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JACK W. McDONALD
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EXECUTIVE SUMMARY

Background

Over a 25 year period the civil justice system has moved the public and private enterprise into a liability rich state of escalating civil cases and damage awards.

The public sector has moved from a state of limited immunity in the early 1960's to a state of extensive liability in 1985. This shift has been stimulated by a judicial mandate bent on class equity utilizing the civil suit as a weapon of social indignation.

This move that is termed the "New Economic Democracy" has been marked by major dislocations in both the public and private sectors. Traditional insurance coverage is unavailable to many municipalities. Cities are going bankrupt and the market place is developing new standards to deal with our civil neurosis.

The law enforcement function is an integral part of this phenomena and by the very nature of its responsibilities is in a high risk class. These vested

concerns demand a higher standard of effort towards mitigative actions that can resolve law enforcement's exposure levels.

The Study

The study was directed to two primary objectives:

- . Determine the current litigative trends, exposure levels, ancillary costs, and varied effects on the public sector with particular emphasis directed to law enforcement
- . Develop a cohesive strategic management infrastructure to impact long term legislative reconciliation or other mitigative structures that can energize change in the civil justice system

This project was a structured assessment of these major elements:

- . Historical Perspective of Civil Justice System--major case law and legislative landmarks were reviewed to determine how we arrived at the state of extensive public liability. Both California law and Federal Civil Rights law were reviewed to demonstrate the consonant history of both facets of the civil justice system.
- . The Suit Experience--a broad assessment of the public sectors civil suit exposures was reviewed at the national, state, and federal levels of government.
- . The Capacity Shortage--a cost assessment of the impact of spiraling civil actions and damage awards. This phenomena has stimulated major economic dislocations in the insurance industry, the public enterprise, and has placed increasing numbers of cities in financial chaos.
- . The Constituency--a review of recent "deep pocket" corrective legislation and the constituent mass involved in SB 75.

Summary of Findings

Briefly, the study made a number of concluding findings:

- . In a period of 25 years, California Tort Law and Federal Law have moved the public sector from a state of extensive immunity to a state of extensive liability.
- . The repudiation of sovereign immunity by judicial mandate has stimulated the "deep pocket" mind set and dramatic increases in civil actions at both the state and federal levels. Parallel with the increase in tort actions, is the staggering magnitude of the damage awards.
- . Law enforcement, by its very nature is a high risk function. The experience of law enforcement in general civil actions and federal civil rights actions clearly support this position.
- . Phenomenal jury awards have led to major economic dislocations in California and indeed in the nation to include:
 - . Insurance coverage becoming unavailable for many governmental entities,
 - . Cities are going bankrupt or are going on the "easy payment plan" with increasing frequency,
 - . The same phenomena is impacting the private sector with more punishing force. The combined effects have the potential for major social, political, and economic consequences.
- . Legislative efforts in California have been strapped by the Assembly Judiciary Committee. This bottleneck coupled with judicial "Liberal Legalism" has magnified the problem into one of the major policy issues of our decade.

Summary of Recommendations

25 years of judicial mandates and legislative acquiescence to pressures from vested-interest groups will be difficult to change. Given the dynamics of the

emerging trends, no change could be devastating to the public enterprise and only further encourage the capacity shortage.

Several alternatives have been discussed in Chapter VI and the preceding text. In summation, our resolve in the public and law enforcement sectors should be dedicated towards:

- . The development of a well informed counter constituency who are motivated toward capping the civil neurosis and moving the legislative bottleneck.
- . Developing governmental insurance alternatives that can adjust to the capacity shortage and increasing demands caused by escalating civil judgements.
- . Providing institutionalized risk management structures designed to focus on potential root causes of litigation by enhanced policy formulation techniques, administrative procedures, and personnel management techniques such as training.

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Gene Chappie	United States Congressman Washington, D.C.
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George Fransell	Attorney at Law Los Angeles, CA
Darrell Heppner	Smart's Insurance Bulletin 150 Sunnyside Drive San Leandro, CA
Greg Jackson	Research Director International City Management Association Washington, D.C.
Mike McCrystal	Special Agent Federal Bureau of Investigation Sacramento, CA
Jim Nielsen	State Senator Sacramento, CA
James Nunn	Lieutenant San Bernardino County Sheriff's Department 351 N. Arrowhead San Bernardino, CA
Tim Reiterman	Staff Writer The San Francisco Examiner 10010 5th Street San Francisco, CA
Wayne Schmidt	Americans for Effective Law Enforcement, Inc. Chicago, IL

Alexander Stevens

Lieutenant
San Francisco Police Department
850 Bryant Street
San Francisco, CA

William C. Summers

International Association of Chiefs
of Police, Inc.
Gaithersburg, MD

Robert H. Whitmer

Chief of Police
Technical Advisor
Redding Police Department
1313 California Street
Redding, CA

Norwood Erich and
Larry Hill

Attorneys at Law
Weintraub Genshlea Hardy Erich &
Brown
Redding and Sacramento, CA

CHAPTER I

LEGAL FOUNDATIONS OF PUBLIC CIVIL TORTS; AN HISTORICAL PERSPECTIVE

For 25 years, the courts at both the State and Federal levels have evolved a set of public civil tort mandates that run strikingly parallel with each other and have equally significant impact on the public sector.

In this relatively short period of time, the public sector has gone from a state of extensive immunity to a state of extensive liability. A comparative analysis of these two facets of the law will demonstrate the consonant reasoning and parallel history of both court systems and the underlying philosophy of the civil justice system.

To demonstrate the linkage between this legal evolution, the courts' philosophy, and our present litigative dilemma, this presentation has been tailored to focus on the major legal/philosophical decisions that have served as benchmarks during the last quarter century. By taking this concise approach and providing a historical overview, many of the case decisions which

were made during this era have been excluded. Therefore, this document does not assert to be a legal treatise; it is a mechanism to demonstrate how we arrived at such a controversial point in our civil justice history.

Consistent with this approach, Chapter I will be divided into three separate areas of discussion:

California Tort Law. This analysis will review the foundations of our civil law from 1872 to post-1978, and the evolution into the "deep pocket" era.

Federal Civil Rights Torts. Federal Civil Rights Law has closely paralleled in both time and philosophy our state law. Due to the nature of Federal law, it has the capacity for becoming far more devastating to the public sector, particularly to the law-enforcement function.

Public sector realities. A discussion of the potential impact on management by the development of our present judicial mandate.

California Tort Law

Prior to 1961, California Tort Law was defined substantially by English "common law" practices and philosophies. Hence, the "King can do no wrong," or the theory of "sovereign immunity." Basically, the sovereign immunity doctrine prevented a governmental entity from being subject to civil tort action. This doctrine was

codified into State law by the California Tort Claims Act of 1872.

The doctrine arose out of the practical necessity of enabling the State/Government to exercise its functions unhampered by careless mistakes of its agents and potential for consequential tort actions. As a result, few civil actions were filed against governmental bodies in California prior to 1960/61.

Historically, though the more "progressive" courts and writers had long advocated repudiation of sovereign immunity and urged full tort liability as a corrective check on government.(1) Then in January, 1961, this repudiation philosophy led to the erasure of the "sovereign immunity" doctrine by the case decision of Muskopf v. Corning Hospital District.(2)

Muskopf established several precedents:

The court rejected the common law rule of sovereign immunity as "outdated, mistaken and unjust." Concurrently they went on to say:

"...immunity from tort is an anachronism, without rational basis and has existed only by force of inertia...no one defends total government immunity. In fact it does not exist...."

Sovereign immunity clearly denied aggrieved parties the right of redress for their grievances against the government.

The court further held that the state could no

longer shield the torts of its agents who acted in a ministerial duty. It did not determine the extent of immunity for discretionary acts by its agents.

On the same day in 1961, the court also decided in a parallel case in Lippman v. Brisbane Elementary School District(3) and thusly further clarified the emerging doctrine of discretionary immunity as follows:

- . Immunity was affirmed for the discretionary acts of the school board.
- . Immunity of a public agency for discretionary conduct was not as extensive an immunity as personal immunity.

Later decisions, such as Toney v. State(4), and the passage of California Government Code section 815.2{6} have held entities vicariously liable for the conduct of its agents only if it is established that the employee/ agent would be liable for their conduct.

With the prevailing philosophy in pre-1961 law of "sovereign immunity," few suits were filed against governmental entities and particularly law-enforcement officials as a result of:

- . The negative social stigma attached to suing a police officer/entity, and there was no monetary incentive. Police officers particularly did not have enough assets, and the "deep pocket" mind set had yet to emerge.

What had occurred to this point was a repudiation by the court of 89 years of legal history by erasure of the sovereign immunity doctrine and the emergence of new doctrine on unsettled legal terrain.

This uncertainty was clarified by the 1963 California Legislature.

Post 1963 Law

When the 1963 California Legislature adjourned they had effectively given legislative approval to judicial repudiation of the "sovereign immunity" doctrine by the passage of the California Tort Claims Act of 1963.

- . Codified Division 3.6 of the Government Code, sections 810 through 996.6.
- . Repealed much of the previous inconsistent legislation and case law.
- . Established a legal framework for all claims and actions against public entities/employees since that time.
- . Recognized limited remedies available to plaintiffs, and reaffirmed the doctrine of "contributory negligence" which in substance barred recovery if the plaintiff contributed to their cause of action.

After the passage of the Tort Claims Act of 1963, our next major case law came in 1975 with Li v. Yellow Cab(5), at which time the "comparative negligence" doctrine was developed. The period 1963-1975 was not a hiatus in case law, as significant cases were rendered. However, 1975 served as a hallmark year because it set the stage for our current public sector dilemma--"joint-and-several liability."

Li effectively abrogated the 1872 doctrine of contributory negligence and established the prevailing

doctrine of comparative negligence. This doctrine essentially apportions liability in direct proportion to the degree of fault in each case.

Thusly, contributory negligence by a plaintiff does not bar his/her recovery and awards will be diminished in proportion to the amount of negligence that can be attributed to the plaintiff.

Concurrently, with the backdrop of Li, the California Supreme Court expanded the doctrine of "comparative negligence" by another landmark decision in American Motorcycle Association v. Superior Court(6). This case established the "deep pocket", joint-and several-liability framework by three new concepts:

- . Added the joint and several liability doctrine to the existing comparative negligence doctrine;
- . Determined that a defendant in a comparative negligence action may be jointly and severally liable for all damages and can bring others into the suit as defendants even if they are not named in the original complaint;
- . Held that "good faith" settlement with the plaintiff discharges that defendant from any claims for partial or comparative indemnity, limiting recovery to the amount of the settlement--not the proportionate responsibility for injury. Hence a concurrent tortfeasor is liable for the whole of the injury whatever his negligence is that was a proximate cause of that injury.

In substance it established the "deep pocket" theory by permitting an injured party to obtain full recovery even when one or more of the tortfeasors have inadequate financial resources to cover their liability.

The equity mentality has been extended to mean that "someone will pay" to correct the injuries sustained.

In brief, with the move to total "equity" or the "someone must pay" mind set, we have moved into a liability-rich era marked by the "deep pocket" theory. Deep pocket can be explained by this example:

- . Two autos collide on a county or city road. The driver of one car is returning home from an all-night drunk and crosses the center line, striking the station wagon of a physician and his family on their way to church.

The physician is killed. His wife and five young children are injured. They sue the drunk driver for obvious negligence. They sue the county or city alleging that the road was in a dangerous and defective condition in that it sloped one-half inch toward the center in the vicinity of the impact.

The jury returns a verdict of \$7 million against both the drunk and the county or city. The jury allocates 99 percent of the negligence against the drunk and 1 percent against the county or city. Under the concept of joint-and-several liability, each defendant is liable to the plaintiffs for the entire judgement. If one defendant pays the entire judgment, that defendant is entitled to recover from the other defendant the latter's share according to the allocation of negligence.

Hence the drunk is uninsured (or underinsured) with little or no assets. The county or city has to pay the \$7 million and is left with the right to recover from the drunk \$6,930,000, obviously a clear incentive to name a public entity, or other party with "deep pockets" whenever possible.

To summarize, California has moved from a state of extensive immunity in the pre 1961 era to a liability rich state of the "deep pocket" era of today.

We have compromised the "historical equity" of

the law to that of "social equity" by judicial mandate and to some extent by early legislative repudiation of the sovereign immunity doctrine.

This movement has created a critical liability-rich condition for both the private and public sectors in California which is only just beginning to show signs of its full impact. In the post Proposition 13 era, this is particularly critical for the public sector.

