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The Constitutional Infirmity of the California Government Claim Statute

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"Where doubt enters in,
there enters the judicial function."
-Cardozo[1]

In recent years, the California Supreme Court has swept from the law a number of archaic legal doctrines;[2] doctrines touching the most intimate aspects of the lives of California citizens, but having little relationship to the realities of life in contemporary

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1. B.N. Cardozo, *The Paradoxes of Legal Science*, at 10 (1928).

2. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), wherein the Court held unconstitutional the automobile "guest statute". In People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), the Court held capital punishment to be unconstitutional. Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), wherein the Court reviewed the doctrine of parental immunity for personal torts and rejected it as an anachronism.

society. The claim requirement of the California Tort Claims Act[3] is today the foremost example of a doctrine which has ceased to serve a legitimate public purpose. It has become a procedural barrier to the exercise of fundamental constitutional rights and, thus, deserves an in-depth review by the courts to determine if this requirement is clothed with any constitutional infirmities.

The Tort Claims Act of 1963 requires that one must file a written claim for "money or damages" if the claim arises from an act or omission of the State or a local public entity.[4] If the damages result from the conduct of a "local public entity," the written claim must be filed with its governing board.[5] In the event that the damages are the consequence of a State agency's conduct, the claim must be filed with the State Board of Control.[6] In addition to complying with the administrative requirement of filing a claim, one must also scrupulously comply with a special "statute of limitations."[7] The special "statute of limitations" requires that a claim be filed within one hundred days after the accrual of the cause of action.[8] The date of accrual is governed by the statute of limitations which would be applicable if there were no requirement that a claim be presented.[9] There are also provisions for filing

3. Cal. Gov. Code § 900 *et seq.* (Deering 1973). The Tort Claims Act was enacted in 1963, after the California Supreme Court overruled sovereign immunity in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); also see the companion decision, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961). For a comprehensive study of government tort liability in California, *see* A. Van Alstyne, *California Government Tort Liability* (1964, Supp. 1969).

4. Claims must be filed with local public entities in all but a few circumstances specified by statute. Cal. Gov. Code § 905 (Deering 1973). In contrast, claims must be filed with the State only in expressly enumerated circumstances. Cal. Gov. Code § 905.2 (Deering 1973).

5. Cal. Gov. Code §§ 900.2, 900.4 (Deering 1973).

6. Cal. Gov. Code §§ 900.2, 900.6 (Deering 1973).

7. The written claim must be composed by the claimant, or it may be a form provided by the public entity in question. A composed claim must contain certain specified information. Cal. Gov. Code § 910 (Deering 1973). A claim which is presented on a form provided by a governmental entity is presumed to be in compliance with Government Code section 910. Cal. Gov. Code § 910.4 (Deering 1973).

8. Cal. Gov. Code § 911.2 (Deering 1973). All references to the claim statute in this article include both the administrative requirement of filing and the short statute of limitations.

9. In their respective areas, the following statutes of limitation determine the date of accrual:

Cal. Code Civ. Proc. § 340, subd. 3 (Deering 1972); one year statute of limitations for torts;

Cal. Code Civ. Proc. § 340.5 (Deering 1972); a statute of limitation of four years from date of injury or one year from date of discovery, which ever comes first, in cases of medical negligence;

a claim not timely presented[10] and for obtaining judicial relief from the one hundred day filing requirement.[11]

Although the claim requirement touches many areas of the law,[12] the authors shall limit this article to an examination of its constitutional validity as it relates to negligence actions involving governmental entities.

The submission of a claim to a governmental agency is a condition precedent to instituting suit against that entity or one of its employees.[13] It is most difficult to perceive the reason or rationality of a distinction which requires that an injured person's rights be dependent upon the tortfeasor's employer. To the individual who has had the normal pattern of his life disrupted and his bodily function impaired, it is of little consequence that the tortfeasor's paymaster is a governmental entity.

The courts and the Law Revision Commission which drafted the claim statute have set forth three rationale which are the exclusive justification of the claim requirement:

> [1] The statute would permit meritorious claims to be accepted without litigation;
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> [2] The statute would permit early investigation, preparation of a defense, and correction of the offending condition or practice; and
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> [3] The statute would permit the budgeting of potential liabilities and make it possible to obtain reasonably priced insurance.[14]

As will be demonstrated, these historic rationale which justified enactment of the claim requirement have ceased to be applicable. Doubt has entered in, and the authors submit that it is now the

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Cal. Code Civ. Proc. § 338 (Deering 1972); a three year statute of limitations for fraud, mistake, wrongs to property and rights therein.

10. Cal. Gov. Code § 911.4 (Deering 1973).

11. Cal. Gov. Code § 946.6, subd. (e) (Deering 1973).

12. San Luis Obispo County v. Ranchita Cattle Co., 16 Cal. App. 3d 383, 94 Cal. Rptr. 73 (1971), [Inverse Condemnation]; Meyers v. Orange County, 6 Cal. App. 3d 626, 86 Cal. Rptr. 198 (1970), [Action for wrongful discharge of county employee]; Ridley v. San Francisco, 272 Cal. App. 2d 290, 77 Cal. Rptr. 199 (1969), [False arrest and imprisonment]; Stromberg, Inc. v. Los Angeles County Flood Control Dist., 270 Cal. App. 2d 759, 76 Cal. Rptr. 183 (1969), [Declaratory relief action], Hooper v. Allen, 266 Cal. App. 2d 797, 72 Cal. Rptr. 435 (1968) [Defamation].

13. Cal. Gov. Code §§ 911.2, 950.2 (Deering 1973).

14. Cases cited note 35 *infra*.

judicial function to test the constitutionality of this legislation.[15]

JUDICIAL FUNCTION AND CONSTITUTIONALITY

Society is ever changing, and, therefore, the rules of law which once served the demands of previously established norms may fail to correspond to contemporary standards. In such circumstances, the validity of the rule is called into question, and it is the judicial function to restore equilibrium.

