in *Cooper*[18] held that while this section authorized impounding, it did not authorize searching. The United States Supreme Court in *Cooper* did not rule on the section but merely found the search reasonable under the fourth amendment. *Webb* did not definitely hold that section 11611 authorizes a search but apparently considered it in determining the search's reasonableness. It is, therefore, unclear what impact section 11611 has on search and seizure.[19]

The present state of the law is difficult to define. It would be difficult to specify which of the *Webb* justifications taken singly or as a group is sufficient to authorize a search. Because *Webb* specifically affirmed *People v. Burke*,[20] the two cases must be read together. On the other hand, *Cooper* may have severely limited *Preston v. United States*.[21] Taken generally, *Webb* and *Cooper* certainly give more freedom to the police in conducting searches. The court will look to all relevant factors rather than to a rigid set of rules. Nearly universal use of cars for transportation and movement will make *People v. Webb* a key case in the field of searches and seizures.

VII

DAMAGES

A. Collateral Sources

City of Salinas v. Souza & McCue Construction Company.[1] A city sued a public works contractor and its supplier for breach of a contract to construct a sewer line. The contractor cross-complained against both the city, alleging misrepresentation of soil conditions, and against the supplier, alleging guaranteed performance of the piping it supplied and a promise to indemnify the contractor for any losses.

Justice Peek, speaking for a unanimous court, held that the trial court, in finding for the contractor, improperly determined damages against the city for breach by refusing to permit the city to discover an alleged settlement between the contractor and the supplier. The city

[18] People v. Cooper, 234 Cal. App. 2d 587, 44 Cal. Rptr. 483 (1965).

[19] *Cf.* People v. Burke, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 531 (1964), which specifically held that Vehicle Code §§ 22651 and 11850 do not authorize a search, although they do authorize the police to remove a car from the highway when they have arrested its driver. *But cf.* People v. Grubb, 63 Cal. 2d 614, 408 P.2d 100, 47 Cal. Rptr. 772 (1965), holding that Vehicle Code § 2805, which authorized the police to enter abandoned cars to check title and registration, justified the search. However, Grubb objected only to the initial entry, and the court carefully avoided delineating the permissible scope of any search under section 2805. *Id.* at 619 n.6.

[20] People v. Webb, 66 A.C. 99, 106, 424 P.2d 342, 347, 56 Cal. Rptr. 902, 907 (1967), *aff'g* People v. Burke, 61 Cal. 2d 575, 394 P.2d 67, 39 Cal. Rptr. 772 (1965).

[21] 376 U.S. 364 (1964).

[1] 66 A.C. 210, 424 P.2d 921, 57 Cal. Rptr. 337 (1967).

claimed that, pursuant to the settlement, the supplier compensated the contractor at least in part for the damages it sustained due to the city's alleged breach. The trial court's judgment in favor of the contractor was reversed only for the limited purpose of determining the nature of the settlement. The supreme court further held that any amount the contractor received from the supplier as damages for the city's breach would reduce the damages the city would have to pay the contractor.

If the supplier had in fact compensated the contractor for its losses due to the city's misrepresentation, the supplier was a collateral source for the contractor. Under the collateral source rule, when an injured party receives compensation for his losses from a source wholly independent of the wrongdoer, the payment does not preclude or reduce the damages to which he is entitled from the wrongdoer.[2] Although the collateral source rule normally applies only in tort cases,[3] some courts have applied it in contract actions,[4] particularly if the breach has a "tortious or willful character."[5] However, the court did not reach the issue of whether the city's misrepresentations invoked the collateral source rule because it held that the rule was not applicable to a public entity.[6] The court reasoned that, since the rule is punitive in nature[7] and since punitive damages cannot be levied against a public entity,[8] the rule should not apply to a public entity. The rule is considered punitive because to the extent a wrongdoer is required to compensate an injured party who has already been compensated by another source, payment does not compensate the injured party but punishes the wrongdoer.[9]

It appears, however, that the court's reasoning is applicable to private persons as well as public entities and contracts as well as torts. Courts

[2] *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 1344 (1956).

[3] *See* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 672 (1962).

[4] Gusikoff v. Republic Storage Co., 241 App. Div. 889, 272 N.Y.S. 77 (1934); Waumbec Mills, Inc. v. Bahnson Service Co., 103 N.H. 461, 174 A.2d 839 (1961).

[5] *See* White v. Steam-Tug Mary Ann, 6 Cal. 462 (1856); Kavalaris v. Anthony Bros., 217 Cal. App. 2d 737, 32 Cal. Rptr. 205 (1963).

[6] 66 A.C. at 221, 424 P.2d at 926, 57 Cal. Rptr. at 342.

[7] See F. HARPER & F. JAMES, *supra* note 2, at 1345; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1483-84 (1966).

[8] CAL. GOV'T CODE § 818 (West 1966) provides: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

According to the California Law Revision Commission, "such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved, since they would fall upon innocent taxpayers." 4 CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY 817 (1963).

[9] See F. HARPER & F. JAMES, *supra* note 2, at 1344-45; Dodds v. Bucknum, 214 Cal. App. 2d 206, 214, 29 Cal. Rptr. 393, 398 (1963).

cannot impose punitive damages against private persons except in cases of oppression, fraud or malice.[10] Since the collateral source rule is punitive in nature, the rule ought not to apply to private entities in the absence of fraud, oppression or malice. It is doubtful, however, that the court will extend the reasoning of *City of Salinas* to private entities in the near future for the result would be far reaching.