Federal Civil Rights Torts--A Parallel Path

On April 14, 1871, H.R.320, sponsored by Representative Shellabarger, became law as the Civil Rights Act of 1871. The primary intent of this legislation was to address the violence and other post-reconstruction period inequities that were impacting our nation during this time in history. It was codified as Title 42 United States Code, section 1983.

In substance, 42 U.S.C. 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Congressional intent was not for this law to be utilized as presently conceived. The Supreme Court articulated this point in closing arguments of Monell v.

Department of Social Services, 1978 (7):

"None of the members of this Court can foresee the practical consequences of today's removal of that protection (provided in Monroe v. Pape, 1961(8)). Only the Congress, which has the benefit of the advise of every segment of this diverse nation, is equipped to consider the results of such a drastic change in the law. It seems all but inevitable that it will find it necessary to do so after today's decision."

To date Congress has not reacted to this challenge.

To place this area of the law into additional perspective, we need to look at three landmark cases:

- . Monroe v. Pape, 1961
- . Monell v. Department of Social Services, 1978
- . Owen v. City of Independence, 1980 (9)

In 1961, Monroe held that a municipality was not a person within the context of 42 U.S.C. 1983 and could not be sued as an entity. Seventeen years later, the Court reversed itself in Monell and held that municipalities could be sued if the unconstitutional action complained of was implemented or executed as a result of policy, ordinance, regulation, or decisions officially adopted or promulgated and fairly said to be policy. The Court held in Owen that clearly, municipalities are strictly liable under 42 U.S.C. 1983 and stated that Owen, together with prior decisions, accomplished three objectives:

- . The individual harmed by an abuse of governmental authority is assured compensation for their injury.

- . Section 1983 should serve as a deterrent against further constitutional deprivation and provide compensation for past abuses.
- . Observed that the possibility of the levy of damages against a city might encourage its policymakers to institute internal rules designed to minimize the likelihood of unintentional constitutional violations. (10)

To summarize the close, consonant history with California law, Mr. Frank J. Komdrat, Jr., Chief Council for Shaker Heights, Ohio, in his address to the 1981 Ohio Municipal Law Institute, July 24, 1981, stated,

"What is believed to be appropriate to California, that in a relatively short span of time, we have moved from extensive immunity to extensive liability under section 1983 for municipalities and individual officers. Section 1983 remedies are being expanded in a manner that unlikely was envisioned by Congress in 1871." (11)

Title 42 U.S.C. 1988. Concurrent with the decade of 1965-1975 and developments in 42 U.S.C. 1983 violations, Congress passed a landmark mandate in 1976 called the Civil Rights Attorney's Fees Awards Act of 1976.

The sole Congressional intent for this piece of legislation, as defined by the U.S. Supreme Court in Hensly v. Eckerhart, 1983 (12) was:

"Congress enacted section 1983 solely to make certain that attorneys representing plaintiffs whose rights had been violated could expect to be paid, not to spawn litigation, however interesting...."

Essentially, section 1983 provides that attorneys representing clients in civil rights cases may file as a "prevailing party" and be compensated by the Court after their efforts have been "objectively" reviewed by

the Court. In Nadeau v. Helgemoe, 1978 (13), the Court defines "prevailing party" as:

"...plaintiffs may be considered "prevailing parties" for attorneys fee purposes if they succeed on any significant issues in litigation which achieves some of the benefit the parties sought in winning suit...."

In retrospect, we have seen 42 U.S.C. 1983 as originally conceptualized in 1871 moved from a post re-construction corrective agent to the present period marked by extensive state governmental indemnity.

This indemnity has been marked by increased litigation which is stimulated by the provisions of 42 U.S.C. 1988. Increased exposure to general, punitive, and injunctive awards can be expected to continue, with particular focus on law-enforcement.

Public Sector Realities--A Summary

In a relatively short span of history, we have moved from a legal state of extensive public sector immunity in 1961-1963 to a state of extensive liability. This phenomena has occurred at both the state and Federal levels, and it is quite clear that both sectors of the law have developed along close philosophical and date/time periods.

These legal/legislative trends have permeated all sectors of our society--both public and private. They have and will continue to have major import particularly on the public sector and its ability to manage

the public enterprise.

In California, we have experienced a clear thrust by judicial mandate towards class equity in lieu of equity of the situation. As a consequence, the joint liability rationale has embraced the potential for major financial dislocations in the public sector. We have only begun to experience the impact of this trend. Federal civil rights actions appear to be following the same course and will have similar effects.

FOOTNOTES

CHAPTER I

1. Edwin Bochard, Government Liability on Tort, (34 Yale L. J. 1, 129, 229), 1924.
2. Mustkopf v. Corning Hospital District, 11 Cal. Rptr. 89 (1961).
3. Lippman V. Bristome Elementry School {District, 11 Cal. Rptr. 97, (1961).
4. Toney v. State, 126 Cal. Rptr. 869, (1976).
5. Li v. Yellow Cab, 13 Cal. 3d. 804, Sup. 119, Cal. Rptr. 888, (1975).
6. American Motorcycle Association v. Superior Court, 20 Cal. 3d. 598, (1978).
7. Monell v. Department of Social Services, 436 U.S. 658, (1978).
8. Monroe v. Pape, 365 U.S. 167 (1961).
9. Owen v. City of Independence, 445 U.S. 622 (1980).
10. Paul T. Hardy and J. Deverex Weeks, Personal Liability of Public Officials Under Federal Law, (University of Georgia: Carl Vinom Institute of Government, January 1985), p. 10-11.
11. Marvin D. Fienstein and Martin Maver, Civil Liability Issues, (California Peace Officers' Association, 1984), p. 3-11.
12. Henslev v. Eckerhart, U.S. Sup. Ct. 81-1244, 33 CRL. 3089, (May 1983).
13. Nadeau v. Helgema, 581F. 2d. 275, 278, 279 Cal. 1978 (1978).

CHAPTER II

AN ANALYSIS OF THE LIABILITY EXPERIENCE

This chapter will consider the number, type and causes of civil actions which have been impacting the public sector in increasing numbers at the national, state and particularly local levels of government. The linkage between our judicial, historical, and liability experience will clearly demonstrate a causal relationship.

With a multi-level approach, we can illustrate the national significance of our dilemma, provide a broader base for trend evaluation, and focus on the police function with greater accuracy. It is important to accentuate the national import of this phenomena--because it is another trend that was initiated in California and has spread eastward.

In consideration of this approach, Chapter II will be presented as follows:

- . The National Scene, a broad review of the local governments' experience.
- . The California Environment, a review of the public sector exposure in our state,

- . The Law Enforcement Community, an overview of our experience with both State and Federal Law.

The National Scene

Local Governments' experience with this radically changing trend has been difficult to trace for several reasons:

- . There is no centralized monitoring or evaluation mechanism.
- . Evaluation criteria and institutional mechanisms are as diverse as the public entities they are assessing.
- . Law enforcement and other limited sectors of the public enterprise have long been sensitive to this developing issue. Many other sectors of our governmental structure were apparently insensitive, until it started impacting their pocketbook at significant rates. Consequently, being perceived as a "new" issue area, we do not have the accurate data base or evaluation instruments readily available.

This data vacuum has recently been the focus of much effort designed to provide qualitative resource material for advocacy groups supporting corrective legislation efforts. As a result, much of the information is dollar valued. Several of these research efforts will be utilized later in this text.

Correspondingly, one of the first efforts that began identifying and evaluating various elements of this civil vortex was the news media. They continue to sustain this leading role. One of our first components is a comparative profile of nine major American cities drawn from various sectors of our diverse country.

Table 1 compares population base, lawsuits, and payouts in 1983-84 and appeared in a series of articles on this subject in the San Francisco Examiner.

TABLE 1

City-by-city comparison				
1983-84 figures				
City	Population	Claims	New Lawsuits	Payouts
New York City	7,086,096	12,000	9,000	\$81.4 million
San Francisco	691,637	5,853	1,273	10.23 million
Los Angeles	3,022,247	6,090	1,327	7 million
San Diego	915,956	2,778	171	6 million
Chicago ¹	2,997,155	10,000	1,704	3.7 million
San Jose	659,181	828	115	2.2 million
Cleveland	658,869	1,800 ²	800-900 ²	1 million
Indianapolis	707,655	469 ³	264	477,000
Oakland	344,652	706	N.A.	98,989 ⁴

1. 1983 figures 2. Pending 3. Notices of suits 4. Claims only

Source: Tim Reiterman, "Why San Francisco is Suited To Life in The Court Room", San Francisco Examiner, April 15, 1985

This regional transparency provides a matrix for a general environmental profile of some of the costs and numbers of suits we have experienced in just one year.

The intuitive reaction, without exception, from all the qualified parties interviewed in various facets of this project has clearly reported a drastic or exponential growth in public sector civil actions. With an empirical response such as this, supported by the vested concerns of many elements of the public sector, it is quite clear we have a significant problem in this area.

Conversely, except for early studies contracted by the International Association of Chiefs of Police, Inc., (1) very limited data has been made available until this year when the International City Management Association contracted with the Wyatt Company to do a national assessment of public liability. To my knowledge, this is the first national effort of this type outside of the 1976 I.A.C.P. law-enforcement study.

This Washington, D.C. based think tank has yet to complete and publish its findings. However, a copy of their rough data package was made available and a number of substantive conclusions can be formulated which are consistent with professional empirical observations. Of particular note is that of the 1244 respondents they received returns from, 46.7% were from

California. Additionally, the data not only evaluates the public sector "en bloc," it also provides a sound data margin for law enforcement.

Perception of Immunity. Consistent with the discussion in Chapter I of the delineation of "sovereign immunity," a key element in an environmental scan of our public suit experience should be that of attitudes or perceptions. In this case, the perception of a public official's immunity was evaluated by 13 separate national regions and individual states. The consistency of responses is particularly significant as one can see in Table 2.

TABLE 2

Perceived Immunity to Suit by Public Officials

Region	Full Immunity	Limited Immunity	No Immunity
California	3.4%	26.4%	70.3%
Pacific Coast	3.0%	26.1%	70.9%
Nationally	3.3%	23.7%	72.9%

Source: The Wvatt Company, Washington D.C., "Public Liability Survey," Tables 11 and 12

Perceived Immunity by Population. Table 3 demonstrates a demographical change in the population groups of 50,000 to 250,000 range. This shift, whether demographic, social, or psychological, may be significant because it appears in other areas of our evaluation.

TABLE 3

Perceived Immunity by Population

Population	Total Number Of Respondents	Full Immunity	Limited Immunity	No Immunity
10,000-24,999	565	3.2	20.7	76.1
25,000-49,999	311	4.5	22.5	73.0
50,000-99,999	176	3.4	26.7	69.9
100,000-249,999	119	2.5	32.8	64.7
250,000-499,999	32	6.3	40.6	53.1
500,000-1,000,000	19	0.0	36.8	63.2
Over 1,000,000	6	0.0	33.3	66.7
Totals	1,228	3.5	24.0	72.5

Source: The Wyatt Company, Washington, D.C., "Public Liability Survey," Table 13

Reported Losses and Frequency of Suit. Between 1979 and 1985 the I.C.M.A. survey identified 765 civil actions which had been reported "lost" by the respondents. No indication was made as to the ratio of claims or suits filed vs. the number of cases lost. However, experience in California demonstrates a significant number of claims (roughly 5:1 ratio) never actually become suits.

TABLE 4

<u>Year of Claim</u>	<u>Public Officials Losses Reported</u>		
	<u>Number of Claims</u>		
	<u>City and Townships</u>	<u>Counties</u>	<u>Total</u>
1979	54	17	71
1980	83	33	116
1981	85	26	111
1982	110	61	171
1983	114	57	171
1984	83	33	116
1985	Omitted due to incomplete data		

Source: The Wyatt Company, Washington D.C., "Public Liability Survey", Table 35, pg. 52

Susceptibility to Suit. Looking at susceptibility rates in Table 5, we see that the population groups 50-250,000 tend to experience higher levels of exposure than entities at the other end of the continuum.

TABLE 5

Liability Claims by susceptibility, and Population Base

<u>Population</u>	<u>Susceptibility</u>		
	<u>Claims</u>	<u>Entities</u>	<u>Percent</u>
10,000-24,999	122	567	21.5
25,000-49,999	85	312	27.2
50,000-99,999	73	178	41.0
100,000-249,999	47	118	39.8
250,000-499,999	13	31	41.9
500,000-1,000,000	6	19	31.6
Over 1,000,000	2	5	40.0

Source: The Wvatt Company, Washington, D.C., "Public Liability Survey," Table 37

The law enforcement function has long known that they are in a high exposure profession. Table 6 clearly supports this contention when we compare the law enforcement function to other risk groups and causes of action.

