state to protect its child domiciliary by imposition of duties under its law.

Elkind v. Byck is an opinion in need of clarification. Hopefully, that clarification will herald a new day in the protection of children.

VIII
TORTS

A. Government Immunity

1. *Duty to Update Construction*

Cabell v. State[1] and *Becker v. Johnston*.[2] The 1963 California Tort Claims Act[3] was enacted to deal comprehensively with the problem of governmental tort liability. Section 830.6 of the Act[4] provides immunity against tort claims arising from the dangerous condition of public property, provided the defendant entity can show that the injury resulted from a plan or design which was reasonably approved in advance of construction by a governmental agency exercising discretionary authority. In *Cabell* and *Becker*, the supreme court held that the immunity conferred by this provision, once established by a showing that the design was reasonable when adopted, is not undermined by proof that the property has been maintained by an agency having full knowledge that it has since subsequently become inadequate and hazardous.[5]

In *Cabell*, the plaintiff was injured when he accidentally thrust his hand through a glass door in the state college dormitory in which he was a paying resident. Noting that two similar accidents had recently occurred, and that the college had responded by merely replacing the broken glass with the same nonsafety variety, the plaintiff sued the state for damages, alleging that his injury was

1. 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).
2. 67 Cal. 2d 187, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).
3. CAL. GOV'T CODE §§ 810-966.6 (WEST 1966).
4. CAL. GOV'T CODE § 830.6 (West 1966): "PLAN OR DESIGN OF CONSTRUCTION OF, OR IMPROVEMENT TO, PUBLIC PROPERTY. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."
5. 67 Cal. 2d at 154, 430 P.2d at 37, 60 Cal. Rptr. at 479; 67 Cal. 2d at 172-3, 430 P.2d at 48-49, 60 Cal. Rptr. at 490-91.

caused by the defendant's negligent design of the door, and by its continued maintenance of the dangerous condition thereby created despite having had both notice of the condition and sufficient time to remedy it.

In *Becker*, the plaintiff was injured in a head-on automobile collision when an oncoming motorist did not see a Y intersection in a county highway, and crossed the centerline into the path of the plaintiff's vehicle. Becker sued the motorist, Mrs. Johnston, who in turn cross-complained against the county of Sacramento, relying, as had Cabell, upon the 1963 Act. In support of her claims against the county, the cross-complainant argued that while the design of the intersection might have been adequate when constructed by the state in 1929, its continued maintenance in its original condition since that time, despite the numerous accidents which had occurred there and its obvious inadequacy by modern standards, constituted actionable negligence under the statute.

The defendants in both cases argued that not only had the plaintiffs failed to prove the existence of a "dangerous condition," but also that section 830.6 of the Tort Claims Act provided a complete defense. The latter argument was twofold: First, that section 830.6 granted immunity with regard to injuries caused by a dangerous condition of public property constructed in accordance with a plan which was reasonable at the time of its adoption; and second, that the section should be interpreted to relieve a public entity of any continuing duty to maintain such property so as to insure its freedom from defects disclosed by subsequent experience.

The majority and dissenting opinions in both *Becker* and *Cabell* agreed that the evidence established the existence of a dangerous condition, the required statutory notice of the condition to the public entity,[6] and the reasonableness of the plan when originally approved. The court split, however, on whether section 830.6 allowed a government entity to permit the continued dangerous operation of such construction merely because there was a reasonable justification for the adoption of its plans. The majority held that the government had no absolute duty to maintain and operate public property in a safe condition.[7] The court reasoned that section 830.6 prevented judicial reevaluation of discretionary legislative decisions as to the manner in which public properties should be constructed and maintained.[8] Thus, the supreme court, in its first major interpretation[9]

6. CAL. GOV'T CODE § 835.2 (West 1966).

7. 67 Cal. 2d at 154-55, 430 P.2d at 37, 60 Cal. Rptr. at 479.

8. This was the position of the California Law Revision Commission in 4 CALIFORNIA

of the provisions of the 1963 Act covering government responsibility for dangerous conditions in public property, greatly limited the scope of potential liability.

Prior to the 1963 Act, injuries caused by dangerous or defective property conditions provided the largest single source of tort claims against the government.[10] Such liability was, however, imposed only upon cities, counties, and school districts.[11] Other public entities, unless engaged in a "proprietary" function, were immune from liability for injuries resulting from dangerous property conditions.[12] The 1963 Act ended this confusing situation by providing that all public entities are liable, but only to the extent provided by statute.[13]

The section 830.6 grant of immunity represents a marked change in the law.[14] The only legislative history on this section is the report of the California Law Revision Commission.[15] The Commission's comment states that there should be immunity where a government body reasonably exercises its authorized discretion in the planning and design of public construction and improvements. It further declares that the immunity established by section 830.6 should be similar to the immunity granted to public entities in New York by the judicial decision of *Weiss v. Fote*.[16]

As the forceful dissent of Justice Peters[17] makes clear, the *Weiss* case is not a definitive grant of immunity. There, the court held the state immune from liability for a dangerous public property condition, absent experience subsequent to the construction which evidenced any danger. The court carefully noted that the facts before it presented no question of continuing duty to review its plan in light of actual operation. The court did note, however, that in a prior decision it had imposed liability on the state for a violation of its continuing

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LAW REVISION COMM'N, *Recommendation Relating to Sovereign Immunity* 823 (1963). *See also* comment by A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 556 n.4 (Cal. Cont. Educ. Bar 1964).

9. The immunity granted by § 830.6 is an affirmative defense and, as such, is waivable. Therefore, the court was not required to consider the meaning of § 830.6 in Teall v. City of Cudahy, 60 Cal. 2d 431, 435, 386 P.2d 493, 496, 34 Cal. Rptr. 869, 872 (1963), where the defendant had not raised that defense by appropriate pleadings.

10. *See* VAN ALSTYNE, *supra* note 8, at 185.

11. Act of Oct. 1, 1949, ch. 81, §§ 53050-51, [1949] Cal. Stats. 284-85 (repealed 1963). *See, e.g.*, Acosta v. Los Angeles, 56 Cal. 2d 208, 363 P.2d 473, 14 Cal. Rptr. 433 (1961).

