52.70 10/20/69

Memorandum 69-139

Subject: Study 52.70 - Sovereign Immunity (Nuisance Liability)

Sovereign Immunity Recommendation No. 10 is being printed. One provision of this recommendation deals with nuisance liability. We have received a comment from Gideon Kanner concerning this aspect of the recommendation. We reproduced Mr. Kanner's comment as Exhibit I (pink) attached.

Reproduced as Exhibit II are (1) the preliminary portion of the printed recommendation which deals with nuisance liability and (2) the text of the recommended provision and comment thereto. It should be noted that the proposed legislation does not refer to the "nuisance concept." It merely states that a public entity is not liable for damages under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code. As pointed out in both the recommendation and the Comment to the proposed section, the proposed section does not affect liability under Section 14 of Article I (inverse condemnation) nor does it affect liability under any applicable statute excluding Part 3 of Division 4 of the Civil Code.

The staff does not believe that there is any merit to Mr. Kanner's criticism of the recommendation and recommends that no change be made in the recommendation in response to his comment.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

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October 7, 1969

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Re: Recommendation Relating to Sovereign Immunity, Number 10 - Revisions of the Governmental Liability Act - Nuisances.

Dear John:

I have read with interest the above-entitled Commission Recommendation, and as a result have prepared a comment on the nuisance aspects thereof, which I hope will receive thoughtful consideration by the Commission.

The basic problem - the imprecision of the term "nuisance" - is obviously not of the Commission's making. Yet, it is a fact of legal life and must be dealt with. I respectfully suggest that use of the term "nuisance" in the proposed legislation, without any indication as to what kind of nuisance is the subject of that legislation, will not be helpful. Indeed, it will likely lead to further conceptual confusion and constitutional problems unless the legislative intent not to trench on the area protected by the "just compensation" clauses is made unequivocally clear.

Sincerely,

GIDEON KANNER

GK:ph

Enclosure

THE CONCEPT OF NUISANCE IS A NUISANCE

A Comment on California Law Revision Commission Recommendation Relating to Sovereign Immunity Number 10 - Revisions of the Governmental Liability Act (Proposed Government Code §815.8).

by

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". . . there is glory for you!"

"I don't know what you mean by 'glory'," Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't - till I tell you. I meant 'there's a nice knockdown argument for you'."

"But 'glory' doesn't mean 'a nice knockdown argument'," Alice objected.

"When I use a word," Humpty Dumpty said in a scornful tone, "it means just what I choose it to mean - neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master - that's all." Carroll, "Through the Looking Glass", (1964 ed., Grosset & Dunlap), pp. 230-231.

Like Humpty Dumpty, courts have refused to knuckle under to mere words. They have gone on in the apparent belief that the word "nuisance" means just what they choose it to mean in any given case neither more nor less.[1/] The end result to the litigants - to carry the simile a bit further - can be just as disastrous as Humpty Dumpty's

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1/ "Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem. The defendant's interference with the plaintiff's interests is characterized as a nuisance , and there is nothing more to be said." Prosser on Torts (3rd ed.), p. 592.

was to him, except that the King's men (the King does not appear to rely on his horses these days) exhibit no particular inclination to put the judicially-produced pieces together again. Indeed, the King's men appear to thrive on the confusion surrounding the word (see Burrows v. State (1968) 260 CA 2d 29).

It is impossible to speak about "nuisance" with any degree of intelligebility, unless one first defines the term.

> "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." Prosser on Torts (3rd ed.), p. 592.

The Restatement gave up on the use of the word "nuisance" altogether in order to "avoid the use of a term attended with so much confusion and uncertainty of meaning". Restatement of Torts, Ch. 40, Introductory Note, p. 215.

Inasmuch as this note is concerned with the law of eminent domain, which in turn is concerned with "taking" and "damaging" of "property", it becomes necessary to inquire to what extent "nuisance" constitutes an interference with "property", and whether such interference invokes the constitutional protection of the "just compensation" clauses.

"Most of this vagueness, uncertainty and confusion has been due to the fact that the word 'nuisance', which in itself means no more than hurt, annoyance or inconvenience, has come by a series of historical accidents to cover the invasion of different kinds of interests, and of necessity to refer to various kinds of conduct on the part of the defendant. The word first emerges in English law to describe interferences with servitudes or other rights to the free use of land. It became fixed in the law as early as the thirteenth century with the development of the assize of nuisance, which was a criminal writ affording incidental civil relief, designed to cover invasions of the plaintiff's land due to conduct wholly on the land of the defendant. This was superseded in time by the more convenient action on the case for nuisance, which became the sole common law action. The remedy was limited strictly to interference with the use or enjoyment of land, and thus was the parent of the law of private nuisance as it stands today." Prosser on Torts (3rd ed.), pp. 592-593, (footnotes omitted).