TABLE 6

<u>Claimant</u>	<u>Parties Who Filed Claims</u>	
	<u>Number of Claims</u>	<u>Percentage of Claims</u>
Private Citizen(s)	371	48.6%
Employee(s) or former employees	175	22.9%
Prisoners	102	13.4%
Commercial Firm	79	10.4%
Labor Union	5	0.7%
Government Agency	9	1.2%
Public Action Group	11	1.4%
Other	11	1.4%
Total	763	100%

Who are named as Tort-Feasors? This table really speaks for itself:

TABLE 7

Tort-Feasors

Defendant	Number of Claims	Percentage of All Claims*
Public Entity	531	68.6%
All Members of Governing Board	156	20.2%
Several Officials or Employees	309	39.9%
Single Employee or Official	138	17.8%
Other	8	1.0%

* The percentage of claims exceeds 100 percent since some claims involved more than one set of defendants.

Source: The Wvatt Company, Washington, D.C. "Public Liability Survev," Table 43

What are the major causes of action? While this table is self-explanatory, it is important to identify one area which specifically involves the law enforcement function, and represents the second highest liability exposure in Table 8, "treatment of suspects or prisoners" -- 23.5%.

TABLE 8

Causes of Action

Circumstances	Number of Claims	Percentage of All Claims*
Zoning or rezoning	95	12.3%
Treatment of suspects or prisoners	182	23.5%
Failure to follow legally mandated	309	39.9%

procedures	203	26.2%
Failure to provide service	52	6.7%
Quality of service	56	7.2%
Disciplinary action (non-employee)	13	1.7%
Hiring of employees	23	3.0%
Dismissal of employee	113	14.6%
Promotion/Tenure	31	4.0%
Labor negotiations	6	0.8%
Issuance of licenses	37	4.8%
Title F discrimination	82	10.6%
Conduct of inspection	39	5.0%
Purchase of goods or services	9	1.2%
Administration of grants	4	0.5%
Transportation	4	0.5%
Sale of Land	8	1.2%
Property condemnation	32	4.1%
Annexation/detachment	6	0.8%
Anti-trust	10	1.3%
Reverse discrimination	4	0.5%
Discrimination in precient structuring	2	0.3%
Assessment of taxes	21	2.7%
Others	44	5.7%

* The percentage of claims exceeds 100 percent since some claims involved more than one set of circumstances.

Source: The Wyatt Company, Washington D.C., "Public Liability Survey," Table 44.

In closing our critique of the national scene, we can make a number of conclusions:

- . We have not developed any qualitative evaluation mechanism to quantify the law-suit mania.
- . Law enforcement has been sensitive to the suit phenomena for some time.
- . The cost of civil actions is escalating nationally at substantial rates.
- . Between 1982-85, law suits against public officials rose an average of 100% nationally.(2)
- . The population groups 50,000-250,000 may have a higher rate of exposure and susceptibility than other groups surveyed.

- . Law enforcement wins 80% of its cases that go to court. In the general public sector, the plaintiff wins 52-59% of the time.
- . 23.5% of claims in the I.C.M.A. study were for suspect management.

The California Environment

In 1983 the State of California had an estimated 25,174,426 people within its geographical boundaries. It is commonly accepted that we have the most diverse and intense composition of humanity in our nation.

With this diversity, we have continually been on the leading edge of many socio-economic, political and technological changes. Public sector litigation is no exception.

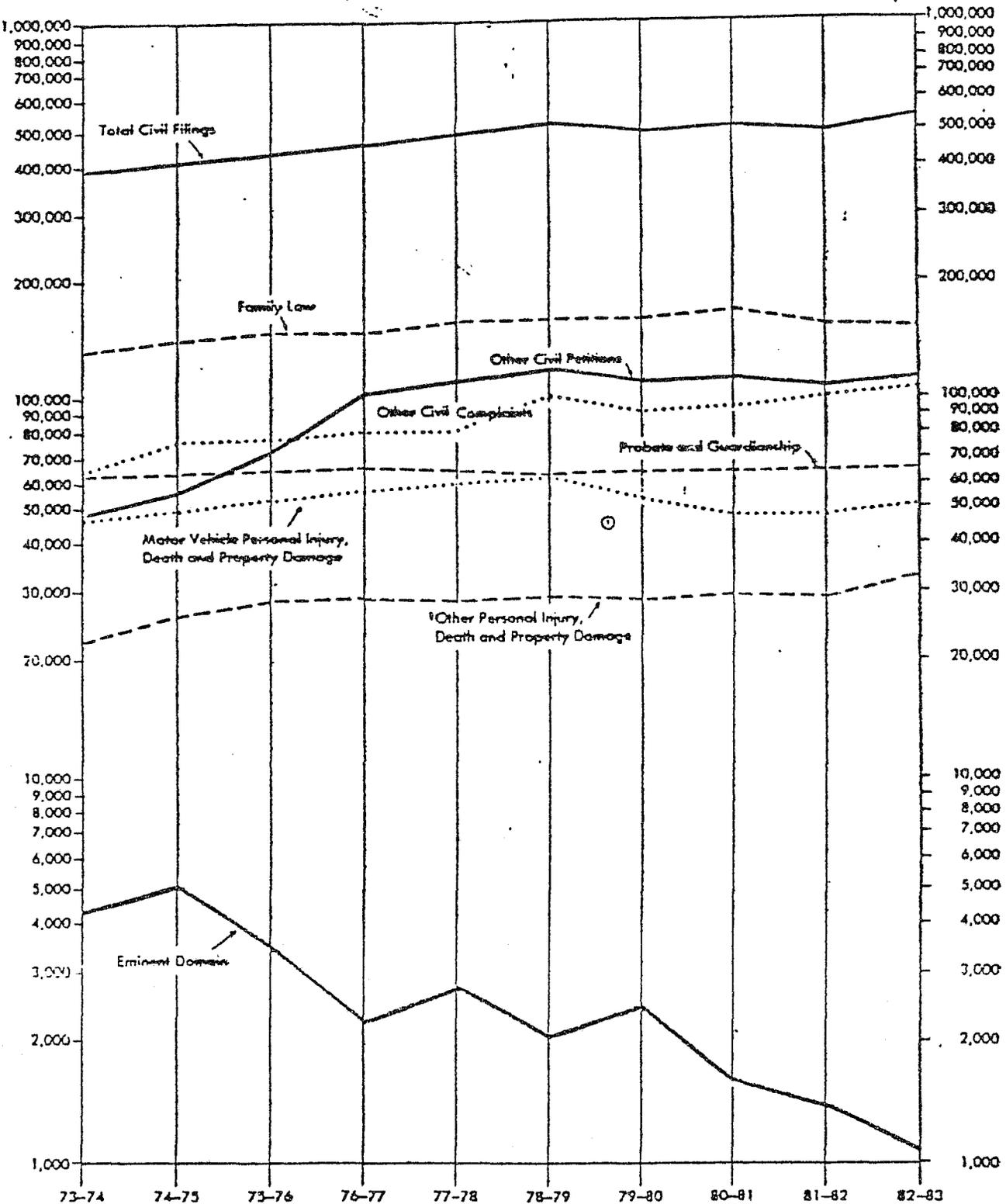
Chief Justice Warren E. Burger, while addressing the Minnesota Bar Association on August 20, 1985, summed up the California experience while applying a national standard to civil liability and arbitration proceedings by stating:

"...some form of mass neurosis that leads many people to think courts were created to solve all the problems of mankind..."(3)

During the fiscal year 1982-83, California Superior Courts handled 540,000(4) civil actions. Substantial numbers of these cases are arbitrated or referred to the lower courts. The process cost taxpayers \$695 million dollars annually, disregarding other ancillary costs of the civil justice system. Table 9 profiles this overall trend.

California Superior Court Civil Filings

FIGURE 8—CALIFORNIA SUPERIOR COURTS
CIVIL FILINGS
Fiscal Years 1973-74 through 1982-83



SOURCE TABLE T-17

O Lower court jurisdiction of civil cases raised from a minimum of \$5,000 to \$15,000 on July 1, 1979

The Cities and Counties. Developing an understanding for what is statistically occurring in California's cities and counties, is at best difficult for a variety of reasons:

- . The emerging issue or crisis has focused on dollar values and hence surveys are balanced in that direction.
- . There is a strong tendency for the entities involved to maintain suit statistics, in a strictly confidential mode.
- . With this particular issue only beginning to develop, statistics have not been maintained in many cases.
- . Many entities have simply not kept accurate accounting because of agency size, costs, or previously perceived needs.

Despite this statistical anomaly, the view of the parties interviewed and documentation available in this project indicated that there was a strong upward escalation of public sector suit activity in California.

In conclusion, one city's experience is well worth reviewing because it is considered by many as a "worst possible case scenario"--San Francisco.

San Francisco has grown to the ominous position of the most litigated city in the United States because:

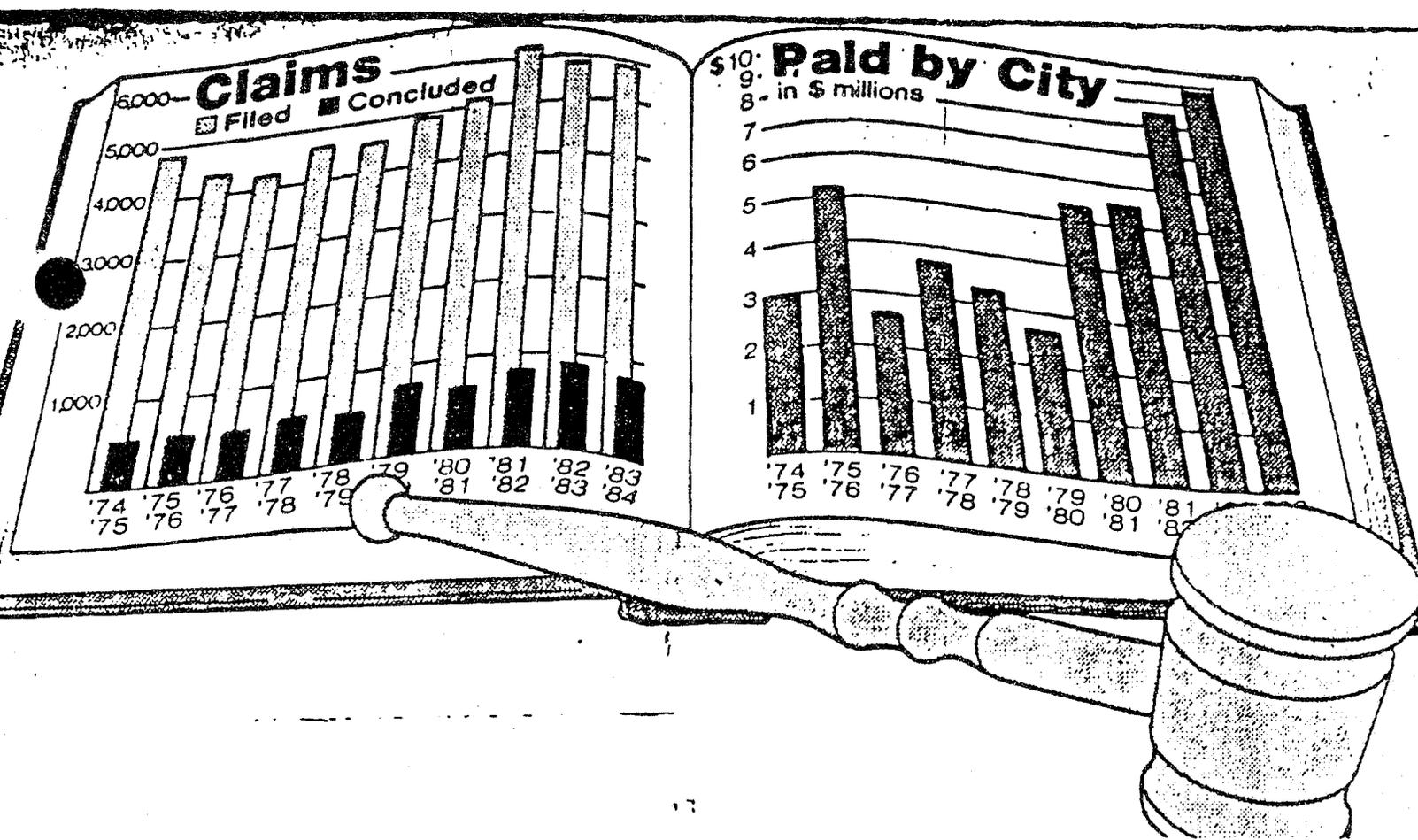
- . Community demographics and lifestyle
- . The highest ratio of attorney-client in the U.S.--70:1
- . The City tends to have a large, highly educated white collar population with easy access to legal assistance, resulting in its prevailing "liberal" views which contribute to generous jury awards. (5)

- . The City has many structural, recreational, and industrial complexes that lend themselves to suit activities.

