#52 9/16/70

Memorandum 70-102

Subject: Study 52 - Sovereign Immunity (Nuisance Liability, Ultrahazardous Activity Liability, Plan or Design Immunity)

SUMMARY

The Commission is asked to approve for submission to the 1971 Legislature the attached recommendation relating to governmental liability. This recommendation provides for ultrahazardous activity liability, limits the plan or design immunity, and makes clear that governmental entities cannot be held liable for tort on a common law nuisance theory. (Inverse liability is not affected.) As a package, the recommendation might have a chance for legislative enactment. If any one of the three provisions is deleted, it will have no chance. The policy questions are:

(1) We have excepted streets and highways from the proposed limitation on the plan or design immunity. Should water projects also be excepted?

(2) Should tort liability on a theory of nuisance be eliminated?

(3) Should a recommendation be submitted to the 1971 Legislature? (What procedure should be followed for obtaining comments of interested persons and organizations?) We must send this to the printer now if we are to submit it in 1971.

BACKGROUND

At the last meeting, the Commission directed the staff to prepare a draft of a recommendation for submission to the 1971 Legislature to again propose the changes proposed to the 1970 Legislature (in Senate Bill 94) that were not enacted. The recommendation is attached. Please mark your suggested changes on one copy to turn in to the staff at the meeting. The

recommended legislation reflects the provisions as they were at the latest point where they were still being considered seriously by the Legislature. The preliminary portion of the recommendation is substantially the same as the recommendation to the 1970 session except that it has been revised to reflect the changes made in the proposed legislation after its introduction.

You will recall that Senate Bill 94 contained a package of various provisions, some beneficial to injured persons and some beneficial to public entities. The three major provisions of the bill failed despite general approval of both persons who represent injured persons and public entities. These provisions failed because the Department of Water Resources objected to limiting the plan or design immunity and Mr. Kanner and Mr. Fadem objected to making clear that liability cannot be based on a theory of nuisance. There would be no chance of obtaining approval of any one of the provisions if it were submitted as a separate bill.

PLAN OR DESIGN IMMUNITY

The Commission has considered in some detail the objections of the Department of Water Resources and it would serve no useful purpose to go through those objections again at this time. The Department wanted the immunity for plan or design to apply whether or not the plan or design represented sound engineering and was unwilling to permit any exceptions--even the limited one proposed by Senate Bill 94 as amended during the session.

NUISANCE LIABILITY

Mr. Kanner and Mr. Fadem objected to the provision that makes it clear that a public entity is not liable for damages on a theory of common law

nuisance. We think that this objection merits full discussion even though the Commission has discussed the objection from time to time in the past.

The recommendation would add Section 815.8 to the Government Code to make clear that a public entity is not liable for damages on a theory of common law nuisance. This provision would not affect the right to specific relief to enjoin or abate a nuisance. Nor would the provision affect liability based on the negligence of an employee, a dangerous condition of property, a failure to comply with a mandatory statute, or inverse condemnation.

Background

Prior to the decision of the California Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (abolishing doctrine of sovereign immunity in California), the California courts had developed the theory of liability for common law nuisance as a means of avoiding sovereign immunity. A number of cases prior to 1963 based public entity liability on facts bringing the case within the common law based definition of nuisance in Civil Code Section 3479.

The 1963 governmental liability statute was intended to provide statutory rules specifying when and under what circumstances a public entity would be liable for damages. The 1963 statute makes a public entity liable for damages for injury arising out of negligent or wrongful acts of its employees (Govt. Code § 815.2), for injury arising out of the dangerous condition of public property (Govt. Code §§ 830-840.6), for injuries resulting from the failure of the public entity to comply with a mandatory statute (Govt. Code § 815.6), and for injuries resulting under certain other circumstances (e.g., Govt. Code § 815.4). In addition, liability exists under an inverse condemnation theory for injuries to property (no showing of negligence required),

and the proposed legislation would make a public entity liable for injuries resulting from ultrahazardous activities to the same extent as a private person.

The theory of the 1963 statute is that a person seeking to impose liability upon a public entity must base the liability upon a statute that imposes liability on the public entity. As indicated above, there are a number of such statutes, and experience under these statutes indicates that with few exceptions they operate to impose liability and immunity appropriately. Moreover, Senate Bill 94 was introduced at the 1970 session to make changes that would remedy those few defects which experience shows exist in the 1963 statute.

When the governmental liability act was enacted in 1963, the Legislature intended to eliminate all nonstatutory bases of governmental liability. The Senate Judiciary Committee, in the official comment to Section 815, indicates a clear intent to eliminate common law nuisance as a theory of liability. See Van Alstyne, California Government Tort Liability 126 (Cal. Cont. Ed. Bar 1964)("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."). However, this legislative intent may not be entirely effective, and several cases decided since 1963 have indicated that common law nuisance may still exist as a theory of liability, even though liability was not imposed on such theory in these cases.

Liability of public entities for pollution

Mr. Jerrold A. Fadem, Los Angeles attorney, has objected to the enactment of proposed Section 815.8 on the ground that it would make public entities immune from liability for pollution caused by them. Section 815.8

does not make a public entity immune from liability for damages for pollution; it merely provides that common law nuisance is not available as an additional theory of liability. Thus, the section does not make a public entity immune if the pollution results from a negligent or wrongful act or omission of a public employee, or from a dangerous condition of public property, or from the failure of the public entity to comply with a mandatory statute, or from a "taking" or "damaging" within the meaning of Section 14 of Article I of the State Constitution (inverse condemnation), or from any other cause under circumstances where a statute makes the public entity liable. Thus, there are a number of carefully drawn statutory provisions under which an injured person can impose liability for pollution.

Mr. Fadem cites a number of pre-1963 cases where he notes liability was imposed on a theory of nuisance and suggests that immunity will exist under the circumstances of these cases if proposed Section 815.8 is enacted. This is not accurate. All of these cases were considered by the Law Revision Commission when the 1963 statute was drafted, and the 1963 statute was drafted to impose liability directly rather than on a theory of nuisance in the types of cases where liability formerly was imposed on the theory of nuisance. See Exhibit II (yellow) for an analysis of the cases cited by Mr. Fadem.

No court of appeal or Supreme Court decision since 1963 has imposed liability for pollution on a theory of common law nuisance. A careful analysis of the pre-1963 cases that imposed liability upon a theory of nuisance for pollution indicates that liability would exist under the facts of those cases under the 1963 statute. In this connection, it is of interest to note that one of the post-1963 cases cited in the recommendation was a case where the Fadem-Kanner firm represented a plaintiff seeking damages on a nuisance theory for freeway noise, dust, and the like, where no property was taken. The court refused to impose liability on any theory in this case.

Conclusion

Potentially, if the California courts accept common law nuisance as a theory of liability and apply that theory to its full extent, a huge fiscal burden would be imposed on the state and local public entities. This is because the vague definition of nuisance--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"--permits imposition of liability for damages without any consideration of whether the public entity is acting reasonably. (For pertinent statutory provisions, see Exhibit III--green.) For example, a number of public entities are polluting the San Francisco Bay because their sewage treatment plants are not up to the standards that are needed in view of modern conditions. There are a number of methods of working out this problem--other than judgments for money damages to injured plaintiffs (whoever they might be). The problem of pollution by governmental entities on the scale of the San Francisco Bay problem is one that will require much legislative imagination and tremendous fiscal resources, but the solution to this problem would not be aided by imposing governmental liability on a theory of common law nuisance.

If there are any particular circumstances where public entities are not now liable and liability should be imposed, such liability should be imposed by carefully drawn statutes after consideration of the fiscal consequences of such liability. For example, liability does not now exist for injuries from ultrahazardous activities (except on an inverse condemnation theory), and the proposed recommendation would provide liability on this theory. The plan or design immunity has operated, in the view of the Law

Revision Commission, to provide an unjustified immunity in some cases. However, the solution to this problem is not to wipe out all statutory immunities by permitting imposition of liability on a theory of nuisance; instead, the solution lies in drafting appropriate limitations on the plan or design immunity.

Specifically, if there are any situations where public entities should be liable for pollution--whether it be water, air, noise, or some other type of pollution--the Commission believes that these situations should be described by the Legislature in carefully drawn statutes rather than by the courts under the vague and uncertain theory of common law nuisance.

Mr. Kanner's response

The letter from Mr. Kanner in response to the above is set out as Exhibit IV (gold). In connection with the enjoining of public entities engaged in activities that result in pollution, see Assembly Bill 1311 which was considered at the last session. The bill was not enacted and the Assembly Judiciary Committee is studying this problem in the interim prior to the next session. See Exhibit V (attached).

STAFF CONCLUSION

The staff recommends approval of the attached recommendation for submission to the 1971 session. We recommend that it be sent to the printer immediately. We also recommend that it be distributed to interested persons and organizations for comment immediately and that the comments we receive be considered early in January and any needed revisions in the proposed legislation be then made. As previously indicated, there was a general feeling at the 1970 session that the bill was a desirable enactment. This view was

shared by attorneys who represent plaintiffs and by attorneys who represent public entities. As previously indicated, there were a few who took a contrary view. However, the staff conclusion is that the bill strikes a fair balance between immunity and liability and would provide relief in some cases where clear injustice now results and would not deprive injured persons of relief in cases where relief should be provided.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 70-102

EXHIBIT I

AMENDED IN ASSEMBLY JULY 24, 1970
AMENDED IN ASSEMBLY JUNE 16, 1970

CALIFORNIA LEGISLATURE—1970 REGULAR SESSION

ASSEMBLY BILL No. 1311

Introduced by Assemblyman Hayes
(Coauthor: Senator Moscone)

March 18, 1970

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Chapter 3.5 (commencing with Section 536) to Title 7 of Part 2 of the Code of Civil Procedure, relating to civil proceedings.

The people of the State of California do enact as follows:

SECTION 1. Chapter 3.5 (commencing with Section 536) is added to Title 7 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3.5. CONSERVATION PROCEEDINGS

Article 1. General Provisions and Findings

536. This chapter may be cited as the "California Conservation Act."

536.1. The Legislature hereby finds and declares that it is the policy of this state to conserve and protect its environment. It is the policy of this state to prevent destruction or pollution of the environment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1311, as amended, Hayes (Jud.). Natural resource conservation proceedings.

