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Memorandum 69-104

Subject: Study 52 - Sovereign Immunity

Attached to this memorandum is a consolidated tentative recommendation that brings together the former separate recommendations on immunity for plan or design of public improvements, police and correctional activities, medical, hospital, and public health activities, ultrahazardous activities, and liability for use of pesticides. In addition, the consolidated tentative recommendation includes a provision relating to liability for nuisance.

The staff prepared this consolidated recommendation because we can save a substantial amount of money by printing one instead of six separate recommendations. Equally important, it will be considerably easier to handle one bill--rather than six--in the Legislature. Moreover, it is hoped that the various proposals, if included in one bill, will have some chance of approval by the Legislature and the Governor.

We will prepare separete memoranda discussing each of the areas of liability dealt with in the consolidated tentative recommendation. These separate memoranda will also discuss the comments we received on the tentative recommendations that were distributed for comment. However, the memoranda will be directed toward the consolidated tentative recommendation rather than the separate recommendations that were distributed for comment.

We made some modest editorial changes in preparing the consolidated tentative recommendation. In addition, we added a provision relating to nuisance liability (discussed below) and we made some revisions in the portion relating to prisoners and mental patients (discussed in Memorandum 69-105).

The fiscal demands that will be made on the state at the 1970 legislative session should be taken into account in determining the content of the consolidated recommendation. Consider, for example, the fact that the Commission's budget will be cut 20 percent below a projection of the expenditures for the current year and that this apparently is the general objective of the administration for all agencies. Obviously, the 1970 session will not be one that will be likely to enact (nor would the Governor be likely to approve) a bill that would substantially increase governmental expenditures for tort liability without at least some offsetting reductions in potential liability.

We believe that the law relating to common law nuisance liability can and should be clarified to eliminate the possiblity of such liability. This matter is discussed at pages 3-5 of the consolidated recommendation and the proposed statutory provision is at page 46 of the consolidated recommendation. We do not repeat that discussion here. (See also Memorandum 69-103 for considerable additional background information on this matter.) You will recall that the Commission directed the staff to research this matter and to make a recommendation as to whether any legislation was necessary. We believe that legislation is necessary and that it is highly desirable that it be included in the consolidated recommendation to the 1970 Legislature.

There is one additional provision that would result in saving to public entities and, at the same time, not leave the injured person without a remedy. I hesitate to raise this matter again, the Commission having declined on one or two previous occasions to recommend any change in the existing law. However, I believe that inclusion of a limitation on the liability of a public entity to an employee of an independent contractor in

the consolidated bill would do much to make the bill more acceptable to public entities. The benefits to injured citizens of the other recommended changes would more than offset any detriment that might result from enacting a limitation on liability for injury or death of employees of independent contractors. In case the Commission is willing to give further consideration to this matter, the staff suggests the following amendment to Government Code Section 815.4:

> 815.4. (a) A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person.
>
> (b) Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.
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> (c) Where an employee of the independent contractor of the public entity is injured or killed within the scope of his employment, the liability of the public entity under this section is no greater than that of his employer under Division 4 (commencing with Section 3201) of the Labor Code unless the public entity is liable for such injury or death under Section 815.6 or the injury or death was caused by a negligent or wrongful act or omission of an employee of the public entity.

Comment. Subdivision (c) of Section 815.4 changes former law. Under former law, a public entity was often subject to unlimited liability for injuries to an employee of an independent contractor caused solely by the negligence of the independent contractor. See Van Arsdale v. Hollinger,

68 Adv. Cal. 249 (1968). Because workmen's compensation is the exclusive remedy for the employee against his employer, this rule of vicarious liability produced the anomalous result that the nonnegligent entity was subject to greater liability than the negligent contractor. To the extent that this result was offset through indemnification of the entity by the employer-contractor, the policies underlying exclusivity of the workmen's compensation remedy were subverted.

