

Memorandum 69-53

Subject: Study 52 - Sovereign Immunity (Liability for Ultrahazardous Activities)

The attached tentative recommendation attempts to implement the policy decision made at the March, 1969, meeting to apply the common law rules relating to ultrahazardous liability to public entities. In reviewing this recommendation, the staff believes the following items should be noted.

The underlying policy seems sound. By definition an ultrahazardous activity while having a certain social utility involves a high degree of risk of serious harm to person and property that cannot be removed by careful conduct. It seems that, regardless of who is conducting the activity, the enterprise should pay its own way. As applied to a public entity, the policy is closely analogous to that underlying inverse and direct condemnation, i.e., that the individual must not be required to contribute more than his proper share to the public undertaking. The theory in both situations scarcely seems subject to dispute.

In practice, one of the first questions will be what is an ultrahazardous activity. California has clearly adopted 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 Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948). The California experience indicates that blasting in a developed area--e.g., Balding v. Stutsman, 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966--), rocket testing--Smith v. Lockheed Propulsion Co., 247 Cal. App.2d 774, 56 Cal. Rptr. 128 (1967)--oil drilling in a

developed area--Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928)--, and fumigation--Luthringer v. Moore, supra--are ultra-hazardous activities. On the other hand, blasting in an undeveloped area--Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82 (1907)--, grading and earthmoving in conjunction with a subdivision project--Beck v. Bel Air Properties, 134 Cal. App.2d 834, 286 P.2d 503 (1955)--, normal irrigation--Clark v. Di Prima, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966)--, and collecting water in a reservoir--Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 Pac. 766 (1920)(alternate holding)--have been held to be not ultrahazardous.

There is no experience regarding application of the doctrine to public entities and therefore none with respect to uniquely governmental activities. Arguably, under a literal interpretation of the Restatement definition, even fire and police activities could be considered ultrahazardous activities. The tentative recommendation entrusts the classification of activities to the courts and it can be anticipated that such governmental activities would be excluded but some more definite assurance may be desired.

An analogous problem is raised with respect to the defenses to liability. It might be noted that, under the recommendation, a public entity is entitled to those defenses, but only those defenses, available to a private person. Again, under the Restatement (and an instruction quoting this section of the Restatement was quoted with apparent approval in Luthringer), "There is no strict liability for an abnormally dangerous activity if it is carried on in pursuance of a public duty imposed upon the actor, or a franchise or authority conferring legislative approval of the activity." (See attached Exhibit I.) This defense is completely

inconsistent with the purpose of this recommendation and the policy sought to be implemented. All activities lawfully carried on by any public entity could be said to be conducted under authority conferred by the Legislature. So interpreted, the defense would preclude any ultrahazardous liability. Alternatively, the defense could be judicially construed to apply only to public employees, shielding them from personal liability, while preserving entity liability. The latter construction would be an acceptable solution to the problem, but the staff has some doubts whether this should be left to the courts to resolve without legislative guidance. (It might be noted that the recommendation provides solely for entity liability. Public employees are not covered and would thereby retain the defenses and immunities afforded by the existing provisions of the Government Liability Act. As noted in the recommendation, these defenses and immunities appear in themselves to preclude ultrahazardous liability.)

These appear to be the highlights. Please read the attached recommendation prior to the meeting. We will go over it carefully at the meeting, after which we hope to be able to distribute it for comment.

Respectfully submitted,

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EXHIBIT I

§ 521. ACTIVITY CARRIED ON UNDER PUBLIC SANCTION

THERE IS NO STRICT LIABILITY FOR AN ABNORMALLY DANGEROUS ACTIVITY IF IT IS CARRIED ON IN PURSUANCE OF A PUBLIC DUTY IMPOSED UPON THE ACTOR, OR A FRANCHISE OR AUTHORITY CONFERRING LEGISLATIVE APPROVAL OF THE ACTIVITY.