To illustrate the case in point, Table 10 provides a profile of San Francisco's claims and cash outlay since 1974-75.

TABLE 10

A Profile of San Francisco Claims



Source: Tim Reitmann, San Francisco Examiner, April 1985

The Law Enforcement Community

The brief general public sector critique that preceded this section profiled an overall increase in civil cases and their attendant costs. This section will be devoted on the law enforcement function and has been separated into national and local police study groups.

We will outline what our experience has been and what the causes of action are so we can later focus on corrective mechanisms.

A.E.L.E. Study

The most conclusive study done on the law enforcement liability experience was completed in 1976 by Americans For Effective Law Enforcement (A.E.L.E.). This study was contracted through the International Chiefs of Police, Inc. (I.A.C.P.), and it evaluated United States law enforcement for the decade of 1967-1976 with projections into the year 1980.

This series of studies surveyed 2060 law enforcement agencies across the United States and 153,130 police officers. Within this time span, the number of both state and federal filings rose by 517%.⁽⁶⁾ It was estimated that this trend would continue to escalate and by 1980 would reach 26,000; an increase of 12,889 over 1976 projections.

Based upon their experience, A.E.L.E. made a series of projections for the years 1967-1976. This assessment is contained in Table 11.

TABLE 11

Table I — Projected Number of Suits Filed Against State, County & Local Officers.

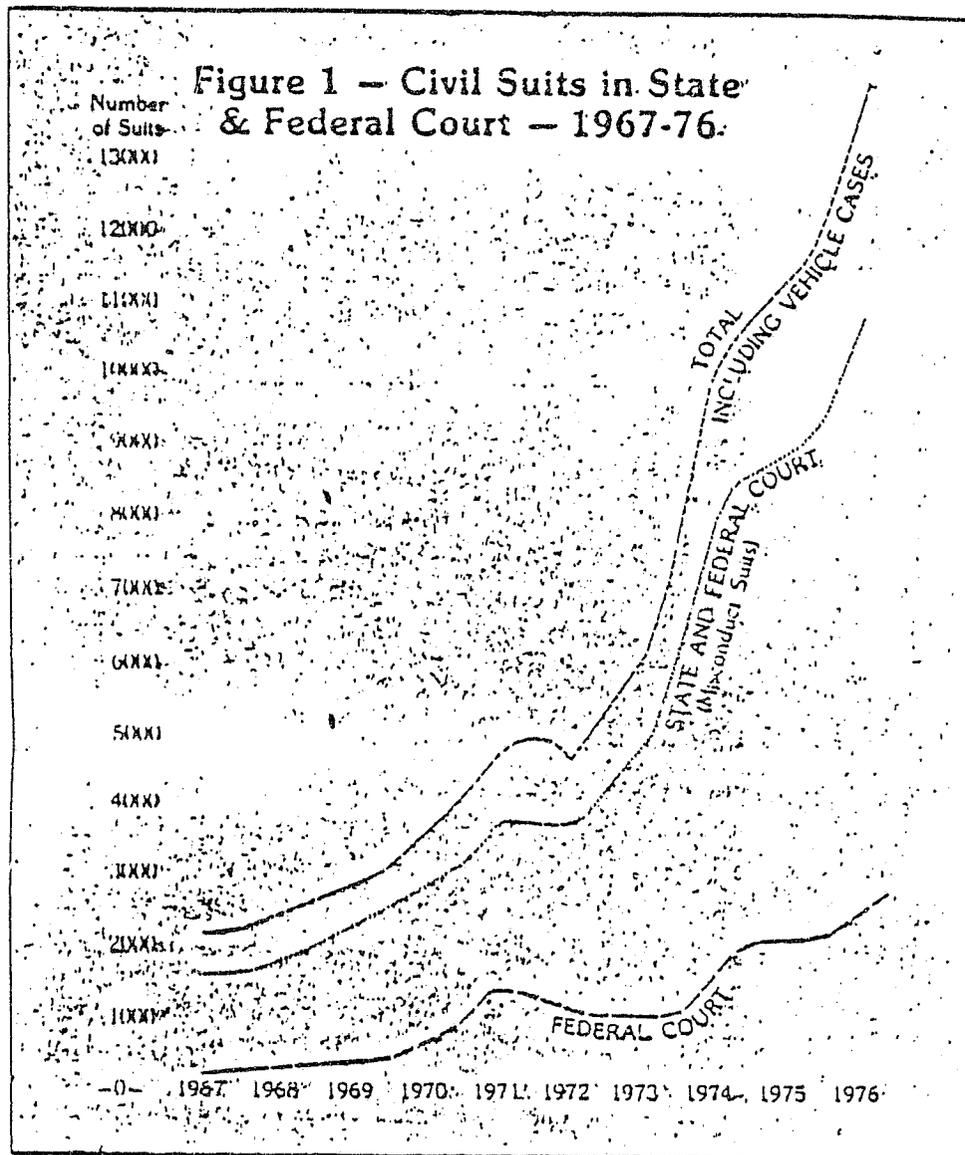
The projected number of suits in state and federal courts, plus vehicular claims, appears in table I.

Year	Suits in State Courts (Miscellaneous)	Suits in Federal Courts (Civil Rights)	Motor Vehicle Suits	Total Suits Filed	Misconduct Suits Per 1000 Officers
1967	1,556	167	450	2,173	5.46
1968	1,665	189	484	2,338	5.58
1969	2,045	322	618	2,985	6.53
1970	2,201	794	783	3,778	7.77
1971	2,318	1,545	1,009	4,872	9.30
1972	2,645	1,101	979	4,725	8.05
1973	3,744	1,044	1,250	6,038	9.72
1974	5,959	4,671	1,994	9,624	15.11
1975	6,750	2,178	2,335	11,263	17.11
1976	8,007	2,626	2,778	13,411	19.64

Source: Americans For Effective Law Enforcement, Impact, Table 1, P-2, 1979

Actual recorded experience during this same time period was both steady and dramatic as indicated in Illustration 1

ILLUSTRATION 1



Source: Americans For Effective Law Enforcement, Impact, Figure 1, pg.3, 1979

Of these suits, less than 4% were found on behalf of the plaintiffs. This may be inconsistent with the California experience where it is estimated we are winning favorable decisions in roughly 80% of police cases.(7)

There is a possibility that this tendency may be changing because it is becoming increasingly difficult to get a fair trial for police personnel in some sectors of the state. The reason--adverse publicity caused by unprofessional conduct of a few officers.(8) This is in contrast when evaluating the public sector as a whole.(9) For example, San Francisco plaintiffs win 59% of the time, vs. Chicago with a rate of 52%.(10)

To supplement the A.E.L.E. suit profile, two collateral resources will be referred to:

- . The Administrative Office of the United States Courts, and
- . The San Francisco Police Department

The United States Court Study

The United States Court survey represents an assessment of 42 U.S.C. 1983 violations filed in the State of California in Federal Court only, between the calendar years 1980-84.

State filings are not tabulated because we have no retention or reporting policies relative to this type of action, and this type of violation can be filed at

either level of the Courts.

This data has been profiled from a massive computer printout provided by the United States Court and could only be separated into two measurable criteria:

- . Petitions Filed by State Prisoners
- . Petitions Filed Against Public Officials

TABLE 12

42 U.S.C. 1983 Civil Rights Petitions
 Filed in U.S. District Courts
 State of California

Type of Petition	1980	1981	1982	1983	1984	Total by Category	% Increase 1980-1984
Petitions Filed By State Prisoners	566	630	711	839	891	3637	643%
Petitions Filed Against Public Officials	290	310	414	748	897	2659	917%
Annual Total	856	940	1125	1587	1788	6296	736%

Excludes 42 U.S.C. 1983 Violations Filed In State Courts

Source: Administrative Office of the United States Courts,
 Washington, D.C., June 25, 1985

In addition to the previous data base, the U.S. Courts also provided a table summarizing the Prisoner Petitions filed in U.S. District Courts nationally between June 30, 1975, and June 30, 1984.

TABLE 13

U.S. District Courts
Prisoner Petitions Filed
During the Twelve Month Periods Ended June 30, 1975 through 1984

Type of Petition	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	Percent Change 1984/1983
Total	19,307	19,809	19,537	21,924	23,001	23,287	27,711	29,303	30,775	31,107	1.1
Petitions by Federal Prisoners	5,047	4,780	4,691	4,955	4,499	3,713	4,104	4,328	4,354	4,526	4.0
Motions to Vacate Sentence	1,690	1,693	1,921	1,924	1,907	1,322	1,248	1,186	1,311	1,427	8.8
Habeas Corpus	2,344	1,959	1,745	1,851	1,664	1,465	1,680	1,927	1,914	1,905	-0.5
Mandamus, etc.	535	626	542	544	340	323	342	381	339	372	9.7
Civil Rights	478	502	483	636	588	603	834	834	790	822	4.1
Petitions by State Prisoners											

Source: Administrative Office of United States Courts, Washington, D.C., 1985

San Francisco Police Department Study

An assessment of the claims filed against the San Francisco Police Department between 1974 and fiscal year 1984-85 demonstrates a 258% increase in civil claims. This data is profiled in Table 15.

TABLE 14

Civil Claims Against the San Francisco Police Department
1974-1985

<u>Year</u>	<u>Number of Claims</u>
1974	670
1975	627
1976	678
1977	799
1978	773
1979	907
1980	785
1981-82	1,162
1982-83	1,517
1983-84	1,470
1984-85	1,716

Table 15 reflects the causes of action filed by the San Francisco Police Department between 1980 and 1985, and the number of claims filed for each cause during the evaluation period. During this period the department experienced a 220% increase in overall claims.

TABLE 15

San Francisco Police Department Suit Profile
1980 to 1984-85

Type of Lawsuit/ Cause of Action	1980	1981-82	1982-83	1983-84	1984-85	Total By Category
False Arrest	60	123	162	156	321	822
Assault	104	174	126	89	171	664
Negligence	117	10	4	4	20	155
Collision	124	191	144	116	125	700
Shooting and Wrongful Death	10	12	3	8	1	34
Faulty Tow	297	464	818	820	842	3241
Lost Property	11	43	64	80	67	265
Miscellaneous	71	84	136	134	100	525
Return of Property	10	9	5	7	12	43
Failure to Notify	16	0	0	0	1	17
Malicious Prosecution	0	0	0	0	1	1
Property Damage	56	52	54	66	65	293
Totals	785	1162	1517	1470	1726	6670

Source: San Francisco Police Department

To supplement the San Francisco Police Department study on causes of action, we again can look to A.E.L.E. for their findings in Table 16.

TABLE 16

A.E.L.E. Study - Types of Suits Filed

Table 2 TYPE OF LAWSUIT FILED	NUMBER AND TYPE OF SUIT FILED PER HUNDRED OFFICERS - 1972-77						PERCENT OF TOTAL BY TYPE **		
	A Local Police	B County Sheriffs	C Federal Agencies	D State Patrols	E Other* Agencies	F Total 1972-77	G 1972-77 All Suits	H 1972-77 Misconduct	I 1967-71 Misconduct
False Arrest, Imprisonment, Prosecution	2.43	2.43	1.23	.81	2.06	2.05	24.9	32.1	41.7
Assault and Battery - Non Deadly Excessive Force	2.66	.92	1.07	1.10	2.41	2.01	24.5	31.5	27.9
Firearms Related - Injuries Caused	.31	.06	.14	.09	.19	.22	2.7	3.4	3.2
Firearms Related - Death Caused	.33	.04	.03	.07	.04	.22	2.7	3.4	3.2
Vehicle Injuries Property Damage (includes Collisions)	1.54	.23	1.93	.75	.50	1.15	14.0	N/A	N/A
Libel, Slander, Defamation	.82	.58	1.90	.31	.23	.69	8.4	N/A	N/A
Poor Jail Conditions or Facilities	.15	.12	.28	.08	.23	.14	1.7	2.1	.9
Illegal Search and Seizure	.11	1.02	.41	.00	.31	.24	2.9	3.7	.9
Invasion of Privacy	.23	.22	.28	.19	.50	.23	2.8	3.6	2.8
Injunctive Relief	.13	.09	.28	.07	.04	.11	1.3	1.8	1.6
Miscellaneous	.30	.16	.00	.13	.47	.23	2.8	3.7	6.1
Unknown Allegations	1.02	.88	1.21	.64	2.72	.94	11.4	14.6	11.6
TOTAL Suits Filed	.93	.20	.00	.23	.47	.64	**	N/A	N/A
	10.95	6.94	8.78	4.47	10.17	8.86	100.0	100.0	100.0

*Other agencies includes campus police, railroad police, and other specialized enforcement agencies.