Under subdivision (c) a public entity's liability for injuries to an employee of an independent contractor of the entity caused solely by the negligence of the contractor is limited to an amount equivalent to that recoverable by the employee against his employer under the Workmen's Compensation Act; moreover, the employee may not recover from both the entity and his employer. It should be noted that this section deals only with vicarious liability for the acts of an independent contractor and subdivision (c) does not, therefore, affect the entity's liability for the negligent conduct of its own employees. See Government Code Section 815.2. Subdivision (c) does not affect the law regarding the determination of liability; it merely limits the scope of recovery. The entity may, therefore, raise defenses (e.g., contributory negligence, assumption of risk) that are unavailable under the Workmen's Compensation Act. The limitation on recovery only applies to "an employee" and does not affect the recovery of third persons generally. Although generally the employee will recover as a matter of course from his employer, subdivision (c) provides a cause of action against the entity in the rare situation where the contractor-employer fails to secure payment of compensation. In

essence, the entity simply becomes a guarantor of workmen's compensation where the conditions of liability obtain. Finally, subdivision (c) applies whenever liability is predicated on the negligence of an independent contractor. For example, city (C) engages A and B, both independent contractors, to perform certain work. (1) E, an employee of A, is injured through the negligence of A in circumstances where C would be subject to vicarious liability under Section 815.4. E can recover no more than the relief provided under the Workmen's Compensation Act. (2) Similarly where E, is injured solely through the negligence of B, E can recover no more than workmen's compensation from C, though his recovery against B is unlimited.

Respectfully submitted,

John H. DeMoully
Executive Secretary

#52 Revised July 29, 1969

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

RECOMMENDATION

relating to

SOVEREIGN IMMUNITY

NUMBER 10--REVISIONS OF THE GOVERNMENTAL LIABILITY ACT

Nuisance

Immunity for Plan or Design of Public Improvement

Police and Correctional Activities

Medical, Hospital, and Public Health Activities

Ultrahazardous Activities

Liability for the Use of Pesticides

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

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.

LETTER OF TRANSMITTAL

In 1963, upon recommendation of the Law Revision Commission, the Legislature enacted comprehensive legislation dealing with the 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 recommended to the 1965 Legislature certain revisions of the Governmental Liability Act; the recommended legislation was enacted. See Cal. Stats. 1965, Chs. 653, 1527. Legislation recommended by the Commission relating to the statute of limitations in actions against public entities and public employees was enacted by the 1969 Legislature. See Cal. Stats. 1969, Ch.

The 1965 and 1969 legislation did not deal with the provisions of the 1963 statute that relates to substantive rules of liability and immunity of public entities and public employees because the Commission concluded that additional time was needed in which to appraise the effect of these provisions. The Commission has reviewed the experience under those provisions of the 1963 legislation that deal with the immunity for the plan or design of a public improvement, police and correctional activities, and medical, hospital, and public health activities. The Commission has also considered the areas of liability for nuisance,

ultrahazardous activities, and the use of pesticides. This recommendation is concerned with each of these areas of governmental liability. In preparing this recommendation, the Commission has considered both the decisional law and other published materials commenting on these provisions. See, e.g., A. Van Alstyne, California Government Tort Liability (Cal. Cont. Ed. Bar 1964; Supplement 1969); 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); Rector, Sovereign Liability for Defective or Dangerous Plan or Design--California Government Code Section 830.6, 19 Hastings L.J. 584 (1968); The Supreme Court of California 1967-1968, 56 Cal. L. Rev. 1612, 1756 (1968); Note, California Public Entity Immunity From Tort Claims by Prisoners, 19 Hastings L.J. 573 (1968).

RECOMMENDATION OF THE CALIFORNIA LAW
REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 10--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

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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 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.)

of the California Supreme Court in Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (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 has reviewed the experience under those provisions of the 1963 legislation that deal with the immunity for an approved plan or design, police and correctional activities, and medical, hospital, and public health activities. The Commission has also considered the areas of law dealing with liability for nuisance, ultrahazardous activities, and the use of pesticides. This recommendation is concerned with revisions affecting each of these areas of governmental liability. For convenience and ease of reference, each topic is discussed separately below, although the legislation proposed to effectuate the Commission's recommendation is presented in a single bill which is set forth at the end of the recommendation.