12. LAW REVISION COMM'N, *supra* note 8, at 819-20.

13. CAL. GOV'T CODE § 815 (West 1966).

14. *See, e.g.*, Pritchard v. Sully-Miller Contracting Co., 178 Cal. App. 2d 246, 2 Cal. Rptr. 830 (1960); Fackrell v. San Diego, 26 Cal. 2d 196, 157 P.2d 625 (1945).

15. LAW REVISION COMM'N, *supra* note 8, at 851.

16. 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

17. 67 Cal.2d at 155, 430 P.2d at 37, 60 Cal. Rptr. at 479.

duty to review its construction plan in light of actual operation.[18] In that case, evidence of changed physical conditions and of numerous accidents occurring after construction was sufficient to demonstrate a breach of the duty.

It is not clear whether the California Law Revision Commission intended to recommend the New York analogy only insofar as it granted immunity with respect to original defects or whether it intended also to follow New York in withholding immunity as to subsequent defects. In light of section 835.4(b) of the 1963 Act, which provides that an entity is not liable for injuries caused by a dangerous condition of its property if it proves that its action or failure to act after notice was "reasonable,"[19] it is doubtful that the Commission meant to grant absolute "maintenance immunity" to public entities.

By interpreting section 830.6 to extend immunity to a public entity when it continues to maintain a dangerous condition constructed under an originally reasonable plan, the court has immunized the government from many worthy injury claims. When a construction, although reasonable at its inception, has proved defective through experience, an entity should not be allowed to maintain it forever in that condition. Where numerous accidents occur at the same corner, remedial construction is needed. Generally, defects in highway construction, for example, do not necessitate rebuilding the entire highway. An additional signal, warning device, or traffic island will quite often suffice.[20]

Extending immunity to include negligent maintenance and

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18. The reference was to Eastman v. State, 303 N.Y. 691, 103 N.E.2d 56 (1951). Another case in point is Ward v. State, 45 Misc. 2d 385, 389, 256 N.Y.S.2d 1007, 1011 (Ct. Cl. 1964), where the court said, "This is not to say that . . . the State does not have the continuing obligation to restudy, to redesign and to continually search for better and safer highways and to make those already constructed better and safer when and where needed."

19. CAL. GOV'T CODE § 835.4 (West 1966) provides:

"(a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."

20. In *Becker* a $5,000 island was all that was necessary to reduce head-on collisions by 70 to 90 percent. 67 Cal. 2d at 170, 430 P.2d at 47, 60 Cal. Rptr. at 489.

operation of the property was unnecessary to prevent government liability from reaching a financially unfeasible level. Even if the court had limited the immunity provided in section 830.6 to "initial discretionary judgment," the extensive preconditions of government liability would assure that those entities would not be burdened with a rash of judgments to pay. These preconditions include proof of a dangerous condition[21] and fulfillment of the statutory notice requirements.[22] In addition, the Act immunizes the government entity from liability caused by minor or trivial risks,[23] certain weather effects on streets and highways,[24] and a number of other common occurrences.[25]

The court also noted several limitations on the immunity granted by section 830.6. The original immunity applies only to the original plan and normal maintenance, rather than to reconstruction or new construction.[26] Thus, where the entity rebuilds the structure, the showing of rcasonableness would relate to the time of the adoption of the new plan or design. Also, the immunity would not cover injuries where the construction did not conform to its plan[27] nor does it cover a situation where a warning sign is necessary to warn of a concealed trap.[28]

The amicus curiae suggested,[29] and the court implicitly realized,

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21. *E.g.*, Pfeifer v. San Joaquin, 67 Cal. 2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967) (decided in connection with *Becker* and *Cabell*); *see* Feingold v. Los Angeles, 254 Cal. App. 2d 622, 62 Cal. Rptr. 396 (1967).

22. *See* Strongman v. Kern County, 255 A.C.A. 345, 349, 62 Cal. Rptr. 908, 911 (1967).

23. CAL. GOV'T CODE § 830.2 (West 1966).

24. *Id.* § 831.

25. Among the other defenses available to the entity are:

First, immunity for failure to provide traffic control signals. *Compare* CAL. GOV'T CODE § 830.4 (West 1966). *with id.* § 830.8. Pfeifer v. San Joaquin, 67 Cal. 2d at 184, 430 P.2d 56, 60 Cal. Rptr. 498 (1967), holds that a dangerous condition must be established before § 830.8 is applicable. *Pfeifer* was followed on this point in Feingold v. Los Angeles, 254 Cal. App. 2d 622, 62 Cal. Rptr. 396 (1967). *But cf.* Callahan v. San Francisco, 249 Cal. App. 2d 696, 57 Cal. Rptr. 639 (1967).

Second, immunity for injuries sustained on unimproved public property. CAL. GOV'T CODE §§ 831.2, 831.4, 831.6 (West 1966).

Third, immunity for injuries due to conditions of reservoirs, irrigation districts, or state-owned canals, conduits, etc. CAL. GOV'T CODE § 831.8 (West 1966).

Fourth, immunity for injuries resulting from a dangerous condition where the entity had notice of such condition and *reasonably* acted or failed to act after weighing the costs involved, the probability and extent of injury, and the time and opportunity to act. CAL. GOV'T CODE § 835.4 (West 1966).

26. 67 Cal. 2d at 154-55, 430 P.2d at 37, 60 Cal. Rptr. at 479.

27. *Cf.* 67 Cal. 2d at 153-54, 430 P.2d at 36, 60 Cal. Rptr. at 478.

28. CAL. GOV'T CODE § 830.8 (West 1966); *see* Callahan v. San Francisco, 249 Cal. App. 2d 696, 704, 57 Cal. Rptr. 639, 645 (1967).