**Unknown lawsuits eliminated for the percentage analysis (Columns G, H and I)

NOTE The last two columns eliminate motor vehicle claims from consideration, and thus increase the percentage for each category of "Misconduct" allegations. The total number of suits in column "F" varies from Table 1 because it also includes 1977

Source: Americans for Effective Law Enforcement, Impact,
Table 2, p. 3, 1979

In closing this section devoted to law enforcement, it is evident that we are in a high exposure profession which has had very pronounced levels of civil activity; regardless of which time periods are evaluated. Further commentary will follow with the Chapter's closing remarks.

A Summary of Experience

It is appropriate at this time to again quote Chief Justice Burger when he described our national civil dilemma as a:

"...mass neurosis...expecting the courts to solve all of mankind's problems...."

Chapter II has demonstrated our propensity towards this neurosis--particularly in California. The public sector clearly has been subject to significant increases in civil torts which have had a growing impact on local government. We are not alone in this plight as the private sector is experiencing a similar deluge.

To briefly highlight key points in the presentation, selected critical data has been outlined:

I.C.M.A. Study

- . Suits for all sectors of public enterprise have increased 100% during evaluation period 1979 to 1984.
- . This study reflects 1,244 respondents--46.7% are from California.
- . Entities with populations of between 50,000 and 250,000 appear to have a higher susceptibility to exposure.

- . Primary groups who filed suits were:
 - . 48.6%--individual citizens
 - . 22.9%--employees or former employees
 - . 13.4%--prisoners
- . Primary cause for action against law enforcement
 - . 23.5%--treatment of suspects or prisoners

A.E.L.E. Study

- . Surveyed 2,060 police agencies nationally between 1967-1976
- . They reported a 517% increase in suits during this period and concluded the increase would continue at dramatic rates.
- . They reported police win 96% of the cases.
- . They profiled our major causes of action and exposure. These closely parallel the San Francisco Police study.

United States Court Study

- . Between 1980 and 1984 in California, we experienced a sharp increase in 42 U.S.C. 1983 petitions. This increase varied between 643% and 917% depending on the class of action evaluated.
- . Between 1975 and 1984, the 42 U.S.C. 1983 petitions filed nationally by prisoners increased 161%.

San Francisco Police Department Study

- . Between 1974 and 1984-85, their civil claims increased by 258%. Likewise, between 1980 and 1984-85, they experienced a 220% increase.

This outline reinforces a strong pattern that has been formed throughout this chapter which clearly indicates at least some of the magnitude of the issue.

Concurrently, the legal impact of some of the forces described in Chapter I are discernible. Particularly in civil rights type cases which have a special relationship to law enforcement and have the added incentive of being dollar valued and driven since 1976.

Our long term trend assessment would indicate that our civil exposures will continue to escalate at potentially exponential rates with the possibility that civil rights torts will be a primary thrust in California.

FOOTNOTES

CHAPTER II

1. Americans For Effective Law Enforcement, Survey of Police Misconduct Litigation 1967-1971, (5519 N. Cumberland Ave. #1008, Chicago, IL)
2. "The Liability Insurance Issue." Nations Cities Weekly. 26 August, 1985, p.8
3. "Chief Justice Backs More Arbitration." Redding Record Searchlight. 20 August, 1985
4. 1984 Annual Report of Judicial Council. 1985, p. iix
5. "Why San Francisco is Suited to a Life in The Courtroom." The San Francisco Examiner. 15 April, 1985
6. "Lawsuits Against Police Skyrocket; Few Plaintiffs Ever Convince Juries However." Impact, (Americans For Effective Law Enforcement, Chicago, IL, 1979) p. 1
7. Interview with George Fransell, Attorney at Law, Los Angeles, CA. 2 October, 1985
8. Ibid
9. "Why San Francisco is Suited to Life in The Court Room." The San Francisco Examiner. 15 April, 1985
10. Ibid

CHAPTER III

THE COMING CAPACITY SHORTAGE

The title of this chapter has been coined from a developing concept being used by the private sector with increasing frequency. It is descriptive in that it reflects the concern over the potential future of a cash availability crisis when attempting to pay awards stimulated by civil litigation. This same monetary concern is being voiced by a growing majority in the public sector.

This interest in the public sector has been motivated by two dollar valued concerns:

- . The cost of insurance, and
- . The multiple costs of spiraling civil litigation

To illustrate this concept, this presentation is divided into three sections:

- . The Public Sector Economy and Fiscal Crunch
- . The Insurance Industry--A Costly Linkage
- . The Coming Capacity Shortage

The Public Sector Economy and Fiscal Crunch

On June 10, 1985, Mr. Peter North Miller,

Chairman, Lloyd's of London, made a very astute and particularly accurate observation in an interview with the Los Angeles Times:

..."without reform of tort law in the United States, there will not be a market to cover the liabilities Americans want to see covered." (1)

This pointed commentary sets the atmosphere for our outline on the status of California's public enterprise economy:

- . Post Proposition 13--In most jurisdictions in our state, the era of retrenchment is fully implanted. Even so, the full impact of Proposition 13 is only recently demonstrating some of its far reaching realities. The "deep pocket" so many plaintiffs are wanting to reach into is drying up.
- . New Federalism--In January, 1980, a transition began in Washington, D.C. that is still developing into full fruit. Loosely defined as the New Federalism, it is the philosophical phenomena of returning responsibilities to the local levels of governmental enterprise and reducing the role of the Federal government. It has also been marked by less revenues from the Federal Government.
- . The New California Economic Base--The suggestion that the entire California economy is in a massive transition is continuing to be a major focus in some studies. With our movement towards the post industrial/service based economy, we are also reducing our available revenue for the public sector. Service job structures do not lend themselves well to high salaries or high tax brackets.

Considering this economic portfolio in California and the increases in civil action, the "deep pocket" syndrome has developed into a top political issue. Consequently the California League of Cities initiated a

survey in early 1985 of 162 cities to determine the level of exposure, cost of insurance, and their defense costs for "deep pocket" cases.(2) The results of their survey were surprising. In substance they found:

- . Insurance premiums, where a carrier could be found, were raised from 191% to 505%+.
- . The estimated exposures for the 162 cities was \$210,446,773.00.
- . The 1981-84 total for defense costs was estimated at a minimum of \$15,446,773.00.
- . Three year (1981-84) payouts were \$42,446,773.00.

On April 15, 1985, the County Supervisors Association of California released a report to the Senate Judiciary Committee outlining a host of joint liability case studies and their staggering costs.(3) Both the C.S.A.C. and League studies were supportive documents for Senate Bill 75 which was designed to address corrective action for the joint liability problem. S.B.75 has never become law as it was effectively killed in the Assembly Judiciary Committee as have three previous corrective bills.

Regardless which study or newspaper article you review, the costs are becoming substantial. Two recent examples will illustrate the point:

- . January, 1985--Newport Beach. \$6,000,000,
Cause: Swimmer hit his head while diving into the surf. Now many Southern California beach communities are receiving similar suits.(4)

- . February, 1985--San Diego. Settled for \$1,623,390. Cause: drunk driver, fatality accident. (5)

To show how "trendy" this type of action becomes, we only have to look at Laguna Beach. Laguna Beach is another beach community; so following the major award in Newport Beach, Laguna Beach is presently looking at two similar beachfront accidents having price tags of \$8,000,000 and \$25,000,000 respectively. Laguna Beach City Manager Ken Frank said the city of 18,000 cannot pay the price of damage awards and commented,

"It's crazy. It's not logical for our taxpayers to pick up the cost of injuries to people who come to our beach from everywhere." (6)

We have many cities in California and throughout the United States who are now members of the judicial "easy payment plan."

- . South Tucson, Arizona, 1984. Filed bankruptcy and had to give an accidentally shot policeman eight acres of land and sell \$2,000,000 in bonds to pay for the \$3.78 million settlement.
- . Cashion, Oklahoma, 1985. Imposed a \$5.00-per-month fee on all utility users to pay \$157,000 judgement in a town of 550. Reason--sewer gas explosion that injured a family.
- . Troy, Michigan. The city considering a \$200-per-household tax to cover 1982 shooting incident involving armed burglary suspect. (7)

The evidence indicates quite clearly that:

- . We are living in the post Proposition 13 era marked by severely limited public sector funding resources.
- . The costs of civil suits, the amount of the awards, and the frequency of suits are escalating at higher levels.

- . Insurance carriers are not willing to insure public entities, and when they do, the increases in premiums are escalating between 191% and 505%.

The Insurance Industry--A Costly Linkage

In 1984-1985, many municipalities and other governmental bodies began to feel a real insurance premium crunch. California experienced rate changes between 191% and 505%. However in other parts of our country, they were also experiencing similar, and sometimes more dramatic increases:

- . Dallas, Texas--1,128%
- . Winston/Salem, North Carolina--262% to 375%(8)
- . Davenport, Iowa--3,000%(9)

Linda Woodhouse writing for Nation Cities Weekly newspaper, reported that the average appeared to be between 200% to 400% with some ranging into the 1,000% to 2,000% plus brackets.(10) California appears to rank in the median range for our insurance premiums. The real caveat to this situation is that there are a radically decreasing number of carriers who are willing to write insurance for governmental groups. They are particularly unwilling to write policies for law enforcement coverage. Of the professionals interviewed inside and outside of the insurance industry, all reported that between three and five carriers were all that remained who were willing to write such high

liability policies for municipalities in California. the general opinion of this same group indicated that this unwillingness to insure will continue and are fully in accord with Lloyd's Chairman Miller's introductory comments.

When trying to access the rationale of how this insurance void has developed, we need to look at some of the basic operational policies of the industry:

- . The insurance industry is a profit/loss motivated enterprise. Since it is dollar valued, its policy choices must be directed toward that end.
- . Private enterprise ventures tend to follow cycles based upon market influences which impact the industry and the general economy. The insurance industry is struggling out of a deep low point in a six to eight year cycle.
- . Reinsurers, such as Lloyd's, have adopted a policy of no proviso support to the American Insurance industry. Hence European money markets are not willing to spread, or invest in the risk of the American public sector.
- . They insure the private enterprises as well and this sector has been as hard hit by litigation as the public sector.

All of these market influences have had an effect on the industry, nationwide, that meant they must reduce their risk portfolio if they wish to remain solvent. Because of the unpredictability of the risk in public sector liability insurance, they are reducing their investment. Civil justice system policies have no small part in the industry's decision to retrench, as a statement from the industry prospectus, "The Coming Capacity Shortage" will indicate:

"The civil-justice system has to be fundamentally changed to do away with inefficiencies and excessive costs of the basic financial structure if the insurance business, if not major corporate entities, is threatened. ...without substantive reform of the civil justice system, the very foundation that supports the spreading of losses through an insurance system may be cracked.(11)

The Coming Capacity Shortage

Quite simply, a capacity shortage is the inability of a particular monetary or economic system to pay for its maintenance, support functions and liabilities. If the enterprise is unable to meet the monetary demands of all its liabilities, it has a capacity shortage or an inability to pay its obligations. If a system, or an integral part of that system collapses, files bankruptcy, or seeks other dissolution mechanisms, we have a economic dislocation. Conversely, if we have several elements of the overall system fail or begin to show signs of dislocation, we have the potential for major disruptions in the overall political, social, and governmental structures.

When we are addressing economies of scale having dimensions such as discussed in this and the preceding chapters, they tend to have enormous long-term consequences which are not easily mitigated. This is particularly true in cases that have developed the political and social momentum that the civil litigation issue has.

At this point it would be timely to briefly

review some of the indicators impacting this cash flow crisis:

- . Civil Actions against all levels of governmental enterprises have increased from 100% to 917% depending on the group surveyed and the dateline of the survey.
- . The public sector economy, specifically in California is in a continuing period of re-trenchment and contraction of its funding sources.
- . The cost of litigation and awards rendered are continuing to increase for both the public and private sectors.
- . Nationally, municipalities are going bankrupt, going on the "easy payment plan" and developing pooling groups to help pay for their awards.
- . When available, insurance premiums have been increased between an average of 200% to 500% with some going into the 2000% plus club.
- . International financial institutions are no longer willing to accept our civil neurosis and consequently are not investing in our insurance risk management programs.

