52 8/1/69

Memorandum 69-103

Study 52 - Sovereign Immunity (Liability of Public Entities for Nuisance)

At several recent meetings, in connection with the Commission's study of the recommendations relating to ultrahazardous activities and the use of pesticides, the question has arisen whether a public entity can be held liable for damages on the ground of nuisance. To resolve this problem the staff has reviewed the minutes to ascertain the Commission's intent when it recommended the enactment of Government Code Section 815 which apparently abolished nuisance liability and has examined the law of nuisance as it relates to sovereign immunity. Attached to this memorandum you will find a copy of the relevant statutes (Exhibit I), the portion of Van Alstyne's 1963 sovereign immunity study which discusses the nuisance liability of public entities (Exhibit II), and extracts from California Government Tort Liability (Cal. Cont. Ed. Bar 1964, Supp. 1969) (Exhibit III). Van Alstyne's 1963 study discusses the liability of public entities for nuisance prior to 1963.

The harshness of the sovereign immunity doctrine served to generate numerous judicial exceptions to the rule of governmental immunity. Prior to the enactment of the Governmental Tort Liability Act in 1963, the courts were rapidly expanding nuisance concepts in an attempt to impose tort liability in areas in which public entities traditionally had been immune.

The lack of statutory or judicial restraints on the concept of nuisance liability promised to make the nuisance exception a significant inroad on the doctrine of sovereign immunity.

However, the California Supreme Court abolished the doctrine of sovereign immunity in 1961 and the Legislature enacted a comprehensive revision of the law relating to governmental tort liability in 1963. This legislation was carefully drafted to incorporate pragmatic analysis and implement selected philosophic theories of tort liability. Consequently, this legislation attained a fine balance between governmental liability and the need for immunity in the performance of certain governmental functions. In order to achieve this delicate balance it was necessary to replace all common law and judicially created forms of liability for public entities with carefully considered statutory liability.

Government Code Section 815 was intended to replace the uncertain and largely undefined liability of public entities for the creation or maintenance of a nuisance with other statutory and constitutional forms of liability.[1] The section provides: "Except as otherwise provided by statute: (a) A public entity is not liable for an injury. . . ." The comment to that section elaborates on this point:

> For example, there is no section in this statute declaring public entities are liable for nuisance, even though the California courts have previously held that public entities are liable for nuisance even in the absence of statute. Under this statute, the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the situation.

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1. This is the conclusion reached by the only two commentators on this subject. Van Alstyne, California Governmental Tort Liability § 5.10 (1964); Witkin, Summary of California Law, Torts § 44B (Supp. 1967).

Clearly, Government Code Section 815 when construed in light of the California Tort Liability Act was intended to eliminate public entity liability for damages on the ground of nuisance.[2]

A careful review of the minutes sheds considerable light on the intent of the Commission in enacting Government Code Section 815. The minutes indicate that until August 1962 the Commission concurred with Van Alstyne's recommendation that governmental liability for nuisance should be continued. A special section was drafted which provided: "902.02. A public entity is liable for injury proximately caused by a nuisance created or maintained by it." The tentative recommendation explained the statute as follows:

> Public entities should be declared by statute to be liable for nuisance. They are liable for nuisance under existing law, and this liability should be continued. Under existing law, a plaintiff must bring his case within the scope of Civil Code Section 3479 or some other statute defining nuisance in order to make out a case of nuisance.
>
> Civil Code Section 3482 provides: "Nothing which is done or maintained under the express authority of statute can be deemed a nuisance." This section has been limited to a certain extent by decisions holding that a general statutory authority to engage in a particular activity (as distinguished from explicit authority to create the nuisance itself) would not be construed to authorize the creation of a nuisance. However, the existence of Section 3482 would appear to preclude liability from being imposed upon public entities under this recommendation for "governing" in one of its most fundamental senses--making laws.

The next entry relating to nuisance reports that Section 815, in substantially its present form, had been adopted. No disposition relating to proposed Section 902.2 is reported and no explanation of the shift from 902.2 to

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2. The right to specific relief to enjoin or abate a nuisance is expressly preserved by Government Code Section 814. See also the Comment to Government Code Section 815.

815 is given. However, this abrupt change indicates that it became obvious to the Commission that as the Tort Liability Act took shape the preservation of nuisance liability was superfluous and undesirable.

This legislative intent to eliminate public entity liability on the ground of nuisance except where otherwise expressly provided by statute may not be effectuated by Section 815. Public entity liability on the ground of nuisance is founded upon statutory law. Civil Code Section 3479[3] defines a nuisance, and the right to maintain an action for damages caused by a nuisance is provided by Civil Code Sections 3484, 3491, and 3501 and Code of Civil Procedure Section 731. Although these statutes are generally worded and do not specifically refer to public entities, this does not preclude their application to such entities.[4] Thus, although Government Code Section 815 was apparently intended to preclude nuisance liability except where provided by statute, the above code sections may provide the necessary statutory exception.

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3. Civil Code Section 3479 provides:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

4. Prior to the enactment of Government Code Section 815, these statutes were held to impose liability upon public entities. Moreover, generally worded statutes have been applied to public entities in other situations where no impairment of sovereign powers would result. Flournoy v. State, 57 Cal.2d 497, 370 P.2d 331, 27 Cal. Rptr. 627 (1962)(wrongful death statute held applicable to public entities).