Adds Ch. 3.5 (commencing with Sec. 536), Title 7, Pt. 2, C.C.P.

Enacts "California Conservation Act."

Authorizes and provides for specified legal and administrative proceedings for conservation and protection of environment from destruction or pollution.

Vote—Majority; Appropriation—No; Fiscal Committee—Yes.

536.2. The Legislature hereby finds and declares that conservation of natural resources and protection of the environment are pursuits often beyond the scope of inquiry, legislation, or enforcement by local government; that the boundaries of local government do not coincide with the amorphous boundaries of ecological communities; that several local public entities existing in the same ecological community have acted in differing and, sometimes, conflicting manners; that uniform, coordinated, and thorough response to the questions of protection of environment and conservation of natural resources must be assured; and that these matters are of statewide concern.

536.3. The Legislature hereby finds and declares that persons and public entities must consider the impact of their conduct, products, plans, and budgets upon the environment and affirmatively determine that such conduct, products, plans, and budgets support this state's policy of conservation.

536.4. The provisions of this chapter are not exclusive, and the causes of action and remedies provided for in this chapter shall be in addition to any other remedies or causes of action provided for in any other law or available under common law.

536.5. If any provision of this chapter or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

536.6. Any waiver by any person of the provisions of this chapter is contrary to public policy and shall be unenforceable and void.

Article 2. Construction and Definitions

536.10. This chapter shall be liberally construed and applied to promote its underlying purposes which are to protect the environment from destruction or pollution and to provide for the people efficient and economic judicial and administrative procedures to secure such protection.

536.11. As used in this chapter, "person" means and includes natural persons, corporations, firms, partnerships, joint stock companies, associations, counties, city and counties, cities, municipal water districts, irrigation districts, public utility districts, state agencies, districts, commissions, and departments, any other public corporation or association of persons, and the United States to the extent authorized by federal law.

536.12. As used in this chapter, "environment" means the land, as defined in Section 536.14, or water, air, or silence which, irrespective of ownership, contributes, or in the future may contribute, to the health, safety, or welfare of a substantial number of persons, or to the balance of an ecological community.

536.13. As used in this chapter, "public entity" means any county, city and county, city, municipal water district, irrigation district, public utility district, and any other public corporation, and any state agency, district, commission, or department.

536.14. As used in this chapter, "land" is limited to the land owned, leased, or held by any public entity in this state and any minerals, vegetation, wildlife, historic or aesthetic sites, or any other natural resources thereon.

536.15. As used in this chapter, "pollution" means the substantial alteration of the physical, chemical, or biological properties of the air or water in a manner contrary to the promotion of the health, safety, or welfare of a substantial number of persons, or to the balance of an ecological community.

536.16. As used in this chapter, "destruction" means a use, abuse, waste, or omission of duty substantially affecting the environment in a manner contrary to the promotion of the health, safety, or welfare of a substantial number of persons, or to the balance of an ecological community.

Article 3. Remedies

536.20. The Attorney General of the State of California or any person may maintain an action for equitable relief against any other person for the preservation and protection of the environment from destruction or pollution.

536.21. To maintain an action under this chapter, the plaintiff shall allege facts showing that the defendant did, or unless restrained will, destroy or pollute the environment, and, either of the following:

(a) That the defendant's conduct or product is inconsistent with this state's policy of conservation and is not reasonably required for the promotion of the public health, safety, or welfare.

(b) That there is a technologically and economically feasible alternative to the defendant's conduct or product which better promotes this state's policy of conservation.

536.22. (a) No action may be maintained under this chapter where any conduct or product is expressly authorized by state statute.

(b) No action may be maintained under the provisions of this chapter against any person for any conduct or product expressly authorized by any rule, regulation, order, permit, or variance of any state agency, board, district, commission, or department, except against the public entity which issued the rule, regulation, order, permit, or variance.

(c) No action may be maintained under the provisions of this chapter against any person for any conduct or product expressly authorized by any rule, regulation, order, permit, or variance of any public entity which imposes more stringent conditions, restrictions, or limitations with respect to the protection of the environment than any state statute or rule, reg-

vation, order, permit, or variance of any state agency, board, district, commission, or department, except as against the public entity which issued the rule, regulation, order, permit, or variance.

Article 4. Review of Administrative Decisions

536.30. Every public entity shall, before granting any permit, license, or final approval, or adopting any program, plan, budget, or design, first find that such grant or adoption of program, plan, budget, or design is consistent with this state's policy of conservation.

~~536.31. Upon the commencement of consideration by any~~ *536.31. Every public entity shall include in any report on any program they propose to carry out which could have a significant effect on the environment, a detailed statement setting forth the following:*

(a) The environmental impact of the proposed action.

(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

(c) Mitigation measures proposed to minimize the impact.

(d) The description and consideration of all other technologically and economically feasible alternatives to the proposed action.

(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

536.32. Prior to making the report required by Section 536.31, the public entity shall consult with any governmental agency which has jurisdiction by law with respect to any environmental impact involved.

536.33. The public entity shall include the environmental impact, report, together with any comments received from other governmental agencies pursuant to Section 536.32, as a part of the regular project report used in the existing review and budgetary process. Such report shall be available to the general public for inspection.

536.34. The transcript and other evidence presented at the public entity hearing and any other evidence deemed relevant by the court shall be admissible in any action for judicial review commenced according to the provisions of this chapter.

536.35. A court shall find that the public entity has abused its discretion if the court determines that the public entity has not proceeded in the manner required by law, that the order or decision is not supported by findings, or that the findings are not supported by the evidence.

~~public entity of a program, plan, budget, or design which has a substantial impact upon its environment, such public entity shall solicit the views of the resources, recreation, and planning agencies of the California, federal, and local government which~~

such public entity knows or believes shall be directly affected by such program, plan, budget, or design. The public entity shall establish and maintain a list upon which any person may enroll to receive notice of such considerations in any area specified by such person. All written views received as a result of the provisions of this section shall be made available to the public as a part of paragraph (2) of subdivision (b) of Section 536.33.

536.32. A public entity shall provide opportunity for a public hearing regarding any program, plan, budget, or design which has a substantial impact upon the environment.

A public entity shall satisfy the requirements of such public hearing by holding a public hearing, or publishing two notices of opportunity for a public hearing and holding a public hearing if any written requests for such a hearing are received in reasonable time. The procedure for requesting a public hearing shall be explained in the notice. The last day for submission of such request shall not be less than 21 days after the date of publication of the first notice of the opportunity for public hearing, and no less than 14 days after the date of publication of the second notice of opportunity for public hearing.

The opportunity for additional public hearings shall be afforded in any case where the program, plan, budget, or design is so changed from that presented in the original notice or public hearing as to have a substantially different environmental impact.

The opportunity for a public hearing shall be afforded in each case in which the public entity is in doubt whether a public hearing is required.

536.33. (a) Notice of the public hearing shall be given as follows:

(1) When a public hearing is to be held, a notice of public hearing shall be published in a newspaper of general circulation in the county of the expected impact on the environment. The first publication shall be from 30 to 40 days before the date of the hearing, and the second publication shall be from 5 to 13 days before the date of such hearing.

(2) The public entity shall mail copies of the notice to appropriate news media, such resources, recreation, and planning agencies, and such persons requesting notice, as described in Section 536.32.

(3) Each notice of public hearing shall specify the date, time, and place of the hearing and shall contain a description of the program, plan, budget, or design.

(b) The conduct of the public hearing shall be as follows:

(1) Public hearings shall be held at a place and time generally convenient for affected persons.

(2) Provision shall be made for submission of written statements and other exhibits in place of, or in addition to, oral statements at a public hearing. The procedure for such submissions shall be described in the notice of public hearing

and at the public hearing. The final date for receipt of such statements shall be at least 10 days after the public hearing.

(3) At a reasonable time after the hearing and before the program, plan, budget, or design is approved, all information in support of such program, plan, budget, or design shall be available upon request for public inspection and copying.

(c) Transcripts shall be prepared as follows:

(1) The public entity shall provide for the making of a verbatim written transcript of the oral proceedings at each public hearing together with attached statements, photographs, exhibits, or other demonstrative evidence admitted or filed in connection with a public hearing.

(2) The public entity shall make copies of the materials described in paragraph (3) of subdivision (b) available for public inspection and copying not later than 60 days after the public hearing.

526.34. Whether or not public hearings are held, each consideration by a public entity about a program, plan, budget, or design which shall have a substantial impact on the environment shall include a study report containing each of the following:

(a) Descriptions of alternatives considered and a discussion of the anticipated environmental impact of the alternatives, pointing out the significant differences and the reasons supporting the proposed program, plan, budget, or design, and an analysis of the relative consistency of the alternatives with this state's policy of conservation.

(b) A summary and analysis of the views received concerning the proposed program, plan, budget, or design.

(c) A list of any prior studies relevant to the undertaking.

526.35. The public entity shall publish notice of the action taken in a newspaper as described in paragraph (1) of subdivision (a) of Section 526.33. The notice shall include a narrative description of the program, plan, budget, or design and shall state that all transcripts, statements, photographs, and other demonstrative evidence admitted or filed in connection with the consideration are publicly available at a convenient location.

526.36. The transcript and other evidence presented at the public entity hearing and any other evidence deemed relevant by the court shall be admissible in any action for judicial review commenced according to the provisions of this chapter.

526.37. A court shall find that the public entity has abused its discretion if the court determines that the public entity has not proceeded in the manner required by law, that the order or decision is not supported by findings, or that the findings are not supported by the evidence.

526.38. (a) No action may be commenced or maintained against any program, plan, budget, or design expressly permitted, licensed, approved, or adopted by any public entity more than one year after such final permission, license, approval, or adoption, provided such public entity has complied

~~with the provisions of this chapter relating to public hearings.~~

~~(b) Notwithstanding the provisions of subdivision (a), a public hearing may be demanded of a public agency for any program, plan, budget, or design expressly permitted, licensed, approved, or adopted by such public agency at any time upon a showing by clear and convincing evidence that notwithstanding former compliance with the provisions of this chapter relating to public hearings, the program, plan, budget, or design is inconsistent with this state's policy of conservation and is not reasonably required for the promotion of the public health, safety, or welfare.~~

Article 5. Procedure

536.40. An action under this chapter shall be brought in the superior court of any county where the alleged conduct relating to destroying or polluting the environment is alleged to have occurred.