Note to Institute: This parallels § 517, on dangerous animals. See the Note to that Section. — This Note is attached to the end of this Exhibit — JIH

Comment:

a. A public official a part of whose duties is to make or store high explosives in large quantities is not subject to the strict liability imposed by the rule stated in § 519. He is not liable unless he is negligent in the manufacture or keeping of the explosives, or has selected a place for storing them which makes their storage unnecessarily dangerous in the event of an explosion. On the other hand, he is liable if he negligently fails to exercise in these particulars that care which the highly dangerous character of the matter of which he has the custody requires him to exercise. So too, a common carrier, in so far as it is required to carry explosives offered to it for transportation, is not liable for harm done by their explosion, unless it has failed to take that care in their carriage which their dangerous character requires.

b. Even where there is no duty to engage in the abnormally dangerous activity, the defendant may be protected from strict liability by a sanction conferred by the legislature, under circumstances such as to indicate approval of the activity sufficient to confer immunity. Normally this is the case when, under a franchise given to such a defendant as a common carrier, it is authorized but not required to accept dangerous commodities for transportation. It may likewise be the case where the legislature grants to a defendant authority to engage in an activity of the abnormally dangerous kind, as where, in wartime, a defendant is authorized to construct and operate a plant making explosives in an area of special danger.

On the other hand, it is not every authorization or permission to engage in an activity which can be taken to confer immunity from strict liability, by giving such approval to the activity as to indicate an intent that the defendant shall not be liable. In the absence of special circumstances indicating such an intent, the normal interpretation of the act of the legislature in granting a franchise or authority to act in such a manner is that the defendant is authorized to proceed, but must be strictly responsible if the activity in fact results in harm to those in the vicinity.

§ 517. ANIMALS KEPT UNDER PUBLIC SANCTION

THERE IS NO STRICT LIABILITY FOR THE POSSESSION OF A WILD ANIMAL, OR AN ABNORMALLY DANGEROUS DOMESTIC ANIMAL, IF IT IS IN PURSUANCE OF A PUBLIC DUTY IMPOSED UPON THE POSSESSOR OR A FRANCHISE OR AUTHORITY CONFERRING LEGISLATIVE APPROVAL OF THE ACTIVITY.

Note to Institute: The old Section is sound as far as it goes. The defendant is not liable where he has undertaken the duty to the public, as in the case of the superintendent of the national zoo in Jackson v. Baker, (1904) 24 App. D.C. 100. This includes any public utility which has undertaken the positive duty of rendering the service, as in the case of a carrier which must accept the animal for transportation. See Actiesselskabet Ingrid v. Central R. Co. of New Jersey, (2 Cir. 1914) 216 F. 72 (carrier required to haul explosives); Gould v. Winona Gas Co., (1907) 100 Mass. 258, 111 N.W. 254 (gas pipes in the street); Schmeer v. Gas Light Co., (1895) 147 N.Y. 529, 42 N.E. 202 (same).

The cases indicate, however, that the defendant is also protected when he has assumed no positive duty, but merely has legislative sanction to go ahead if he wants to. Thus:

Mulloy v. Starin, (1908) 191 N.Y. 21, 83 N.E. 588. A carrier transporting bears. The majority opinion held that there was no strict liability because it was "warranted in so doing," and clearly goes on authorization rather than duty. One judge concurred on the ground that there was a duty to accept the bears; one dissented on the ground that there was no duty.

Stamps v. Eighty-Sixth St. Amusement Co., (1916) 95 Misc. 599, 159 N.Y.S. 683. Strict liability when performing lions got into a theatre orchestra. Dictum, distinguishing the Mulloy case on the ground that the carrier there was authorized to carry the bears, and so had legislative sanction, although it was under no duty to do so.

Guzzi v. New York Zoological Society, (1920) 192 App. Div. 511, 182 N.Y.S. 257, affirmed (1922) 233 N.Y. 511, 135 N.E. 897. The Society had a charter from the legislature to conduct the zoo. It is not clear whether it assumed any duty to do so. The decision is put solely on the ground of legislative sanction in the charter. No strict liability.

Pope v. Edward M. Rude Carrier Corp., (W. Va. 1953) 75 S.E. 2d 584. Defendant, a truck carrier, was given the "right" to transport dynamite, although it could refuse to accept such a shipment. No strict liability, on the ground of legislative sanction.

McKinney v. City and County of San Francisco, (1952) 109 Cal. App. 2d 844, 241 P. 2d 1060. Defendant maintained a public zoo. This was held to be a governmental function, which left nuisance as the only possible ground of liability. Held, that it was not a nuisance, citing the Guzzi case above, and saying that there should be no liability "where the animals were maintained as a public enterprise under legislative authority for educational purposes and to entertain the public."

Hyde v. City of Utica, (1940) 259 App. Div. 447, 20 N.Y.S. 2d 335. The city maintained a zoo. Its charter did not authorize it to do so. It was held strictly liable. The court distinguished the Guzzi case, above, on the basis of sanction from the legislature.