Further, the cases decided since the enactment of Government Code Section 815 have impliedly regarded nuisance law as still applicable to public entities. In Granone v. City of Los Angeles,[5] the court stated that an action based on nuisance was an appropriate remedy for the recovery of damages caused by the flooding of plaintiff's land due to an obstruction of a water course by the City of Los Angeles. And in Lombardy v. Peter Kiewit Sons' Co.,[6] the state's liability on the ground of nuisance was denied on the merits of the case. This disposition of the case impliedly indicates that in an appropriate case a cause of action in nuisance can be stated against a public entity. However, neither decision discusses the significance of Government Code Section 815 and it is therefore unclear what position the courts will take when this issue is carefully considered.

As indicated by the preceding discussion, there is a distinct possibility that public entities can be held liable for damages on a nuisance theory of liability. This nuisance liability, if it still exists, would provide an independent vehicle for redressing many types of tortious injuries. However, in view of the enactment of the Government Tort Liability Act in 1963, nuisance is no longer an appropriate form of governmental liability.

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5. 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965). In Granone, liability was predicated on four independent legal theories: (1) nuisance, (2) inverse condemnation, (3) dangerous and defective condition of public property, and (4) negligent construction.

6. 266 Cal. App.2d ___, 72 Cal. Rptr. 240 (1968). In Lombardy the court denied relief on the ground that the complaint did not state a cause of action in nuisance against the state because no nuisance existed by virtue of Civil Code Section 3484. Section 3484 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court found that the construction and maintenance of freeways by the state was expressly authorized by statute.

If nuisance liability has not been abolished, the public policies implemented by the 1963 Governmental Tort Liability Act would be thwarted. A tort claimant, by pursuing recovery on the ground of nuisance rather than on the statutory grounds provided by the 1963 Act, could successfully escape many of the restrictions soundly placed on governmental liability.

A provision should be added to the 1963 Act to make clear that governmental liability for damages for nuisance has been replaced by other constitutional and statutory theories of liability. This would not affect the important right of enjoining a nuisance. The right to specific relief to enjoin or abate a nuisance created or maintained by a public entity is specifically preserved by Government Code Section 814. Also, the new provision would not alter the constitutional liability of public entities for inverse condemnation of private property. In the past nuisance liability has often been imposed on public entities in cases where an action in inverse condemnation would have provided an adequate remedy.[7] In other cases nuisance liability has been imposed in tort situations involving ordinary negligence or the maintenance of a dangerous condition of public property.[8] The Governmental Tort Liability Act now provides an adequate remedy in these situations. Without the new provision the delicate balance between governmental liability and the need for immunity in the performance of certain governmental functions may be upset.

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7. Compare Granone v. City of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965)(both inverse condemnation and nuisance liability affirmed) with Lombardy v. Peter Kiewit Sons' Co., 266 Cal. App.2d ____, 72 Cal. Rptr. 240 (1968)(both inverse condemnation and nuisance liability denied).

8. Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 432 P.2d 987 (1959); Bright v. East Side Mosquito Abatement Dist., 168 Cal. App.2d 7, 335 P.2d 527 (1959). Cf., Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958). These and other cases are discussed in Exhibit II.

Respectfully submitted,

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Junior Counsel

Memo 69-103

EXHIBIT I

STATUTORY PROVISIONS

States ⇐112.
C.J.S. Counties § 215 et seq.
C.J.S. Militia § 22.
C.J.S. Municipal Corporations § 745 et seq.
C.J.S. Schools and School Districts §§ 158, 320 et seq.
C.J.S. States § 129 et seq.

Sovereign immunity study. Cal.Law Revision Comm. (1963) Vol. 5, p. 11 et seq.

Tort liability of public entities and public employees; recommendation. Cal.Law Revision Comm. (1963) Vol. 4, p. 807 et seq.

§ 815. Liability for injuries generally; immunity of public entity; defenses. Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person. (Added Stats.1963, c. 1681, p. 3268, § 1.)

Legislative Committee Comment—Senate

This section abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e. g., inverse condemnation. In the absence of a constitutional requirement, public entities may be held liable only if a statute (not including a charter provision, ordinance or regulation) is found declaring them to be liable. Because of the limitations contained in Section 814, which declares that this part does not affect liability arising out of contract or the right to obtain specific relief against public entities and employees, the practical effect of this section is to eliminate any common law governmental liability for damages arising out of torts. The use of the word "tort" has been avoided, however, to prevent the imposition of liability by the courts by reclassifying the act causing the injury.

As originally introduced, this section used "enactment" instead of "statute." The word "statute" was substituted because the terms and conditions of liability of public entities are matters of statewide concern and should be subject to uniform rules established by the action of the Legislature.

In the following portions of this division, there are many sections providing for the liability of governmental entities under specified conditions. In other codes there are a few provisions providing for the liability of governmental entities, e. g., Vehicle Code Section 17001 et seq. and Penal Code Section 4900. But there is no liability in the absence of a statute declaring such liability. For example, there is no section in this statute declaring that public entities are liable for nuisance, even though the California courts have pre-

viously held that public entities are subject to such liability even in the absence of statute. Under this statute, the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the situation. However, the right to specific or preventive relief in nuisance cases is not affected. Similarly, this statute eliminates the common law liability of public entities for injuries inflicted in proprietary activities.

In the following portions of this division, there also are many sections granting public entities and public employees broad immunities from liability. In general, the statutes imposing liability are cumulative in nature, i. e., if liability cannot be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section. On the other hand, under subdivision (b) of this section, the immunity provisions will as a general rule prevail over all sections imposing liability. Where the sections imposing liability or granting an immunity do not fall into this general pattern, the sections themselves make this clear.