536.41. The court may, upon the application of either party, or of its own motion, direct a referee, who is disinterested and technically qualified, to try any or all of the issues in an action commenced under this chapter, whether of fact or of law, and to report findings and recommendations thereon. Costs of reference may be apportioned between the parties, on the same or adverse sides, in the discretion of the court.

536.42. (a) In any administrative or judicial proceeding, the public entity or court may permit the Attorney General or any person to intervene as a party upon a showing that the proceeding involves conduct which may be contrary to this state's policy of conservation.

(b) Where intervention was available in another action or proceeding and the plaintiff in an action under this chapter willfully and inexcusably refused to intervene in such other action or proceeding, the court may dismiss with prejudice the action of such plaintiff.

536.43. An action brought pursuant to this chapter shall take special precedence over all civil matters on the calendar of the court, except those matters to which equal precedence on the calendar is granted by law.

536.44. (a) No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the court deems proper. In no event shall such sum be more than ten thousand dollars ($10,000). Such security shall be given for the payment of such cost and damages as may be incurred or suffered by any person who is found to have been wrongfully enjoined or restrained. No such security shall be required of: (1) the Attorney General, or (2) any public entity or officer thereof, or (3) the applicant upon the issuance of a permanent injunction.

(b) Whenever security is required pursuant to subdivision (a) and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety

submits himself to the jurisdiction of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of motion as the court prescribes may be served on the clerk of the court, who shall immediately mail copies to the sureties if their addresses are known.

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EXHIBIT II

ANALYSIS OF CASES CITED BY MR. FADEM

The following is an analysis of the facts and holdings in the cases cited by Mr. Fadem. Also indicated is whether that result would be reached in the case under the 1963 governmental tort liability act.

Behr v. County of Santa Cruz, 172 Cal. App.2d 697 (1959)

Plaintiff brought action for damage to his real and personal property from spread of a fire originating in a refuse dump owned and operated by defendant county. There were three theories of recovery: (1) liability for a dangerous and defective condition of property (this theory is continued by 1963 tort liability act); (2) liability for negligent operation by county employee of motor vehicle which allegedly ignited a fire in the dump (this theory is continued by 1963 tort liability act); and (3) liability for maintenance of a nuisance.

The jury found that the county did not maintain the dump in a dangerous and defective condition--that is, that the county was not negligent in maintaining the dump; the trial court directed a verdict for the county on the second basis of liability--that is, there was no evidence from which the jury could find that the county employee negligently operated the vehicle. The appellate court held that the county could not be held liable on the theory of nuisance, stating: "A dangerous or defective condition of the dump itself is a necessary part of the nuisance charge. Without it there could be no nuisance." Hence, the jury having found no negligence in maintaining the dump, there could be no liability on the theory of nuisance.

Same result under 1963 tort liability act.

Ambrosini v. Alisal Sanitary District, 154 Cal. App.2d 720 (1957)

Action for damages to celery crop based on nuisance and inverse condemnation. Damage was caused by overflow of a sewer line owned by defendant sanitary district. Sanitary district negligently failed to maintain its sewer line. Held, that although Section 3482 of the Civil Code states that nothing done under express statutory authorization is a nuisance, "it cannot be said that the statute authorizes the construction of a defective outfall line." Held, district liable on nuisance theory (negligent design, maintenance, and operation of sewer line) and inverse condemnation (damage resulted from outfall line, functioning as deliberately conceived).

Same result under 1963 tort liability act.

Mulloy v. Sharp Park Sanitary District, 164 Cal. App.2d 438 (1958)

Held, a sanitary district may be liable on the theory of negligence for a private nuisance resulting from an obstruction in a sewer line which the district failed to discover where jury found that it was not discovered because of an improper inspection of the sewer system.

Same result under 1963 tort liability act.

Bloom v. San Francisco, 64 Cal. 503 (1884)

Refuse from city and county hospital was conducted over the land of the plaintiff, through a trough, which, being defective and rotten, burst and discharged the contents over his premises. Though often notified through its board of supervisors, the defendant neglected and

refused to abate the nuisance, and by reason thereof the plaintiff and his son became sick and suffered great pain and expense and loss of time. Held, city and county hospital liable for damages.

Same result under 1963 tort liability act.

Bright v. East Side Mosquito Abatement District, 168 Cal. App.2d 7 (1959)

District employees released chemical spray or fog along side of a public highway and reduced visibillty to three or four feet. Plaintiff injured by cars that crashed into hers when she stopped hers because of the fog. Action for personal injuries sustained due to a nuisance caused by and due to negligence of defendant mosquito abatement district. Held, district liable both under nuisance theory and also under theory of motor vehicle operation liability under specific statute.

Same result under 1963 tort liability act.

People v. Glenn-Colusa Irrigation District, 127 Cal. App. 30 (1932)

Action to enjoin defendant from diverting water from Sacramento River, through its irrigation canal, until such time as fish screen is constructed and maintained by defendant so as to prevent destruction of fish in consequence of such diversion. Injunction granted. No damages sought or awarded.

Same result under 1963 tort liability act.
(1963 governmental liability statute does not affect relief other than money damages.)

Conniff v. City and County of San Francisco, 67 Cal. 45 (1885)

Action to recover damages for injury to property where city in grading street obstructed natural channel and thus diverted surface

waters to plaintiffs land instead of permitting them to flow into bay. Held, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."

Same result under 1963 tort liability act.
(1963 statute does not affect inverse condemnation liability.)

Lind v. City of San Luis Obispo, 109 Cal. 340 (1859)

Action to abate a nuisance. Defendant city collected its sewage in a cesspool near plaintiff's lot. Noxious odors and discharge of materials from cesspool on plaintiff's land created a nuisance and it was held that plaintiff was entitled to have nuisance abated.

Same result under 1963 tort liability act.
(Right to abate not affected by 1963 tort liability act; also would be liability for damages under 1963 statute on theory of dangerous condition of property.)

Peterson v. City of Santa Rosa, 119 Cal. 387 (1897)

Action to enjoin defendant city from discharging sewage into creek and for damages. City maintained a sewer farm where all sewage was collected. During high water, substantial quantities of the sewage overflowed and discharged into the creek. The creek ran through plaintiff's land and was a nuisance. Trial court granted permanent injunction and jury awarded $1 damages. Held, it "is well established that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction."

Same result under 1963 tort liability act.
(Right to injunctive relief remains; right to damages under dangerous condition of property provisions.)

Adams v. City of Modesto, 131 Cal. 501 (1901)

Action to abate nuisance and for damages. City operated open wooden trough through which the sewage matter passed, evidence showing that damages resulted from conduct of sewage matter through the trough and also from running the sewage on the ground. Held, that plaintiff was entitled to have nuisance abated, but finding as to damages was held not sustained by evidence.

Right to abate not affected by 1963 tort liability act; also resulting damages recoverable under 1963 statute.

Kramer v. City of Los Angeles, 147 Cal. 668 (1905)

Held, where drain pipe was insufficiently constructed to withstand the pressure of the drain water when full, and such defective construction, combined with negligent allowing of the outlet of the pipe to be clogged with debris, caused the bursting of the pipe on plaintiff's premises, which the city, after notice from plaintiff, neglected to repair or remedy in any manner, the city is liable to plaintiff for all damage resulting to his premises, property, and business by reason of such negligence.

Same result under 1963 tort liability act.

Richardson v. City of Eureka, 96 Cal. 443 (1892)

Action to abate a nuisance and to recover damages occasioned by the obstruction of a natural watercourse flowing across plaintiff's land. The obstruction consisted of an embankment erected in grading a street which extended across the natural watercourse. Held, "If it was a natural watercourse, the city was not authorized to place any obstruction

across the channel without taking the necessary precautions for the escape of the water flowing therein."

Damages would be recoverable on theory of dangerous condition of property and inverse condemnation.

EXHIBIT III

CODE OF CIVIL PROCEDURE

§ 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.)

CIVIL CODE

§ 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. Amended by Code Am.1873-74, c. 612, p. 268, § 284.)

§ 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. Amended by Code Am.1873-74, c. 612, p. 268, § 285.)

§ 3481. Private nuisance

PRIVATE NUISANCE. Every nuisance not included in the definition of the last section is private.

(Enacted 1872.)

§ 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.)

§ 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. Amended by Code Am.1880, c. 11, p. 1, § 1.)

§ 3492. Remedies; indictment or information; regulation

The remedy by indictment or information is regulated by the Penal Code.

(Enacted 1872. Amended by 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.)

§ 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.)

§ 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 wrong-doer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it.

(Enacted 1872.)

Memorandum 70-102

EXHIBIT IV

August 4, 1970

The Honorable James A. Hayes
Chairman
Assembly Judiciary Committee
State Capitol
Sacramento, California 95814

Re: SB 94

Dear Mr. Chairman:

Mr. Fadem has left for a long-delayed vacation and was therefore unable to write to you himself. I, therefore, would offer the following comments on SB 94, particularly in response to the lengthy commentary thereon, which I believe was prepared by the Law Revision Commission staff.

For reasons of brevity, I will not undertake here a lengthy analysis of the cases, although I disagree with the Commission's interpretation of a number of them. The cases speak for themselves. My position is a great deal more fundamental, and is simply this:

(a) The major premise underlying the Commission's memorandum, i.e. that governmental nuisance will continue to be amenable to injunctive relief, is fallecious.

While authority can be found for courts occasionally enjoining governmental nuisance, all attorneys who have had experience in this area know that obtaining such an injunction is a herculean task. Courts are extremely reluctant to enjoin the operation of a governmental activity, and prefer to relegate the plaintiff to damages

as his remedy.*/ SB 94 would take away this remedy, which is pragmatically the only real remedy.

Besides, if in a pollution case such as those cited by Mr. Facem, an owner should be lucky enough to get an injunction, how would that remedy his economic detriment that he suffered in the past, and the cost of cleaning up the now-enjoined pollution?

(b) SB 94 may well be unconstitutional.