On the other hand, although no cases have been found, it seems quite clear that the mere permit from a city council to hold a circus would not prevent strict liability. Certainly the ordinary dog license does not confer immunity from strict liability for dog bites. There must be such an authorization or sanction from the legislative body as will indicate an intent that the defendant may carry on his activity without liability so long as he uses proper care. What is needed is language to say this.

a. The rules of strict liability imposed upon the possessor of a wild animal, or an abnormally dangerous domestic animal, in §§ 507-515, do not apply to persons who as a part of their public duties are required to take the possession or custody of such animals. Thus there is no strict liability on the part of a common carrier which is required by law to accept a bear, or an abnormally vicious dog, for transportation. Likewise there is no liability on the part of an employee, such as a superintendent of a public zoo, who as a part of his official duties to the public has undertaken to be responsible for the possession or custody of such animals.

b. Even where there is no duty to receive possession of the animal, the defendant may be protected from strict liability by a sanction conferred by the legislature, under circumstances such as to indicate approval of the activity sufficient to confer immunity. Normally this is the case when, under a franchise given to such a defendant as a common carrier, it is authorized but not required to accept dangerous animals for transportation. It is likewise the case where the legislature grants to a city or other municipal corporation the authority to establish a public zoological garden. On the other hand, it is not every authorization or permission which can be taken to confer immunity, by giving such approval to the activity as to indicate that it is intended that there shall be no strict liability. Thus a permit from a city council to hold a circus will normally not prevent strict liability when one of the lions escapes, nor does the ordinary dog license confer any immunity whatever from strict liability for dog bites. The question is one of legislative intention in granting the authorization in question.

c. While public officers, common carriers, and others acting under legislative sanction are not subject to strict liability under the rules stated in §§ 507-515, they are nevertheless liable for negligence if they fail to exercise ordinary care commensurate with the dangers involved.

March 26, 1969

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

NUMBER 12--REVISIONS OF THE GOVERNMENTAL LIABILITY ACT

Ultrahazardous Activities

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

WARNING: 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 it will make to the California Legislature.

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.

NOTE: COMMENTS OF INTERESTED PERSONS AND ORGANIZATIONS MUST BE IN THE HANDS OF THE COMMISSION NOT LATER THAN AUGUST 4, 1969, IN ORDER THAT THEY MAY BE CONSIDERED BEFORE THE COMMISSION'S RECOMMENDATION ON THIS SUBJECT IS SENT TO THE PRINTER.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

NUMBER 12--REVISION OF THE GOVERNMENTAL LIABILITY ACT

Ultrahazardous Activities

BACKGROUND

Comprehensive legislation relating to the liability of public entities and their employees was enacted in 1963. Under that legislation, a public entity is directly liable for the dangerous condition of its property¹ and is vicariously liable for the torts of its employees.² Generally, the liability of public employees is determined by the same rules that apply to private persons.³ However, review of the substantive rules of liability in conjunction with the Commission's other work has revealed a limited but significant area of liability--liability for ultrahazardous activities--that is not adequately provided for by the Governmental Liability Act. Such liability is not expressly treated in the Act and, as indicated below, existing bases for liability in the Act because of the various exceptions and immunities provided cannot be reconciled with liability predicated on ultrahazardous grounds.

The general principle applicable to ultrahazardous activities is that one who carries on such an activity is subject to liability for harm resulting from the activity even though he has exercised the utmost care

1. Govt. Code § 835.

2. Govt. Code § 815.2.

3. Govt. Code § 820.

to prevent such harm.

The liability arises out of the abnormal danger of the activity itself, and the risk which it creates, of harm to those in the vicinity. It is founded upon a policy of the law which imposes upon anyone who, for his own purposes, creates such an abnormal risk of harm to his neighbors, the responsibility of making good that harm when it does in fact occur. The defendant's enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.⁴

In short, as applied to public entities, it would require the distribution of losses resulting from abnormally dangerous (or ultrahazardous) activities to be spread to the public generally rather than be left to absorption by an unfortunate few.