Private enterprise has experienced the same phenomena:

- . 680% plus increase in Federal product liability suits since 1974 (12)
- . Businesses are named as defendant three times more often than Governmental agencies. (13)
- . They are paying proportionate increases in insurance.
- . They pay 260% more in damages than governmental agencies. (14)
- . Businesses are going out of business, to include insurance companies.
- . Finally, we have the judicial and legislative

continuum that has pervaded our civil justice system for almost 25 years.

In retrospect, we see both the public and private sectors experiencing a similar trend that is increasingly having very widespread impact on both the private and public sectors' ability to continue to operate. The indicators illustrate that this trend is not abating, but escalating at alarming rates. If these trends continue, major dislocations can be expected to occur.

FOOTNOTES

CHAPTER III

1. "Losses, Fraud Hit Lloyds of London", Los Angeles Times, 6 June 1985, p. 2.
2. "Deep Pocket Survey", League of California Cities, 1985.
3. "Report to the Senate Judiciary Committee, Joint-and-Several Liability Cases, County Supervisors Association of California", April 1985.
4. "Beach Lawsuits Flood Orange County Cities", United Press International/Daily Recorder, 1 April 1985.
5. "Liability: Who Should Pay Most", Los Angeles Times, 21 February 1985.
6. "Beach Lawsuits Flood Orange County Cities", United Press International/Daily Recorder, 1 April 1985.
7. "Who Pays? Public Entity or Consumer?", Register.
8. "The Liability Insurance Issue", Nation Cities Weekly, 26 August 1985.
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12. Smarts Insurance Bulletin, July 19, 1985, Darrell Hoppner and Associates, 154 Sunnyside Dr., San Leandro, CA.
13. "Deep Pocket Doctrine Attacked by Chambers", Redding Directions, Chamber of Commerce newsletter, November 1985, p. 1.
14. Ibid.

CHAPTER IV

THE CONSTITUENCY

In order for us to understand the magnitude of the constituency base involved in the "deep pocket" issue, we will focus on the history of the most recent bill authorized to correct some of the "deep pocket" inequities. This method will provide us with a backdrop of the political momentum and constituency mass that is surrounding the entire public debate and concern over civil liabilities.

Senate Bill 75 was authored by Senator John Foran, which, like its three predecessor bills, died a natural legislative death in the Assembly Judiciary Committee. SB75 attempted to address major liability problems with the "deep pocket" scenario. There have been numerous bills sponsored in both houses in an attempt to address various facets of the overall liability issue.

Since 1979, a minimum of four bills have been authored that have specifically addressed the "deep pocket" cases. These four bills were:

<u>Bill Title</u>	<u>Year of Introduction</u>	<u>Final Disposition</u>
SB463	1979	Held in Assembly Judiciary Committee
SB500	1982	Held in Assembly Judiciary Committee
SB575	1983	Held in Assembly Judiciary Committee
SB75	1984-85	Held in Assembly Judiciary Committee

Rather than entertain a finite discussion of SB75 or its predecessors, it is appropriate for this section to simply indicate that all four bills were directed towards various efforts to help mitigate the impact of the "deep pocket" theory. Consequently the remainder of this presentation will be directed to the identification and discussion of various constituent groups and their role in the legislation.

- . The California Trial Lawyers Association and the Legislative Bottleneck--A saga of money and power politics
- . The Other Majority--A discussion of the growing coalition advocating tort reform
- . The Judiciary--A discussion of the philosophical construct that got us to this point in history

The California Trial Lawyers' Association
And Legislative Bottleneck

The C.T.L.A. has historically demonstrated itself to be one of the most powerful lobbying groups in California. This is also true at the national level with the National Trial Lawyer's Association. (1)

In 1982, Mr. Steven Zehner, then General Counsel for the County Supervisor's Association, related that,

"It's always difficult to challenge joint-and-several liabilities because of the strength of the trial lawyers association in judiciary committees.... They are a very powerful lobby...."

Mr. Zehner went on to outline his perception of their motivation:

"...joint and several liability cases have been pretty much a bread and butter issue." Translated, this means lawyers receive substantial fees from these cases.(2)

Contrary to this position, the President of C.T.L.A., Peter Hinton, relates,

"...I wouldn't want the innocent victim to suffer...."(3)

Whatever the real motivation is, the lobbying effort is substantial:

- . Since 1981, the C.T.L.A. has contributed \$1.3 million dollars to legislators(4)
- . The Assembly Judiciary Committee is dominated by the C.T.L.A. Legislation routinely passes the Senate and dies in this committee which is strongly influenced by Speaker Willie Brown.(5) Dr. C.S. Avery, President of the California Medical Association, put it in this fashion:

"...we've tried four times in the Legislature. Each time we've been blocked by...trial lawyers. This time we're determined to go to the people to correct the inequities."(6)
- . In 1982, the C.T.L.A. and Speaker Willie Brown made the following contributions to Assembly Judiciary Committee members:(7)

	1982 C.T.L.A. Contribution	1982 Willie Brown Contribution
Harris (Chairman)	9400	0
Connely (V. Chairman)	3500	83684
Colderon	0	397
Groggin	3000	82806
Johnson	3000	0

McAlister	0	680
Moorhead	13,400	82940
Robinson	14,200	0
M. Watters	9200	0

Assemblyman E. M. Harris, who chairs the Judiciary Committee, summed the situation up in an interview with The Los Angeles Times on February 21, 1985:

"...defendants, including doctors and hospitals, are better able to handle the burden of paying damages than injured victims are. "...and those cases that were existing are decided by jurors who will have to pay the verdicts in taxes...."(8) (9)

The Other Majority

The advocacy groups in support of SB75 type legislation are growing almost daily. The following page is a partial listing of 80 of SB75's supporters. As one can see, there are a number of very formidable organizations identified.

LIST OF SUPPORTERS

CITIES

League of California Cities
Bellflower
Buena Park
Los Alamitos
San Francisco
San Mateo
Villa Park

COUNTIES

County Supervisors Assn of CA
Alameda
Los Angeles
Mono
Orange
San Bernardino
San Diego
Santa Cruz
San Francisco
Venture

PUBLIC SECTOR

CA Highway Patrol
Community Hospitals Task Force
Department of Transportation
Huntington Beach City School District
Law Enforcement Administrators of Amador County
Los Angeles County Transportation Commission
Jackson Police Department
Regional Council of Rural Counties
Marin United Taxpayers Assn
Southern CA Rapid Transit District

PRIVATE SECTOR

Alaco Ladder Company
American College of Emergency Physicians St. Chapter
Assn. of CA Water Agencies
Associated General Contractors of CA
Associated General Contractors of San Diego
Association of California Insurance Companies
Association of California Tort Reform
Berchtold Equipment Comp.

(Private Sector, Continued)

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CA Assn. of Publicly Owned Transit
CA Chamber of Commerce
CA Council of Civil Engineers & Land Surveyors
CA Manufacturers Assn
CA Medical Assn.
CA Municipal Utilities Assn
CA Peace Officers Assn
CA Police Chiefs Assn
CA State Bar, Public Law Section
CA State Sheriffs Assn
CA State Automobile Assn
CA Veterinary Med. Assn.
CA Women for Agriculture
Capistrano Beach County Water District
Concrete Contractors Assn
Fresno County & City Chamber of Commerce
Garden Grove Chamber of Commerce
General Telephone
Governmental Affairs Council-Southern Cal, BIA
Highway Carriers Assn
Hollywood Chamber of Commerce
Hughes Aircraft
Huntington Beach Chamber of Commerce
Intermountain Republic Women's Club Federated
Irvine Ranch Water District
Manteca Chamber of Commerce
Orange Park Acres Mutual Water Company
Orco Block Company, Inc.
Professional Community Management
San Francisco Medical Society
Santa Clarita Valley Chamber of Commerce
Skippy Insurance
Southern California Builders Assn
Southern CA Contractors Assn
Southern CA Gas Company
Southern CA Gas Company
Southern Pacific Transportation Company
Union of American Physicians & Dentists
Western Liquid Gas Assn

PRESS EDITORIALS SUPPORTING

KCBS 74 - San Francisco
KABC 79 - Los Angeles

Orange Coast Daily Pilot
San Francisco Chronicle
San Mateo Times
Roseville Press-Tribune

Lobbying efforts by these organizations and other representatives are coordinated by the Association for California Tort Reform, a Sacramento based networking and coalition building advocacy body.

The combined effort of this coalition has failed to budge any movement out of the Assembly Judiciary Committee. Therefore, their next move is to go to the electorate with an initiative in 1986.(10)

The Judiciary

For 25 years, the judiciary in California has led the nation in what has been termed "liberalization" of mainstream judicial policy. This policy has permeated every sector of the legal establishment from the law schools to the Legislature and the Court. Likewise, it is spreading eastward according to Samuel Alcorn, President of the nation's eighth largest insurance brokerage firm of Bayley, Martin, and Fay:

"...California judges led the way in the liberalization of liability laws and we have begun to see these trends in virtually every county and state in the nation..."(11)

We see strong sentiment from both ends of the political continuum:

From the New Left, Mickey Kaus, writing for The New Republic magazine, cites the political pollution of the judiciary and quotes speeches from the late Justice Mathew Tobriner on the Court's obligation to react to:

"...the economic imbalance in our society...and...the plight of the economically downtrodden...."(12)

- . From The Right, State Senator Ed Davis, a strong activist in joint liability legislation, identifies the "culprit" as:

"...is doctrine taught in some law schools that tort law is moving in a socialistic direction.... It becomes a social remedy rather than an equity of the situation, so what we're up against in so many decisions is essentially...a share the wealth doctrine...."(13)

- . Parallel with both these commentaries, Mr. Kaus went on to make some strikingly provocative observations about the Supreme Courts' present philosophical ideology. If we consider it within the context of The legal history in Chapter I, it is particularly important. In substance, Kaus describes the Chief Justice's philosophies as:

"...what she believes is a particularly extreme form of ideology that might be called "Liberal Legalism...."(14)

His acrimony goes on to describe what "Liberal Legalism" is:

"...Liberal Legalism is not liberalism. It is a particular mutation produced over the past quarter century as liberals attracted to legal activism as achieving their goals have been embued with more traditional lawyers concerns."(15)

Regardless of which definition you may feel comfortable with, or generic description you wish--the philosophy has exploded throughout our civil justice structure and indeed across our country.

Those who hold policymaking positions in the judicial/legislative power structure, are obviously bent on seeing that this philosophy will continue; apparently in their best interests. The Other Majority, which is becoming larger daily, is equally committed to changing this philosophy.

FOOTNOTES

CHAPTER IV

1. "Who Pays? Public Entity or Consumer?" The Register (Calif.) 1985, p. 2
2. "Deep Pockets Feel Victimized." Redding Record Searchlight. 20 February, 1985. p. 2
3. "Reform of 'Deep Pocket' Law May Be Coming." The Sacramento Bee. 18 August, 1985. p. A-26
4. Ibid
5. "California Trial Lawyers May Find Out Just How Deep Their Pockets Can Go." Redding Record Searchlight. 23 August, 1985
6. "Doctors Target Deep Pockets." Redding Record Searchlight. 24 October, 1985
7. Darrell Heppner Smart's Insurance Bulletin #1365, (154 Sunnyside Drive, San Leandro, CA. March 29, 1984)
8. "Liability: Who Should Pay Most?" Los Angeles Times. 21 February, 1985
9. Senate Committee on Judiciary Report, SB75, California State Senate
10. "Doctors Forget Deep Pocket." Redding Record Searchlight. 24 October, 1985
11. "Who Pays? Public Entity or Consumer?" The Register (Calif.) 1985. p. 2
12. Mickey Kaus, "The Diminishing Returns of Legal Activism." The New Republic. (April 15, 1985) p. 25
13. "Deep Pockets Feel Victimized." Redding Record Searchlight. 20 February, 1985.
14. Ibid, Mickey Kaus, p. 24
15. Ibid, p. 24

CHAPTER V

SCENARIO DELIMITATION

Today's Problems

Prior to discussing our base scenario, it is opportune to briefly outline key points in the proceeding chapters:

Chapter I, The Legal Foundations of Public Civil Torts: An Historical Perspective

. California Tort Law

1872-1961: The era of sovereign immunity for governmental bodies. This doctrine ended with the Muskopf and Lippmann cases.

1963: The 1963 Tort Claims Act was passed by the Legislature repudiating the "sovereign immunity" doctrine and reaffirming the doctrine of "contributory negligence."

1975: Li established the "comparative negligence" doctrine and set the stage for the "deep pocket" decision.