NUISANCE

Background

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

> [T]here is no section in this statute declaring that public entities are liable for nuisance . . . ; [hence] the right to recover damages for nuisance will have to be established under the provisions relating to dangerous conditions of public property or under some other statute that may be applicable to the situation.

However, this legislative intent may not have been fully effective.

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

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

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

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

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

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

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

7. E.g., Vater v. County of Glenn, 49 Cal.2d 815, 323 P.2d 85 (1958); Mercado v. City of Pasadena, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); Zeppi v. State, 174 Cal. App.2d 484, 345 P.2d 33 (1959); Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App.2d 438, 330 P.2d 441 (1958).

8. The fact that these sections are general in language, and do not specifically refer to public entities, does not preclude their application to such entities. See Van Alstyne, supra note 3.

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

Recommendation

To eliminate the existing uncertainty and to effectuate the Legislature's original intention, the Commission recommends that a new section--Section 815.8--be added to the Government Code to eliminate expressly liability for damages for nuisance under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code. This section would eliminate liability for damages based on a theory of common law nuisance. Enactment of the section would have no effect on liability for damage to property based upon Section 14 of Article I of the California Constitution (inverse condemnation), liability based upon other specific statutory provisions, or the right under Government Code Section 814 to obtain relief other than money or damages.

The comprehensive governmental liability statute (supplemented by the provisions relating to ultrahazardous activity liability hereinafter recommended), together with inverse condemnation liability, provide a complete, integrated system of governmental liability and immunity. This carefully formulated system was intended to be the exclusive source of governmental liability. Although the term "nuisance" is not employed, the system does permit the imposition of liability upon governmental entities under most circumstances where liability could be imposed upon a common law nuisance theory. Even 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 a potential extension of governmental liability that is both undesirable and unnecessary.

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.[10] 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 this type of liability exists. The general rule is that a public entity is liable for an "injury"[11] caused by the "dangerous condition"[12] of its property if the entity created or had actual or constructive notice of the dangerous condition and failed to take reasonable measures to protect against the risk of injury it created.[13] However, this general rule of liability is subject to several specific defenses and immunities.

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10. See Governmental Tort Liability, Senate Fact Finding Committee on Judiciary (Seventh Progress Report to the Legislature, 1963); A. Van Alstyne, California Government Tort Liability 185 (Cal. Cont. Ed. Bar 1964).

11. Govt. Code § 810.8.

12. Govt. Code § 830(a).

13. Govt. Code §§ 835-835.4.

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.[14] 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. This recommendation relates to a single, but apparently far-reaching, question that has arisen in applying Section 830.6. Once the immunity comes into play because of the reasonable adoption of the plan or design, does it persist notwithstanding changes of circumstance and the development of experience with the improvement? 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.[15] Cogent dissents from those decisions and

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14. 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.

15. 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).

several legal writers[16] urge that the immunity should be considered dissipated once the plan or design is executed and the occurrence of injuries demonstrate that the improvement is hazardous.

In Cabell v. State,[17] 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,[18] 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.

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16. 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, Sovereign Liability for Defective or Dangerous Plan or Design--California Government Code Section 830.6, 19 Hastings L.J. 584 (1968); The Supreme Court of California 1967-1968, 56 Cal. L. Rev. 1612, 1756 (1968).

17. 67 Cal.2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967).

18. 67 Cal.2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967).

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,[19] 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 where 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

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19. See Govt. Code § 835.2.

experience demonstrates that they are dangerous.[20] 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,[21] imposes upon the public entity "a continuing duty to review its plan in the light of actual operation,"[22] and expressed their view that:[23]

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20. 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).]

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, 472 (1963).

21. See A. Van Alstyne, California Government Tort Liability 555 (Cal. Cont. Ed. Bar 1964).

22. 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).

23. 67 Cal.2d at 158, 430 P.2d at 39, 60 Cal. Rptr. at 481.

> 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.
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> 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 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.

Recommendation

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) prior injuries have occurred that demonstrate that fact, and (3) the public entity has had knowledge of these prior injuries. To facilitate proof by the tort claimant that the public entity had knowledge of the previous injuries, the California Public Records Act[24] should be amended to make clear that public records needed for this purpose will be available to the claimant.