Existing law fails to provide similar relief. The Governmental Liability Act imposes liability on a public entity for the acts of its employees and provides that public employees in turn are liable for injury to the same extent as a private person. However, the Act expressly immunizes both an entity and its employee from liability for acts resulting from the exercise of discretion by the employee. The precise scope of this immunity awaits case-by-case judicial definition, but it would appear that its potential reach would embrace and protect discretionary decisions to engage in certain ultrahazardous activities. Moreover, the emphasis for this source of liability is on "acts"; a major area of liability for ultrahazardous activities is concerned with maintenance of dangerous conditions. The Governmental Liability Act deals directly with dangerous conditions of public property, but its provisions are completely inconsistent with a theory of strict liability for ultrahazardous activities. Assuming the basic conditions of liability under the Act are met,⁵ the Act provides two special defenses that eliminate

4. Restatement (Second) of Torts § 519, comment d (Tentative Draft No. 10, (1964)).

5. Govt. Code § 835.

ultrahazardous liability. The first of these is the plan or design immunity.⁶ With respect to this immunity, suffice it to say here that many dangerous conditions and potential sources of ultrahazardous liability (storage facilities for explosives, gas, oil, and so on) will be the product of an approved plan or design and thereby removed as a source of liability. Far more devastating, certainly in theory, is the ability of the entity to defend its activity by showing the reasonableness of its acts in protecting against the risk of injury created by the activity or condition.⁷ The very essence of ultrahazardous liability is strict liability despite a showing of utmost care on the part of the defendant. If negligence could be shown, there would be no need to rely on a theory of strict ultrahazardous liability in the first place.

It should not be inferred from the foregoing that liability for ultrahazardous activities is unlimited or application of the doctrine renders the defendant defenseless. On the contrary, recovery is denied for injury brought about by the intervention of the unforeseeable operation of a force of nature⁸ or intentional, reckless, or negligent conduct of a third person.⁹ Recovery is denied for injury resulting from the abnormally sensitive character of the plaintiff's activity.¹⁰ Liability extends only to such harm as is within the scope of the abnormal risk which is the basis of the liability. What makes blasting in a residential area ultrahazardous is the risk of explosion, not the possibility that someone may stub his toe on a box left lying around. Thus,

6. Govt. Code § 830.6.

7. Govt. Code § 835.4.

8. Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 Pac. 766 (1920).

9. See Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 Pac. 617 (1903).

10. See Postal Telegraph-Cable Co. v. Pacific Gas & Elec. Co., 202 Cal. 382, 260 Pac. 1011 (1927).

in the latter case, the doctrine has no application. Finally, the defense of assumption of risk or a restricted version of contributory negligence may be available.¹¹

It bears repeating that the doctrine requires only that "the defendant's enterprise . . . pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character." As applied to a public entity, the underlying policy is clearly reflected in the area of eminent domain and inverse condemnation where a critical factor is whether the property owner "if uncompensated would contribute more than his proper share to the public undertaking!"¹² It seems inexcusable to ignore this policy where not only property but life and limb are injured. The Commission believes the existing hiatus with regard to ultrahazardous activities should be filled and accordingly submits this recommendation.

RECOMMENDATIONS

The existing common law relating to ultrahazardous activities is a developing, viable body of law. Rather than attempt to capture and codify it in its present form, thereby reducing it to a rigid statutory formulation, the Commission recommends that this body of law be adopted intact, but its desirable flexibility retained, by simply establishing the fundamental principle that a public entity carrying on an ultrahazardous activity shall be liable for injuries caused by that activity to the same extent as a private person. Whether an activity is "ultrahazardous" and whether the entity has a defense available to it should also be determined by the

11. See *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

12. *Albers v. County of Los Angeles*, 62 Cal.2d 250, 263, 42 Cal. Rptr. 89, 398 P.2d 129, ____ (1965), quoting *Clement v. State Reclamation Board*, 35 Cal.2d 628, 642, 220 P.2d 897, ____ (1950).

same guiding principle. In short, the public entity in this limited area should be treated as though it were a private person.

As indicated above, such legislation would work some change in existing law. For example, the entity no longer would be protected by the basic discretionary immunity nor the defenses provided in conjunction with liability for dangerous conditions of property. But, as indicated, this does not mean that its liability would be unlimited, for adequate safeguards are provided by the common law. The basic change would be the salutary one of conforming the status of the public entity to that of a private person in an area where no basis for distinction exists.

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

An act to add Chapter 8 (commencing with Section 880) to
Part 2 of Division 3.6 of the Government Code,
relating to ultrahazardous activities.

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

Section 1. Chapter 8 (commencing with Section 880) is added
to Part 2 of Division 3.6 of the Government Code, to read:

Chapter 8. Ultrahazardous Activities

Section 880. Conditions of liability; defenses

880. (a) A public entity carrying on an ultrahazardous activity is liable for injury proximately caused by such activity to the same extent as a private person.