In order to avoid the "vagueness, uncertainty and confusion" complained of by Dean Prosser, this note concerns itself with "nuisance" to the extend "nuisance" amounts to an invasion of property. To that end, the definition of "nuisance" used here is the one used by the Restatement of Torts §822:

"The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

(a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and

(b) the invasion is substantial; and
(c) the actor's conduct is a legal cause of the invasion; and
(d) the invasion is either
(i) intentional and unreasonable; or
(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."

In other words, "nuisance" in its historical and Restatement meaning is a course of conduct which constitutes an invasion of the aggrieved party's property interests, i.e., the right of user of one's property.[2/] It cannot be overemphasized that "nuisance" does not describe the actor's conduct, but only the impact of that conduct upon the aggrieved party. Dean Prosser makes this point with his usual lucidity:

> "Another fertile source of confusion is the fact that nuisance is a field of tort liability, rather than a type of tortious conduct. It has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion. The attempt frequently made to distinguish between nuisance and negligence, for example, is based upon an entirely mistaken emphasis upon what the defendant has done rather than the result which has followed, and forgets completely the well established fact that negligence is merely one type of conduct which may give rise to a nuisance." Prosser on Torts (3rd ed.), pp. 594-95.

2/ This right is, of course, protected by the just compensation clauses of the constitutions. See Pacific Telephone, etc. Co. v. Eshleman (1913) 166 Cal 640, 664.

Likewise see Restatement of Torts, Ch. 40, Introductory Note, pp. 220-21.

Therefore, when the "just compensation" constitutional commands are kept in mind, one cannot simply speak of "nuisance". One must distinguish between classic nuisance (i.e., ". . . interference with the use or enjoyment of land. . .", Prosser on Torts, (3rd Ed.), pp. 592-93), and the purely personal annoyance type of nuisance.

To the extent the term "nuisance" is used to denote a deprivation or damaging of property rights, governmental liability therefor arises out of the Constitution directly, and cannot be abrogated by legislative enactment. The California Supreme Court noted this principle early and unequivocally. The Court noted the property invasion/inverse condemnation aspects of nuisance and concluded:

> "The former Constitution of California under which the work was done as well as the Constitution now in force renders null all legislation purporting to authorize such a proceeding." Coniff v. San Francisco (1885) 67 Cal 45, 49.

Following Coniff, the U.S. Supreme Court stated this rule even more emphatically:

> "But the legislation we are dealing with must be construed in the light of the provision of the 5th Amendment - 'nor shall private property be taken for public use without just compensation' - and is not to be given an effect inconsistent with its letter or

> spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that 'a railroad authorized by law and lawfully operated cannot be deemed as a private nuisance'; that 'what the legislature has authorized to be done cannot be deemed unlawful', etc. These and similar expressions have at times been indiscriminately employed with respect to public and private nuisances. We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use." Richards v. Washington Terminal Co.(1913) 233 U.S. 546, 552-553; 58 L.ed. 1088, 1091 (emphasis added).

Whether a particular activity interferes with adjacent property sufficiently to invoke the constitutional guarantees against "taking" or "damaging" without compensation, is of course a question of fact. This is well illustrated by a series of U.S. Supreme Court decisions involving one parcel of land:

(1) In Peabody v. United States (1913) 231 U.S. 530, 540, the court held that very rare firings of naval guns near the affected land did not constitute a "taking".

(2) In Portsmouth Harbor etc. Co. v. United States (1919) 250 U.S. 1, 2,

involving the same land and the same guns, the court held that a slight increase in the firing frequency did not raise the interference to the level of a "taking".

(3) But, in Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327, again involving the same land and the same guns, the court held that allegations of new and additional naval gunnery activity gave rise to a right to trial on the merits, which could not be denied upon a demurrer. In the words of Mr. Justice Holmes: "The present case was decided upon demurrer. The question, therefore, is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require or at least warrant, a different finding from those previously reached." 260 U.S. at 328-29. (Emphasis added).

On a less exalted level, see the pragmatic decision of the court in U.S. v. Certain Parcels etc. (1966) 252 Fed.Supp. 319, holding that the question of whether nuisance-type activities (i.e., noise, dust, vibrations, etc., from a nearby construction) constituted a constitutional "taking" was a question of fact, which had to be resolved on the merits, and could not be decided on affidavits.