Rather than press my own arguments on you, I quote without comment the words of the U.S. Supreme Court in Richards v. Washington Terminal Co., 233 US 546, 552-553:

> "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

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*/ For a textbook example see Loma Portal Civic Association v. American Airlines, 61 C 2d 582, where the Supreme Court denied injunctive relief against the terribly injurious operation of the San Diego Airport, even though the Court readily granted injunctive relief against a private airport in Anderson v. Souza, 38 C 2d 825.

> 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." (emphasis added).

The California Supreme Court has also indicated in Coniff v. San Francisco, 67 Cal 45, 49, that all legislation purporting to immunize government from nuisance liability, would be "null" under the State Constitution.

> (c) The Commission's repeated suggestion that under the 1963 Tort Liability Act the results would be the same as under the cases cited by Mr. Fadem is a non-sequitur, as SB 94 would further reduce governmental liability below the levels permitted by the 1963 Act.

Finally, and most importantly,

> (d) The conclusion to the Commission memorandum (pp.4-5) is a classic "parade of horribles" argument.

The Commission's conclusion proceeds on the implicit premise that nuisance liability is some kind of newfangled theory about to be unleashed on an unsuspecting world. (e.g. ". . . if California courts accept common law nuisance as a theory of liability and apply that theory to it. full extent, a huge fiscal burden would be imposed on state and local entities"). The cold historic fact is that California courts have always "accept[ed] common law nuisance as a theory of liability". */

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*/ Muskopf v. Corning Hospital Dist., 55 C 2d 211, 219, expressly recognized that even in the old sovereign immunity days, government was liable for nuisance.

This argument of the Commission has been severely criticized by virtually every legal commentator who has analyzed the subject, because the argument rests on several fallacies:

First: The question is whether the aggrieved party has been damaged, not whether he who inflicted the damage finds it economically convenient to make amends. It ought to shock one's conscience to permit anyone - including governmental entities - to inflict damage on perfectly innocent citizens and then turn away the demands of justice with an imperious: "Sorry. We would rather spend our money on other things than compensating the victim." As Justice Holmes put it: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 US 393, 416.

Second: The cries of governmental poverty are calculated to appeal to the fiscal fears and prejudices of judges and legislators, particularly in these days of high taxes. These cries, however, are uniformly devoid of a shred of fiscal data to support them. */

Third: It is basic economics that the denial of compensation to damaged persons does not reduce the cost. It only unfairly shifts the economic

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*/ I myself have written on the subject, see Kanner, "When is 'Property' not 'Property Itself' etc.", 6 California Western Law Review 57; particularly see pp.76-85, and note the critical observations by other commentators, collected there. I enclose a reprint, and hope you will find time to peruse it, particularly the portion cited above.

burden of the damage onto the shoulders of those hurt, instead of distributing the cost among the members of society which benefit from the damage - causing governmental activity. As Professor Van Alstyne put it in his most recent study for the Law Revision Commission: "The fundamental question that should be faced, and which deserves a rationally developed legislative response, is not whether these costs will be paid; it is who will pay them, in accordance with what substantive and procedural criteria, and though which institutional arrangements." Van Alstyne, "Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California", 16 U.C.L.A. Law Review 491, 543-544 (1969). (Emphasis in the original)

SB 94 is a bad bill which would unfairly impose burdens on individual citizens, that in fairness and justice should be borne by society as a whole. And, inasmuch as nuisance liability has traditionally been used as the conceptual foundation for dealing with government-caused pollution, the destruction of that foundation in this day and age would seem not only unwise and improvident, but also contrary to the manifest feelings and beliefs of this state's population.

Very truly yours,

Gideon Kanner

GIDEON KANNER
for
FADEM AND KANNER

GK/ms

Encl.

Memorandum 70-102

EXHIBIT V

THE LOS ANGELES DAILY JOURNAL Friday, September 11, 1970

Bar Meeting Hearings To Emphasize Ecology

By Steve Martini

"Ecology" may be the watchword of this year's State Bar Convention scheduled for the Century Plaza Hotel in Los Angeles. Three committees of the state legislature plan to conduct interim hearings on proposed legislation at this year's convention, and information is that at least one of the committees will be laying heavy emphasis on environmental legislation.

The Assembly Judiciary Committee has announced that it will review the proposed "California Conservation Act" AB 1311, carried unsuccessfully in the last session of the legislature by the committee's chairman, Assemblyman James Hayes (R-Long Beach).

The committee, which will hold two days of hearings during the week-long convention — on Monday, September 14, and Tuesday, September 15 — will devote a good part of the Monday meeting to the matter of conservation.

As explained by the Judiciary Committee Consultant, Herb Nobriga, the Conservation Act, as placed before the last legislature, would have provided "equitable relief" — primarily injunctive relief — for parties bringing action against spoilers of the environment. The bill would have given private citizens or the Attorney General a standing in court to seek such relief, if the plaintiff posted a $10,000 bond to cover possible damages caused by his action. The measure would not have provided for money damages for the plaintiff.

Under existing law, a party has standing in court only if pollution of the environment constitutes a public or private nuisance.

In the last session, the bill got only as far as the Assembly Ways and Means Committee, where it died in the last minute rush to get legislation out before final adjournment.

Nobriga pointed to one of the other aspects of the bill, also termed as "significant". The Act would have caused California law in the area of pollution control to conform to federal law. The consultant stated that under provisions of the National Environmental Policy Act on 1969, signed by President Nixon on New Year's Day, the federal government is required to study the environmental implications of any federal capital project prior to undertaking that project. The Hayes bill would have required that the state conduct similar studies with regard to capital projects of the local and state governments as well as those of the private sector.

One state agency, which already has stated its intention to voice opposition to the proposed legislation during the convention hearing is the State Department of Water Resources. Presently engaged in the massive California Water Project, designed to bring Northern California Water into the southern reaches of the state, the department sees the Hayes bill as a threat to the $20 million a month project.

Porter A. Towner, chief counsel for the department, explained that while his agency has not yet formulated any formal position on the measure, he will address the committee meeting in Los Angeles. "Our position essentially," said Towner, "is that we are all for protection and enhancement of the environment, but we see some danger in this bill — through costly delays in completion of the (water) project."

Towner, who was unable to come up with a dollar figure regarding losses to the state if the water project were delayed, did contend that they would far exceed the $10,000 bond protection provided under the Conservation Act.

The counsel, who called the bill "loose as the devil", said that his department fears that passage of the legislation in its present form will lead to "harassing litigation". He

THOMAS C. LYNCH
ATTORNEY GENERAL

STATE OF CALIFORNIA

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FIFTH STREET AND CAPITOL MALL, SACRAMENTO 95814

October 5, 1970

California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Attention: John H. DeMoully

Re: Tentative Recommendation Relating to Sovereign Immunity, Number 11, Revisions of the Governmental Liability Act

Dear Mr. DeMoully:

Although this office did not oppose S.B. 94 in the 1970 legislative session, a position in opposition was taken on A.B. 242, Assemblyman Waxman's bill to limit the design immunity, which was endorsed by the Law Revision Commission toward the end of the session and which failed to obtain approval by the Assembly Ways and Means Committee. Our opposition to A.B. 242 was based on the principle that the design immunity doctrine was a part of a thorough and careful study by the Commission and the Legislature, and was included in the 1963 Tort Act as a proper allocation of costs of government in the field of dangerous and defective conditions of public property. We also felt that the suggested modification of the immunity would, in most instances, destroy its effectiveness. We would continue to oppose any further efforts to modify this immunity.

Further, we can see no legal or equitable reason for the exception of streets and highways from the proposed modification in the tentative recommendation. If the sole reason for such an exclusion is the great cost involved in rebuilding streets

or highways determined to be dangerous because of numerous accidents, then this argument would apply equally in the case of the water projects of the California Water Plan such as the California Aqueduct. We would therefore urge that such water projects be also excluded if the Commission seeks to renew its support of this legislation in 1971.

We should also like to comment on the proposal to make governmental entities strictly liable for ultrahazardous activities. We believe this is in contradiction to the original policy adopted by the Commission in drafting the Tort Act of 1963. It was our understanding the Commission determined at that time that liability should be specific in the case of public entities so that budgets could be determined and insurance obtained with some certainty of the exposure under the law. Because the term "ultrahazardous activity" is open-ended in that it can be subjected to continual judicial redefinition, the Commission's proposal in making governmental liability in this area the same as private parties does not eliminate confusion and uncertainty. In fact the proposal would do just the opposite. The statement in the recommendation to the effect that "case law relative to liability without fault for ultrahazardous activity is an evolving body of law" seems to make the point specifically. A method more consistent with the original philosophy of the Commission and more acceptable to public entities would be to determine what activities of government are of so hazardous a nature as to warrant liability without fault.

It is hoped the Commission will give due consideration to the comments we have submitted.

Very truly yours,

THOMAS C. LYNCH
Attorney General

Willard A. Shank
WILLARD A. SHANK
Assistant Attorney General

WAS:cg

#52 September 11, 1970

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

Number 11--Revisions of the Governmental Liability Act

Nuisance

Immunity for Plan or Design of Public Improvement

Ultrahazardous Activities

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN OCTOBER 26, 1970.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

STATE OF CALIFORNIA

RONALD REAGAN, Governor

CALIFORNIA LAW REVISION COMMISSION

SCHOOL OF LAW
STANFORD UNIVERSITY
STANFORD, CALIFORNIA 94305

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Ex Officio

October 9, 1970

To HIS EXCELLENCY, RONALD REAGAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with liability of public entities and their employees. See Cal. Stats. 1963, Chs. 1681-1686, 1715, 2029. This legislation was designed to meet the most pressing problems created by the decision of the California Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

The Commission reported in its recommendation relating to the 1963 legislation that additional work was needed and that the Commission would continue to study the subject of governmental liability. The Commission reviewed the experience under the 1963 legislation and submitted a recommendation to the 1970 legislative session. See Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969). Most of the revisions recommended in 1970 were enacted, but three important sections --those relating to nuisance liability, the plan or design immunity, and liability for ultrahazardous activities--were deleted so that they could be given further study. This recommendation is the result of further study of these sections by the Commission.