Subdivision (b) also makes it clear that the sections imposing liability are subject to the ordinary defenses, such as contributory negligence and assumption of the risk, that are available in tort litigation between private persons.

Historical Note

Derivation: Educ.C.1959, § 903, added by Stats.1959, c. 2, p. 622, § 903, amended by Stats.1959, c. 1727, p. 4144, § 1.

Educ.C.1959, § 1012, added by Stats. 1963, c. 629, p. 1508, § 2.

Educ.C.1943, § 1007, added by Stats. 1943, c. 71, p. 323.

Pol.C. § 1623, amended Code Am. 1873–74, c. 543, p. 95, § 20; Stats.1923, c. 145, p. 298, § 1.

School C. § 2.801, amended Stats.1931, c. 1178, p. 2487, § 1; Stats.1937, c. 149, p. 414, § 1.

Cross References

Liability of public entity,
Operation of motor vehicles by public entity's employees, see Vehicle Code § 17001.
Persons erroneously convicted, see Penal Code § 4900.

Law Review Commentaries

Liability of quasi-municipal and municipal corporations under the California Liability Act of 1923 (1937) 26 C.L.R. 135.

Problems of a sovereign without immunity. Harold W. Kennedy and Robert P. Lynch (1963) 36 So.Cal.L.R. 161.

Recovery for wrongful death against municipal corporations. (1939) 27 C.L.R. 622 (July 1939).

Sovereign immunity. Thomas Stanton (1963) 38 S.Bar J. 177.

Tort liability of municipalities. Leon Thomas David (1933) 6 So.Cal.L.R. 269; (1933) 7 So.Cal.L.R. 48; (1934) 7 So.Cal. L.R. 214; (1934) 7 So.Cal.L.R. 295; (1934) 7 So.Cal.L.R. 372.

Part 3

NUISANCE

Title 1

GENERAL PRINCIPLES

Cross References

Actions to abate nuisances, see Code of Civil Procedure § 731 et seq.
Building unfit for human habitation, see Health and Safety Code § 17921 et seq.
Clothes cleaning establishments, fire nuisance in, see Health and Safety Code §§ 13253, 13553, 13685.
Fish reduction plant as nuisance, see Fish and Game Code § 1070.
Fishing nets illegally used as nuisance, see Fish and Game Code § 845.
Housing, nuisances respecting, see Health and Safety Code §§ 15024, 15290 et seq.

§ 3479. Nuisance defined

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance. (Enacted 1872. As amended Code Am.1873–74, c. 612, p. 265, § 284.)

Cross References

Abatement, right of action, see Code of Civil Procedure § 731.
Artesian wells, uncapped well as a public nuisance, see Water Code § 395.
Blackjacks, etc., as nuisances, see Penal Code § 12020.
Cities of fifth and sixth classes, see Government Code §§ 38770–38775.
Concealed weapons, carrying as a nuisance, see Penal Code § 12028.
Defined as to,
Auto courts, etc., see Health and Safety Code § 18103.
Housing, see Health and Safety Code § 15024.
Penal provisions, see Penal Code § 370 et seq.

Prostitution, building or place as nuisance, see Penal Code § 11225.
Similar provisions, see Penal Code § 370.
Weeds, rubbish and refuse as public nuisance, see Government Code § 39501.

§ 3480. Public nuisance

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. (Enacted 1872. As amended Code Am. 1873–74, c. 612, p. 268, § 285.)

Cross References

Abatement, right of action, see Code of Civil Procedure § 731.
Artesian well, not capped, etc., to prevent waste, see Water Code § 305.
Austrian field cress, see Agricultural Code § 159a.
Camelthorn, see Agricultural Code § 159.
Capri fig trees, see Agricultural Code § 995.
Cultivated black currant, see Agricultural Code § 160.
Diseased apiary, see Agricultural Code §§ 277, 278, 281.
Honey unlawfully packed, etc., see Agricultural Code § 843.
Labor camp improperly maintained, see Labor Code § 2423.
Mosquito breeding places, see Health and Safety Code § 2271 et seq.
Similar provisions, see Penal Code § 370.
Weeds as public nuisance, see Health and Safety Code §§ 14876, 14880.

§ 3481. Private nuisance

PRIVATE NUISANCE. Every nuisance not included in the definition of the last section is private. (Enacted 1872.)

Cross References

Remedies, etc., see § 3501 et seq.

§ 3482. Acts under statutory authority not a nuisance

WHAT IS NOT DEEMED A NUISANCE. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. (Enacted 1872.)

§ 3483. Continuing nuisance; liability of successive owners for failure to abate

SUCCESSIVE OWNERS. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (Enacted 1872.)

§ 3484. Damages recoverable notwithstanding abatement

ABATEMENT DOES NOT PRECLUDE ACTION. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (Enacted 1872.)

Cross References

Similar provisions, see Code of Civil Procedure § 731.

Title 2

PUBLIC NUISANCES

Sec.