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.[25] 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."[26] If the court were not persuaded that the property

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24. Govt. Code §§ 6250-6260.

25. The plan or design immunity aside, the court may determine as a matter of law that a condidion of public property is not "dangerous." See Govt. Code § 830.2; Pfeifer v. 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.

26. Govt. Code § 830(a)(emphasis added).

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 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.

In addition to proving to the satisfaction of the court that the plan or design actually created a dangerous condition at the time of the injury, the plaintiff would have to prove (1) that prior injuries had occurred that demonstrated that the plan or design created such a condition and (2) that the public entity had knowledge that those injuries had occurred. If the plaintiff were unable to prove such prior injuries and knowledge of them on the part of the entity, he could not recover even though he could prove that a long-forgotten plan or design decision had not recently been reviewed, that changed circumstances had made the improvement hazardous, that technological advances had provided a way of eliminating the hazardous nature of the improvement at a modest cost, or that protection could have been afforded with slight effort, such as posting a warning sign.

Moreover, the public entities would remain shielded from liability by other broad statutory immunities or preconditions to liability.[27] In connection with dangerous conditions of public property, and specifically in connection with the failure to update hazardously obsolescent improvements, the most important of these other protections is provided by Section 835.4. Even if the plaintiff proves the existence of a dangerous condition, whether caused by a faulty or obsolescent plan or design or otherwise, the public entity is not liable if it establishes that "the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable." In addition, the reasonableness of action or inaction on the part of the public entity is to 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."

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."[28] Nevertheless, in the Cabell and

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27. 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 (requirements of notice or knowledge of dangerous condition); and 835.4 (immunity for "reasonable" action or inaction).

28. See the articles in note 16, supra.

Johnston cases, the defendants and amicus curiae[29] 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 litigation were allowed, the judge or jury might merely superimpose their 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 Section 835.4--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 spectre 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,[30] and all other public entities were liable for dangerous conditions of property devoted to a "proprietary" function.[31] Yet, no plan or design immunity was recognized in California until enactment of Section 830.6 in 1963.

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29. 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).

30. See the so-called Public Liability Act of 1923, Cal. Stats. 1923, Ch. 328, p. 675. See also Van Alstyne, California Government Tort Liability 35-37 (Cal. Cont. Ed. Bar 1964).

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

Also, as Justice Peters points out,[32] 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.[33] 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."[34]

Admittedly, the cost of updating improvements that have proven or become dangerous can involve substantial sums of money. For example, the Commission is advised that the variety of glass involved in the Cabell case has been used in many state college dormitories. Complete replacement of this glass is estimated to cost approximately one million dollars. 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 where used with due care or to compensate the innocent victims. The more widely the dangerous plan or design has been used, the more danger it creates and hence the more deserving it is of corrective attention. 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

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32. See Cabell v. State, 67 Cal.2d 150, 155, 430 P.2d 34, 38, 60 Cal. Rptr. 476, 480 (1967)(dissenting opinion).

33. 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).

34. See Ill. Ann. Stats., Ch. 85, § 3-103 (Smith-Hurd 1966).

commitment of funds, time, or personnel--may be sufficient.[35]

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. But here it is vital to notice that the successful tort claimant must not dwell upon the obviously dangerous condition of the property by which he allegedly is injured. The plan or design immunity entirely apart, a public entity has the same defenses--including contributory negligence and voluntary assumption of risk--that are available to a private defendant.[36] As New York decisions succinctly put the matter:[37]

> Proof of the condition of a highway over a considerable distance is generally double-edged because while it may show notice to the state that the highway is in need of repair it also shows that the claimant driver should have been on guard for his own safety.

Under the recommended solution to the problem of dangerous obsolescence, no circumstances other than the occurrence of previous injuries will deprive the public entity of its immunity from liability for an injury allegedly

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35. 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 or 90 percent. 67 Cal.2d at 170, 430 P.2d at 47, 60 Cal. Rptr. at 489.