29. Brief for State Department of Public Works as Amicus Curiae at 14-17, Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967); Pfeifer v. San Joaquin, 67 Cal.

that the scope of governmental responsibility in public life is almost without limit, and that a governmental body must therefore be allowed to weigh the priorities and decide what must be done first. If judicial review of such essentially political decisions were allowed, the judge and jury would merely superimpose their values without accepting the entities' concomitant responsibility for other areas of public concern. This argument further urges that public budgets are insufficient to bring all public facilities up to modern standards.[30] A public entity should, therefore, be able to absolve itself of liability for creating and thereafter failing to remedy a dangerous condition by showing that to do so would have been too costly or impractical.

Nevertheless, even accepting this argument, the court did not have to go as far as it did in *Becker* and *Cabell*. The Law Revision Commission, in recommending that section 834.5 be enacted, noted that:

> Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot 'go out of the business' of governing.[31]

Section 834.5 gives an entity a defense from liability if, under the circumstances, its act or its failure to act is "reasonable." Therefore, rather than insulate the government from the reasonable costs of safely maintaining its facilities and passing those costs on to innocent victims, section 834.5 requires a weighing of the probability and gravity of the potential injury against the practicability and cost of protecting against the risk of such injury. The question of reasonableness under section 830.6 relates to the time of the plan's initial adoption, whereas under section 835.4, reasonableness relates to

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2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967); Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

30. In a letter from Haradon M. Dillon (attorney for plaintiff and appellant in *Cabell*) to the author, March 5, 1968 (on file with the *California Law Review*), Mr. Dillon stated:

"The state and particularly the Department of Public Works which is concerned with highways, complained loudly at this [imposition of a duty to operate and maintain] on the ground it might force them to reconstruct freeways or other highways which may have had a large number of accidents and that this would place an intolerable financial burden upon the state . . . .

"I believe this matter of public fiscal policy had a great deal to do with the decision. It was urged strongly by the Department of Public Works and Mr. Nellis wrote several letters to Chief Justice Traynor prior to the Supreme Court's taking the case informing him that the District Court of Appeals decision would place an intolerable financial burden upon the state and arguing the case first by letter and subsequently in the Amicus Curiae brief which he was permitted to file."

31. 4 CALIFORNIA LAW REVISION COMM'N, *supra* note 8, at 857.

the time the public entity received notice of the dangerous condition. In addition, while reasonableness under section 830.6 is a question of law for the judge,[32] under Section 835.4 it is a jury question.[33] Instead of extending 830.6 to cover *Cabell* and *Becker*, the court should have applied section 834.5 which would have covered both situations.[34]

Section 830.6 deserves further legislative and judicial scrutiny in light of the comprehensive policy arguments for limiting the scope of the state's immunity.[35]

2. *Liability for Acts of Independent Contractor*

Van Arsdale v. Hollinger.[1] In an action by a street improvement contractor's employee against the city of Los Angeles and a motorist for injuries inflicted when the employee was struck by the motorist's vehicle, the court expanded the liability of a public entity for the tortious conduct of its independent contractors.

At the time of the accident, the plaintiff was eradicating the line which separated two traffic lanes on a busy boulevard, a process

32. *See* VAN ALSTYNE, *supra* note 8, at 556.

33. The application of the standard of reasonableness has traditionally been reserved for the jury. For a discussion of the allocation of decisionmaking between judge and jury, see Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

34. "In many cases, this defense [835.4] may raise issues closely similar to those that underlie the statutory immunity for a dangerous condition consisting of property improved in accordance with an approved plan or design." VAN ALSTYNE, *supra* note 8, at 213.

Van Alstyne, in discussing § 835.4, also mentions, however, that if a plan or design reasonably had been approved "it might be within the immunity provided by § 830.6 and therefore not actionable as a matter of law." *Id.* at 214. This statement can be interpreted to refer to a situation of initial discretionary judgment immunity and not as a reference to maintenance and operation immunity.

Further ambiguities are apparent in the court's reliance on Van Alstyne's comment on § 830.6: "The reasonableness of adoption or approval of the design, plan, or standards is measured as of the time the adoption or approval occurred. A plan or design now judged to have been reasonable when adopted is not actionable even though its defective nature is considered wholly unreasonable under present circumstances and conditions." *Id.* at 556. *Compare* the majority's reliance on this interpretation in Cabell v. State, 67 Cal. 2d at 153-55, 430 P.2d at 36-37, 60 Cal. Rptr. at 478-79 (1967), *with* Justice Peters' dissent in *Cabell*, *id.* at 161-63, 430 P.2d at 42-43, 60 Cal. Rptr. at 484-85.

35. Another state bas specifically recognized the problem presented by such a statute and has enacted appropriate legislation. ILL. ANN. STAT. ch. 85, § 3-103 (Smith-Hurd 1966). This section, enacted after § 830.6, contains a plan or design immunity similar to § 830.6 but adds an additional sentence: "The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that is not reasonably safe."

It should be noted that two pro tem judges were sitting in the four man majority in *Becker* and *Cabell*. When this question comes before the court again, the cbanged court could well decide the question differently.

1. 68 A.C. 249, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

which entailed walking slowly down the line in a bent over position with his back toward the approaching traffic. The precautions normally associated with such work had not been taken: No flagmen had been provided to alert oncoming motorists to the danger, the plaintiff was not wearing the usual bright red or orange jacket, and he had proceeded some distance beyond the barriers which had been erected to indicate the closure of one of the two lanes. In failing to insure that such safety measures were taken, the contractor had violated his contract with the city which required him to furnish certain specified safety devices to protect both his workmen and the public, to include barriers, warning lights and signs, and red-coated flagmen. He was further required under the contract "to provide such further safeguards as would be employed by a diligent and prudent contractor."[2]

In dealing with the question of the city's liability for an injury incurred under such circumstances, the court delivered an opinion which is significant in three respects: First, it adopted as authoritative the Law Revision Commission's interpretive comment which viewed Government Code section 815.4[3] as retaining the rule that both public entities and private persons may at times be liable for the acts of their independent contractors.[4] Thus, unlike other provisions of the Government Code,[5] section 815.4 does not provide a public entity with any special dispensation in the way of governmental immunity.[6] Second, the court held that the city, as the employer of an independent contractor, could not immunize itself against liability for its acts or omissions by contractually shifting the burden of taking

2. *Id.* at 252, 437 P.2d at 510, 66 Cal. Rptr. at 22.