At times, it has been suggested that the Legislature is the best suited branch of government to deal with iniquitous statutes and that the judiciary should scrupulously and conscientiously restrain itself from passing judgment on their constitutionality so long as the right to vote is fully honored and the market place of ideas remains open.[16] To the contrary, it is the judicial function to rule upon the constitutionality of statutes and, thus, to maintain some semblance of equilibrium between contemporary standards and the existing rule of law.[17] The doctrines of "judicial restraint" and "separation of powers" have often been treated as a single concept intended to restrain the powers of the judiciary to pass upon the constitutionality of legislative enactments. The better approach is to avoid treating such a concept as a principle of judicial construction, but, instead, to recognize it as political ploy rather than constitutional interpretive doctrine.[18]

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15. Not only is the time appropriate for judicial review, but the California Supreme Court currently has before it the case of Whitfield v. Roth, 31 Cal. App. 3d 153, hearing granted June 13, 1973 (S.F. 23020), which may be a suitable vehicle for such review. In *Whitfield*, a minor girl brought an action for injuries alleged to have resulted from misdiagnosis or failure to diagnose a cranial tumor. Suit was brought against one of the county hospitals where she was treated and its employee, a defendant doctor. The trial court entered a judgment of non-suit on the grounds that: (1) the plaintiff's cause of action accrued when her mother was informed of the cranial tumor; and (2) the claim was not filed within one hundred days after the mother learned of the alleged medical negligence. The Court of Appeal affirmed after reluctantly conceding that it was impressed with the logic and reasoning of two Michigan Supreme Court cases which held unconstitutional a similar statute. The court also acknowledged that the Equal Protection analysis of Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), was persuasive. The Court of Appeals essentially declined to rule upon the issue out of judicial deference to the Supreme Court. Now the issue has been layed at the Supreme Court's doorstep.

16. Antieau, 1 Modern Constitutional Law 691 (1969). *Judicial Modesty: Down with the Old—Up with the New?*, 10 U.C.L.A. L. REV. 533 (1963).

17. Cooper v. Aaron, 358 U.S. 1 (1959).

18. *See*, Friedman, *The Court and Social Policy*, 47 CALIF. ST. B.J. 558 (1972); Mosesian v. County of Fresno, 28 Cal. App. 3d 493, 104 Cal. Rptr. 655 (1973).

Not only is it historically and conceptually appropriate for the judiciary to challenge legislative enactments, but it is constitutionally required of state and federal judges.[19] In *Marbury v. Madison*,[20] it was made clear that the constitutional mandate to the judiciary, to rule on the constitutionality of legislation, was not to be subordinated to questionable legislative enactments.[21] Historically, the courts as constitutional arbitors were not intended to be responsive to the transient passions of the electorate or its representatives.[22]

DENIAL OF EQUAL PROTECTION AS A CONSTITUTIONAL INFIRMITY

To determine whether a statute is constitutionally infirm as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[23] and Article One of the California Constitution,[24] one may subject it to four types of analysis depending upon the nature of the interest to be affected and the basis of the classification: [1] reasonable or rational relationship standard; [2] suspect classification; [3] as affecting a fundamental interest; and [4] as invidiously discriminatory in its application. A brief analysis of each is essential to our discussion.[25]

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19. U.S. CONST. art. VI, cl. 2: "This Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

20. 5 U.S. (1 Cranch) 137 (1803).

21. *See* Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262 (1972).

22. *See*, Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881, aff'd sub nom. Reitman v. Mulkey, 387 U.S. 369 (1967).

23. U.S. CONST. amend. XIV, § 1: ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

24. CALIF. CONST. Art. I, §§ 11, 21:

"All laws of a general nature shall have a uniform operation."

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

25. Although it is beyond the scope of this paper, it should be noted that the claim statute is also susceptible to Procedural Due Process analysis.

The importance of a system of rules to an organized society was conceded by Justice Harlan writing for the Court in Boddie v. Connecticut, 401 U.S. 371, 374 (1971):

Perhaps no characteristic of an organized and cohesive society is

The California Supreme Court has construed the State Equal Protection Clause as "substantially the equivalent" of the Equal

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> more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

In spite of its narrow holding that it violates Procedural Due Process to impede access to the courts by requiring the poor to pay a filing fee to obtain a divorce, *Boddie* is unique in that it deals with the rights of plaintiffs in a civil suit. Prior to *Boddie*, access litigation had traditionally involved the rights of defendants.

Access to the judicial process requires that the potential litigant be able to comply with the mechanics of litigation and succeed in convincing the court that it should determine the claim on the merits. In light of *Boddie*, it would not be unreasonable for the courts to conclude that substantial justice and fair play require that justiciable matters be resolved on their merits in the courts. As Justice Black noted in his dissent in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971), a decision which involved a group of cases denying access to the Civil Courts:

> Society generally *encourages* people to seek recompense when they suffer damages through the fault of others. And I cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less "fundamental" than a person's right to seek a divorce. (958) (Emphasis in original).

In United States v. Kras, 409 U.S. 434 (1972), the Supreme Court was given an opportunity to confront the issue of access to the courts directly. In *Kras*, the District Court had held the Bankruptcy filing fee provision as an unconstitutional denial of the Fifth Amendment right to Due Process of Law and as violative of Equal Protection. Justice Blackman, writing for the Court, narrowly construed the implications of *Boddie v. Connecticut* and concluded that the right to a discharge in bankruptcy is not a "fundamental" right demanding a compelling governmental interest as a precondition to regulation. Justices White, Powell, and Rehnquist joined in the opinion with Chief Justice Burger concurring. Justices Douglas and Brennan joined in a dissenting opinion, and Justices Stewart and Marshall each wrote dissenting opinions.

Justice Marshall, in his dissenting opinion, directly confronted the issue of access to the courts:

> I view the case (*Kras*) as involving the right to access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to discharge in bankruptcy. When a person raises a claim of right or entitlement under the law, the only forum in our legal system empowered to determine that claim is a court.
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> . . . .
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> The legal system is of course not so pervasive as to preclude private resolution of disputes. But private settlements do not determine the validity of claims of right. Such questions can be authoritatively resolved only in courts. It is in that sense, I believe, that we should consider the emphasis in *Boddie* on the exclusiveness of the judicial forum—and give Kras his day in court. 409 U.S. 434 at 462-463.

In consideration of the analysis in *Kras* and the five-four division of the Court, it would not be overly optimistic to observe that the issue of access to the court as a fundamental interest is yet unresolved. For a general discussion see: Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972).

Protection Clause of the Fourteenth Amendment, thus obviating the necessity of separate analysis.[26]

[A] RATIONAL RELATIONSHIP CLASSIFICATION

The principle of equal protection does not preclude the state from drawing distinctions between different groups of individuals[27] although it does insist that persons similarly situated with respect to the particular enactment receive the same treatment.[28] To be valid under the Equal Protection Clause, a statutory discrimination or classification must, at a minimum, bear some rational relationship to a legitimate state purpose.[29]

If a classification is unreasonable or without reasonable relations to a proper legislative objective, the presumption of validity and discretion is overcome. Under such circumstances, the Legislature has departed from the province of its discretion and the statute which proposes to afford one of two classes different treatment must meet two requirements: some rational basis for singling out the class and nondiscriminatory application within the class.[30]

In reviewing a statute's constitutionality, the court is not confined to the express language of the statute and may look to other judicial, legislative, or administrative directions governing the rights of other persons similarly situated.[31]

The rational relationship analysis imposes a heavy burden upon one challenging an enactment such as the government claim stat-

26. Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

27. Rinaldi v. Yaeger, 384 U.S. 305, 308-309 (1966). Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); *In re* King, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970).

28. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Purdy & Fitzpatrick v. State of California, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

29. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Gulf, Colo. & S. Fe Ry. v. Ellis, 165 U.S. 150 (1897); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

30. Rinaldi v. Yeager, 384 U.S. 305 (1966); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Hayes v. Superior Court, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971).

31. Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); *see, e.g.*, James v. Strange, 407 U.S. 128 (1972); Hayes v. Superior Court, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971).

ute. The challenging party must neutralize every rational justification for the statute because any reasonable relationship to a legitimate state purpose is sufficient to repel a constitutional challenge.

[B] Fundamental Interests

Fundamental interests are personal rights which are recognized and protected by the Equal Protection Clause without explicit mention in either the California or United States Constitution. To date, the following personal rights have been recognized as fundamental interests: the right to procreate,[32] the right to travel,[33] the right to vote,[34] and the right to education.[35] The question of how an interest is recognized as fundamental and singled out for protection remains a judicial postulate upon which even members of the United States Supreme Court have been unable to agree.[36] When state statutory classifications approach sensitive and fundamental personal rights, the courts exercise a "stricter scrutiny".[37] Any classification which serves to penalize the exercise of a fundamental interest is unconstitutional as violative of Equal Protection unless it is shown to be necessary to promote a compelling governmental interest.[38]

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32. Stanley v. Georgia, 394 U.S. 557 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942).

33. Dunn v. Blumstein, 405 U.S. 330 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

34. Dunn v. Blumstein, 405 U.S. 330 (1971); Evans v. Cornman, 398 U.S. 419 (1970).

35. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *Cf.* Palmer v. Thompson, 403 U.S. 217 (1971).

36. In United States v. Guest, 383 U.S. 745 (1966), Justice Stewart, writing for the majority, suggested that fundamental interests are rights which are inextricably intertwined with the purposes for which our Federal Government was formed. In Shapiro v. Thompson, 394 U.S. 618, 642 (1966) (concurring opinion), he further suggested that fundamental interests need only be "recognized" by the Court to be afforded Equal Protection safeguards:

> The Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.

Justice Harlan took somewhat of a divergent view:

> When a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitles, this Court to pick out particular human activities, characterize them as "fundamental" and give them added protection under an unreasonably stringent equal protection test.

394 U.S. at 662 (dissenting opinion).

37. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); *In re* Gary W., 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971); *See*, Comment, *Developments in the Law: Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

38. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson,

The application of a strict Equal Protection analysis to the classification imposed by the government claim statute will depend upon whether access to the courts may be viewed as a fundamental interest.[39] Certainly, access to the courts is as important to the establishment and maintenance of our system of government as the right to vote, travel, and receive an education. To date, only a few Federal District courts have been so bold as to refer to access to the courts as a fundamental interest,[40] and those decisions were essentially overruled by the Supreme Court in *United States v. Kras.*[41]

In *Brown v. Merlo*,[42] the California Supreme Court rejected the plaintiff's attempt to challenge the automobile "guest statute" as violative of plaintiff's fundamental right to sue for negligently inflicted injuries. The opinion did not discuss the substance of plaintiff's arguments; it merely made the observation that the plaintiff cited "neither authority nor persuasive reasoning" for the proposition.[43] In light of this recent pronouncement of the California Supreme Court and the many divergent views held by the United States Supreme Court, it is doubtful that access to the courts will be accorded fundamental interest status in the near future.

[C] SUSPECT CLASSIFICATIONS

In its most fundamental sense, the Equal Protection Clause is a limitation on arbitrary legislative classifications and an insistence

394 U.S. 618, 634 (1969). *Cf.* Sherbert v. Verner, 374 U.S. 398, 406 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

39. *See generally*, Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972).

40. In *In re* Naron, 334 F. Supp. 1150, 1151 (D. Ore. 1971), an equal protection approach was used to strike down a $50.00 bankruptcy filing fee:

> [A]ccess to court is a *fundamental interest* of citizenship, and the Government's purely economic justification for bankruptcy filing fees is not a sufficiently compelling interest to make such fees a precondition of access to the courts.

O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971); *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971), reversed United States v. Kras, 409 U.S. 434 (1972); see discussion at note 25, *supra.*

41. 409 U.S. 434 (1972); see discussion at note 25, *supra.*

42. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

43. *Id.*, at 862, n.2; 506 P.2d at 216, n.2; 106 Cal. Rptr. at 392, n.2.

that capricious means not be utilized to attain even legitimate ends. Certain statutory classifications including race,[44] national ancestry or lineage,[45] alienage,[46] sex,[47] and possibly wealth[48] have been found to be "constitutionally suspect" by the court and, therefore, subject to the "most rigid scrutiny." Constitutionally suspect classifications have been described as groups which are in special need of protection because they are "discrete and insular" minorities.[49] When minority groups in the community are subject to legislative classification, the legislative judgment is more critically regarded because such groups generally cannot exert sufficient political influence to protect their interests.[50] Furthermore, an overview of suspect classifications suggests that they share the odious characteristics of being a stigma of inferiority or a badge of opprobrium and not being readily subject to change.

A state which adopts a suspect classification bears a heavy burden of justification.[51] In order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial.[52]

The courts utilize the "strict scrutiny" standard only in cases involving "suspect classifications", which are comparable to racial or sexual classifications. Thus, it must be concluded that the

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44. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Anderson v. Martin, 375 U.S. 399 (1964).

45. Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

46. *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972).

47. Frontiero v. Richardson, 411 U.S. 677 (1973). *Cf.* Reed v. Reed, 404 U.S. 71 (1971).

48. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

49. Graham v. Richardson, 403 U.S. 365, 372 (1971); United States v. Carolene Products Co., 304 U.S. 144, 152-153, n.4 (1938).

50. *Id.*

51. *In re* Griffiths, 413 U.S. 717, 722 (1973); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

52. *E.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483, 495 (1954).