Respectfully submitted,

Thomas E. Stanton, Jr.
Chairman

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 11 --Revisions of the Governmental Liability Act

INTRODUCTION

In 1963, upon the recommendation of the Law Revision Commission,[1] the Legislature enacted comprehensive legislation dealing with the liability of public entities and their employees.[2] This legislation was designed to meet the most pressing problems created by the decision of the California Supreme Court in *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

There are three major problem areas in the 1963 legislation: the immunity for the plan or design of a public improvement, the failure of the 1963 legislation to include any specific provision relating to liability for injuries resulting from ultrahazardous activities, and the uncertainty whether liability of a public entity can be based on a theory of common law nuisance. This recommendation is concerned with revisions affecting each of these areas of governmental liability.[3]

[1] See *Recommendations Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees; Number 2—Claims, Actions and Judgments Against Public Entities and Public Employees; Number 3—Insurance Coverage for Public Entities and Public Employees; Number 4—Defense of Public Employees; Number 5—Liability of Public Entities for Ownership and Operation of Motor Vehicles; Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers; Number 7—Amendments and Repeals of Inconsistent Special Statutes*, 4 CAL. L. REVISION COMM'N REPORTS 801, 1001, 1201, 1301, 1401, 1501, 1601 (1963). For a legislative history of these recommendations, see 4 CAL. L. REVISION COMM'N REPORTS 211-213 (1963). See also Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1 (1963).

[2] Cal. Stats. 1963, Ch. 1681. (Sovereign immunity—tort liability of public entities and public employees.)
Cal. Stats. 1963, Ch. 1715. (Sovereign immunity—claims, actions and judgments against public entities and public employees.)
Cal. Stats. 1963, Ch. 1682. (Sovereign immunity—insurance coverage for public entities and public employees.)
Cal. Stats. 1963, Ch. 1683. (Sovereign immunity—defense of public employees.)
Cal. Stats. 1963, Ch. 1684. (Sovereign immunity—workmen's compensation benefits for persons assisting law enforcement or fire control officers.)
Cal. Stats. 1963, Ch. 1685. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)
Cal. Stats. 1963, Ch. 1686. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)
Cal. Stats. 1963, Ch. 2029. (Sovereign immunity—amendments and repeals of inconsistent special statutes.)

[3] This recommendation is based on a recommendation submitted to the 1970 legislative session. See Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 (1969). Although most of the revisions recommended in 1970 were enacted, the provisions included in this recommendation were deleted from the legislation proposed in 1970 so that they could be given further study.

IMMUNITY FOR PLAN OR DESIGN OF PUBLIC IMPROVEMENT

Background

Allegedly dangerous or defective conditions of public property constitute the largest single source of tort claims against the government.[1] Understandably, therefore, the comprehensive governmental tort liability statute enacted in 1963 treats the subject in detail. Government Code Sections 830–840.6 undertake to state definitively the circumstances under which liability exists for injury arising from this cause. The general rule is that a public entity is liable for an "injury"[2] caused by the "dangerous condition"[3] of its property if the entity created the dangerous condition or had actual or constructive notice of it and failed to take reasonable measures to protect against the risk of injury it created.[4] However, this general rule of liability is subject to several specific defenses and immunities.

One of the most pervasive exceptions to the general rule of liability is the so-called "plan or design immunity" conferred by Section 830.6.[5] Under that section, no liability exists for "an injury caused by the plan or design" of a public improvement if the plan or design was legislatively or administratively approved and the trial or appellate court (rather than the jury) determines that there was "any substantial evidence" to support the reasonableness of that official decision. Two recent decisions of the California Supreme Court hold that—at least under the circumstances of those cases—the plan or design immunity persists despite the fact that actual experience after construction of the improvement proves that it creates a substantial risk of injuring a person using it with due care.[6] Cogent dissents from those decisions and several legal writers[7] urge that the immunity should be considered

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[1] See CALIFORNIA SENATE FACT FINDING COMMITTEE ON JUDICIARY, GOVERNMENTAL TORT LIABILITY 22 (Seventh Progress Report to the Legislature, pt. 1, 1963); A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 185 (Cal. Cont. Ed. Bar 1964).

[2] GOVT. CODE § 810.8.

[3] GOVT. CODE § 830(a).

[4] GOVT. CODE §§ 835–835.4.

[5] Government Code Section 830.6 reads as follows:

> 830.6. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

[6] Cabell v. State, 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); Becker v. Johnston, 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

[7] *E.g.*, Chotiner, *California Government Tort Liability: Immunity From Liability for Injuries Resulting From Approved Design of Public Property—Cabell v. State*, 43 CAL. S.B.J. 233 (1968); Note, *The Supreme Court of California 1967–1968*, 56 CAL. L. REV. 1612, 1756 (1968); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968).

dissipated once the plan or design is executed and the occurrence of injuries demonstrates that the improvement is hazardous.

In *Cabell v. State*,[8] the plaintiff was injured when he accidentally thrust his hand through a glass door in the state college dormitory in which he lived. Noting that two similar accidents had recently occurred and that the college had responded by merely replacing the broken glass with the same breakable variety, he sued for damages. He alleged that his injury was caused by the state's negligent design of the door and by its continued maintenance of the "dangerous condition" thereby created, despite having had both knowledge of the condition and sufficient time to remedy it.

In *Becker v. Johnston*,[9] the plaintiff was injured in a head-on collision when an oncoming motorist did not see a "Y" intersection in a county highway and crossed the centerline into the path of the plaintiff's car. The defendant in turn cross-complained against the county of Sacramento. In support of her claim, she argued that, while the design of the intersection might have been adequate when plans for its construction were approved in 1927, its continued maintenance in its original condition—despite numerous accidents that had occurred there and its inadequacy by modern design standards—constituted actionable negligence.

The defendant entities argued in both cases that, not only had the plaintiffs failed to prove the existence of a "dangerous condition," but also that Section 830.6 provided a complete defense. The latter argument was twofold: first, that the section confers immunity with regard to injuries caused by a dangerous condition of public property constructed in accordance with a plan that was reasonable at the time of its adoption and, second, that the section relieves a public entity of any continuing duty to maintain property free of defects or shortcomings disclosed by subsequent experience.

The majority and dissenting opinions in both cases assumed that the evidence established the existence of a dangerous condition, the statutorily required notice of the condition on the part of the public entity,[10] and the reasonableness of the plan at the time it was originally approved. The court divided, however, as to whether Section 830.6 allows a public entity to permit the continued existence or operation of an improvement merely because there was some justification for its plan or design at the time it was originally adopted or approved when it has become apparent that the plan or design now makes the improvement dangerous. The majority held, under these circumstances, that the government has no duty to take reasonable measures to protect against the danger created by the now defective plan or design. In the view of the majority, Section 830.6 prevents judicial reevaluation of discretionary legislative or administrative decisions not only as to adoption or approval of original plans or designs but also as to the "maintenance" (*i.e.*, continuance in existence or operation) of improvements constructed in accordance with such plans or designs even after

[8] 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 470 (1967).
[9] 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).
[10] See Government Code Section 835.2.

experience demonstrates that they are dangerous.[11] The court noted, of course, that it dealt only with routine "maintenance" (*i.e.*, upkeep, repair, or replacement) rather than reconstruction or new construction. In the latter case, as the court noted, the showing of reasonableness would have to relate to the plans for the reconstruction or new construction rather than to the original plan or design of the improvement.

The dissenting justices noted that the New York decisional law, from which the plan or design immunity derives,[12] imposes upon the public entity "a continuing duty to review its plan in the light of actual operation," [13] and expressed their view that: [14]

> There is nothing in the language of section 830.6 of the Government Code that would immunize governmental entities from their duty to maintain improvements free from dangerous defects or that would permit them to ignore, on the basis of a reasonable decision made prior to construction of the improvement, the actual operation of an improvement where such operation shows the improvement to be dangerous and to have caused grave injuries.
>
> Undoubtedly section 830.6 granted a substantial extension of the immunity of public entities for the dangerous condition of public improvements compared to the liability which existed under prior law. This was its intent. [Citation omitted.] Under the former Public Liability Act, it was held in numerous cases that where a municipality in following a plan adopted by its governing body had itself created a dangerous condition, it was per se culpable, and that lack of notice, knowledge, or time for correction were not defenses to liability. [Citations omitted.] It is clear that the enactment of section 830.6 abrogates this rule by limiting liability for design or plan. This is a substantial change in the law. But it does not follow that merely because an improvement is constructed according to an approved plan, design, or standards, the Legislature intended that no matter what dangers might appear from the actual operation or usage of the improvement, the public agency could ignore such dangers and defects and be forever immune from liability merely on the ground that the improvement

[11] The court quoted, with apparent approval, the rationale of the plan or design immunity insofar as it exonerates the original planning decision:

> There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested. [4 CAL. L. REVISION COMM'N REPORTS 801, 823 (1963), quoted in Cabell v. State, 67 Cal.2d at 153, 430 P.2d at 36, 60 Cal. Rptr. at 478.]

For development of more general justifications for this immunity, see Hink & Schutter, *Some Thoughts on the American Law of Governmental Tort Liability*, 20 RUTGERS L. REV. 710, 741 (1966); Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 So. CAL. L. REV. 161, 179 (1963); Van Alstyne, *Governmental Tort Liability—A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463, 465–472 (1963).

[12] See A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 555 (Cal. Cont. Ed. Bar 1964).

[13] See Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63 (1960); Eastman v. State, 303 N.Y. 691, 103 N.E.2d 56 (1951).

[14] 67 Cal.2d at 158–159, 430 P.2d at 39–40, 60 Cal. Rptr. at 481–482.

was reasonably adopted when approved without regard to the knowledge that the public entity has that the improvement as currently and properly used by the public has become dangerous and defective, or a trap for the unwary. Such an interpretation is so unreasonable that it is inconceivable that it was intended by the Legislature.

The problem presented by the *Cabell* and *Johnston* cases—whether the plan or design immunity persists after injury-producing experience with the improvement—would thus appear to be one deserving of reconsideration and explicit resolution by the Legislature.

Recommendations

The immunity conferred by Government Code Section 830.6 is justified and should be continued to the extent that it provides immunity for discretionary decisions in the planning or designing of public improvements. As a matter of simple justice, however, the immunity should be considered to have terminated when the court finds that (1) the plan or design, as effectuated, has actually resulted in a "dangerous condition" at the time of an injury, (2) the condition arose subsequent to the construction of, or improvement to, such property, (3) the public entity knew of the dangerous condition a sufficient time prior to the injury to take measures to protect against the dangerous condition, and (4) the public entity acted unreasonably in failing to protect against the risk of injury created by the condition. The proposed exception to the immunity should not apply where the injury is caused by the condition of a street or highway.