1978: American Motorcycle case establishes "joint and several liability" doctrine

. Federal Civil Rights Torts

1871 Civil Rights Act of 1871 becomes law as an effort to alleviate post civil war reconstruction violence.

- 1961: The Monroe case reaffirms the "sovereign immunity" doctrine.
- 1976: Congress passes the Civil Rights Attorneys Fees Awards Act which allows attorneys to file as prevailing parties and collect collateral legal fees.
- 1978: In Monell, the Supreme Court reverses itself on "sovereign immunity" and in 1980 reaffirms the repudiation with Owen.

- . In 25 years we have moved from a state of extensive immunity to a state of extensive liability.

Chapter II, An Analysis of the Liability Experience

- . National/California Environment--a dramatic increase in civil actions of all types are experienced by the public sector. Average increases are 100% plus.
- . Law Enforcement Community--the law enforcement community experienced increases from 220% to 917%, depending on the area and subject evaluated.

Chapter III, The Coming Capacity Shortage

- . The public sector is in an era of retrenchment in California, particularly with Proposition 13, the New Federalism, and a limited number of new funding resources.
- . The costs of litigation have escalated dramatically in California and across the country.
- . Insurance, when available to municipalities has averaged premium increases of 200% to 500% in California. Some locales report experiencing 1000% to 2000% plus increases.
- . There is a growing concern that insurance will not be available and both the public and private sectors will not be able to pay the costs of awards--hence a capacity shortage.

Chapter IV, The Constituency

- . An analysis of the constituency groups in SB75 has identified the legislative and C.T.L.A. power elite and how its strangle hold on mitigative legislation continues.
- . It describes the emerging "other majority."
- . It describes the New Economic Democracy, by Judicial mandate.

Base Scenario Assumptions

Evaluation of the target events have led to these reasonable assumptions from which we established the base scenario and alternatives.

- . Events are formulated on a 1995-2000 end time period.
- . It precludes national critical incidents, political upheaval, or catastrophes.
- . Social, political, economic, and legislative profiles will remain reasonably constant.
- . Assumes no major sweeping, legislative relief at either the State or Federal levels. Although some incremental corrective action should be expected.

The Base Scenario

Evolution of the Legal System

- . Twenty-five years of evolution into the "liberal Legalism" doctrine will be difficult to change. Even with sweeping legislation or a complete change in the judiciary in 1986, we would not feel the impact of change in any substantive form until 1990 or 1995.
- . This trend which started in California is sweeping the nation. So we are looking at a national trend that could take longer to evolve and even longer to change.

- . "Liberal Legalism" or the "New Economic Democracy" has pervaded every sector of the legal system, from the law schools to the Court. It will take a long time to redirect this trend.

Legislative Relief

- . The possibility of sweeping corrective action by the California Legislature has a very low probability of occurring with the present power elite and their predominant mind set.
- . Some incremental changes will occur as with SB969 (Punitive Damages) but this will probably be on a case by case basis.
- . The Counter Constituency is growing steadily and an initiative will probably be on the ballot in 1986 to cover "deep pocket" cases. Because of the complex nature of the issue, and the money that will be involved, it would be unwise to suggest an outcome. However, even if it does pass, we can expect other civil actions to continue at their present rate of increase.

The Public Economy

- . The availability of new revenue sources will continue to deteriorate for local and state government in the post Proposition 13 era.
- . The New Federalism and general tone of retrenchment will continue thus providing few cash resources for local/state entities.
- . California is developing a new economic base consistent with its move to a service-based economy.
- . The cost of civil litigation and the awards will continue to increase. This trend is still developing at both the state and national levels.
- . Governmental entities will continue to go bankrupt, sign up for the "easy payment plan" or go out of business altogether. Likewise, they will continue to lose cases at an equally increased rate.

The Insurance Market

- . The unwillingness of reinsurers to invest in the American Market place will continue and the insurance industry will not have a mechanism to spread their financial risks.
- . Governmental enterprise has a very high risk potential--particularly law enforcement. The insurance industry will continue its policy of not wanting to insure governmental entities. Some insurance will probably be available, but with severe restrictions and at very high cost.
- . The industry is in a very difficult adjustment period and will reportedly be unable in the future to meet their liabilities with the present trends in civil justice.

The Coming Capacity Shortage

- . Because of increased levels of litigation and proportionate awards, many businesses and governmental agencies are being forced out of business as they are unable to meet the awards demanded. This trend will continue to develop at both the state and national levels.
- . If we combine the collective impact of private and public sector capacity shortages, and the resulting bankruptcies, we have the realistic potential for a major economic dislocation of major proportions.

Exposure Trends

- . Barring any sweeping legislation at either the state or the national level, we can expect the present areas of exposure in most cases to continue--they are dollar-driven value systems and can therefore be expected to perform as continuing economic incentive for suits.
- . We should expect to encounter increased litigative efforts in these areas, excluding the law enforcement function.
 - . Toxic or hazardous waste management
 - . Other environmental conditions
 - . Civil rights cases filed against public officials

- . Sexual discrimination
- . Due process causes, particularly with employees
- . Vicarious liability

California Law Enforcement

- . Law enforcement will continue to be a high risk function by the very nature of its broad responsibilities.
- . The increases in all types of law enforcement civil action we have seen over the last two decades will continue to escalate at sharp rates. While there is some suggestion this will change, historical records and the trends in the judiciary do not support this theory. We should expect increased exposures in these areas.
 - . The use of force of all types to include the new electronic control weapons
 - . Use of motor vehicles, particularly pursuits
 - . Jail conditions
 - . Sexual discrimination cases and other protected classes
 - . Expansion of Vicarious Liability type cases
 - . Use of police tactics, particularly where force is used or in cases where other alternatives are available that could have prevented the use of force
 - . 14th Amendment, due process cases involving employee discipline and vested rights
 - . Expansion of special relationship doctrines and duty to protect cases
 - . 42 U.S.C. 1983 actions will continue to be used with increasing frequency because it has flexible content and Section 1988 has attached a positive dollar incentive to filing such cases. As the "Liberal Legalism" doctrine develops, we should expect more frequent use of injunctive relief mechanisms and the master concept

- . We have enjoyed the confidence of the general population to a large extent and this has been evident in our case loss rate. However, there is a developing trend in Southern California of having difficulty finding impartial juries. This trend will probably continue with a significant impact on our financial resources.
- . Insurance coverage for law enforcement will be all but impossible to acquire because of our past experience, the developing trends, and our general high level of exposure.
- . The civil environment will continue to add to the pressures that have forced qualified police candidates out of or away from the profession. Likewise it can and does have a direct effect on the ability of the law enforcement community to perform their functions.

CHAPTER VI

EVALUATION AND RECOMMENDATIONS

It has taken 25 years for the civil justice system to arrive at its present state of civil neurosis. Trends that have developed during this period are just now beginning to demonstrate their potential magnitude.

The dynamics of these trends will have continuing impact on both public and private institutions. In fact, some end time events could indeed cause major economic, social, and political dislocations if continued unchecked.

Like the trends themselves, the path to positive resolution will take time before effective change can be realized. Consequently, this closing commentary has been designed to reflect an overall evaluation of the study's conclusions and is presented in four sections:

- . The Development of a Counter Constituency
- . Corrective Legislative Relief
- . Insurance Alternatives
- . Risk Reduction Alternatives

The Development of a Counter Constituency

The key to any kind of substantive change is the development of an aggressive constituency motivated towards making sweeping changes in our civil justice system and legislative bottleneck. Such a Counter Constituency is developing very slowly.

To nurture this momentum, the cooperative effort of both the public and private sectors should be devoted towards:

- . Framing the issues in a manner that is easily understood and supported by the public at large
- . Motivate the public and other constituent groups to become actively involved in the development of public policy.
- . Train the public, our employees, professional and civil groups, in the dynamics of our case so they will be reacting as a sensitized trained group. Many times we expect the public "en bloc" to react favorably in an information vacuum, on very complicated and sometimes emotional issues.
- . The training process begins with--us--we need a better understanding of the issues, and underlying causes so that the message can be effectively disseminated.
- . Keep the momentum going. Frequently substantive public policy issues die a "natural death." If corrective action is to occur, the issue must be maintained as a high priority, high profile issue on the public agenda.

Corrective Legislative Relief

Vested, broad-based elements of both the public and private sectors must motivate themselves towards a team effort directed at:

- . Supporting mitigative legislation designed to cap the "deep pocket" syndrome. Equally important is the need to inform the public on where the legislative bottleneck is located so that they may make their own electoral choices.
- . The "deep pocket" issue is only one issue in a broad scope of civil law changes. If the sweeping approach does not work, then the incremental approach should, as we experienced with the recent passage of SB969, which was designed to relieve punitive damage awards.
- . 28 states have developed some sort of partial immunity for their governmental entities.(1) California should likewise continue that move towards the return to full or traditional forms of governmental immunity we had 25 years ago.

California's cause is only step one. Our second major hurdle is corrective Federal legislation aimed at harnessing the misuse of 42 U.S.C. 1983. Traditionally, civil rights violations were largely directed toward the police function; but this trend is changing. Increasingly, we are now seeing this type of violation being used against higher levels of government office holders, such as Boards of Supervisors and City Council members. This area of the law is clearly being contorted in a way that is nowhere near its original intent as promulgated in 1872.

While sweeping corrective changes may seem unlikely; particularly with some of the noteworthy abuses portrayed on television, some incremental protective measures can be sought which are designed to control punitive damage awards, control levels of attorneys' awards, and abuses observed in records maintenance.

Insurance Alternatives

As the civil suit continues to be used as a primary social weapon of indignation and class activism tool, the public and private sectors must move towards more effective mechanisms to combine their assets in order to pay for the mounting judgements that are being awarded. The only other alternatives appear to be economic dislocation by going out of business, or the "easy payment plan." To fill this dollar shortage created by judicial mandate, several viable alternatives are beginning to emerge:

- . Insurance pooling has been a mainstream resource since the mid-1970's, particularly for small cities which have a limited cash flow base.(2) The civil neurosis has simply expanded the use of the insurance pool to include regional pooling organizations.
- . Out of the initial concept of pooling resources has come a new mega-pool that was even discussed in the 1985 California Assembly as the Super Pool.(3) The Super Pool is a second generation California pool that goes beyond the Regional and State insurance concepts and sets up a new economic formula. Briefly, this concept is described as:

Both the private and public sectors provide funds to a central funding agency.

These funds are managed by an administrative body who are responsible for distributing the monies in conjunction with other social service agencies in a coordinated fashion. This would probably entail the establishment of a new state regulatory or administrative agency.

Conceptually, a plaintiff would merely apply to this administrative body to be "justly" compensated for their injuries or economic losses.

Hence, with higher and more frequent judgements, the plaintiffs simply apply for relief to the mega-governmental pool.

Industry spokesmen say that insurance will probably be available to some public enterprise groups. However, it will cost substantially more than we presently enjoy and there will be strings attached to protect the interests of the insurance company. The general feelings appear to be that the market place will determine what new mechanisms will prevail in dealing with the problems of the industry.

Another example of some of this new era thinking is the concept which can be defined as "economic accreditation." While this concept will be discussed in detail later in this chapter, for the immediate purpose, it will be loosely defined by example:

- . Your city/county is a member of an insurance pool, super pool, or still has some form of traditional insurance coverage.
- . As a police administrator you have a responsibility to promulgate policies to effectively guide your personnel; your deadly force policy as an example.
- . Under the economic accreditation gauge, your policy, and hence your insurance coverage, regardless of formula, will be evaluated on a risk management basis. We all know that the Supreme Court in Tennessee v. Garner, 1984(4) effectively delineated the use of deadly force in fleeing felon type cases. But, your policy, if you have one, still has this proviso contained. Your city's/county's insurance is now up for renewal before the pool or insurer. They see your policy as a poor risk and inconsistent with social norms. Therefore they give your governmental unit a set of choices:

- . Modify your policy so it is consistent with contemporary case law and volume systems, or
- . your rates will be increased proportionally to the risk, or
- . they will not insure your agency.

Risk Reduction Alternatives

Corrective legislation and creative insurance alternatives are essentials in formulating a resolution to our civil litigative exposures. It is equally important to focus on potential root causes of litigation with an eye towards risk reduction. This section has been separated into three major discussion areas:

- . Critical Task Policy Formulation
- . Administrative Procedures
- . Personnel Management Techniques

Critical Task Policy Formulation. In developing this project, one of the most common criticisms of the general public sector and the law enforcement function was a lack of contemporary policies which accurately reflect the value systems of today and could also meet the test of judicial review.

As our study demonstrates, our most frequent exposures in law enforcement are those requiring the use of force, police vehicles, tactics, or arrest control techniques. Law enforcement must effectively respond to the leadership task by providing field personnel with qualitative guidelines.