36. Govt. Code § 815(b).

37. E.g., Lurie v. State, 282 App. Div. 913, 125 N.Y.S.2d 299 (1953). These and other New York highway cases are discussed in Mosk, The Many Problems of Sovereign Liability, 3 San Diego L. Rev. 7, 21-23 (1966).

caused by the defective plan or design of a public improvement. But, in cases where injuries have occurred, the public entity will be encouraged to examine the injury-causing improvement to determine whether corrective action is reasonably required to protect persons and property against a substantial risk of injury. Because the immunity will be eliminated only in cases where prior injuries have been caused by the improvement and the court determines that a dangerous condition actually exists, the recommended solution will permit consideration on the merits of those claims most likely to be worthy of consideration, and the immunity will continue to protect public entities against having to try cases on the merits where the claims are more likely to be without substance.

POLICE AND CORRECTIONAL AND MEDICAL, HOSPITAL, AND PUBLIC HEALTH ACTIVITIES

Background

Under the 1963 legislation a public entity is directly liable for the dangerous condition of its property[38] and vicariously liable for the torts of its employees.[39] Subject to certain qualifications,[40] a public entity is required to indemnify its employee against liability for acts or omissions within the scope of his employment,[41] so that in most cases the financial responsibility for a tort ultimately rests with the entity.

Generally, the liability of public employees is determined by the same rules that apply to private persons.[42] However, a public employee is given an overriding immunity from liability for injuries resulting from an exercise

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[38] Govt. Code § 835.

[39] Govt. Code § 815.2. But see Govt. Code §§ 844.6 and 854.8.

[40] See Govt. Code §§ 844.6 and 854.8, which grant the public entity immunity but do not grant the employee a comparable immunity. See also Govt. Code § 825.2 (right of employee to indemnity). The public entity is not required to pay punitive or exemplary damages (Govt. Code § 825) and may recover from the employee for any claim or judgment paid by the public entity where the employee acted or failed to act because of actual fraud, corruption, or actual malice (Govt. Code § 825.6).

[41] Govt. Code §§ 825-825.6. See also Govt. Code §§ 995-996.6 (defense of public employee).

[42] Govt. Code § 820.

of discretion vested in him, and the vicarious liability of the public entity also is limited by this immunity for discretionary acts.[43]

These broad general rules are supplemented by specific ones relating to certain major areas of potential liability. With certain significant exceptions, these specific rules merely specify the extent to which the immunity for discretionary acts applies in particular situations. Such specific rules are provided for police and correctional activities[44] and for medical, hospital, and public health activities.[45] However, in these two major areas, a broad general immunity for all injuries by or to prisoners[46] and mental patients[47] respectively is conferred upon the public entity, but not upon the public employee. Thus, to this extent, the rules in these areas are inconsistent with the general rule of vicarious liability.

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43 Govt. Code § 820.2. The leading case interpreting the "discretionary" immunity provision is Johnson v. State, 69 Adv. Cal. 813 (1968).

44 Govt. Code §§ 844-846.

45 Govt. Code §§ 854-856.4.

46 Govt. Code § 844.6.

47 Govt. Code § 854.8.

Recommendations

General immunity for injuries caused by or to prisoners

Government Code Section 844.6 gives public entities a broad immunity from liability for injuries caused by or to "prisoners." Except for injuries arising out of the operation of a motor vehicle or medical malpractice, a prisoner has no right to recover from the public entity for injuries that result from the negligence of a public employee or from a dangerous condition of public property. The immunity applies to any "inmate of a prison, jail or penal or correctional facility."[48] Thus, the immunity extends to innocent--as well as guilty--persons held in custody. However, Section 844.6 provides immunity only for the public entity; it does not cover the public employee (who remains liable in most circumstances for his negligence or willful misconduct) nor, except in malpractice cases, does it require the public entity to pay any judgment against the public employee. Thus, the section is inconsistent with the general rule under the governmental liability act that the employing public entity is liable whenever its public employee incurs a liability in the scope of his employment.