This recommended revision of Section 830.6 would preserve a significant portion of the plan or design immunity:

First, the immunity would be eliminated only if the plaintiff can persuade the court that a dangerous condition actually existed at the time of the injury.[16] Under the existing statutory definition, a "dangerous condition" is one "that creates a *substantial* (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with *due care* in a manner in which it is reasonably foreseeable that it will be used."[17] If the court were not persuaded that the property actually was in a dangerous condition, the immunity provided by Section 830.6 would preclude recovery based on an allegedly defective plan or design. A public entity could thus avoid trying a case to a jury where the court could be persuaded that no dangerous condition existed even where there might be sufficient evidence to sustain a jury finding to the contrary. In addition, the fact that the court determined that the property was in a dangerous condition would not relieve the plaintiff of the burden of proving that fact to the satisfaction of the

[16] The plan or design immunity aside, the court may determine as a matter of law that a condition of public property is not "dangerous." See GOVT. CODE § 830.2; Pfeifer v. County of San Joaquin, 67 Cal.2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967). The determination that would be made under the revision of Section 830.6 should be distinguished from that under Section 830.2. In making the determination under Section 830.6, the court would have to be persuaded that a dangerous condition existed while the determination under Section 830.2 is merely whether there is evidence sufficient to sustain a finding that the property was in a dangerous condition.

[17] GOVT. CODE § 830(a) (emphasis added).

jury. Hence, in a case of liability asserted on the theory of defective plan or design, the public entity would have two opportunities to contest the plaintiff's claim that a dangerous condition existed since both the court and the jury would have to be persuaded of that fact.

Second, the plaintiff would have to prove to the satisfaction of the court that the condition arose subsequent to the construction of, or improvement to, the property. Under Cabell, the plan or design immunity provided by Section 830.6 allows a public entity to permit the continued existence or operation of an improvement merely because there was some justification for its plan or design at the time it was originally approved even though subsequent to the construction of the improvement a condition arises that results in the property's being in a dangerous condition. Such a condition might arise, for example, by an increase in the number of persons using the improvement, by a change in the nature of the use made of the improvement, or by a change in the conditions in the general area of the improvement.

Third, the plaintiff must persuade the court that the defendant public entity had knowledge of the dangerous condition for a sufficient period of time to take remedial measures and that the action

or inaction of the public entity was unreasonable. The "reasonableness" of the action or inaction of the public entity should be determined "by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury." This is the same standard that is used by the jury under Section 835.4.

Even where the plan or design immunity is not applicable because the plaintiff has satisfied the requirements discussed above, the public entity may have one or more other statutory immunities or preconditions to liability[18] that will shield it from liability. A principal argument for a limited plan or design immunity is that

> these other immunities are ample to protect the public entities even if the plan or design immunity should be considered to be limited to "initial discretionary judgment."[19] Nevertheless, in the *Cabell* and *Johnston* cases, the defendants and amicus curiae[20] suggested, and the court seemed to accept, the view that the potential scope of governmental responsibility is so great that the public entity alone must be allowed to weigh the priorities and decide what must be done first. It was further suggested that, if judicial review of such questions in tort

[18] See Govt. Code §§ 830.4 (immunity for failure to provide traffic signs and signals); 830.5 (accident itself does not show dangerous condition); 830.9 (immunity for traffic signals operated by emergency vehicles); 831 (immunity for weather conditions affecting streets and highways); 831.2 (immunity for unimproved public property); 831.4 (immunity for certain unpaved roads); 831.6 (immunity for tidelands, school lands, and navigable waters); 831.8 (immunity for reservoirs, canals, drains, etc.); 835.2 (requirement of notice or knowledge of dangerous condition); and 835.4 (immunity for "reasonable" action or inaction).

[19] See the articles in note 7, *supra* at 816.

[20] See Brief for State Department of Public Works as Amicus Curiae at 14–17, Becker v. Johnston, 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

litigation were allowed, the judge or jury might merely superimpose its values without considering the entity's concomitant responsibility for other areas of public concern. This argument also urges that public budgets may well be insufficient to bring all public facilities up to modern standards. The argument does not make clear, however, why

the proposed revision of Section 830.6--which

expressly requires weighing of the probability

and gravity of the potential injury against the practicability and cost of protecting against the risk of injury—does not afford a just and feasible solution to the problem of hazardous obsolescence.

With respect to the specter of crippling governmental costs, it should be noted that—long before enactment of the comprehensive government tort liability statute in 1963—cities, counties, and school districts were liable for dangerous conditions of their property,[21] and all other public entities were liable for dangerous conditions of property devoted to a "proprietary" function.[22] Yet, no plan or design immunity was recognized in California until enactment of Section 830.6 in 1963. Also, as Justice Peters points out,[23] New York has imposed general sovereign tort liability since 1918, but its judicially created plan or design immunity has never barred liability where experience has shown the dangerous character of the improvement.[24] It is further notable that Illinois, another leading sovereign liability state, includes in the plan or design immunity section of its statute a provision that the public entity "is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it [*sic*] is not reasonably safe."[25] In addition, it must be recognized that the plan or design immunity provided by Section 830.6 is limited to a design-caused accident; it "does not immunize from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident."[26] Thus, for example, the plan or design immunity does not bar recovery for the wrongful death of a motorist whose car skids on an icy bridge where the theory of the plaintiff's cause of action is that the public entity "had knowledge of a dangerously icy condition (not reasonably apparent to a careful driver) and failed to protect against the danger by posting a warning."[27]

Finally, notwithstanding the plan or design immunity, all California public entities are subject to liability under a theory of inverse condemnation for "actual physical injury" *to property* "proximately caused by . . . [an] improvement as deliberately designed and constructed . . . under Article I, Section 14, of . . . [the California]

[21] See the so-called Public Liability Act of 1923, Cal. Stats. 1923, Ch. 328, § 2, p. 675. See also A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 35–37 (Cal. Cont. Ed. Bar 1964).

[22] Brown v. Fifteenth Dist. Agricultural Fair Ass'n, 159 Cal. App.2d 93, 323 P.2d 131 (1958).

[23] See Cabell v. State, 67 Cal.2d 150, 155, 430 P.2d 34, 37, 60 Cal. Rptr. 476, 479 (1967) (dissenting opinion).

[24] For a discussion of the New York experience with this and other problems of government tort liability, see Mosk, *The Many Problems of Sovereign Liability*, 3 SAN DIEGO L. REV. 7 (1966).

[25] See ILL. ANN. STATS., Ch. 85, § 3–103 (Smith-Hurd 1966).

[26] Flourney v. State, 275 Adv. Cal. App. 919, 924–925, 80 Cal. Rptr. 485, 489 (1969).

[27] *Id.* at 924, 80 Cal. Rptr. at 488.

> Constitution."[28] Hence, the cost of such liability must already be absorbed and, to protect against the risk of such liability, a public entity must continually review its plan or design decisions. By comparison, the recommended revision of Section 830.6 is a relatively modest change and would result in a considerably less burdensome imposition of liability for injury *to persons*.
>
> The cost of updating an improvement that has become dangerous might involve substantial sums of money. However, the cost consideration alone does not vitiate the essential justice of requiring the government either to take reasonable measures to protect against conditions of public improvements that create a substantial danger of injury when used with due care or to compensate the innocent victims. Moreover, correction often will not require replacement or rebuilding but simply warning. For example, warning signs, lights, barricades, or guardrails—steps that ordinarily do not involve any large commitment of funds, time, or personnel—may be sufficient.[29]

With one significant exception, the revision of Section 830.6 outlined above is basically the same as the revision proposed at the 1970 legislative session in Assembly Bill No. 242. Assembly Bill No. 242 was approved by the Assembly Committee on Judiciary, but died in the Assembly Ways and Means Committee. The Commission is advised that an important reason why the bill was not approved by the Ways and Means Committee is that it made the proposed exception applicable to all public improvements, including streets and highways.

> Of all the myriad types of public property, it appears to be state and county highways that most concern the public entities in the present connection. In *Becker v. Johnston*, for example, the highway was built at a time when it was intended for travel by horses and buggies and long before the advent of homes, schools, and shopping centers in the area. Public officials also point out the existence of thousands of miles of mountainous highways in this state that are of questionable

safety. In view of the concern expressed by public entities and by the Assembly Ways and Means Committee, the Commission has included in its revision of Section 830.6 a provision that will make the new exception to the immunity not applicable where the injury is caused by the condition of a street or highway.

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[28] Albers v. County of Los Angeles, 62 Cal.2d 250, 263-264, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965). See generally Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

[29] Subdivision (b) of Government Code Section 830 expressly defines the key phrase "protect against" to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." In *Becker v. Johnston*, it was estimated that a $5,000-island would have reduced head-on collisions by 70 to 90 percent. 67 Cal.2d at 170, 430 P.2d at 47, 60 Cal. Rptr. at 489.

ULTRAHAZARDOUS ACTIVITIES

Background

In tort litigation between private persons, California courts follow the general common law rule that one who carries on an ultrahazardous activity is subject to liability for harm resulting from the activity even though he has exercised the utmost care to prevent such harm.[1] An activity is considered "ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."[2] The California decisions indicate that blasting[3] and oil drilling[4] in a developed area, rocket testing,[5] and fumigation with a deadly poison[6] are ultrahazardous activities. Blasting in an isolated area,[7] earthmoving operations,[8] and building construction[9] are examples of activities that have been held to be not ultrahazardous.

California law as to liability without fault for escaping water is unclear. In *Sutliff v. Sweetwater Water Co.*,[10] the California Supreme Court rejected liability without fault for damage from the escape of waters impounded in a reservoir. In *Clark v. Di Prima*,[11] the Court of Appeal for the Fifth District, in a case involving a *break* in an irrigation ditch, held that the normal or customary irrigation of crops does not constitute an ultrahazardous undertaking nor carry with it the risk of absolute liability. However, an earlier decision by the First District[12] applied the doctrine of absolute liability to that situation.

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[1] *E.g.*, Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948); Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928).