3. CAL. GOV'T CODE § 815.4 (West 1966) states: "A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity."

4. 68 A.C. at 257, 437 P.2d at 513, 66 Cal. Rptr. at 25. *See* 4 CALIFORNIA LAW REVISION COMM'N, *Recommendation Relating to Sovereign Immunity* 839 (1963): "The California courts have held that public entities—and private persons, too—may at times be liable for the acts of their independent contractors. Snyder v. Southern Cal. Edison Co., 44 Cal. 2d 793, 285 P.2d 912 (1955) (discussing general rule); Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961). This section retains that liability. Under the terms of this section, though, a public entity cannot be held liable for an independent contractor's aet if the entity would have been immune had the act been that of a public employee."

5. *See, e.g.*, CAL. GOV'T CODE § 830.6 (West 1966).

6. Section 815.4 makes a single exception from liability for acts or omissions done by independent contractors that would not havc made the public entity liable if the act or omission had been committed by an employee of the entity.

special precautions when there was a peculiar risk of physical harm to others.[7] Third, the court held that the contractor's employees were included in the class protected against the peculiar risk of physical harm,[8] and therefore have a potential cause of action against the public entity.

The court thus reaffirmed California's acceptance of those sections of the *Restatement (Second) of Torts* which define the liability of an employer for the acts of his independent contractor.[9] Although the California courts have readily followed these sections in the past, they have differed in their interpretations.[10] A particularly troublesome problem has been the relationship between sections 413 and 416,[11] the very point upon which the trial court in *Van Arsdale* was held to have erred. These sections govern the right of the employer to shift to the independent contractor the burden of taking special precautions in connection with work likely to create a "peculiar"[12] unreasonable risk of physical harm to others. Section 413 states that one who employs an independent contractor in such a situation will be liable for any resulting physical harm unless he either contractually shifts the duty to take adequate precautions, or takes them himself. Section 416 provides that if physical harm results

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7. 68 A.C. at 259, 437 P.2d at 514, 66 Cal. Rptr. at 26.

8. *Id.* at 258, 437 P.2d at 514, 66 Cal. Rptr. at 26.

9. *See* RESTATEMENT (SECOND) OF TORTS §§ 409-29 (1965).

10. *See* authorities cited note 14 *infra*.

11. RESTATEMENT (SECOND) OF TORTS § 413 (1965) provides: One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer (a) fails to provide in the contract that the contractor shall take such precautions, or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions. RESTATEMENT (SECOND) OF TORTS § 416 (1965) provides: One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

12. The word "peculiar" is found in the wording of both section 413 and 416 of the RESTATEMENT OF TORTS. See note 11 *supra*. Comment (b) to section 413 states that the section is concerned with special, unreasonable, and recognizable risks which arise because of the nature of the work itself.

"Peculiar does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself." *Id.* Thus, these sections are not "concerned with the taking of routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work. Such precautions are the responsibility of the contractor . . . ." *Id.*

because adequate precautions were not taken, the employer is liable to the injured third party even if he has contractually shifted to the contractor the duty to take such precautions.

It is not difficult to see why courts have had difficulty reconciling these two provisions; they are wholly inconsistent on their face. One writer has suggested that this inconsistency is explained by comment (b) to section 416, which notes that although an employer cannot relieve himself of liability by contractually shifting the burden, his contract would nevertheless give him indemnity against the contractor for such liability.[13] If this interpretation is correct, however, section 413 would appear to be superfluous. Another possible explanation is that liability under section 413 rests upon the personal negligence of the employer, while section 416 is a rule of vicarious liability. This interpretation suffers the same weakness as the last, since it fails to justify the existence of section 413(a), allowing an employer to contractually avoid personal liability.

The *Van Arsdale* court shed little more light on this apparent contradiction than had its predecessors.[14] The court merely stated that the trial court's jury instruction based upon section 413 was erroneous, and held that: "Under section 416 . . . the city is liable for the failure of the independent contractor to take special precautions even though it has provided in its contract for the taking of the precautions."[15] The meaning and purpose of section 413(a) remains an enigma.[16]

The decision was considerably more helpful in its resolution of a dispute among the courts[17] as to whether section 416, in referring to

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13. Brooks, *Tort Liability of Owners and General Contractors for on the Job Injuries to Workmen*, 13 U.C.L.A. L. REV. 99, 114 n.54 (1965).

14. On the interrelationship of §§ 413 and 416 of the RESTATEMENT (SECOND) OF TORTS see McDonald v. Oakland, 233 Cal. App. 2d 672, 675, 43 Cal. Rptr. 799, 802 (1965): "A reading of the two sections and their explanatory comments leaves no doubt that they were intended to apply in the alternative and that, pursuant to their terms, one who employs an independent contractor under an agreement requiring the latter to take special precautions to avoid an unreasonable risk of bodily harm to others does not thereby relieve himself of liability in the event the contractor fails to take such precautions."

See also Courtell v. McEachen, 51 Cal. 2d 448, 557, 334 P.2d 870, 874 (1959): "They [sections 413 and 416] impose liability upon the employer for an injury caused by the absence of such precautions if he has failed to take steps to assure observance of the precautions, either by a provision in the contract or in some other reasonable manner, [§ 413] or if the independent contractor has not exercised reasonable care to take such precautions [§ 416]."

15. 68 A.C. at 260, 437 P.2d at 515, 66 Cal. Rptr. at 27.

16. One is also puzzled by the description of the nature of the danger to be guarded against. In section 413 it is described as a "peculiar unreasonable risk," and in section 416 as a "peculiar risk." If the authors of the two provisions intended to incorporate a difference in meaning through the insertion of the adjective "unreasonable" in the former section, that distinction has so far escaped detection.