In California the situation is further compounded by the legislative enactment of CCP §1239.3 which permits taking of property ". . . if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport . . ."

Therefore, at least as to areas near airports, the presence of classic "nuisance" gives rise to a power to take. Conversely, and ineluctably, under the Rose and Breidert rule[3/], when these conditions occur and no taking is initiated by the government, the aggrieved owner can bring an inverse condemnation action.

3/ I.e., the provisions of Art. 1, §14, of the California Constitution are self-enforcing (Rose v. State (1942) 19 C 2d 713, 720), and therefore there is no substantive difference between direct and inverse condemnation (Breidert v. Southern Pac. Co. (1964) 61 C 2d 659, 663, fn. 1).

I recognize that one might be tempted here to differentiate between airports and other nuisance-based interferences with the use or enjoyment of property because of the higher intensity of aircraft noise. Recent scientific studies, however, indicate that this is not a valid distinction.

> "Noise radiation from vehicular traffic and railroads is becoming a major source of complaint among urban and suburban dwellers. ... Of the two sources, vehicular traffic especially highway noise, is the more serious offender.
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> * * *
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> "Generally speaking, traffic noise radiating from the freeways and expressways and from mid-town shopping and apartment districts of our large cities probably disturbs more people than any other source of outdoor noise. Although aircraft noise is much more intense, the exposure time is substantially less than that of round-the-clock, continuous highway noise." Noise - Sound Without Value, Committee on Environmental Quality of the Federal Council for Science and Technology, Sept. 1968, p. 16.

In short, we now have legislation on the books to the effect that classic nuisance (i.e., "noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property") invokes the taking power. And, this legislation uses virtually the same language as Civil Code §3479 defining nuisance.

Therefore, I respectfully suggest that enactment of the proposed Government Code §815.8 as now drafted will compound the confusion surrounding the concept and application of nuisance to specific fact situations.

Even without this code section courts have on occasion confused nuisance affecting the person with nuisance affecting property. An example of such confusion is the case cited in footnote 9 of the Commissions Recommendation Relating to Sovereign Immunity Number 10: Lombardy v. Peter Kiewit Sons' Co. (1968) 266 A.C.A. 652. In Lombardy the thrust of the homeowners' arguments was that the nuisance elements (i.e., noise, dust, fumes, vibrations, shocks and apprehension of harm) were so severe as to deprive them of the use and enjoyment of their property. But in the opinion the court ignored this argument altogether and invoked Civil Code §3482 on the basis of mostly pre-Muskopf nuisance cases involving personal injuries (Larson v. Santa Clara Valley Water Conservation Dist. (1963) 218 CA 2d 515, Zeppi v. State (1959) 174 CA 2d 484; Vater v. County of Glen (1958) 49 C 2d 815).4/

4/ In the interest of accuracy it should be noted that the court also relied on Liebman v. Richmond (1930) 103 CA 354, a non-injury case. Liebman however did not involve any interference with plaintiff's property, nor was it even a private nuisance case (Mr. Liebman sought to abate the Alameda County courthouse as a [public] nuisance).

I therefore respectfully suggest:

1. Enactment of proposed Government Code §815.8 as now drafted, will tend to compound rather than clarify the existing confusion surrounding the word "nuisance".
2. To the extent §815.8 is intended to abrogate governmental liability for nuisance affecting the person it is unnecessary because Civil Code §3482 already provides immunity for statutorily authorized nuisances.
3. To the extent §815.8 is intended or can be said to abrogate governmental liability for nuisance-type interference with the use or enjoyment of one's property (i.e., in the Restatement or CCP §1239.3 sense), it is not only confusing but also unconstitutional.
4. If I have been unsuccessful in persuading the Commission to delete §815.8 from the Recommendation altogether, I suggest that at the very least the language of §815.8 be amended as follows:

"815.8. A public entity is not liable for damages under Part 3 (commencing with

Section 3479) of Division 4 of the Civil Code, unless such damages arise out of interference with the use or enjoyment of private property."

EXHIBIT II

PROVISIONS RELATING TO NUISANCE LIABILITY

NUISANCE

Background

Section 815 of the Government Code, particularly when construed with the rest of the 1963 legislation, was clearly intended to eliminate any public entity liability for damages on the ground of common law nuisance.[3] The Senate Judiciary Committee, in the official comment indicating its intent in approving Section 815, notes:[4]

> [T]here is no section in this statute declaring that public entities are liable for nuisance . . . ; [hence] 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, this legislative intent may not have been fully effective.