The term "substantial" with reference to the governmental interest was used in Dunn v. Blumstein, 405 U.S. 330, 343 (1971); other terminology has also been used by the Court to describe the governmental interest or purpose: McLaughlin v. Florida, 379 U.S. 184, 196 (1964) ["overriding"]; Loving v. Virginia, 388 U.S. 1, 11 (1967) ["compelling"]; Graham v. Richardson, 403 U.S. 365, 375 (1971) ["important"]. The Court in *In Re* Griffiths, 413 U.S. 717, 722 n.9 (1973), did not find these variations particularly significant as each referred to the same type of governmental interest.

"strict scrutiny" standard would not be used for the Equal Protection analysis of the California Government Tort Claims Statute.

[D] Discriminatory Application

Even though a state statute is fair on its face, invidiously discriminatory action pursuant to its authority by public officials will be violative of Equal Protection.[53] The common example used to illustrate invidiously discriminatory application is that of San Francisco officials who would not permit Chinese to use their property for laundries, while permitting others similarly situated to make such use of their property; the Supreme Court of the United States voided the ordinance.[54]

Although, as this article will indicate, the claim statute is applied unevenly and is used as a procedural barrier, there is no indication that there is a policy of systematic discrimination practiced by all governmental agencies, unless one may so term the prefunctory denial of all claims. It is highly unlikely that this Equal Protection test would be applied in a challenge to the California claim statute.

Brown v. Merlo and Equal Protection

The preceding analyses as to which Equal Protection test might be effectively applied to the California claim statute leads one to the conclusion that the most probable approach is that of the traditional rational relationship analysis. In order to obtain a preview of the form that such an analysis may take in its application to the government claim statute, it is useful to examine the recent California Supreme Court case of *Brown v. Merlo*[55] where the court

53. Williams v. Illinois, 399 U.S. 235, 242 (1970); Griffin v. Illinois, 351 U.S. 12, 17, *reh. denied,* 351 U.S. 958 (1956); Guinn v. U.S., 238 U.S. 347, 359 (1915).

54. Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886):

> Though the law itself be fair on its face and impartial in appliance yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

55. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). An action was brought for injuries suffered by the plaintiff while riding as a nonpaying guest in a vehicle driven by the defendant. Relying on the automobile "guest statute", the jury precluded plaintiff's recovery by failing to

addressed itself to the constitutionality of the automobile "guest statute."[56] The opinion is useful in this consideration of the claim statute as it is a model of judicial analysis and application of the "rational relationship" Equal Protection test.

The claim statute is suspectible to essentially the same analysis applied to the automobile "guest statute." In fact, the parallels between the two statutes—obsolescent historic justification, iniquitous application, and changing contemporary conditions—portend the demise of the claim statute under similar analysis.

The traditional justifications of the "guest statute" were: first, the protection of hospitality and, second, the elimination of collusive suits. To achieve these goals, the statute made three "classifications" or "discriminations": [1] the statute distinguished between paying and non-paying passengers; [2] it distinguished between automobile guests and other types of guests; and [3] it created, through exceptions, statutory subclasses among "guests."[57] After an exhaustive analysis, the court concluded that the two traditional justifications did not provide a reasonable explanation for the tripartite "classification" or "discrimination". Thus, there was no rational basis upon which the statute could be upheld against constitutional attack.

From the opinion, one may distill a number of propositions which apparently played a central role in the court's decision; these propositions established criteria which militated against the constitutionality of the "guest statute":

[1] Any benefits rendered by the classifications did not justify diminishing the rights of persons coming within the classification;[58]

[2] The historic rationale was rendered inappropriate and inapplicable under contemporary standards;[59]

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find "intoxication" or "willful misconduct" on the part of the defendant. Defendant's motion for summary judgment on plaintiff's cause for negligence was granted. An appeal was taken from the summary judgment only; the Supreme Court reversed with directions to permit plaintiff to proceed on his negligence cause.

56. Cal. Veh. Code § 17158:

> No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

57. Brown v. Merlo, 8 Cal. 3d at 859.

58. *Id.*, at 865, 873-875.

59. *Id.*, at 869.

[3] The classification was over inclusive and restricted the rights of persons not intended to be covered by the classification;[60]

[4] The exceptions to the classification were illogical and had no relationship to the purpose to be achieved by the statute.[61]

When the above criteria are applied to the contemporary operation of the claim statute, it becomes apparent that it too is violative of Equal Protection. The discussion following *infra* will illustrate the *Brown v. Merlo* Equal Protection analysis as it may apply to the government claim statute.

THE CLAIM STATUTE AND EQUAL PROTECTION

[A] CALIFORNIA CASES REVIEWING THE CONSTITUTIONALITY OF THE CLAIM STATUTE

The California Supreme Court has on occasion examined the constitutionality of the claim statute.[62] Although the issue of constitutionality has been raised, it has not received the careful analysis that such an important issue merits. The most recent Supreme Court case on the subject, *Tammen v. County of San Diego*,[63] devotes little more than ten lines to the subject. Plaintiffs, the widow and minor child of the decedent, brought an action for wrongful death when decedent's automobile struck two horses that had strayed onto a State highway. Plaintiffs failed to file a claim within one hundred days of decedent's death; the court then denied plaintiffs' application for permission to file a late claim. The Supreme Court affirmed as to the widow and reversed as to the minor. The court in *Tammen* summarily held that the statute did not violate the constitutional guarantees of Due Process and Equal Protection by concluding that "public agencies, generally speaking, afford a proper subject for legislative classification."[64]

The *Tammen* opinion relies principally upon *Dias v. Eden Town-*

60. *Id.*, at 859, 876.
61. *Id.*, at 878 *et seq.*
62. Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967); Dias v. Eden Township Hospital Dist., 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962). Appellate courts have also upheld the constitutionality of the claim statute with summary opinions. Lewis v. San Francisco, 21 Cal. App. 3d 339, 98 Cal. Rptr. 407 (1971); Wadley v. County of Los Angeles, 205 Cal. App. 2d 668, 23 Cal. Rptr. 154 (1962).
63. 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967).
64. 66 Cal. 2d at 481, 426 P.2d at 761, 58 Cal. Rptr. at 257.

ship Hospital District.[65] In *Dias,* plaintiffs brought an action for wrongful death but failed to allege in their complaint that a claim had been filed. The trial court sustained a demurrer to the complaint; the California Supreme Court affirmed with the same observation made in *Tammen* above.

The gist of the situation is that there has not been a thorough analysis of the claim procedure comparable to the judicial analysis contained in *Muskopf v. Corning District Hospital*[66] or the Equal Protection analysis in the recent case of *Brown v. Merlo.*[67]

There is little merit to any suggestion that the constitutionality of the claim statute has been considered and resolved in California. The courts have yet to provide a satisfactory constitutional analysis of whether the statute's classification of injured persons, according to the identity of the tortfeasor, bears a reasonable relationship to the purposes sought to be achieved.