17. The case of Bedford v. Bechtel Corp., 172 Cal. App. 2d 401, 414, 342 P.2d 495, 503

physical harm caused to "others" by a contractor's failure to take adequate precautions, provides a cause of action for one of the contractor's own employees. Observing that it had already held that employees of an independent contractor come within the word "others" as used in the companion sections 413, 414, and 428, the court held that, "There is no reason to hold otherwise with respect to section 416."[18]

While the *Van Arsdale* case does not change the rule that an employer is not liable for the "collateral" or "casual" negligence of his independent contractors or servants,[19] it is clear that by adopting the Law Revision Commission's comment to section 815.4 of the Government Code, the court has subjected public entities to the expanding exceptions to the "general rule" of nonliability of an employer for the torts of his independent contractor.

B. Automobile Guests

Williams v. Carr.[1] The California Vehicle Code provides that an individual who is injured in an automobile accident while riding as a guest passenger can recover damages from his host driver only if he can prove that his injuries resulted from the driver's willful misconduct or intoxication.[2] Ordinary negligence will not sustain a recovery. In *Williams*, the court held that contributory negligence is

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(1959) stated that the word "other" in section 416 did not include the employee of an independent contractor. In dicta the supreme court disapproved that interpretation in Wollen v. Aerojet General Corp., 57 Cal. 2d 407, 410-11, 369 P.2d 708, 711, 20 Cal. Rptr. 12, 15 (1962), stating that the *Bedford* court had failed to consider Austin v. Riverside Portland Cement Co., 44 Cal. 2d 225, 282 P.2d 69 (1955) and Snyder v. Southern Cal. Edison Co., 44 Cal. 2d 793, 285 P.2d 912 (1955). However, these cases neither specifically discuss section 416 nor do they attempt to explain the potential breadth of the word "others" on the liability imposed by sections 409-29.

In McDonald v. City of Oakland, 233 Cal. App. 2d 672, 43 Cal. Rptr. 799 (1965), the city defendant did not raise the question of the meaning of the word "other" on appeal, but instead unsuccessfully argued for the applicability of section 413. Since the city did not raise the interpretation issue in *McDonald* and lost on their other arguments, the court had no alternative but to apply section 416.

18. 68 A.C. at 258, 437 P.2d at 514, 66 Cal. Rptr. at 26.

19. "Collateral" or "casual" negligence is negligence in performing acts that are not intimately connected with the work itself—acts not necessarily incidental but only accidentally connected with the work. The "collateral" or "casual" negligence doctrine holds "that one who hires an independent contractor and reserves only a general supervisory right to control the work so as to insure its completion in accordance with the contract does not thereby render himself liable for the contractor's negligence in performing the details of the work." McDonald v. City of Oakland, 233 Cal. App. 2d 672, 677, 43 Cal. Rptr. 799, 803 (1965).

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1. 68 A.C. 603, 440 P.2d 505, 68 Cal. Rptr. 305 (1968).

2. CAL. VEHICLE CODE § 17158 (West Supp. 1967).

In *Davis v. Nelson*,[9] for example, the plaintiff and the defendant jointly purchased two six packs of beer to drink during a trip in the defendant's car. The plaintiff drank two cans and then immediately fell asleep. The defendant, however, continued to drink, and ultimately allowed the car to skid off the road and strike a tree, seriously injuring the plaintiff. In affirming a judgment for the defendant against the plaintiff's contention that the trial court should not have instructed on contributory negligence, the court of appeal held that the jury could have inferred that the plaintiff's act of paying for some of the beer was "an inducing cause" of the defendant's misconduct.

Other cases,[10] while recognizing that contributory negligence may be a defense in automobile guest passenger litigation, had apparently restricted its availability by departing from the generally accepted standard[11] of contributory negligence. In *Enos v. Montoya*,[12] for example, the plaintiff had been injured when the defendant, in whose car she had fallen asleep while returning from a party at which both had been drinking beer, lost control of the vehicle and allowed it to plunge over an embankment. The trial court refused to instruct on contributory negligence. In upholding the decision below, the court of appeal stated that there was no evidence that the plaintiff knew or should have known that the defendant was incapable of driving carefully.[13]

The *Williams* court unequivocally rejected the introduction of negligence concepts in automobile guest litigation. Stating that willful misconduct differs from negligence not only in degree and in kind, but also in the social condemnation attached to it, the court declared that "a serious wrongdoer should not escape liability because of the less serious or even perhaps trivial misstep of his victim."[14] Thus, the court held that once the plaintiff has established that his injuries were caused by the defendant's willful misconduct or intoxication, simple contributory negligence on the part of the former will not defeat his recovery.

The court expressly disapproved cases such as *Davis*, which based the denial of the plaintiff's recovery on his participation in the

9. 221 Cal. App. 2d 62, 34 Cal. Rptr. 201 (1963).

10. *E.g.*, Lindemann v. San Joaquin Cotton Oil Co., 5 Cal. 2d 480, 55 P.2d 870 (1936); Enos v. Montoya, 158 Cal. App. 2d 394, 322 P.2d 472 (1958).

11. See text accompanying note 8 *supra*.

12. 158 Cal. App. 2d 394, 322 P.2d 472 (1958).

13. The court also stated that evidence that the plaintiff had so participated in the drinking activities as to be in equal fault with the defendant would have warranted a contributory negligence instruction. 158 Cal. App. 2d at 401, 322 P.2d at 476.

14. 68 A.C. at 607, 440 P.2d at 509, 68 Cal. Rptr. at 309.

not a defense in such a suit, and that the contributory misconduct of the plaintiff will defeat his recovery only if it reflects a "willful or reckless disregard of his own safety."[3]

The plaintiff, a guest in the defendant's automobile, was injured when the defendant fell asleep at the wheel and the car left the road, colliding with a pole. Prior to the collision both parties had been drinking together. The defendant had consumed a considerable amount of beer, and he admitted that beer usually made him sleepy. Furthermore, although he appeared to walk and drive normally, he had been awake for 22 hours preceding the accident. The plaintiff alleged that his injuries had been caused by the defendant's willful misconduct and intoxication; the defendant claimed that the plaintiff had been contributorily negligent. The trial court instructed the jury that contributory negligence was a complete defense. The jury returned a verdict for the defendant, and the court entered judgment thereon. Holding that it was error to instruct on contributory negligence, the supreme court reversed.[4]

As a general rule, contributory negligence is not a defense to willful misconduct.[5] A substantial number of California automobile guest passenger cases, however, have characterized conduct which will defeat the plaintiff's recovery as contributory negligence.[6] As to the exact nature of the guest passenger's conduct which will bar his recovery, however, these cases are not in accord.