Cross References

Action to abate, see, also, Code of Civil Procedure § 731 et seq.
Auto courts, resorts, etc., abatement, see Health and Safety Code §§ 18104, 18201, 18202.
Cesspools and other means of sewage disposal, see Health and Safety Code § 4762.
Definition of public nuisance, see § 3480.
Dourine, animal afflicted with, see Agricultural Code § 207.7 et seq.
Eggs and egg products, unlawfully packed, stored, etc., see Agricultural Code §§ 1106.2, 1145b.
Encroachment on,
County highways, see Streets and Highways Code § 1484.
State highways, see Streets and Highways Code § 723.
Fertilizer, adulterated or misbranded, see Agricultural Code § 1044.5.
Grain warehouse, insect infested as public nuisance, see Agricultural Code § 1260.3.
Health, abating or enjoining nuisances dangerous to, see Health and Safety Code §§ 205, 206.
Life insurance analyst, unlicensed, see Insurance Code § 1720.13.
Manufacture or commercial use in industrial zone, restrictions on right to abate, see Code of Civil Procedure § 731a.
Mausoleum or columbarium improperly constructed, see Health and Safety Code § 9676.
Narcotics, abatement of buildings, see Health and Safety Code § 11780 et seq.
Notice to abate, see Penal Code § 373a.
Swimming pools dangerous to health, see Health and Safety Code §§ 24106, 24107.

§ 3490. Lapse of time cannot legalize public nuisance

LAPSE OF TIME DOES NOT LEGALIZE. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. (Enacted 1872.)

§ 3491. Remedies; public

The remedies against a public nuisance are:

1. Indictment or information;
2. A civil action; or,
3. Abatement. (Enacted 1872. As amended Code Am.1880, c. 11, p. 1, § 1.)

Cross References

Cities of fifth and sixth classes, see Government Code §§ 38772, 38773.
Nuisance on tax deeded land, see Revenue and Taxation Code § 3657.

§ 3492. Remedies; indictment or information; regulation

The remedy by indictment or information is regulated by the Penal Code. (Enacted 1872. As amended Code Am.1880, c. 11, p. 1, § 2.)

§ 3493. Remedies; private person

REMEDIES FOR PUBLIC NUISANCE. A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise. (Enacted 1872.)

§ 3494. Abatement; parties authorized

ACTION. A public nuisance may be abated by any public body or officer authorized thereto by law. (Enacted 1872.)

Cross References

City attorney, action to abate by, see Code of Civil Procedure § 731.
District attorney,
Civil action by to abate public nuisance, see Government Code § 26528.
Duty to prosecute, see Code of Civil Procedure § 731; Penal Code § 373a.

§ 3495. Abatement; private person; method

HOW ABATED. Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. (Enacted 1872.)

Title 3

PRIVATE NUISANCES

Sec.

§ 3501. Remedies

REMEDIES FOR PRIVATE NUISANCE. The remedies against a private nuisance are:

1. A civil action; or,
2. Abatement.

(Enacted 1872.)

§ 3502. Abatement; method

ABATEMENT, WHEN ALLOWED. A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury. (Enacted 1872.)

§ 3503. Abatement; notice

WHEN NOTICE IS REQUIRED. Where a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it. (Enacted 1872.)

Part 4

MAXIMS OF JURISPRUDENCE

Sec.

Chapter 2

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY

Sec.

§ 731. Nuisance; action to abate; damages; parties authorized to sue; public nuisance

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city. (Enacted 1872. As amended Stats.1905, c. 128, p. 130, § 1.)

Cross References

Damages recoverable in spite of abatement of nuisance, see Civil Code § 3484.
Definition generally, see Civil Code §§ 3479, 3482.
District attorney directed to bring an action to abate public nuisance, see Government Code § 26528.

EXHIBIT II

Extract From 1963 Background Study

Injury Caused by Nuisance

In discussing the extent of the legislative and judicial inroads upon the doctrine of governmental immunity, Mr. Justice Traynor, in *Muskopf*, concludes with the terse statement: "Finally, there is governmental liability for nuisances even when they involve governmental activity." [1] Although undoubtedly a correct statement of the case law,[2]

P.2d 528 (1954), in holding that a public golf course was a proprietary activity: "A golf course does not serve the public generally but only those who play the game . . . . Many private golf courses are maintained, some for profit, and others as an adjunct to private clubs or associations. . . . It is actually in competition with other courses, and in its clubhouse commercial enterprises usually are carried on where commercial rates are charged for commodities and services."

[a] See, *e.g.*, Burnett v. City of San Diego, 127 Cal. App.2d 191, 192-93, 273 P.2d 245, 246 (1954), where the court, without analysis or explanation, held that the maintenance of a fine arts gallery was clearly a governmental function, but where, in the court's statement of facts the following significant circumstances are emphasized: "The accident occurred on the premises of the Fine Arts Gallery in Balboa Park, which was *built by private persons* on land owned by the city and turned over to the city *as a gift*. The gallery was being used by the Fine Arts Society, for educational and cultural purposes, under an informal agreement with the city. Under this arrangement the city *budgeted a certain amount for the operations of the society*, and the society's director and curator and all of the maintenance men and guards, with one exception, were listed as employees of the city and paid by the city." (Emphasis supplied.)

[b] See, *e.g.*, Knapp v. City of Newport Beach, 186 Cal. App.2d 669, 9 Cal. Rptr. 90 (1960) (enforcement of building and safety regulations); Legg v. Ford, 185 Cal. App.2d 534, 8 Cal. Rptr. 292 (1960) (administration of public assistance programs by county Department of Charities); Jones v. Czapkay, 182 Cal. App.2d 192, 6 Cal. Rptr. 182 (1960) (administration of public health services by a county for a city under contract); Seybert v. County of Imperial, 162 Cal. App.2d 209, 327, P.2d 560, (1958) (regulation of speed boats using county recreational lake); Armstrong v. City of Belmont, 158 Cal. App.2d 641, 323 P.2d 999 (1958) (enforcement of municipal electrical building code by permit system). Cases of this type often reflect the implications of the distinction, often recognized in other jurisdictions, between misfeasance and nonfeasance. See discussion in text at 200-08 *infra*.