The constitutionality of the California claim statute has not been adjudicated, but rather it has been assumed *pro forma.*

[B] The Claim Statute is Irrational in Practice

Following the 1961 California Supreme Court decision in *Muskopf v. Corning District Hospital*[68] striking down sovereign immunity, a moratorium was declared to enable the California Law Revision Commission to recommend and the Legislature to enact a comprehensive law to regulate government tort liability. The Tort Claims Act of 1963 retained the necessity of filing a claim[69] because, as noted previously, it was believed that it would: [1] permit meritorious claims to be accepted without litigation; [2] permit entities to make early investigation and defend against claims or correct the offending condition or practice; and [3] facilitate the

65. 57 Cal. 2d 502, 370 P.2d 334, 20 Cal. Rptr. 630 (1962).

66. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In *Muskopf,* an action was brought for damages for injuries sustained by a paying patient operated upon by the defendant hospital district. After a reevaluation of the rule of governmental immunity from tort liability, the Court concluded that it must be discarded as mistaken and unjust. In its opinion, the Court meticulously reviewed the history of governmental immunity and tested the reasons for its continuance against the results of its application.

67. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

68. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); companion case, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

69. Prior to the Tort Claims Act of 1963, procedures governing claims against the State were governed by former Government Code Sections 600-655, and claims against local public entities were governed by former Government Code Sections 700-730.

budgeting of potential liabilities and making it possible to obtain realistically priced insurance.[70] In the ten years since the statute's enactment, the validity of these rationale has erroded so that they are now devoid of all substance.

The claim procedure fails to serve any of its intended purposes; instead, the statute has served as a "trap for the unwary and ignorant claimant." The fear of the California Supreme Court that the "labyrinth of claims statutes," existing prior to *Muskopf*, might be rebuilt has materialized.[71]

In order to assert one's right to damages for personal injuries or wrongful death, a claim must be filed with the tortfeasor governmental entity within one hundred days of the accrual of the cause of action,[72] even if the injured party is a minor.[73] If for some reason the one hundredth day is missed, only through a series of artfully pleaded petitions and affidavits may the right to maintain an action be rescued from destruction. The complaining party must first seek permission from the tortfeasor governmental entity to file a claim not timely presented.[74] After its certain per-

70. 1 Cal. Law Revision Com. Rep. 809 (1963); 4 Cal. Law Revision Com. Rep. 1008 (1963). These justifications have also been echoed by the courts without regard to the fact that in reality the statute has become a procedural barrier which obstructs rather than furthers these enunciated goals. *See,* Viles v. California, 66 Cal. 2d 24, 423 P.2d 818, 56 Cal. Rptr. 666 (1967); Bozaich v. California, 32 Cal. App. 3d 688, 108 Cal. Rptr. 392 (1973); C.A. Magistretti Co. v. Merced Irrigation Dist., 27 Cal. App. 3d 270, 103 Cal. Rptr. 555 (1972); Meyers v. Orange County, 6 Cal. App. 3d 626, 86 Cal. Rptr. 198 (1970).

71. Viles v. California, 66 Cal. 2d 24, 31, 423 P.2d 818, 56 Cal. Rptr. 666 (1967), citing with approval Hobbs v. Northeast Sacramento County Sanitation Dist., 240 Cal. App. 2d 552, 49 Cal. Rptr. 606 (1966).

72. Cal. Gov. Code § 911.2 (Deering 1973).

> A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented . . . not later than the 100th day after the accrual of the cause of action . . .

The date of accrual of a cause of action is not affected by the claims requirement, only the time when the right to proceed is terminated. Cal. Gov. Code § 901 (Deering 1973); Los Angeles City School Dist. v. Superior Court, 9 Cal. App. 3d 459, 88 Cal. Rptr. 286 (1970); Frost v. California, 247 Cal. App. 2d 378, 55 Cal. Rptr. 652 (1966).

73. Wozniak v. Peninsula Hospital, 1 Cal. App. 3d 716, 82 Cal. Rptr. 84 (1969). A minor is entitled to mandatory relief from Government Code Section 911.2, if petition for such relief is made to the court within one year of the accrual of the cause of action. Cal. Gov. Code § 911.6 (Deering 1973).

74. Cal. Gov. Code § 911.4 (Deering 1973). Leave to present a claim

functory denial, the claimant must give notice and petition the Superior Court for relief from the claim statute.[75]

What is set forth above as the claim procedure is but a skeleton upon which is draped a plethora of distinctions and exceptions, all professing to relieve the claimant of some particularly onerous burden. One need only examine the recent case of *Jamison v. State of California*[76] to perceive the numerous legal machinations that are often necessary to escape an unreasonably harsh result imposed by the statute.[77]

1. Settlement of Meritorious Claims.

As previously noted, one of the justifications for the claim requirement was that meritorious claims would not be resisted. A mockery has been made of this premise by the artifice and deceit practiced by some governmental entities; such conduct has forced persons with legitimate causes of action to seek vindication in court of their right to even present a claim. Among the activities which the courts have condemned are the following: intentionally failing

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not timely filed must be sought within one year after the accrual of the cause of action. The governmental entity shall either grant or deny the petition within forty-five days, on the grounds set forth in Government Code § 911.6.

75. Cal. Gov. Code § 946.6 (Deering 1973). Our experience has been that not only are all timely claims denied, but those where permission is sought to file a late claim are also denied as a matter of course.

In cases where the injured party has failed to seek the assistance of counsel until after the one hundredth day, a formidable array of documents is prepared in an attempt to preserve or rescue the right of action. The following are submitted to the governmental entity: petition to file a claim not timely presented; affidavit of the prospective claimant; affidavit of claimant's attorney; and a proposed claim. After the petition's prefunctory denial, the following documents are prepared to be filed with the Superior Court: notice of petition to the court; petition to the court; declaration of claimant's attorney; points and authorities; and all documents filed with the governmental entity are incorporated and made a part of the petition by appending them as exhibits.

The points and authorities are prepared in an attempt to demonstrate to the court that the claimant can be compartmentalized into one of the exceptions to the statute which will entitle him to relief: (1) mistake, inadvertence, surprise or excusable neglect; (2) minority during the whole claims period; (3) physical or mental incapacity during the claimed period; and, (4) that the claimant died before the expiration of the claims period.