Most of the cases have held that while contributory negligence is normally not a defense in automobile guest litigation, it will bar the guest's recovery where his "conduct is such that it is a part of, or an inducing cause of, the host's willful misconduct."[7] Although this language suggests that the courts had narrowly restricted the availability of the defense of contributory negligence—the failure to use reasonable care to protect one's own safety[8]—an examination of the reported cases reveals that such was not the case. The courts had so diluted the "inducing cause" requirement that the plaintiff's slightest participation in the defendant's misconduct seemed to satisfy it.

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3. 68 A.C. at 612, 440 P.2d at 512, 68 Cal. Rptr. at 312.

4. Since the jury's general verdict did not reveal whether the plaintiff's recovery was denied because he was contributorily negligent or because the defendant was not guilty of either willful misconduct or intoxication, a reversal was required.

5. *See, e.g.*, Cawog v. Rothbaum, 165 Cal. App. 2d 577, 331 P.2d 1063 (1958); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 436 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 503 (1965).

6. *See* authorities cited notes 7, 10 *infra*.

7. *E.g.*, Davis v. Nelson, 221 Cal. App. 2d 62, 66, 34 Cal. Rptr. 201, 203 (1963); Bradbeer v. Scott, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458 (1961); Schneider v. Brecht, 6 Cal. App. 2d 379, 44 P.2d 662 (1935).

8. PROSSER, *supra* note 5, at 429.

defendant's misconduct. However, the court did approve the rule enunciated in *Enos*: Where the plaintiff, having a reasonable opportunity to withdraw, remained in the car despite the fact that he knew or should have known that the defendant could not or would not drive carefully, his recovery will be defeated. The court stated that under such circumstances the plaintiff is not merely guilty of contributory negligence, as *Enos* suggests, but rather is guilty of contributory willful misconduct—conduct which evidences a wanton and reckless disregard for one's own safety.[15]

In making contributory negligence unavailable to defendants in automobile guest litigation, *Williams* brings California into line with the great majority of other jurisdictions.[16] Contributory negligence has often been criticized as harsh since the plaintiff's slightest misconduct can completely bar his recovery.[17] It is particularly difficult to justify in automobile guest cases since it can deny recovery to a plaintiff who was only slightly at fault even though the defendant's misconduct was more serious than mere negligence.

C. Street Vendor's Duty

Schwartz v. Helms Bakery Limited.[1] In *Schwartz*, the supreme court faced the question of the duty of care owed by a street vendor to a juvenile customer. Reversing a judgment entered for the defendant on his motion for a nonsuit, the court found that the vendor's conduct established two relationships, each of which created a duty toward the child at common law: First, one who voluntarily undertakes a course of conduct affecting another's interest must exercise reasonable care as to the latter's safety; and second, one who invites another to do business with him must exercise reasonable care to prevent injury to the invitee on "the premises."[2]

In *Schwartz*, the defendant street vendor was selling bakery goods from a truck. The plaintiff, age four, approached the vehicle and asked the defendant if he would wait for him while he went home

15. To the extent that the plaintiff has knowledge of the danger, appreciates its magnitude, and voluntarily continues in his course conduct, he has assumed the risk of the defendant's willful misconduct. PROSSER, *supra* note 5, at 459-60. Assumption of risk is a defense to willful misconduct. RESTATEMENT (SECOND) OF TORTS § 503 (1965).

16. *See* F. HARPER & F. JAMES, THE LAW OF TORTS 1214-15 (1956).

17. *See* PROSSER, *supra* note 5, at 428.

1. 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).

2. Other issues in the case involved proximate cause and the *degree* of care required where one deals with young children. Since these issues involve neither novel legal principles nor difficult factual questions, they will not be discussed in this Note.

for money.[3] The vendor agreed to wait at a point further up the street, approximately opposite the plaintiff's house. He made two sales in the vicinity of the plaintiff's home, and, no longer expecting the child to return, continued up the street to make a third sale. During the course of this third sale, the vendor heard the plaintiff shout, "Hey, wait!" Before he could warn the child not to run across the street, the plaintiff darted from behind a parked car and was struck by an approaching vehicle.[4]

In neither California nor other jurisdictions have the courts had serious difficulty establishing a duty of care between a street vendor and the young children who purchase his wares. Vendors have been held responsible for the safety of such customers in three different situations. The most frequent occasion arises where the defendant-vendor violates a parking or similar regulatory ordinance.[5] Liability is imposed when the violation is the proximate cause of the accident and the child injured is within the class of persons intended to be protected by the statute.[6] Responsibility is also found where the vendor's parked truck obscured the vision of the driver who hit the child.[7] This usually occurs when the child has completed his purchase and is recrossing the street to return home.[8] The third situation is where the vendor, knowing that young children are playing around his truck, hits the child himself.[9]

Acknowledging that the California courts had not previously

3. The court noted that the defendant saw the child almost struck by a passing vehicle as he crossed the street to make this request. This fact did not help to establish the existence of a duty between the plaintiff and the defendant as a matter of law; it was relevant, however, in the jury's determination of the degree of care required of the defendant when dealing not only with a normal four-year-old but with one who had actually displayed a "heedlessness of the hazards of traffic." 67 Cal. 2d at 243, 430 P.2d at 75-76, 60 Cal. Rptr. at 517-18.

4. Since the plaintiff filed a dismissal with prejudice as to the driver of this car, the question of her liability was not before the court. 67 Cal. 2d at 235 n.1, 430 P.2d at 70 n.1, 60 Cal. Rptr. at 512 n.1.

5. *See, e.g.*, Vought v. Jones, 205 Va. 719, 139 S.E.2d 810 (1965) (it is for the jury to decide whether defendant's parked truck created a dangerous condition within the meaning of the statute); Kendrick v. Miss Georgia Dairies, Inc., 109 Ga. App. 187, 135 S.E.2d 508 (1964), *following* Landers v. French's Ice Cream Co., 98 Ga. App. 317, 106 S.E.2d 325 (1958).