[c] Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 221, 11 Cal. Rptr. 89, 95, 359 P.2d 457, 463 (1961).

[1] Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 219, 11 Cal. Rptr. 89, 94, 359 P.2d 457, 462 (1961).

[2] To the same effect, see Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625 (1945); Hassell v. City & County of San Francisco, 11 Cal.2d 168, 78 P.2d 1021 (1938); Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083 (1901).

(1)

the laconic way in which the rule is stated fails to give even a hint of the remarkable way in which the so-called "nuisance exception" gradually developed or of the theoretical foundations for its acceptance.

The early California cases involving alleged nuisances created or maintained by public entities are characterized both by the willingness of the appellate courts to sustain liability and by the paucity of any discussion of governmental immunity or of reasons why nuisance cases were deemed exceptions to the immunity rule. In perhaps the earliest case, decided in 1881, for example, the court held actionable the flooding of plaintiff's land by reason of the improper construction by the defendant city of a drainage canal.[3] No discussion of legal concepts prolongs the opinion: if the facts were as alleged in the complaint, it was too clear to warrant discussion that the city was liable.

Three years later, a judgment for damages was sustained in behalf of a property owner injured by reason of the maintenance nearby of an open sewer ditch carrying noxious and offensive wastes from a public hospital.[4] Only the briefest hint of legal theory is conveyed by the court's brief comment to the effect that the city "had such *proprietorship* of the . . . hospital as to render it liable in damages."[5] Although these cases were marking the foundations for a long line of later decisions, they failed to articulate in any meaningful way the logic and rationale of the exception.[6]

Finally, in 1885, the Supreme Court grappled with the theoretical problems involved, but with only limited success. The obstruction by a city of a natural watercourse in a manner which had resulted in injury to property, held the court, was "a most flagrant trespass on the rights of [plaintiff] in the shape of a direct invasion of his land amounting to a taking of it . . . occasioning inconvenience and damage to him and thus constituting a nuisance."[7] Although the court's language appears to treat as practically synonymous the distinguishable legal principles relating to trespass, nuisance and inverse condemnation, and thereby is less than helpful, the balance of the opinion appears to positively rest liability upon the theory of inverse condemnation—that is, on the theory, which was consistent with the facts, that the injury to plaintiff's property had resulted from the construction of a public improvement for public use and hence was damage for which just compensation was required to be paid under Section 14 of Article I of the Constitution.[8]

Students of the judicial process have often noted the remarkable generative powers of legal doctrines. The history of the "nuisance exception" is a case in point. The court's attempt in 1885 to rest the

[3] Davis v. City of Sacramento, 59 Cal. 526 (1881).
[4] Bloom v. City & County of San Francisco, 64 Cal. 503, 3 Pac. 129 (1884).
[5] *Id.* at 504, 3 Pac. at 129. (Emphasis supplied.)
[6] The quoted language from Bloom v. City & County of San Francisco, 64 Cal. 503, 3 Pac. 129 (1884), has occasionally led courts to the conclusion that the true basis of liability in that case was not nuisance but negligence in a proprietary capacity. See, *e.g.*, Beard v. City & County of San Francisco, 79 Cal. App.2d 753, 756-57, 180 P.2d 744, 746 (1947); and *cf.* Chafor v. City of Long Beach, 174 Cal. 478, 163 Pac. 670 (1917). On the other hand, the *Bloom* case has been authoritatively cited as one of the leading decisions on nuisance liability as an exception to the governmental immunity doctrine. See, *e.g.*, Vater v. County of Glenn, 49 Cal.2d 315, 323 P.2d 85 (1958); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App.2d 720, 317 P.2d 38 (1957).
[7] Conniff v. City & County of San Francisco, 67 Cal. 45, 49, 7 Pac. 41, 44 (1885).
[8] For a full discussion of inverse condemnation, see the text at 102-108 *supra*.

(2)

exception on an inverse condemnation rationale was reinforced, but only feebly, by a few later opinions showing recognition of this theory.[9] The general stream of decisions, however, ignored the doctrinal content introduced in the 1885 decision, and simply followed its holding.[10] Various forms of governmental activity were thereby found to be actionable nuisances, including both negligent maintenance of facilities like sewers and storm drains,[11] as well as deliberate construction of improvements, which caused foreseeable flooding or other injurious consequences to private property.[12]

In recent years several decisions[13] have emphasized that in order to recover under the "nuisance exception" the plaintiff must allege and prove facts which bring the case within the statutory definition of a nuisance as set forth in Section 3479 of the Civil Code;[14] but the courts (and apparently counsel as well) have ordinarily treated the legal theory of liability as settled. With only one notable exception, the recent opinions merely cite previous decisions, deeming it unnecessary to indulge in either legal analysis or doctrinal discussion, to support the rule of liability for nuisance even where a governmental activity is involved.

The one exception is the recent case of *Vater* v. *County of Glenn*.[15] Prior to this litigation, practically all of the nuisance actions against public entities had dealt with either an actual physical invasion or injury to *property* or with such an interference with its comfortable

[9] See, *e.g.*, Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240 (1895); Stanford v. City & County of San Francisco, 111 Cal. 198, 43 Pac. 605 (1896); Guerkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570 (1896).

[10] In addition to the cases cited in notes 11 and 12 *infra*, see Peterson v. City of Santa Rosa, 118 Cal. 387, 51 Pac. 557 (1897) (pollution of stream by municipal sewage). See also, to the same effect, People *ex rel.* Lind v. City of San Luis Obispo, 116 Cal. 617, 48 Pac. 723 (1897); People v. City of Reedley, 66 Cal. App. 409, 226 Pac. 408 (1924).