76. Jamison v. California, 31 Cal. App. 3d 513, 107 Cal. Rptr. 496 (1973).

77. This presupposes that a court will address itself to the merits and justice of a case and not cloak itself in the self-righteous mantle of "judicial restraint" and "separation of powers" to justify a bad result. *See*, Mosesian v. County of Fresno, 28 Cal. App. 3d 493, 104 Cal. Rptr. 655 (1973).

to advise a claimant that he has filed with the wrong agency;[78] advising the claimant that a private agency was responsible for the injury and refusing to provide a requested claim form;[79] misleading a claimant to believe that his claim was rejected instead of the petition to file a late claim;[80] and conducting negotiations until the period to file suit had run and then asserting failure to file a claim as a defense.[81]

The California Law Revision Commission itself has realized the vacuity of its original premises—that meritorious claims would be settled—since " . . . many public entities take no action on claims as a matter of policy."[82] The origin of this "policy" is uncertain although there is some indication that it is the result of pressure applied by insurance carriers.[83]

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78. Jamison v. California, 31 Cal. App. 3d 513, 107 Cal. Rptr. 496 (1973).

79. Fredricksen v. City of Lakewood, 6 Cal. 3d 353, 491 P.2d 805, 99 Cal. Rptr. 13 (1971); Rand v. Andreatta, 60 Cal. 2d 846, 389 P.2d 382, 36 Cal. Rptr. 846 (1964).

80. McLaughlin v. Superior Court, 29 Cal. App. 3d 35, 105 Cal. Rptr. 384 (1972).

81. Potstada v. City of Oakland, 30 Cal. App. 3d 1022, 106 Cal. Rptr. 705 (1973).

82. 9 Cal. Law Rev. Com. Rep. 55 (1969). The commission then recommended that Government Code Section 945.6 be amended to extend the time for filing suit from one year to two years when the claim was denied by inaction. In 1970, the amendment was enacted. Cal. Stat. 1970, ch. 104, § 6, operative January 1, 1971, ch. 346, § 1.

83. Cal. Law Rev. Com., First Supplement to Memorandum 73-25, Study 52—Sovereign Immunity (Claims Statute), March 24, 1973.

California Government Code Section 990.4 permits any local public entity which is not a state agency to obtain liability insurance or self-insure against negligence.

The following excerpt is illustrative of the influence exerted by insurance carriers: Resolution of the Board of Supervisors of the County of Alameda, State of California, Resolution No. 140440, September 28, 1971.

> WHEREAS, this Board of Supervisors is in receipt of a claim against the County of Alameda filed on August 18, 1971, by J. M., attorney on behalf of A. B. H., for the amount of $1,000,000.00 alleging that, while said claimant was in the custody of the Alameda County Sheriff he was assaulted by two (2) inmates, resulting in the loss of sight of his left eye; and
>
> WHEREAS, *the County's insurance carrier, Chubb/Pacific Indemnity Group, recommends that said claim be denied*; and
>
> WHEREAS, this board of Supervisors did consider said claim of A. B. H.;
>
> NOW, THEREFORE, BE IT RESOLVED that this Board of Supervisors does hereby deny the claim of A. B. H. against the County of Alameda filed by J. M., Attorney at Law, on August 18, 1971, for the total amount of $1,000,000.00. (Emphasis added).

It is dismaying that injured persons should receive such treatment at the hands of institutions whose very existence is intended to serve the citizenry. Government owes to the citizen the duty of providing "protection, security and benefit"[84] and, as such, should treat the citizen with a higher degree of fairness than he may expect from private persons or entities. In the same spirit, the concept of due process of law represents " . . . a profound attitude of fairness between man and man, and more particularly between the individual and government."[85]

In consideration of the above, it is difficult to perceive the manner in which the claim statute promotes settlement of meritorious claims.

2. Early Investigation and Correction of Offending Conditions.

A second justification of the claim statute is that it permits early investigation, preparation of a defense, and the correction of offending conditions or practices.

The implication which is drawn from the need for early investigation is that it is necessary because governmental entities are somehow disadvantaged in this respect. To the contrary, in most cases, the claimant must depend upon information within the exclusive possession of the prospective defendant or another governmental entity. In medical negligence actions, all parties must rely heavily upon medical charts, x-rays, and laboratory reports, all of which are either in the possession of the prospective defendant or a neu-

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A substantial part of the problem lies in the failure of attorneys to make demands for damages which are commensurate with the gravity of the injury sustained by the claimant. If a demand for damages is exorbitant, summary denial of a claim is to be expected.

A public entity must consider a number of factors in determining whether a demand for damages is appropriate: whether the case is defensible, the gravity of the injury, the reputation of the law firm or attorney representing the claimant, venue of the case so far as it relates to the size of jury verdicts in the past, and the size of jury verdicts in general for similar injuries. In simplified terms, the ingredients of settlement may be summarized as the "risk-reward" factor: (1) a public entity will settle a matter when it determines that there is an unacceptable risk that a jury verdict may exceed the claimant's demand; and (2) the plaintiff will settle when there is an unacceptable probability that a jury may award an amount which is substantially less than the amount offered in settlement, or perhaps nothing at all.

84. CAL. CONST. Art. I, § 2:

> All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever public good may require it.

85. Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (concurring opinion).

tral party.[86] In an action for maintenance of a dangerous condition on public property, the claimant must rely upon plans, records, and statistics which are in the exclusive control of the entity.[87] And, in the case of automobile collisions, all parties must look to the accident report prepared by the police to guide their investigation.[88]

The filing of a claim is not essential to the correction of an offending condition. The authors submit that mere verbal or written notice should be sufficient to motivate a governmental entity to act, and the purposefully ambiguous pleading in a written claim is of little assistance in this respect.[89]

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86. In medical negligence actions, it is the claimant who is disadvantaged in the preparation of his case. In such actions, the crucial question is whether the physician or hospital adhered to standard medical practice in the diagnosis, care and treatment of the claimant. Only by examining the medical records, created and maintained by the prospective defendant, can one even determine the nature and course of the medical care rendered. Medical records are in most cases the very basis of liability. The claimant may also be examined by an independent medical specialist in order to reconstruct the course of his medical treatment. In wrongful death cases, the problem of evaluating the course of medical care is more difficult since the only documentation other than the medical records is the autopsy or coroner's report.

87. As in medical negligence cases, the claimant in a highway design defect case must rely totally upon information which is within the exclusive control of state agencies. To evaluate the potential liability in such a case, one must obtain construction contracts, blue prints, proposed plans and drawings, approved and as completed plans and drawings. These documents may consist of hundreds of pages all of which must be examined by a qualified expert.