[2] Smith v. Lockheed Propulsion Co., 247 Cal. App.2d 774, 785, 56 Cal. Rptr. 128, 137 (1967), quoting RESTATEMENT OF TORTS § 520 (1938). A modern formulation of the test for determining whether an activity is ultrahazardous specifically considers not only those factors set forth in the text but also the appropriateness of the activity to the place where it is carried on and the value of the activity to the community. See RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

[3] *E.g.*, Balding v. D. B. Stutsman, Inc., 246 Cal. App.2d 539, 54 Cal. Rptr. 717 (1966); Alonso v. Hills, 95 Cal. App.2d 778, 214 P.2d 50 (1950); McGrath v. Basich Bros. Constr. Co., 7 Cal. App.2d 573, 46 P.2d 981 (1935).

[4] See Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928). During drilling, defendant's oil well erupted with unexpected force, showering plaintiff's adjacent property with debris. Although plaintiff failed to prove that defendant was negligent, defendant was held liable. The holding is consistent with a theory of strict liability for trespass but has been generally interpreted as based on liability for an ultrahazardous activity. *E.g.*, Luthringer v. Moore, 31 Cal.2d 489, 500, 190 P.2d 1, 8 (1948); Rozewski v. Simpson, 9 Cal.2d 515, 520, 71 P.2d 72, 74 (1937); Smith v. Lockheed Propulsion Co., 247 Cal. App.2d 774, 784, 56 Cal. Rptr. 128, 137 (1967). See Carpenter, *The Doctrine of Green v. General Petroleum Corporation*, 5 So. CAL. L. REV. 263 (1932); Note, 17 CAL. L. REV. 188 (1928).

[5] Smith v. Lockheed Propulsion Co., 247 Cal. App.2d 774, 56 Cal. Rptr. 128 (1967).

[6] Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948).

[7] Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82 (1907).

[8] Beck v. Bel Air Properties, 134 Cal. App.2d 834, 286 P.2d 503 (1955).

[9] Gallin v. Poulou, 140 Cal. App.2d 638, 295 P.2d 958 (1956).

[10] 182 Cal. 34, 186 P. 766 (1920) (alternate holding).

[11] 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966).

[12] Nola v. Orlando, 119 Cal. App. 518, 6 P.2d 984 (1932).

Cases of irrigation *seepage* have been regard as distinguishable, and relief has been granted; but in each case the relief could have been based on a theory of continuing nuisance.[13] The California Supreme Court has noted the divergent lines of authority but has not resolved the uncertainty.[14]

Legal writers have discussed the applicability of the ultrahazardous activity doctrine to such technological advances as crop dusting,[15] artificial rainmaking,[16] operation of nuclear reactors,[17] and supersonic aircraft,[18] but there appears to be no definitive California law in these areas.

The liability for an ultrahazardous activity usually is termed "absolute" or "strict," but it should not be assumed that the liability is unlimited or that application of the doctrine deprives a defendant of all defenses. On the contrary, recovery has been denied for injuries brought about by intervention of the unforeseeable operation of a force of nature[19] or the intentional misconduct of a third person.[20] Recovery has also been denied for injuries that result from the unusually sensitive character of the plaintiff's property or activity.[21] Moreover, the liability apparently extends only to such harm as falls within the scope of the risk that makes the activity ultrahazardous. For example, the storage of explosives in a city is ultrahazardous because of the risk of explosion, not the possibility that someone may trip over a box left lying around. Thus, in the latter case, absent an explosion, the doctrine would have no application.[22] Finally, although

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[13] See, *e.g.*, Parker v. Larsen, 86 Cal. 236, 24 P. 989 (1890); Fredericks v. Fredericks, 108 Cal. App.2d 242, 238 P.2d 643 (1951); Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (1922).

[14] Rozewski v. Simpson, 9 Cal.2d 515, 520, 71 P.2d 72, 74 (1937):

> We do not find it necessary to now determine whether or not the doctrine of *Fletcher* v. *Rylands*, *supra* [ultrahazardous activity liability], is applicable in this state. The doctrine was apparently repudiated in the case of *Sutliff* v. *Sweetwater Water Co.*, 182 Cal. 34, in reference to a factual situation somewhat similar to the case here involved; it was apparently followed in the cases of *Parker* v. *Larsen*, 86 Cal. 236; *Kall* v. *Carruthers*, 59 Cal. App. 555; *Nola* v. *Orlando*, 119 Cal. App. 518; and in the late case of *Green* v. *General Petroleum Co.*, 205 Cal. 328, the doctrine of *Fletcher* v. *Rylands*, *supra*, was apparently approved.

Interestingly, petitions for hearing by the California Supreme Court were denied in both *Clark v. Di Prima* and *Nola v. Orlando*.

[15] Comment, 19 HASTINGS L.J. 476, 489-493 (1968); Note, 6 STAN. L. REV. 69, 81-85 (1953). See also AGRI. CODE § 12972 (use of method of chemical pest control that causes "substantial drift").

[16] Note, 1 STAN. L. REV. 503, 534-535 (1949).

[17] Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 HARV. L. REV. 644, 652-653 (1964); Seavey, *Torts and Atoms*, 46 CAL. L. REV. 3, 7-10 (1958); Note, 13 STAN. L. REV. 865, 866-868 (1961).

[18] Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 50-53 (1968).

[19] Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766 (1920) (alternate holding). Section 522 of the *Restatement of Torts* presently states a general rule opposite to the one that apparently obtains in California. However, there is some pressure to change the *Restatement* rule to eliminate liability where the harm is brought about by the unforeseeable operation of a force of nature, action of an animal, or intentional, reckless, or negligent conduct of a third person; and the Reporter for the *Restatement (Second)* indicates that the case law overwhelmingly favors the suggested change. See RESTATEMENT (SECOND) OF TORTS § 522, *Note to Institute* (Tent. Draft No. 10, 1964).

[20] See Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 P. 617 (1903).

[21] See generally RESTATEMENT (SECOND) OF TORTS § 524A (Tent. Draft No. 10, 1964).

[22] See RESTATEMENT (SECOND) OF TORTS § 519, comment *e* (Tent. Draft No. 10, 1964).

ordinary contributory negligence is not a defense, the defenses of assumption of risk and contributory negligence in the sense of one's knowingly and unreasonably subjecting himself to the risk of harm from the activity are apparently available.[23]

In California, a public entity is not liable in tort unless liability is imposed by statute.[24] No statutory provision expressly imposes liability for ultrahazardous activities. Nevertheless, several other theories of liability might result in the imposition of liability without fault upon a public entity engaged in an ultrahazardous activity.

The governmental liability act makes a public entity vicariously liable for the acts or omissions of its employees[25] and, subject to several significant immunities, public employees are liable to the same extent as private persons.[26] It would appear, therefore, that where an injury results from an ultrahazardous activity (such as blasting in a residential area) engaged in by an identifiable employee, the public employee would be liable without fault because he is engaged in an ultrahazardous activity and the public entity would be vicariously liable.[27]

"Inverse condemnation" provides an additional theory upon which liability might be imposed without fault for activities that would be characterized as ultrahazardous in the private sphere. Under the rubric of inverse condemnation, "any actual physical injury to real property proximately caused by [an] improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."[28] Thus, inverse condemnation liability might be imposed for property damage resulting in some situations where a public entity is engaged in an ultrahazardous activity. However, without speculating as to the cases that might be covered by the theory, the failure to compensate for personal injuries and death limits its value in this connection.

It is also possible that, in some cases, damages for injuries resulting from an ultrahazardous activity might presently be recovered on a theory of nuisance. Before enactment of the governmental liability act in 1963, common law nuisance was a basis of recovery for personal injuries as well as property damage.[29] The theory thus provided relief in cases where inverse condemnation liability would not exist. Although Government Code Section 815 was intended to eliminate governmental liability based on common law nuisance, it is uncertain whether the section now has this effect.[30]

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[23] See Luthringer v. Moore, 31 Cal.2d 489, 501, 190 P.2d 1, 8 (1948); *cf.* Rozewski v. Simpson, 9 Cal.2d 515, 71 P.2d 72 (1937) (injury caused solely by acts of plaintiff). See also RESTATEMENT (SECOND) OF TORTS §§ 523, 524 (Tent. Draft No. 10, 1964).

[24] GOVT. CODE § 815(a).

[25] GOVT. CODE § 815.2.

[26] GOVT. CODE § 820.

[27] Specific immunities, such as the immunity for discretionary acts provided by Government Code Sections 820.2 and 815.2(b), might preclude liability in some cases. *Cf.* Dalehite v. United States, 346 U.S. 15 (1953).

[28] Albers v. County of Los Angeles, 62 Cal.2d 250, 263–264, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965).

[29] *E.g.*, Bright v. East Side Mosquito Abatement Dist., 168 Cal. App.2d 7, 335 P.2d 527 (1959). See also 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). See Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 225–230 (1963).

[30] See discussion in text accompanying notes 4–10, *supra* at 809–810.

Recommendations

The Commission concludes that there is no substantial justification for differentiating the liability of a public entity engaged in an ultrahazardous activity from that of a private person engaged in the same activity. Accordingly, the Commission recommends the enactment of legislation to provide that a public entity is liable for injuries caused by its ultrahazardous activities to the same extent as a private person. This clarification would eliminate a substantial degree of uncertainty and confusion that now exists as to the applicability of the various theories upon which liability might be imposed for damages from ultrahazardous activities. It thus would avoid unnecessary litigation to determine the proper theory upon which liability might be based in particular cases. More importantly, it would assure that losses resulting from an ultrahazardous activity—such as blasting in a residential area —would be spread over the public generally rather than be left to be borne by an unfortunate few. The recommended legislation would not, however, deprive the public entity of common law defenses or expose it to limitless liability. The decisional law affords adequate limitations on liability—limitations that are consistent with the underlying theory of liability for ultrahazardous activities.[31]

The case law relative to liability without fault for ultrahazardous activity is an evolving body of law. Rather than attempting to codify its rules, thereby reducing it to a rigid statutory formulation, the Commission recommends that it be adopted intact as to public entities by simply establishing the fundamental principle that a public entity is liable for injuries caused by an ultrahazardous activity to the same extent as a private person. Whether the entity's activity is "ultrahazardous" and whether the entity has an available defense should also be determined by the same guiding principle. This approach will assure uniformity in the principles of law relating to the liability of both public entities and private persons for ultrahazardous activities and, at the same time, permit desirable flexibility in adapting these principles to ever-changing conditions.

