern politically organized society.” We have made great progress “in providing remedies for men wronged by governmental operations,” he said, but, he urged, “for us in the United States of today, surely all remnants of the King’s immunity should have ended.”

I think Dean Pound would have been pleased with California, its Muskopf and Lipman decisions, its 1963 legislative act, and the general trend toward providing remedies for those wronged by governmental activities.

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72 Casey v. State, 191 Misc. 95, 76 N.Y.S.2d 572 (Ct. Cl. 1948).
77 Pound, Perspectives of Law, in Essays For Austin Scott (1964).