The Legislature included Section 844.6 in the governmental liability act despite a recommendation to the contrary by the Commission. The Commission understands that the section was included in the statute primarily because it was feared that much litigation without merit would otherwise result. The Commission has been advised that, in practice,

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[48] Gov't Code § 844.

some public entities have followed the policy of paying any judgment against an employee who acted in good faith in the scope of his employment even though the entity would be immune from direct liability under Section 844.6. Under this policy, the employee is protected against loss and a person with a just claim receives payment from the entity despite the immunity conferred by the section. It is claimed that in actual operation the section has not resulted in injustice but has provided employees engaged in law enforcement activities with an incentive to exercise reasonable care towards prisoners. Accordingly, despite the opinion of some writers that the section is neither necessary nor desirable,[49] the Commission has concluded that the section should be retained subject to the following modifications.

Although "injury" is defined in Section 810.8 to include death, and subdivision (a) of Section 844.6 confers upon public entities an immunity for injuries to any prisoner, subdivision (c) has been construed to permit a separate claim by the heirs of a prisoner where his death allegedly resulted from a dangerous condition of public property, i.e., the jail.[50] No persuasive reason has been advanced for permitting the heirs of a prisoner to recover when the prisoner himself could not have recovered had his injuries been nonfatal. The Commission does not believe that the distinction reflects the Legislature's original intent, and recommends, therefore, that the

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[49] E.g., Note, California Public Entity Immunity From Tort Claims by Prisoners, 19 Hastings L.J. 573 (1968).

[50] See Garcia v. State, 247 Cal. App.2d 814, 56 Cal. Rptr. 80 (1967), petition for hearing by Supreme Court denied, 247 Cal. App.2d 817, 56 Cal. Rptr. (1967). Some uncertainty exists because other courts have intimated a contrary position on this issue; see Datil v. City of Los Angeles, 263 Cal. App.2d 655, 69 Cal. Rptr. 788 (1968)(alternate holding)(semble); Sanders v. County of Yolo, 247 Cal. App.2d 748, 751 n.1, 55 Cal. Rptr. 852, n.1 (1967).

distinction be eliminated and that the immunity apply in a wrongful death action for the death of a prisoner.

Although no decisions have squarely presented the issue, the public entity's immunity from liability for injuries caused by a prisoner conflicts potentially with the entity's general vicarious liability for the torts of its employees.[51] In some instances, a prisoner may also be "an employee." There is no reason why, if the entity elects to use its prisoners in an agency or servant relationship, it should not also assume responsibility for their torts to third persons. The Commission recommends, therefore, that Section 844.6 be clarified to ensure that nothing in subdivision (a) will preclude recovery from a public entity for an injury proximately caused by the wrongful act or omission of a prisoner while acting in the course and scope of employment as an employee of the public entity.

Subdivision (d) of Section 844.6 requires the public entity to pay any malpractice judgment against its employee who is "licensed" in one of the healing arts. This provision might be construed to exclude medical personnel who are "registered" or "certified" rather than "licensed" and also might exclude certain medical personnel specifically exempted from licensing requirements.[52] The subdivision should be revised to make clear that it applies to all public employees who may lawfully practice one of the healing arts, and not merely to those who are "licensed." This revision would make the provision reflect more accurately its original intent.

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[51] Section 810.2 defines an "employee" as including "an officer, employee, or servant, whether or not compensated . . . . ." A prisoner, while performing services for an entity, would, it seems, be considered an employee. Cf. Reed v. City & County of San Francisco, 237 Cal. App. 23, 46 Cal. Rptr. 543 (1965).

[52] See, e.g., Bus. & Prof. Code §§ 1626(c)(out-of-state dental licensees teaching in dental colleges), 2137.1 (out-of-state medical licensees practicing in state institutions), 2147 (medical students), and 2147.5 (uncertified interns and residents).

Also, the courts have held that Section 844.6 does not affect liability imposed by Section 845.6 for failure to summon medical care for a prisoner in need of immediate medical care.[53] Section 844.6 should be revised to codify these decisions and to make clear that certain other special rules of liability prevail over the general immunity conferred by Section 844.6.

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53 Apelian v. Los Angeles County, 266 Adv. Cal. App. 595, 72 Cal Rptr. 265 (1968); Hart v. Orange County, 254 Cal. App.2d 302, 62 Cal. Rptr. 73 (1967); Sanders v. Yuba County, 247 Cal. App.2d 748, 55 Cal. Rptr. 852 (1967).