First, public liability for nuisance originated in--and until relatively recently was restricted to--cases of injury to property or such interferences with the use and enjoyment of property as to substantially impair its value.[5] Such liability, therefore, substantially overlapped liability based upon a theory of inverse condemnation, i.e., liability based upon the directive of Section 14 of Article I of the California Constitution that compensation must be made for damage to

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3. The right to specific relief to enjoin or abate a nuisance was, however, expressly preserved. See Govt. Code § 814. See also A. Van Alstyne, California Government Tort Liability §§ 5.10, 5.13 (Cal. Cont. Ed. Bar 1964; Supp. 1969). The Commission believes this distinction between damages and injunctive relief should be maintained and this recommendation is concerned only with the elimination of liability for damages.

4. Legislative Committee Comment--Senate, Govt. Code § 815 (West 1966).

5. See Van Alstyne, A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 1, 225-228 (1963).

property resulting from the construction of a public improvement for public use.[6] The constitutional source of liability under the latter theory precludes its elimination by Section 815 and, therefore, to this extent "nuisance" liability still exists.

Second, several pre-1963 decisions predicated nuisance liability for personal injury or wrongful death, as well as for property damage on facts bringing the case within the common law based definition of nuisance in Civil Code Section 3479.[7] Civil Code Sections 3491 and 3501 still expressly authorize a civil action as a nuisance remedy; thus, although Government Code Section 815 was intended to preclude nuisance liability "except as otherwise provided by statute," it is less than clear whether Sections 3479, 3491, and 3501 provide the necessary statutory exceptions.[8] Cases decided since 1963 have impliedly regarded nuisance law as still available in actions against public entities; however, none of these decisions have undertaken a careful analysis of the law.[9]

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6. See id. at 102-108; Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431 (1969).

7. E.g., 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 33 (1959); Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App.2d 438, 330 P.2d 441 (1958).

8. 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. See A. Van Alstyne, note 3 supra.

9. See, e.g., Lombardy v. Peter Kiewit Sons' Co., 266 Adv. Cal. App. 652, 72 Cal. Rptr. 240 (1968) (nuisance liability denied on merits); Granone v. County of Los Angeles, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965) (availability of nuisance remedy affirmed, but without discussion of impact of 1963 legislation) (alternate ground).

Recommendation

To eliminate the existing uncertainty and to effectuate the Legislature's original intention, the Commission recommends that a new section--Section 815.8--be added to the Government Code to eliminate expressly liability for damages for nuisance under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code. This section would eliminate liability for damages based on a theory of common law nuisance. Enactment of the section would have no effect on liability for damage to property based upon Section 14 of Article I of the California Constitution (inverse condemnation), liability based upon other specific statutory provisions, or the right to obtain relief other than money or damages.

The comprehensive governmental liability statute (supplemented by the provisions relating to ultrahazardous activity liability hereinafter recommended), together with inverse condemnation liability, provide a complete, integrated system of governmental liability and immunity. This carefully formulated system was intended to be the exclusive source of governmental liability. Although the term "nuisance" is not employed, the system does permit the imposition of liability upon governmental entities under most circumstances where liability could be imposed upon a common law nuisance theory. However, the possibility that liability could be imposed under an ill-defined theory of common law nuisance in circumstances where a public entity would otherwise be immune creates an uncertainty that is both undesirable and unnecessary.

Govt. Code § 815.8 (new). Liability based on nuisance

Sec. 2. Section 815.8 is added to the Government Code, to read:

815.8. A public entity is not liable for damages under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code.

Comment. Section 815.8 expressly eliminates the liability of a public entity for damages based on a theory of common law nuisance under the Civil Code provisions--Part 3 of Division 4--which describe in very general terms what constitutes a nuisance and permit recovery of damages resulting from such a nuisance. It makes clear and carries out the original intent of the Legislature when the governmental liability statute was enacted in 1963 to eliminate general nuisance damage recovery and restrict liability to statutory causes of action. See Section 815 and the Comment thereto; Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801, 000 (1969); A.Van Alstyne, California Government Tort Liability § 5.10 (Cal. Cont. Ed. Bar 1964, Supp. 1969).

Section 815.8 does not affect liability under Section 14 of Article I of the California Constitution (inverse condemnation), nor does it affect liability under any applicable statute excluding Part 3 of Division 4 of the Civil Code. Moreover, Section 815.8 is concerned only with the elimination of liability for damages; the right to obtain relief other than money or damages is unaffected. See Section 814.