These guidelines should not only reflect contemporary legal, moral, and social standards, but must also respond to the judicial test. To assist with this type of policy formulation, it is becoming essential that high risk policies be reviewed by legal staff having expertise in these areas. As we have found in our study, the smaller jurisdictions have a higher civil suit frequency rate. In many cases, their legal staff are very limited, and while highly qualified, they may not possess the expertise to review such policies.

Specialized attorney pools now developing in California are providing this type of expertise. The investment would appear to be wisely spent particularly for smaller entities which are subject to higher proportional risk levels.

The police function will continue to be a high risk function. Therefore, it is necessary for the industry to focus on policy development in critical task areas that incur the highest risk levels:

- . The use of deadly force, and the use of off-duty weaponry
- . The use of arrest control techniques and less than lethal force to include,
 - . Impact weaponry
 - . Chemical agents
 - . Electronic weaponry
- . The use of K-9 units
- . The use of police vehicles in pursuits

- . The use of police confrontational tactics in all forms
- . Inspectional or accountability techniques used to evaluate performance in critical task areas and policy execution

In conclusion, several recommendations are appropriate:

- . Carefully evaluate high risk policies in conjunction with contemporary norms and judicial review standards.
- . Have these policies reviewed by legal personnel that have the expertise to provide critical evaluation of policies prior to implementation.
- . Correct the policy vacuum by developing contemporary policies in the emerging trend areas as outlined in Chapter V.
- . Provide enhanced training to all levels of personnel who must implement these policies.

Administrative Procedures. Essential to the maintenance of institutional and individual integrity of a system, are its reporting, investigative, and inspectional activities.

The consistency and accuracy of police reports has been and will continue to be an on-going institutional training and inspectional problem; but in major cases that could have far reaching impacts, it becomes particularly important that accurate reporting be maintained. This is critical as the "civil neurosis" continues to develop in our society.

Coupled with the accurate reporting of critical incidents, comes the need for increased sophistication

in cases involving police personnel such as officer involved shooting, or vehicular accident cases. Because of this complexity, it is being widely recommended that a trifurcated investigative process should prevail to protect the interests of all parties involved in the incident or potentially could be involved at a later time. this trifurcated format would be as follows:

- . Criminal Investigation
- . Administrative or Internal Affairs Investigation
- . Civil Affairs Investigation

The criminal and administrative investigations are accepted as traditional functions at this time. Civil affairs investigation requires some explanation.

Civil affairs investigation is a third branch of investigating and reporting those facets of the case that have import on the potential civil case at a later time and that may or may not have impact on the normative criminal investigative process. Agencies using this process have reported significant improvement in their defense of such cases at protracted later trial dates of civil cases.

The last aspect of this discussion is the one law enforcement is frequently criticized--the inspectional process. In interviewing police administrators, attorneys, insurance representatives, and other parties directly related to the justice system, it was clear that this probably is one of our most important

risk reducing change agents we have at our disposal.

The inspection process ensures accountability. Both of these responsibilities start with the police officer on the street and his first-line supervisor--the Police Sergeant.

Accountability begins here and the courts are taking clear judicial notice of that fact. They are deciding with increasing frequency that many times, it is not totally the Chiefs, Captains, or Lieutenants, who are not taking measures against errant personnel--but the first-line supervisor who is observing it in some cases and acquiescing in their duties.

Proper policy formulation, inspection/accountability patterns and finally personnel management techniques can reduce some of the underlying causes which stimulate law enforcement litigation. These same antidotes can be applied equally to the general public enterprise.

Personnel Management Techniques. In conjunction with managerial tasks of inspection, comes that of accountability and potentially disciplinary action. Disciplinary procedures are the crux of present concern, specifically records management, due process procedures, and training needs:

- . Records Management--law enforcement basic supervisory schools have long stressed the need for documentation of personnel actions. This supervisory/management responsibility has taken

on an even greater emphasis as the need for stronger accountability grows and the consistent push for vicarious liability of these managers.

Inconsistencies in records management concepts and policies are as varied as the agencies involved; to such an extent that records of citizens complaints compiled by the Department of Justice are considered totally erroneous by many personnel assigned to manage the internal affairs function in our larger agencies. Refer to Appendix A which was an ancillary document developed for this project in an attempt to evaluate the number of suits versus assaults, complaints, and other measurable criteria of police activities.

Several agencies were also contacted during this inquiry to determine what type of tracking mechanism they or their staff had access to for evaluating how many suits, complaints, accidents, and other measurable disciplinary criteria an officer would have acquired. The answer invariably was none. Some could reflect on institutionalized personnel files, and complaint files, but no overall matrix could be drawn. An opposite position could be held that this diversity is a gift in disguise as it will prevent access to sensitive data by plaintiffs or defense counsels.

Contrary to that position, the situation may be forced upon us in time by a very sophisticated plaintiff's bar as was evidenced in a Southern California courtroom in late 1984 with the crude introduction of what has been expanded and termed a "Critical Performance Evaluation Matrix" in Appendix B. As one can see, this matrix measures a whole set of measurable behavior characteristics which if studied, will clearly form a pattern that can be used for evaluation and training or other remedial action. It could be kept manually or computerized.

This standard has been applied to departments, particularly in civil rights cases where an "open door" discovery concept prevails. An expanded organizational model is presented as Appendix C.

Due Process. With the move to more effective

inspectional and accountability roles, comes the likely increase in disciplinary actions. Since we are now experiencing a move toward enhanced due process rights, this trend can only be exacerbated by increased personnel actions. While a major portion of this can be addressed with increased training, it is also important to stress the policy relevance of the trend.

On a number of occasions it was made quite clear that:

- . We have a litigative trend strongly influenced by the Peace Officers' Bill of Rights that is seeking clear procedural guidelines in the due process doctrine.
- . These cases will be subjecting supervisors and managers to exposures under 42 U.S.C. 1983, and
- . In many cases, individual personnel practices are substantially behind the standards set by norms of the industry, the courts, and social expectations.

Unless increased sophistication and contemporary policy guidelines develop and survive, we can look forward to traumatic times in the management of personnel matters.

Training. California law enforcement has just cause to be proud of progressive and successful training programs. Training will continue to play a vital role in developing mechanisms to mitigate institutional causes of civil torts. Training has historically proven to be an effective change agent and can be expected to impact our experience with the civil justice system.

For many years limited training in civil issues has been conducted at the recruit level and later at some advanced officer courses. Only recently have short liability focused courses been available to supervisory and managerial personnel.

In reviewing training resource materials, and conducting limited interviews of sworn personnel, it is apparent that we may have developed a training void in courses structured to support changing this emerging issue. Considering the costs involved and the spiraling number of civil cases, it is appropriate that attention be directed to reviewing law enforcement training needs, and establishing a framework to implement appropriate training programs.

Preliminary needs assessment suggests various levels of training consistent with job assignments in these general law enforcement roles:

- . Executives/Managers
- . Supervisors
- . Training Cadres
- . Sworn Police Personnel
- . Custodial Services Personnel
- . Civilian Support Staff

Such training should be initiated in depth at the recruit level and continue through various stages of responsibility and retraining on a continuing basis to include:

- . Basic Recruit Academy
- . Advanced Officer and Technical Courses
- . Managerial Courses and Seminars

Civil case law and its impacts seem to change at a ratio proportional to criminal law; yet our mechanisms for broad institutional dissemination of this data to police personnel are quite limited. Cost effective, timely, and qualitative delivery systems are available to law enforcement. Several of these systems could include:

- . Interactive video, computerized, or technically enhanced delivery systems
- . Institutionalized training bulletin systems such as "The Law Enforcement Resource Book" or "The Peace Officers' Law Report."

Initial training efforts should be directed towards reduction of risks in our highest exposure areas:

- . General civil awareness training exposure to all job classifications consistent with levels of responsibilities. Such training should be designed with risk reduction or litigative mitigation as a primary goal.
- . Enhanced training in the areas of highest exposure such as:
 - . All types and levels of forceation
 - . Tactical operations
 - . Use of police vehicles
 - . Regionalized training centers designed to manage sophisticated training methodology

- . Development of training programs designed to sustain early mitigation of emerging trends discussed in Chapter V.

Effective implementation of such a training effort needs an appropriate administrative model.

- . A select administrative body such as P.O.S.T., directly, through contract or by delegation, would cause:
 - . Development and implementation of a training needs assessment of civil law training designed to mitigate present trends
 - . Establishment of a multi-disciplined training advisory committee, or committees, dedicated to design of training programs, and monitoring progress of program development and implementation.

FOOTNOTES

CHAPTER VI

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APPENDIX A

CRITICAL PERFORMANCE
MATRIX - CALIFORNIA
LAW ENFORCEMENT

1979 - 1984

CITIZEN COMPLAINTS
AGAINST CALIFORNIA
PEACE OFFICERS

1980 - 1984

APPENDIX A

CRITICAL PERFORMANCE
MATRIX - CALIFORNIA
LAW ENFORCEMENT

1979 - 1984

Calendar Year	F.B.I. Crime Index (1)	Arrests Reported (2)	California Population Base (3)	California Peace Officers (4)	Personnel Complaints Against California Peace Officers (5)	Assaults on California Peace Officers (6)	Homocides on California Peace Officers (7)	Justifiable Homocides by California Peace Officers (8)
1984	1658332	1723955	*Data Incomplete	53001	12875	7872	6	64
1983	1680721	1690544	25,174,426	52068	12008	7571	9	78
1982	1801262	1682281	24,697,000	51047	11569	7494	9	71
1981	1830288	1654022	24,220,000	49945	8686	8406	6	68
1980	1838417	1592827	23,771,017	48740	*Data Incomplete	8770	8	92
1979	1689152	1492508	23,255,000	48028	*Data Incomplete	8355	7	102
1974* Base Year	1427007	1488172						

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APPENDIX A

CITIZEN COMPLAINTS
AGAINST CALIFORNIA
PEACE OFFICERS

1981 to 1984

	<u>1981</u>		<u>1982</u>		<u>1983</u>		<u>1984</u>	
	<u>Report</u>	<u>Sustained</u>	<u>Report</u>	<u>Sustained</u>	<u>Report</u>	<u>Sustained</u>	<u>Report</u>	<u>Sustained</u>
Total	8686	1552	11569	2085	12008	2353	12875	2357
Non-Criminal	8081	1450	10126	1847	11321	2194	12137	2204
Criminal Felony	188	42	322	40	228	75	223	49
Criminal Misdemeanor	417	60	1121	198	459	84	515	104

Source:

State of California
Department of Justice
Bureau of Criminal Statistics &
Special Services

APPENDIX B

CONCEPTUAL
CRITICAL PERFORMANCE
&
EVALUATION MATRIX

APPENDIX B
 CONCEPTUAL
 CRITICAL PERFORMANCE
 EVALUATION MATRIX

Officers Name	
	Date of Assessment
	Date of Hire
	Present Rank
	Assignments
	Case Load
	No. of Arrests
	No. of 148 Arrests
	No. of 243 Arrests
	No. of Citations Issued
	No. of Field Contacts
	No. of Personnel Complaints
	No. of Personnel Actions
	No. of Civil Suits
	No. of Civil Rights Suits
	No. of Traffic Accidents
	No. of 1040 Motions
	No. of Commendations
	Incidents in Use of:
	° Deadly Force
	° Chem. Agents
	° Baton
	° P-9
	° Other
	Industrial Injury Incidents
	Sick Leave
	Court Appearance

APPENDIX C

CONCEPTUAL

City/County Police Agency
Critical Performance Matrix

APPENDIX C
CONCEPTUAL

City/County Police Agency
Critical Performance Matrix

City/County
Police Agency
Name

Total Population

Ethnicity
Composition

Average Age of
Population

Daily Business
Population

Sq. miles Policed

Road miles Policed

Average Daily
Traffic Count

Average per
Capita Income

No. of Sworn
Personnel

Average Level of
Experience

Average Age of
Sworn Personnel

No. of Civilian
Personnel

Average Level of
Experience

Average Age of
Civilian personnel

No. of Civil Suits

No. of Civil Rights
Suits

No. of Citizen
Complaints

No. of Complaints
Sustained

Total Case Load

Number of Field
Contacts

Number of Arrests

PART I
Crime Index

Homicide

Rape

Robbery

Aggr. Assault

Burglary

Grand Theft

Auto Theft

Arson

Total Traffic
Citations

Total DUI Arrests

Total Traffic
Accidents

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- B. Newspapers
- C. Case Law
- D. Interviews

A. Periodicals and Reports

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