6. For a general discussion of the importance of a statute in prescribing the standard of conduct required of a reasonable man, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 35 (3d ed. 1964) [hereinafter cited as PROSSER].

7. Jacobs v. Draper, 274 Minn. 110, 142 N.W.2d 628 (1966); Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965); McKay v. Hedger, 139 Cal. App. 266, 34 P.2d 221 (1934).

8. However, in Jacobs v. Draper, 274 Minn. 110, 142 N.W.2d 628 (1966), the plaintiff was attracted to the truck along with twenty to thirty other children and adults. The court noted that there was nothing in the record indicating that defendant was aware of plaintiff's presence, but nevertheless imposed liability.

9. Hilyar v. Union Ice Co., 45 Cal. 2d 30, 286 P.2d 21 (1955); Conroy v. Perez, 64 Cal. App. 2d 217, 148 P.2d 680 (1944).

faced the precise issue posed by *Schwartz*, the supreme court analogized the case to three recent decisions in other jurisdictions where courts imposed upon street vendors "a high duty of care for the safety of children purchasing their wares."[10] These three cases, however, fall into two of three categories previously described: Two involved situations where the vendor's vehicle blocked the view of the oncoming motorist,[11] and the third involved a violation of a statute.[12] In *Schwartz*, no statute was violated, the vendor's vehicle did not block the oncoming driver's view of the roadway, and the child was struck as he crossed the street to make a purchase—not as he returned home after the purchase. This latter distinction is crucial, because it raises the question of when an invitor-invitee relationship is formed.

It would not seem unreasonable to impose a duty upon a street vendor to see that a child who has made a purchase returns safely across the street.[13] However, to say that a street vendor bears such a responsibility toward any child who may approach his vehicle from any direction is to cast the street vendor in the role of a traveling nursemaid.[14] The imposition of such a duty, furthermore, could well make street-vending economically unfeasible.[15]

The supreme court was able to avoid these troublesome problems by focusing on traditional tort law doctrines and finding that, in this particular case, the defendant's actions amounted to a voluntary

10. 67 Cal. 2d at 236, 430 P.2d at 71, 60 Cal. Rptr. at 513.

11. Jacobs v. Draper, 274 Minn. 110, 142 N.W.2d 628 (1966); Mackey v. Spradlin, 397 S.W.2d 33 (Ky. 1965).

12. Landers v. French's Ice Cream Co., 98 Ga. App. 317, 106 S.E.2d 325 (1958).

13. *But see* Sidders v. Mobile Softee, Inc., 19 Ohio Op. 2d 446, 184 N.E.2d. 115 (1961) (per curiam).

14. Sidders v. Mobile Softee, Inc., 19 Ohio Op. 2d 446, 448, 184 N.E.2d 115, 117 (1961) (per curiam): The vendor "is not an insurer of the safety of its patrons."

15. *See* Mead v. Parker, 221 F. Supp. 601 (E.D. Tenn. 1963), *aff'd*, 340 F.2d 157 (6th Cir. 1965). *Mead* involved a situation analogous to *Schwartz*. The plaintiff, age five, was hit by an oncoming vehicle as he started to cross the street to reach defendant's truck. The district court, after holding that plaintiff was not the intended beneficiary of the breached parking ordinance decided in favor of the defendant on two grounds. First, it stated that the parents of a child too young to understand and avoid ordinary dangers have a duty to keep children away from such vehicles. This defense is, of course, still available to the *Schwartz* defendant now that the plaintiff has established the existence of a duty of reasonable care.

Second, the *Mead* court held that "[t]he owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction." Peters v. Bowman, 115 Cal. 345, 356, 47 P. 598, 599 (1897). The court further noted that "it would have been extremely difficult for the defendants to have prevented any obvious danger to youthful pruchasers of its merchandise without totally destroying the usefulness of the vending truck . . . the attractive presence of the vending truck at the time and place of this accident merely created the occasion which afforded opportunity for another event to produce the minor plaintiff's injuries . . . ." *Id.* at 603.

assumption of the duty.[16] The court held that by agreeing to meet the plaintiff across the street from his house, the defendant had entered into a legal relationship which required him to exercise due care for the child's safety.[17] As a further basis of liability, the court also held that, "A second and concomitant legal relationship arose . . . when the driver invited the child to bccome a customer of his business."[18] In so doing, the defendant undertook the well-established duty of a proprietor to exercise reasonable care for the welfare of his business invitees.[19] By thus characterizing the relationship in *Schwartz* as one recognized at common law, the court was able to avoid creating a new duty.[20]

In grounding the defendant's duty on these previously recognized relationships, however, the court left two significant areas of uncertainty in the law. First, the court said that it was not deciding whether a street vendor's presence with his tinkling bells and flashing lights constituted somcthing similar to an "attractive nuisance" in regard to young children.[21] Second, although the court imposed responsibility on the driver because of his invitation to the child to become a customer, it did not specify precisely what conduct constituted that invitation. Apparently the court viewed the vendor's agreement to meet the plaintiff down the street as such an invitation. It can reasonably bc argued, however, that the mere presence of a street vendor constitutes an invitation to anyone within sight or

16. 67 Cal. 2d at 238-39, 430 P.2d at 72, 60 Cal. Rptr. at 514. *See generally* PROSSER, *supra* note 6, § 54, at 339-43; RESTATEMENT (SECOND) OF TORTS §§ 324, 324A (1965).

17. 67 Cal. 2d at 235, 430 P.2d at 70, 60 Cal. Rptr. at 512.

18. *Id.* at 236, 430 P.2d at 70, 60 Cal. Rptr. at 512.

19. The court held that the public streets and sidewalks were included as part of the business premises because they had become an integral part of the vendor's business. By applying the expanded interpretation of "business premises" to street vendors, the court used a principle formally applicable to owners and lessors of real property to include mere transient business owners as well.