One thing is certain. If a plaintiff already compensated by a collateral source has a cause of action against joint and several defendants, one of whom is a public entity, he should pursue the private defendant in cases of fraud, oppression or malice. In this way, he avoids set-off under the collateral source rule.

B. Proof

Beagle v. Vasold.[1] The plaintiff in a personal injury suit arising from an auto accident appealed from a jury verdict in his favor on the ground the damages were inadequate. He claimed the trial judge erred in preventing his counsel from telling the jury the amount of damages claimed for pain and suffering, either as a per diem amount or a total sum.

The court reversed, unanimously agreeing that an attorney may inform the jury of total general damages sought by the plaintiff. The court so inferred from cases permitting an attorney to read the complaint and prayer to the jury,[2] and from the trial judge's discretion to instruct the jury about total damages in cautioning them to award no more than that amount.[3]

Justice Mosk, writing for a majority of the court,[4] aligned California with the weight of authority[5] which holds it proper for an attorney to make a per diem argument to the jury. Generally, the per diem method

[10] CAL. CIV. CODE § 3294 (West 1954) provides: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[1] 65 Cal. 2d 166, 417 P.2d 673, 53 Cal. Rptr. 129 (1966). See 18 HASTINGS L.J. 684 (1967) for a criticism of the opinion.

[2] Ritzman v. Mills, 102 Cal. App. 464, 472, 283 P. 88, 90 (1929); *see* Knight v. Russ, 77 Cal. 410, 414-15, 19 P. 698, 700 (1888).

[3] Sanguinetti v. Moore Dry Dock Co., 36 Cal. 2d 812, 816, 228 P.2d 557, 559 (1951); Lahti v. McMenmin, 204 Cal. 415, 421, 268 P. 644, 646 (1928); McNulty v. Southern Pac. Co., 96 Cal. App. 2d 841, 852-53, 216 P.2d 534, 542 (1950).

[4] Chief Justice Traynor dissented on this issue maintaining that the per diem argument creates an illusion of certainty and therefore should be prohibited. 65 Cal. 2d at 183, 417 P.2d at 683, 53 Cal. Rptr. at 129.

[5] Of the thirty-three jurisdictions (including California) which have passed on the issue, twenty-two permit an attorney to use the per diem argument and eleven have ruled against it. See *id.* at 173-74, 417 P.2d at 676-77, 53 Cal. Rptr. at 132-33, for a complete list of all the jurisdictions.

consists of computing a dollar amount for the pain incurred each day and then multiplying this figure by the length of time the plaintiff will suffer.[6]

Except for Chief Justice (then Justice) Traynor's dissent in *Seffert v. Los Angeles Transit Lines*,[7] the issue of per diem damages was a matter of first impression for the court. The per diem technique, generally thought to have originated with the well-known "plaintiff attorney" Melvin Belli,[8] is a recent innovation in trial practice. Since its introduction, the technique[9] has been a central subject of legal controversy throughout the country.[10]

The leading case prohibiting the argument is *Botta v. Brunner*,[11] which reasoned that since there can be no testimony on the dollar value of pain and suffering, there is no evidentiary basis for an opinion by plaintiff's counsel. Justice Mosk in rebuttal argued: "If the jury must infer from what it sees and hears at the trial that a certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument."[12]

The court indicated that unless the per diem argument is a matter of right rather than a subject of the trial judge's discretion, courts will face a proliferation of appeals claiming abuse of discretion.[13] Obviously, however, "the trial court has the power and the duty to contain argument within legitimate bounds[14] and it may prevent the attorney from drawing

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[6] *Id.* at 172, 417 P.2d at 675, 53 Cal. Rptr. at 131; Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

[7] 56 Cal. 2d 498, 513-14, 364 P.2d 337, 346-47, 15 Cal. Rptr. 161, 170-71 (1961).

[8] J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. Civ. App. 1950), appears to be the first reported case in which the per diem argument was used. Mr. Belli, in an address to the Mississippi Bar Association, is considered the first to have promulgated the per diem technique. The speech is reprinted in Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951). The per diem technique was later approved in Mississippi in Four-Country Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).

[9] The following is the technique as described by Mr. Belli:

> This is the key: you must break up the . . . life expectancy into finite detailed periods of time. You must take these small periods of time, seconds and minutes, and determine in dollars and cents what each period is worth. . . .
>
> You must start at the beginning and show that pain is a continuous thing, second by second, minute by minute, hour by hour, and year after year . . . . You must interpret one second, one minute, one hour, one year of pain and suffering into dollars and cents and then multiply to your absolute figure to show how you achieved your result . . . .

Belli, *supra* note 8, at 318.

[10] For an extensive list of articles written on both sides of the argument, see Beagle v. Vasold, 65 Cal. 2d 166, 174-75, 417 P.2d 673, 677, 53 Cal. Rptr. 129, 133 (1966).

[11] 26 N.J. 82, 138 A.2d 713 (1958).

[12] 65 Cal. 2d at 176, 417 P.2d at 678, 53 Cal. Rptr. at 134.

[13] *Id.* at 182, 417 P.2d at 682, 53 Cal. Rptr. at 138.

[14] The court, in approving of the per diem argument, specifically did not approve of