[11] Spangler v. City & County of San Francisco, 84 Cal. 12, 23 Pac. 1091 (1890) (negligent maintenance of sewer line); Kramer v. City of Los Angeles, 147 Cal. 668, 82 Pac. 334 (1905) (negligent maintenance of storm drain); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App.2d 720, 317 P.2d 33 (1957) (negligent maintenance of sewer outfall line); Mulloy v. Sharp Park Sanitary Dist., 154 Cal. App.2d 428, 330 P.2d 441 (1958) (negligent inspection and maintenance of sewer lines). See also, Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 937 (1959) (negligent maintenance of rubbish dump); Bright v. East Side Mosquito Abatement Dist., 166 Cal. App.2d 7, 335 P.2d 527 (1959) (negligent mosquito abatement activities).

[12] Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458 (1892) (obstruction of natural watercourse); Lind v. City of San Luis Obispo, 109 Cal. 340, 42 Pac. 437 (1895) (sewage disposal system); Adams v. City of Modesto, 131 Cal. 591, 63 Pac. 1083 (1901) (open sewer ditch); Dick v. City of Los Angeles, 34 Cal. App. 734, 168 Pac. 703 (1917) (obstruction of watercourse); Weisshand v. City of Petaluma, 37 Cal. App. 296, 174 Pac. 955 (1918) (obstruction of watercourse); Hassell v. City & County of San Francisco, 11 Cal.2d 168, 78 P.2d 1021 (1938) (comfort station in public park); Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625 (1945) (vacation and barricading of public road); Ingram v. City of Gridley, 100 Cal. App.2d 815, 224 P.2d 798 (1950) (pollution of water in stream by discharge of sewage therein). See also, Jardine v. City of Pasadena, 199 Cal. 64, 248 Pac. 225 (1926).

[13] Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958); Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); Zeppi v. State, 174 Cal. App.2d 484, 345 P.2d 23 (1959); Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App.2d 428, 330 P.2d 441 (1958). See also, Womar v. City of Long Beach, 45 Cal. App.2d 643, 114 P.2d 704 (1941).

[14] CAL. CIV. CODE § 3479 provides: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

[15] 309 P.2d 544 (1957), vacated and superseded by 49 Cal.2d 815, 323 P.2d 85 (1958).

(3)

and usual enjoyment as to impair its value.[16] Thus, although the underlying inverse condemnation rationale advanced in 1885 had apparently been lost sight of, the actual decisions were generally consistent with the basic theory that there was a taking or damaging of private property for public use.

The *Vater* case involved an action for wrongful death—a type of action which, at least for inverse condemnation purposes, has never been regarded as one for injury to property.[17] The concept of inverse condemnation, however, is wholly inapplicable unless some *property* has been either taken or damaged.[18] Yet, since governmental immunity barred relief on ordinary tort grounds, plaintiff in *Vater* sought to adopt the "nuisance exception" theory as a plausible basis of recovery in the absence of a statutory waiver. The issue was thus presented whether liability for nuisance was merely an aspect of inverse condemnation (in which case Mrs. Vater could not recover since no property was taken or damaged) or whether its persistent judicial acceptance had generated a basis for nuisance liability which was independent of property postulates.

The District Court of Appeal analyzed the nuisance precedents and concluded that they were either founded on the concept of inverse condemnation or were instances of proprietary activities for which governmental tort liability was recognized to exist, and held that wrongful death in the course of a governmental function could not be remedied on the nuisance theory asserted by plaintiff.[19] On hearing by the Supreme Court, however, the availability of the nuisance theory as an exception to the governmental immunity doctrine was expressly affirmed, despite the Court's recognition that inverse condemnation would not support plaintiff's action; but, on the facts pleaded, the Court concluded that no nuisance as defined by law had been shown to exist.[20] By accepting the plaintiff's legal premise that the nuisance theory was perfectly appropriate in a personal injury or wrongful death action, and denying relief solely on the facts, the Court thus clearly demonstrated that the "nuisance exception" was an independent vehicle for redressing *all* types of tortious injuries to which it was logically applicable. Cases decided subsequent to *Vater* have followed this view.[21]

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[16] Of the nuisance cases cited in notes 2-12 *supra*, the only one which may have involved personal injuries was Bloom v. City & County of San Francisco, 64 Cal. 503, 2 Pac. 129 (1884). Although the complaint alleged physical illness of the plaintiffs resulting from the nuisance complained of, the reported opinion is so brief that it is impossible to ascertain therefrom whether the damages awarded were for such physical injuries or for impairment of value of the land due to its being rendered uninhabitable. Also, that case may not, in fact, have been decided on a nuisance theory. See note 6 *supra*.

[17] Although wrongful death has been regarded as a form of action for injuries to property for purposes of survival of actions, see Hunt v. Authier, 28 Cal.2d 235, 169 P.2d 913, 171 A.L.R. 1379 (1946), it is not deemed to be within the rationale of inverse condemnation. Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App.2d 306, 114 P.2d 14 (1941).

[18] See discussion in text at 102-104 *supra*.

[19] Vater v. County of Glenn, 309 P.2d 844 (Cal. App. 1957).

[20] Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958).

[21] Bright v. East Side Mosquito Abatement Dist., 168 Cal. App.2d 7, 335 P.2d 527 (1959), holding that good cause of action for personal injuries was stated on nuisance theory against district engaged in clearly governmental function. See also, Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959), conceding that nuisance theory is appropriate in personal injury action, but holding that no nuisance was pleaded in fact; Zeppi v. State, 174 Cal. App.2d 484, 345 P.2d 33 (1959) (*semble*).