(b) The liability of a public entity under subdivision (a) is subject only to those defenses that would be available to it if it were a private person.

Comment. Section 880 makes applicable to a public entity the common law rule of strict liability for injury caused by an ultrahazardous activity. This section supplements the existing statutory liability for dangerous conditions (Chapter 2 of this part) and for negligent or wrongful acts generally of public employees (Sections 815.2, 820). The latter statutory provisions contain or are subject to such exceptions, immunities, or defenses as to render them irreconcilable with a theory of strict liability for ultrahazardous activities. See, e.g., Section 835.4 (no liability for dangerous condition created by reasonable act). For that reason, the section is intended to be self-contained, stating not only the basic rule of liability but also providing all applicable defenses.

The liability stated in this section is not based upon any intent to inflict injury nor negligence in conduct. On the contrary, the entity is liable despite the exercise of reasonable care. The liability arises out of the activity itself and the risk which it creates of harm to those in the vicinity and is based upon a policy which requires an ultrahazardous enterprise to pay its way by compensating for the injury it causes.

Whether an activity is "ultrahazardous" is determined by the court pursuant to Section 880.2. See Section 880.2 and the Comment thereto. Once that determination is made, in order to provide necessary flexibility in this area, Section 880 does no more than establish the guiding principle that a public entity engaged in an ultrahazardous activity is liable for injuries caused by that activity to the same extent as a private person. Beyond this the section does not attempt to particularize. It might, however, be noted that the apparently broad rule of liability is, under existing law in California, subject to certain significant limitations. For example, by virtue of the requirement of proximate causation, recovery will apparently be denied for injury brought about by the intervention of the unforeseeable operation of a force of nature--see Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 Pac. 766 (1920)--or intentional, reckless, or negligent conduct of a third person--see Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 71 Pac. 617 (1903). Recovery has been denied for injury resulting from the abnormally sensitive character of the plaintiff's activity--see Postal Telegraph-Cable Co. v. Pacific Gas & Elec. Co., 202 Cal. 382, 260 Pac. 1011 (1927). Further, liability extends only to such harm as is within the scope of the abnormal risk which is the basis of the liability. For example, the thing which makes the storage of explosives in a city ultrahazardous is the risk of harm to those

§ 880

in the vicinity if it should explode. If an explosion occurs, the rule stated in this section would presumably apply. On the other hand, if for some reason a box of explosives simply falls on a visitor, this section would have no applicability. See Restatement (Second) of Torts § 519, comment e (Tentative Draft No. 10, 1964). Finally, the defenses of assumption of risk or a restricted version of contributory negligence may be available. See Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948). See also Restatement (Second) of Torts §§ 523, 524 (Tentative Draft No. 10, 1964). However, subdivision (b) of Section 880 makes clear that a public entity is afforded no special statutory immunities or defenses, but rather only those defenses available at common law to a private person.

Section 880.2. Classification as ultrahazardous activity a question of law

880.2. In any action that arises under this chapter, the question whether an activity is "ultrahazardous" shall be decided by the court by application of the common law applicable in a suit between private persons.

Comment. Under Section 880.2, whether an activity is "ultrahazardous" is to be determined by the court, upon consideration of the same principles applicable in a suit between private persons. California appears at present 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. [Smith v. Lockheed Propulsion Co., 247 Cal. App.2d 774, 785, 56 Cal. Rptr. 128, ___ (1967), quoting Restatement of Torts § 520 (19__).]

See Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948); Clark v. Di Prima, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966). Nevertheless, it is difficult if not impossible to reduce ultrahazardous activities to any exact definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm which results from it even though it is carried on with all reasonable care. Accordingly, it seems both unnecessary and undesirable to provide by statute a static, rigid rule for this still developing body of substantive law. See Restatement (Second) of Torts § 520 (Tentative Draft No. 10, 1964). Section 880.2, by requiring the court to apply the same common law principles involved in a suit between private persons, incorporates this viable body of law. Again, as under Section 880, the essential point is that the public entity under this chapter is to be treated as though it were a private person.

Unlike the characterization of specific conduct as reasonable or negligent, the imposition of strict liability under Section 880 involves a characterization of the public entity's activity itself, and a decision as to whether it is free to conduct it at all without becoming liable for harm which results even though it has used all reasonable care. This calls for a decision of the court. 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). See also Restatement (Second) of Torts § 520, comment 1 at 68 (Tentative Draft No. 10, 1964).