[31] See discussion in text accompanying notes 19–23, *supra* at 830–831.

NUISANCE

Background

Section 815 of the Government Code, particularly when construed with the rest of the 1962 legislation, was clearly intended to eliminate any public entity liability for *damages* on the ground of common law nuisance.[4] The Senate Judiciary Committee, in the official comment indicating its intent in approving Section 815, notes:[5]

> [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.[6] 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 *property* resulting from the construction of a public improvement for public use.[7] 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 decisions prior to 1963 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.[8] 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 possible that Sections 3479, 3491, and 3501 provide the necessary statutory ex-

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[4] 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.

[5] Legislative Committee Comment—Senate, GOVT. CODE § 815 (West 1966).

[6] See Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1, 225–228 (1963).

[7] See *id.* at 102–108; Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 481 (1969).

[8] *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).

ceptions.[9] Cases decided since 1963 have impliedly regarded nuisance law as still available in actions against public entities; however, none of these decisions has undertaken a careful analysis of the law.[10]

Recommendations

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 expressly to eliminate 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.[11]

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. 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.

[9] 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 4 *supra*.

[10] See, *e.g.*, Lombardy v. Peter Kiewit Sons' Co., 266 Cal.App. 2d 590, 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).

11 The Commission is advised that the Assembly Committee on Judiciary is currently studying whether private persons should be permitted to enjoin the continuation of a public nuisance by a public entity. In this connection, see Senate Bill No. 660 and Assembly Bill No. 1311 (1970 Regular Session).

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to amend Section 830.6 of, and to add Section 815.8 to, and to add Chapter 8 (commencing with Section 863) to Part 2 of Division 3.6 of, the Government Code, relating to the liability of public entities and public employees.

The people of the State of California do enact as follows:

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

Section 1. Section 815.8 is added to the Government Code, to read:

815.8. A public entity is not liable for damages under Section 731 of the Code of Civil Procedure and 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, 809 (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.

Govt. Code § 830.6 (amended). Plan or design immunity

Sec. 2. Section 830.6 of the Government Code is amended to read:

830.6. (a) Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval, or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which ~~(a)~~ (1) a reasonable public employee could have adopted the plan or design or the standards therefor or ~~(b)~~ (2) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

(b) Nothing in subdivision (a) exonerates a public entity from liability for an injury caused by a dangerous condition of public property if the trial court determines all of the following:

(1) A dangerous condition existed at the time of the injury.

(2) The condition arose subsequent to the construction of, or improvement to, such property.

(3) The public entity knew of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(4) The action the public entity took to protect against the risk of injury created by the condition, or its failure to

take action to protect against such risk, was unreasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

(c) Subdivision (b) does not apply where the injury is caused by the condition of a street or highway.

(d) If the defense provided by this section is pleaded, upon the court's own motion or upon motion of any party to the action, the issue so raised shall be tried separately and before any other issues in the case are tried.

Comment. Section 830.6 has been amended to modify the holding in *Cabell v. State*, 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967). Under *Cabell*, the "plan or design immunity" provided by Section 830.6 allows a public entity to permit the continued existence or operation of an improvement merely because there was some justification for its plan or design at the time it was originally approved even though subsequent to the construction of the improvement a condition arises that results in the property's being in a dangerous condition. Such a condition might arise, for example, by an increase in the number of persons using the improvement, by a change in the nature of the use made of the improvement, or by a change in the conditions in the general area of the improvement.

Subdivision (b), of course, operates only in cases where the immunity conferred by subdivision (a) otherwise would preclude recovery. If the action is not one to recover "for an injury caused by the plan or design" of a public improvement, if the plan or design did not receive discretionary approval (see, *e.g.*, *Johnston v. County of Yolo*, 274 Adv. Cal. App. 51, 79 Cal. Rptr. 33 (1969)), or if there is no substantial evidence to support the reasonableness of the planning decision (see subdivision (a)), the additional factors mentioned in subdivision (b) need not be considered by the court. However, if the trial judge determines that subdivision (a) would apply to the case, he must also determine whether the factors mentioned in subdivision (b) have been established. The immunity is not overcome unless the trial judge is persuaded by a preponderance of the evidence that a "dangerous condition" existed at the time of the accident in question. Thus, he must be persuaded that the condition created "a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." See

Section 830(a). Similarly, he must be persuaded by a preponderance of the evidence that the defendant public entity had knowledge of the dangerous condition for a sufficient period of time to take remedial measures and that action or inaction of the public entity was unreasonable.

Subdivision (d) has been added to permit the court or any party to the action to require that the issue presented when the special defense provided by this section is pleaded be tried separately and prior to the trial of any other issues in the case. If the factors specified in subdivision (b) are established to the satisfaction of the court, neither Section 830.6 nor the determinations made by the court pursuant to either subdivision of this section have any further bearing in the case. Specifically, elimination of the plan or design immunity by operation of subdivision (b) does not relieve the plaintiff of the basic evidentiary burden of proving to the satisfaction of the trier of fact that the several conditions necessary to establish liability—including the fact that the property was in a dangerous condition—existed. Nor does it preclude the public entity from establishing (under Section 835.4) the immunizing reasonableness of its action or inaction (*see Cabell v. State*, *supra*) or affect any other immunity or defense that might be available to the public entity under the circumstances of the particular case.

Govt. Code § 863 (new). Liability for damages from ultrahazardous activities

SEC. 3. Chapter 8 (commencing with Section 863) is added to Part 2 of Division 3.6 of the Government Code, to read:

CHAPTER 8. ULTRAHAZARDOUS ACTIVITIES

863. A public entity is liable for injuries proximately caused by an ultrahazardous activity to the same extent as a private person.

Comment. Section 863 makes applicable to public entities the common law doctrine of "strict" or "absolute" liability for injuries caused by an "ultrahazardous" activity. See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 829–832. (1969). This liability is not based upon any intention to cause injury nor upon negligence. On the contrary, the person responsible for the activity is liable despite the exercise of reasonable care. The liability arises out of the activity itself and the risk of harm that the activity creates. The liability is based upon a policy which requires an ultrahazardous enterprise to pay its way by compensating for any injury it causes.

Section 863 does no more than establish the guiding principle that a public entity is liable for injuries caused by its ultrahazardous activity to the same extent as a private person. Whether an activity is "ultrahazardous" is determined by the court. See Section 863.2 and the Comment to that section.

Ultrahazardous activity liability has been held subject to certain significant limitations. See *Sutliff v. Sweetwater Water Co.*, 182 Cal. 34, 186 P. 766 (1920) (injury brought about by the intervention of the unforeseeable operation of a force of nature); *Kleebauer v. Western Fuse & Explosives Co.*, 138 Cal. 497, 71 P. 617 (1903) (injury resulting from intentional or reckless conduct of a third person); *Postal Telegraph-Cable Co. v. Pacific Gas & Elec. Co.*, 202 Cal. 382, 260 P. 1101 (1927) (injury resulting from the unusually sensitive character of plaintiff's activity). Further, liability extends only to such harm as falls within the scope of the abnormal risk that makes the activity ultrahazardous. For example, the storage of explosives in a city is ultrahazardous because of the risk of harm to those in the vicinity if an explosion should occur. If an explosion did occur, the liability recognized by this section presumably would permit recovery. On the other hand, if for some reason a box of explosives simply fell upon a visitor, the section would have no bearing. See RESTATEMENT (SECOND) OF TORTS § 519, comment *e* (Tent. Draft No. 10, 1964). Finally, the defenses of assumption of risk and contributory negligence in the sense of one's knowingly and unreasonably subjecting himself to the risk of injury may be available. See *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948). See also RESTATEMENT (SECOND) OF TORTS §§ 523, 524 (Tent. Draft No. 10, 1964). It should be noted, however, that a public entity is afforded no special statutory immunities or defenses merely because it is a public entity. Rather, only those defenses available to a private person may be invoked by the entity. For example, the immunity for discretionary acts and omissions provided by Sections 820.2 and 815.2(b) has no applicability where ultrahazardous liability exists.

Govt. Code § 863.2 (new). Classification as ultrahazardous activity a question of law

863.2. In any action arising under this chapter, the question whether an activity is "ultrahazardous" shall be decided by the court by applying the law applicable in an action between private persons. By way of illustration and not by way of expansion or limitation, activities such as riot control, law enforcement and correctional activities, and fire fighting are not ultrahazardous activities.

Comment. Insofar as Section 863.2 makes characterization of an activity as ultrahazardous an issue of law, it continues prior law. See *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948); *Smith v. Lockheed Propulsion Co.*, 247 Cal. App.2d 774, 56 Cal. Rptr. 128 (1967).

In making that characterization, California courts appear to follow the *Restatement* definition that: "an activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." See RESTATEMENT OF TORTS § 520 (1938) and, *e.g.*, *Smith v. Lockheed Propulsion Co.*, *supra*, 247 Cal. App.2d at 785, 56 Cal. Rptr. at 137. As to activities that have been held to be ultrahazardous in California, see *Luthringer v. Moore*, *supra* (fumigation with a deadly poison); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928) (oil drilling in a developed area); *Smith v. Lockheed Propulsion Co.*, *supra* (rocket testing); *Balding v. D. B. Stutsman, Inc.*, 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966) (blasting in a developed area). Contrast *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 P. 82 (1907) (blasting in an undeveloped area); *Clark v. Di Prima*, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966) (normal irrigation); *Beck v. Bel Air Properties*, 134 Cal. App.2d 834, 286 P.2d 503 (1955) (grading and earthmoving); *Sutliff v. Sweetwater Water Co.*, 182 Cal. 34, 186 P. 766 (1920) (alternate holding) (collecting water in reservoir). See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 829–830 (1969).

The section also includes a sentence to make clear that activities such as riot control, law enforcement or correctional activities, and fire fighting are not ultrahazardous activities. This sentence is not intended to expand or to restrict the principles that determine whether an activity is ultrahazardous. The court is to apply the law applicable in an action between private persons in determining whether an activity is ultrahazardous.

Sec. 4. This act applies only to causes of action that accrue on or after the date this act takes effect. Causes of action that accrue prior to the date this act takes effect are governed by the law applicable at the time the cause of action accrued.