Thus, even before *Muskopf* a person injured as a result of a "governmental" activity of a public entity could recover in tort, notwithstanding the immunity doctrine, if the injury resulted from a nuisance. The significance of this "nuisance exception" stems from the fact that many tort situations involving ordinary negligence, for which governmental immunity would otherwise be a complete defense, may reasonably be construed as within the concept of nuisance. For example, when county employees through negligence obscured a public highway with smoke from weed-burning operations, the court in a recent case found a basis for liability in the Public Liability Act of 1923;[22] but when mosquito abatement crews of a mosquito abatement district did substantially the same thing, the court, finding the Public Liability Act inapplicable to such a district, affirmed liability on a nuisance theory.[23] Again, negligent maintenance of a public rubbish dump in such a way as to permit fire to escape therefrom may be actionable either under the Public Liability Act,[24] if applicable, or may be regarded as an obstruction to the free use of adjoining property which interferes with its comfortable enjoyment, and hence an actionable nuisance.[25] Similarly, ordinary negligence in the routine maintenance of a sewage or storm drainage system will not support an action in inverse condemnation for resulting property damage,[26] but relief may be obtained under the Public Liability Act,[27] or where that statute does not apply, in an action founded on a nuisance theory.[28]

In these and other cases, in other words, the courts have employed the nuisance rationale as a technique for retreating from governmental nonliability for negligence.[29] Even the express statutory admonition that "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"[30] was effectively eliminated as a barrier to this result by the simple expedient of holding that general statutory authority to engage in the particular activity (as distinguished from explicit authority to create the nuisance itself) would not be construed to authorize the creation of a nuisance.[31] The practical consequence of the development of the "nuisance exception" was thus to cut down the area of "governmental" immunity. Unfortunately, by assimilating ordinary negligence within the definition of a nuisance, a

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[22] Tolhet v. County of Santa Clara, 149 Cal. App.2d 305, 308 P.2d 356 (1957).
[23] Bright v. East Side Mosquito Abatement Dist., 168 Cal. App.2d 7, 335 P.2d 527 (1959).
[24] Anderson v. County of Santa Cruz, 174 Cal. App.2d 151, 344 P.2d 421 (1959). See also, Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951).
[25] See Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959).
[26] See Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), as discussed in the text at 105-106 *supra*.
[27] See Knight v. City of Los Angeles, 26 Cal.2d 764, 160 P.2d 779 (1945); Selby v. County of Sacramento, 139 Cal. App.2d 94, 294 P.2d 508 (1956). *Cf.* Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955).
[28] Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App.2d 438, 330 P.2d 441 (1958); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App.2d 720, 317 P.2d 33 (1957); Kramer v. City of Los Angeles, 147 Cal. 663, 82 Pac. 334 (1905); Spangler v. City & County of San Francisco, 84 Cal. 12, 23 Pac. 1091 (1890).
[29] Accord, Prosser, Torts 779 (2d ed. 1955).
[30] Cal. Civ. Code § 3482.
[31] Hassell v. City & County of San Francisco, 11 Cal.2d 168, 79 P.2d 1021 (1938); Bright v. East Side Mosquito Abatement Dist., 168 Cal. App.2d 7, 335 P.2d 527 (1959); Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App.2d 720, 317 P.2d 33 (1957).

(5)

substantial degree of uncertainty and confusion was introduced into the law, thereby tending to invite unnecessary litigation.

Relevant to the purposes of the present study is the predominance of nuisance cases which involve either sewage or storm drain systems, or public improvements which obstruct natural watercourses and cause flooding of property.[32] To the extent that the nuisance concept provides an auxiliary remedy where inverse condemnation is insufficient to supply complete relief, these decisions appear to indicate a recurrent and deep-seated judicial consensus as to the need for some device for rendering justice in such cases. Water pollution, noxious odors, flooding of property and the like are hazards of property ownership which may be endurable in an economy founded upon private property if legal redress is generally available; but where such interferences must be borne by the injured person alone, the risk of disrupting or frustrating the legitimate and desirable expectancies of property ownership becomes so great as to demand the strongest possible justification for its existence.

In most such cases, however, intelligent planning and conscientious performance of duty, with decent consideration for the welfare of property owners, would permit public officers to minimize the risk, if not eliminate it entirely. The ever-present problems of public health and sanitation are not significantly advanced toward solution by the easy expedient of dumping raw sewage into a nearby stream or into an open field. A desire for street improvements doesn't justify the obstruction of a natural watercourse with fill, thereby causing the inundation of neighboring land, when an intelligent use of culverts and drainage ditches could avoid the difficulty. Sound public administration, in other words, demands a reasonable degree of care in the planning and maintenance of public improvements of this type which, if not done carefully, threaten serious injury of a lasting nature. Since the resulting financial burdens, for the most part, are avoidable, the threat of liability for nuisance may be greatly reduced by, and thus constitutes an incentive to, good government.

The rationale here suggested admittedly is not explicated in any of the reported cases. It seems consistent with the results reached, however; and at least may suggest certain realistic considerations of sound policy which may justify somewhat different legislative treatment of injuries resulting from public improvements and maintenance of conditions on public property which may affect surrounding property and persons thereon, as compared to other types of tortious governmental conduct. A similar distinction already has motivated much of the existing legislation in California relating to governmental tort liability.[33] To treat the nuisance cases as simply irrational anomalies would, it is submitted, overlook potentially distinguishing policy considerations which deserve careful exploration.