88. A police report not only describes the facts and circumstances of an accident, but it also renders a preliminary evaluation of fault. Thus, if a governmental agency is the owner of an automobile involved in an automobile collision, it is immediately placed on notice that liability may arise from it.

89. Government Code Section 910 (Deering 1973) sets forth the information which must appear in a claim. Section 910, subdivision (e), requires that a description of the circumstances of the occurrence be given; the circumstances are generally set forth in broad pleading terminology such as the following:

In Niles v. City of San Rafael, Civil No. 624, 337 (S.F. County, Cal., filed Nov. 12, 1970), an action was brought against a school district for negligent supervision:

> . . . .
> *Date, Place and Other Circumstances Which Give Rise To This Claim*:
> 1. The occurrence happened on or about June 26, 1970, at Bahia Vista School, a San Rafael City School District, at 125 Bahia Way,

3. Insurance.

The third justification for the claim statute is that it permits the budgeting of potential liabilities and makes it possible to obtain reasonably priced liability insurance.

Every claim filed with a governmental entity is required to indicate a dollar figure for the alleged damages sustained.[90] This figure seldom bears any relationship to the potential liability which may arise when the matter is resolved. This is true for two reasons: (1) one hundred days is too short a period in which to evaluate even a moderate injury; and (2) the amount sought in claims as damages is not binding upon the claimant if the claim is denied.[91]

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in the City of San Rafael, County of Marin, State of California.
2. At said time and place above mentioned, the San Rafael City School District, acting by and through its agents, servants and employees, conducted and/or permitted to be conducted on said premises, a recreation program or similar activity. KELLY NILES, a minor of the age of eleven (11) years, was in attendance at said event at said time and place. As a direct and proximate result of the negligence and carelessness of the San Rafael City School District, and its agents, servants and employees, in the ownership, control and entrustment of said premises, and in the selection, planning, operation, control, staffing, supervision, and conduct of said program, the minor claimant KELLY NILES was caused to be precipitated to the ground and struck about the head and other parts of his body for a substantial period of time.

In Chimienti v. Markoff, Civil No. 74956 (Tulare County, Cal., filed April 9, 1973), an action was brought against a district hospital for wrongful death:

. . . .

D. *DATE AND PLACE OF OCCURRENCE:* For some time prior to April 1, 1972, and thereafter until the decedent's death on or about April 19, 1972, the decedent, VITO JOE CHIMIENTI, was from time to time a patient at the KAWEAH DELTA DISTRICT HOSPITAL, Visalia, California.
E. *OTHER CIRCUMSTANCES OF OCCURRENCE*: That at all times and places mentioned above the decedent consulted the KAWEAH DELTA DISTRICT HOSPITAL for the purpose of obtaining diagnosis and treatment of an illness or medical condition, and employed said hospital to diagnose his sickness and treat and care for him for compensation, which said decedent agreed to pay. Thereon, said decedent became a patient of said hospital and remained under its care at all times and places mentioned above. Said hospital undertook said employment and undertook and agreed to diagnose decedent's illness and to care for and treat decedent and do all things necessary and proper in connection therewith, and said hospital thereafter entered on such employment, individually and by and through its employees and agents.
The KAWEAH DELTA DISTRICT HOSPITAL in connection with others, was negligent and careless in and about said care, treatment, diagnosis and control of decedent.

90. Cal. Gov. Code § 910, subd. (f) (Deering 1973).

91. Orth v. Superior Court, 244 Cal. App. 2d 474, 53 Cal. Rptr. 156 (1966); Steed v. City of Long Beach, 153 Cal. App. 2d 488, 315 P.2d 101 (1957); Sullivan v. City and County of San Francisco, 95 Cal. App. 2d 745, 214 P.2d 82 (1950). *See*, A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY, § 8.20 (1964, Supp. 1969).

Even a moderate injury such as a cervical strain sustained in an automobile collision may require more than one hundred days to stabilize. In severe cases involving paraplegia or quadraplegia, it will take more than one year for the claimant's medical problems to stabilize, and, then, at least one year or more will be required for rehabilitative care. In either case, the attorney who places his demand within the settlement range before the claimant's medical condition stabilizes does his client a grave disservice.[92]

Furthermore, the damages figure sought in a governmental claim does not limit the amount recoverable or the amount which may be sought when a complaint is filed.[93] This, in and of itself, demonstrates the inadequacy of this justification under contemporary standards.

Liability insurance premiums and the annual budgets of governmental entities are not affected by the dollar value of the claims submitted annually. Rather, the significant figure is the amount which is actually paid by way of settlement or judgment annually. This alone reflects the actual annual cash flow to satisfy liabilities incurred as a result of negligent conduct.

Local public entities such as cities and counties function much like any large business or corporation. City and County Management is charged with the obligation of conducting the business of government in a financially responsible manner; its primary obligation is to maintain fiscal solvency. This is a demanding task since the entities' source of income is dependent upon local taxation and

92. If the governmental entity should accept the claim, the claimant is then bound to accept the amount originally sought in full satisfaction. Cal. Gov. Code § 912.6, subd. (4) (b) (Deering 1973).

93. Sullivan v. City and County of San Francisco, 95 Cal. App. 2d 745, 764-765, 214 P.2d 82 (1950):

> It seems too clear to require extended argument that, in a proper case, an injured person should not be limited arbitrarily to the amount of his claim. Such claims must be filed within a very short time after the accident. Many times, as in the instant case, the claim must be filed while the person is still in the hospital and before the extent of his injuries is known. If it were held that the injured person is absolutely limited to the amount of his claim filed before the injuries caused by the governmental agency have been definitely ascertained, grave injustices would necessarily result, as the instant case demonstrates. Moreover, it would result in lawyers always filing excessive claims, out of an abundance of caution, and thus tend to prevent the settlement of such claims—one of the major reasons for the requirement of filing the claim.

revenue grants from the State Legislature. Under such circumstances, sound business practice dictates that potential unliquidated claims for money damages must somehow be transformed into fixed, liquidated obligations. The most effective means of liquidating potential claims for money damages arising out of personal injuries or wrongful death is the securing of insurance. By obtaining insurance, a governmental entity is able to liquidate its potential obligations into an annual premium.

The business of insuring a risk is not a haphazard affair. Based upon prior experience, insurance underwriters are able to analyze and insure a risk while making a profit as any business enterprise seeks to do.

Although an insurance carrier may underwrite a risk and cause the governmental entity to pay a premium, the claim statute provides the insurer with a wind-fall defense. It may even be suggested in such circumstances that the insurer has received a premium without actually having insured the risk.