The cases that have previously extended the concept of business premises are factually distinguishable from *Schwartz*. Those cases involved owners or lessees of real property who by virtue of their permanent location had derived continuing benefit from a small, fixed portion of adjoining property. *See, e.g.*, Johnston v. De La Guerra Prop., Inc., 28 Cal. 2d 394, 170 P.2d 5 (1946). Legally, however, the rationales of such cases would apply to a street vendor: This is a "hazard which resulted from activities carried on in the course of defendants' commercial enterprise." Kopfinger v. Grand Cent. Pub. Mkt., 60 Cal. 2d 852, 858, 389 P.2d 529, 533, 37 Cal. Rptr. 65, 69 (1964).

20. The court specifically stated that it was creating no new duty in *Schwartz*, but was rather merely reeognizing the common law duty arising from the relationship created by the circumstances in the case. 67 Cal. 2d at 239 n.4, 430 P.2d at 72 n.4, 60 Cal. Rptr. at 514 n.4.

21. *Id.* at 236 n.2, 430 P.2d at 70-71 n.2, 60 Cal. Rptr. at 512-13 n.2. The court recognized that the attractive nuisance doctrine is generally applied only to trespassers, but noted that the policies and duties supporting that doctrine were similar to the principles utilized

hearing to become a customer.[22] This would logically create a duty of care toward every child attracted to the vehicle, notwithstanding the absence of verbal encouragement.

Perhaps even more disquieting is the court's failure to set limits as to what might be the maximum extent of a street vendor's "business premises." While it is generally recognized that the "area of invitation will . . . vary with the circumstances of the case,"[23] the potential boundlessness of this defendant's business premises would seem to demand the establishment of outer limits. Apparently recognizing this need, the court suggested that a street vendor's liability extends only to injuries incurred in "the immediate vicinity of his truck," and due to a dangerous condition, or unreasonable risk of harm, "within the invitor's control."[24]

Unfortunately, this formulation adds very little to the precision of the court's holding. If the injury suffered by the plaintiff in *Schwartz* resulted from a condition or risk "within the invitor's control," just where does one draw the line? Is a vendor liable for injuries incurred by children who, without money, are attracted to his truck by its mere presence? Is he liable for injuries to a small child who is pushed into traffic by larger children crowding around the truck? Is the vendor liable for injuries to the driver of an approaching vehicle which is forced off the road trying to avoid children crossing the street to make a purchase? Is the vendor liable in a situation where, as a reasonable man, he should have stopped to serve a child, but instead proceeded up the street to make sales at a more central location where as a result the child was injured while chasing the truck?

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in *Schwartz* to impose a duty of reasonable care when one undertakes to direct the actions of another or where one invites a child to become a customer of his business.

Another case has noted that the danger created by any street vendor "is enhanced by the sense of haste that is purposely aroused in the children of a neighborhood by the tinkling of bells and flashing of lights heralding the imminent arrival of an attraction that will stay but a moment and be gone unless they come at once." Mackey v. Spradlin, 397 S.W.2d 33, 37 (Ky. 1965). *But see* Mead v. Parker, 340 F.2d 157, 160 (6th Cir. 1965), holding under facts similar to *Schwartz* that an ice cream vending truck was not an attractive nuisance as a matter of law.

22. Under both the "economic benefit theory" of invitee duty and the majority view of an "invitation theory" a minor child with money who is attracted to defendant's vehicle will qualify as an invitee. Under the latter theory, which reasons that one who opens his premises to the public impliedly assures that reasonable care will be exercised to make the premises safe, a child without money who is attracted to the vendor's vehicle would qualify as a business invitee. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 332, 343 (1965); Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942).

23. PROSSER, *supra* note 6, § 61, at 401.

24. 67 Cal. 2d at 243 n.10, 430 P.2d at 75 n.10, 60 Cal. Rptr. at 517 n.10. The court also dismissed the possibility of imposing liability without fault. *Id.*

The court's extension of the meaning of "business premises"[25] has subtle ramifications. For example, is the newspaper boy at the football game who stops a fan in the street to make a sale responsible for his customer's injuries if he is hit by a car?

Schwartz dealt solely with the question of whether there was any duty owed by the street vendor to a child. After establishing the existence of that duty in *Schwartz*, the supreme court examined its nature in *Menchaca v. Helms Bakeries, Incorporated*.[26]

In the latter case, the defendant was selling bakery goods, and, as he stopped to make a sale, he blew his whistle to attract children. A number of children approached the truck, including the 22-month-old victim. Defendant completed his sale, restarted his engine, and moved forward, driving over and killing the small child. The *Menchaca* court held that the defendant's duty toward the child included the obligation to equip the vehicle for safe operation.[27]

The vendor planned and intended to attract children to purchase bakery goods. He knew, furthermore, that the truck was so constructed that a substantial blind spot existed in front of the truck. The court held that under these circumstances the truck could be found to be negligently and dangerously equipped, because it was not equipped with a mirror that revealed the entire front portion of the bumper area.[28] The court further noted that the jury should have been given an instruction to the effect that since the structure and equipment of the truck precluded a view of the front of the bumper, it was "reasonably necessary" to sound the horn before moving the truck.[29]

The court thus concluded that a vendor catering to children has a special duty to equip his vehicle with safety devices adequate to eliminate dangerous conditions resulting from the nature of his clientele and to include safety features not required by statute but necessary to eliminate any dangerous conditions involved in operating the vehicle.

Schwartz and *Menchaca* not only suggest the problem of what other transient entrepreneurs might qualify as having an invitor-invitee relationship, with its concomitant duties, but raise the possibility that the expanding degree of care owed by a street vendor to a child-invitee might undermine the economic feasibility of such operations. In future cases the court should make explicit the requisite balancing of the

25. See note 19 *supra*.
26. 68 A.C. 550, 439 P.2d 903, 67 Cal. Rptr. 775 (1968).
27. 68 A.C. at 556, 439 P.2d at 906, 67 Cal. Rptr. at 778.
28. *Id.* at 556, 439 P.2d at 906-07, 67 Cal. Rptr. at 778-79.
29. *Id.* at 557-58, 439 P.2d at 907-08, 67 Cal. Rptr. at 779-80.