[32] See the cases cited in notes 3, 4, 7, 10, 11 and 12 *supra*.

[33] See the discussions in the text of Public Liability Act at 42-59 *supra*; statutory liabilities in weed abatement work at 53-65 *supra*; damages resulting from public improvement projects at 75-97 *supra*. Compare the statutory immunities from liability discussed at 174-98 *supra*.

EXHIBIT III

Extracts From California
Government Tort Liability

d. [§5.10] *Nuisance*

Clearly Govt C §815, construed with the rest of the California Tort Claims Act, was intended to eliminate any public entity liability for damages on the ground of common law nuisance. (The right to specific relief to enjoin or abate a nuisance, however, was expressly preserved. Govt C §814; see §5.13.) As the Senate Judiciary Committee pointed out, "there is no section in this statute declaring that public entities are liable for nuisance"; hence, any claim to damages for nuisance will have to be predicated on "the provisions relating to dangerous conditions of public property or . . . some other statute that may be applicable to the situation." Senate J. Apr. 24, 1963, p 1887; Part V, Legislative Committee Comment, §815.

This legislative intent may not be entirely effective. The concept of nuisance as a basis for government tort liability, notwithstanding the immunity doctrine, originated under the inverse condemnation theory. See §§1.20–1.21. To the extent that this theory is recognized, nuisances may still be actionable in inverse condemnation suits, at least for property damage. Compare §1.21.

Several nuisance decisions have predicated public entity liability on proof of facts bringing the case within the definition of a nuisance in CC §3479. *E.g., Vater v County of Glenn* (1958) 49 C2d 815, 323 P2d 85; *Mercado v City of Pasadena* (1959) 176 CA2d 28, 1 CR 134; *Zeppi v State* (1959) 174 CA2d 484, 345 P2d 33; *Mulloy v Sharp Park Sanitary Dist.* (1958) 164 CA2d 438, 330 P2d 441. Civil Code §3484 declares that abatement of a nuisance (which is still permitted by the 1963 act—see Govt C §814) "does not prejudice the right of any person to recover damages for its past existence"; CC §§3491 and 3501 authorize a civil action as a nuisance remedy. Thus, although Govt C §815 was intended to preclude nuisance liability except when provided by statute, it is not clear whether CC §§3479, 3491, and 3501 are the necessary statutory exceptions.

The fact that these sections are general in language, and do not specifically refer to public entities, does not preclude their application to such entities, because generally worded code sections are applied to governmental bodies if no impairment of sovereign powers would result. *Flournoy v State* (1962) 57 C2d 497, 20 CR 627 (wrongful death statute held applicable to public entities). However, in light of the legislative intent to preclude nuisance liability unless provided by a statute such as the specific dangerous condition statute, the sounder

view, it is submitted, would deny application of the Civil Code's general provisions and require public entities' nuisance liability to rest on statutory language expressly applicable to public entities. See Part V, Law Revision Commission Comment, §830.

e. [§5.11] *Other General Statutory Provisions*

It is now clear that general statutory language is applicable to public entities, absent legislative intent to the contrary (compare §5.10), unless application would substantially impair their sovereign powers. *Flournoy v State* (1962) 57 C2d 497, 20 CR 627. Thus, a possible source of government tort liability may be found in general statutes imposing liability on private persons in defined circumstances. See, *e.g.*, the discussion of Veh C §17150 in §7.65.

Some provisions of the California Tort Claims Act refer to other enactments for the standard of liability. For example, public entities are liable for failure to exercise reasonable diligence to discharge a mandatory duty imposed by enactment. Govt C §815.6; see §5.38. If plaintiff's injury is caused by breach of a duty created by a statute, charter provision, ordinance, or regulation, this statutory liability may be applicable. See §§5.38–5.40. Similarly, if legislative measures establish standards to which public employees must conform at the risk of personal tort liability, breach may be a basis of entity liability under respondeat superior. Govt C §815.2; see §§5.32–5.33.

3. [§5.12] Contractual Liability Not Affected

Governmental immunity traditionally did not preclude enforcement by judgment of contract obligations of public entities that had consented to be sued. See §1.5. This policy has been continued by the California Tort Claims Act, which declares that nothing in its substantive provisions "affects liability based on contract." Govt C §814.

Apparently, a tortious act or omission for which statutory immunity is available (see §§5.27–5.30) may nonetheless be actionable if the facts lend themselves to pleading and proof on a recognized contract theory. For example, the act declares public entities immune from liability for an injury caused by misrepresentation by their employees. Govt C §818.8; see §§5.65–5.67. But, under §814, such misrepresentation is actionable if it constitutes a breach of contract, as well as a tort, since the contractual remedy is still available. Cf. *Souza & McCue Constr. Co. v Superior Court* (1962) 57 C2d 508, 20 CR 634. Similarly, the state may be held liable, notwithstanding an applicable tort immunity, for

5.10 Nuisance Liability

The present status of nuisance concepts, as a basis of governmental tort liability, is uncertain for reasons outlined in Govt Tort Liability 5.10. However, cases decided since the enactment of the California Tort Claims Act of 1963 have impliedly regarded nuisance law as still available in actions against public entities, although no opinion has been found which undertakes a careful analysis of this branch of the law. See, e.g., Lombardy v Peter Kiewit Sons' Co. (1968) 266 CA2d ....., 72 CR 240 (nuisance liability denied on merits); Granone v Los Angeles (1965) 231 CA2d 629, 42 CR 34 (availability of nuisance remedy affirmed, but without discussion of impact of the act) (alternate ground).