[C] Claim Statutes In Other Jurisdictions.

In the last two years, the Supreme Courts of two states have undertaken to restore equilibrium between contemporary standards and the current rule of law governing the validity of claim statutes. The Courts' analyses focused on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and comparable sections of their respective state constitutions. The only analytical test, which has thus far been applied, is the traditional Equal Protection "rationality" standard.

In *Reich v. State Highway Department*,[94] the Michigan Supreme Court held that the sixty day notice provision of the Michigan Tort Claim Act,[95] in effect, created a special statute of limitations with respect to actions arising from governmental negligence and, therefore, violated Equal Protection guarantees of the State and Federal Constitution.

The plaintiff in *Reich* sustained an injury to the cervical spine when the automobile she was driving swerved out of control and

94. 386 Mich. 698, 194 N.W.2d 700 (1972). There were also two companion cases which were consolidated for purposes of resolving the constitutionality of the claim statute: *Knapp v. State Hwy. Dep't, Baker v. State Hwy. Dep't.*

95. Mich. Stats. Ann. § 3.996 (104). It should be noted that before this case was heard by the Supreme Court the sixty day period was extended to one hundred and twenty days. This was not considered a significant distinction.

collided with a tree. The claim for personal injuries against the State Highway Department was filed sixty-three days after the accident and three days after the statutory period had run.[96]

The Court observed that the objective of legislation abolishing governmental immunity for negligence was to put governmental tortfeasors on an "equal footing" with private tortfeasors.[97] The Court in *Reich* concluded that the claim requirement arbitrarily split each of two natural classes, tortfeasors and victims, into two differently treated subclasses. Regarding tortfeasors:

> [T]he notice provisions of the statute arbitrarily split the natural class, i.e., all tort-feasors, into two differently treated subclasses: private tort-feasors to whom no notice of claim is owed and governmental tort-feasors to whom notice is owed.[98]

With respect to tortfeasors, the Court concluded that this constituted "an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection."[99]

With respect to victims of negligence, the Court observed that:

> Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses: victims of governmental negligence who must meet the requirement, and victims of private negligence who are subject to no such requirement.[100]

The Court construed this discrimination against victims as a special statute of limitations which arbitrarily barred a victim's cause of action after only sixty days, while victims of private negligence were afforded three years.[101]

The Michigan Supreme Court concluded that the statute's arbitrary distinction in the treatment of members of the same class was violative of the Equal Protection guarantees of the Michigan and United States Constitution.

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96. 386 Mich. at 620, 194 N.W.2d at 702. In *Knapp v. State Hwy. Dep't.*, *supra* note 94, the claim was filed twenty-eight days after the sixty day period. In *Baker v. State Hwy. Dep't.*, the claim was filed four days after the statutory period had passed.

97. 386 Mich. at 620, 194 N.W.2d at 702.

98. 386 Mich. at 620, 194 N.W.2d at 702.

99. 386 Mich. at 620, 194 N.W.2d at 702.

100. 386 Mich. at 620, 194 N.W.2d at 702.

101. 386 Mich. at 620, 194 N.W.2d at 702.

In *Turner v. Staggs*,[102] the Nevada Supreme Court held the six month statutory notice of claim requirement[103] violative of the Equal Protection guarantees of the Nevada and United States Constitution.[104]

In *Turner*, a wrongful death action was brought against a county hospital for medical negligence. A claim was filed against the hospital on behalf of the decedent's minor children thirteen months after her death. The Nevada Supreme Court recognized that it could confine itself to the immediate issue of whether the notice of claim statute was violative of the rights of minors to Due Process.[105] Rather than approach the problem in such narrow fashion, the Court chose to conclude that, within the present scheme of government, the "claim statutes serve no beneficial use . . . but they are indeed a trap for the unwary."[106]

In its opinion, the Nevada Supreme Court adopted *in toto* the rationale of the Michigan Supreme Court in *Reich v. State Highway Department*.[107]

Although the analyses of these two opinions are not exhaustive, they reflect a judicial disaffection with the constitutional vitality of government claim statutes. They recognize that established rules of law must be reviewed, and their validity judged by contemporary standards rather than by antiquated pronouncements.

Penultimate Reflections

The strongest justification of the claims statute is the proposition that every citizen ought to have a means of dealing with his government without the necessity of filing a lawsuit. The means selected to provide this avenue of redress must be such that they do not curtail the right of a civil litigant to have his claim adjudicated on the merits. The claim statute would serve a salutory purpose if, in fact, it did permit the resolution of controversies between citizen and government without the necessity of litigation; but the collapse of the claim statute system has given rise to a formidable procedural barrier to citizens seeking the resolution of their controversies with the government.

In selecting an approach to the claim statute, the court may choose from a number of constitutional analyses: rational rela-

102. Civil No. 6770 (Nev. Sup. Ct., filed June 6, 1973).
103. N.R.S. §§ 244.245, 244.250.
104. U.S. Const., amend. XIV, § 1; Nev. Const., art. 8, § 5.
105. Turner v. Staggs, Civil No. 6770, at 5 (Nev. Sup. Ct., filed June 6, 1973).
106. *Id.*, at 6.
107. *Id.*, at 6 *et seq.*

tionship analysis, fundamental interest analysis, and Procedural Due Process analysis. The latter two analyses require the courts to directly confront the issue of access to the courts and to determine whether it is so fundamental an interest that substantial fairness and justice do not permit its infringement. The rational relationship analysis requires no more than a cogently reasoned analysis of the legislative interest served by the statute and the result of it implementation.

The historic rationale which justified enactment of the claim requirement have ceased to be applicable. As noted previously, meritorious claims are rejected as a matter of policy; governmental entities do not require a claim to adequately prepare a defense or correct an offending condition; and the claim does not aid governmental entities in determining their monetary liabilities. Since the claim statute has ceased to render a practical advantage or to serve its intended purpose, its classifications do not justify the destruction of a cause of action.

CONCLUSION

The California government claim statute appears to be clothed with constitutional infirmity. To date, its constitutionality has not been subjected to in-depth review, but rather it has been assumed *pro forma.* In light of contemporary standards, the distinctions the statute draws are of doubtful validity when subjected to Equal Protection analysis.

It is now quite apparent that the rule of law governing claim statutes must be brought into equilibrium with contemporary standards. At this juncture, only the courts can deal swiftly, firmly, and unequivocally to prevent further injustice to those who are fortuitously injured by the negligence of governmental agencies.