General immunity for injuries caused by or to mental patients

Section 854.8 of the Government Code parallels Section 844.6 (public entity immunity for injuries by or to a prisoner) and confers a general immunity upon the public entity--but not upon the public employee--for any injury caused by or to a person "committed or admitted" to a "mental institution." Since enactment of Section 854.8 in 1963, the provisions of the Welfare and Institutions Code that deal with the care and treatment of mental patients have been substantially revised. The terminology of Section 854.8 and related sections no longer accords with the terms used in the Welfare and Institutions Code.

The phrase "committed or admitted" in Section 854.8 appears to have been intended to make that section applicable to all persons confined in mental institutions, whether voluntarily or involuntarily. However, the word "committed" might not be construed to cover all of the various procedures now used to effect the confinement of persons in mental institutions.[54] Moreover, although "mental institution" is defined in Government Code Section 854.2, this definition also uses the word "committed" (in this case, without the alternate "admitted") and further is based on the definition of "mental illness or addiction" set forth in Government Code Section 854.4. The latter definition, in turn, is based on terms (now obsolete)

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[54] See, e.g., Welf. & Inst. Code §§ 5206 (court-ordered evaluation for mentally disordered persons), 5304 (90-day court-ordered involuntary treatment of imminently dangerous persons).

that formerly were used in the Welfare and Institutions Code.

To reconcile these Government Code Sections with the new terminology of the Welfare and Institutions Code, Section 854.2 (defining "mental institution") should be revised and a new Section 854.3 should be added to define "county psychiatric hospital." As thus revised, "mental institution" would include (1) county psychiatric hospitals,[55] (2) state hospitals for the care and treatment of the mentally disordered and mentally retarded,[56] and (3) the California Rehabilitation Center for narcotic addicts.[57] Government Code Section 854.4 (defining "mental illness or addiction") should be revised to define "mental illness or addiction" as any mental or emotional condition for which a person may be cared for or treated in a mental institution. This revision would eliminate the existing inconsistency between that section and the revised provisions of the Welfare and Institutions Code, and also would minimize the possibility that future changes in the Welfare and Institutions Code will create similar inconsistencies.

For the reasons given in the foregoing discussion of Section 844.6 (public entity immunity for injuries by or to a prisoner), the broad general immunity conferred by Government Code Section 854.8 should be retained, subject to the following modifications:

(1) The immunity should be restricted to those persons who are inpatients--as distinquished from outpatients--of a mental institution. This revision would be consistent with the intent of the Legislature in enacting Section 854.8.

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55 See Welf. & Inst. Code § 7100.

56 See Welf. & Inst. Code §§ 7200, 7500.

57 See Welf. & Inst. Code § 3300.

(2) The section should be revised both to broaden the immunity to cover liability for the wrongful death of an inpatient and to make clear that liability may be based on the tortious acts of an inpatient while acting in the course and scope of his employment as an employee of the public entity. These revisions are analogous to those relating to prisoners and are discussed more fully above.

(3) The section should be revised to specify more clearly the extent to which the sections that impose special liabilities prevail over the blanket immunity conferred by Section 854.8 and to clarify the scope of the indemnification requirement for public employees "licensed" in one of the healing arts. See the foregoing discussion of incidental changes relating to prisoners.

Liability for escaping or escaped mental patients

Government Code Section 856.2 presently confers immunity only as to injuries caused by an escaping or escaped mental patient. Injuries sustained by the escapee are not covered. Certain other jurisdictions impose liability where a mental patient escapes and is injured because of his inability to cope with ordinary risks.[58] Section 856.2 should be extended to confer immunity for injuries--fatal or nonfatal--sustained by an escaping or escaped mental patient. This revision would be consistent with the rationale of Section 856.2 that the public entity should not be responsible for the conduct of a mental patient who has escaped or is attempting to escape.

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[58] See, e.g., Callahan v. New York, 179 Misc. 781, 40 N.Y.S.2d 109 (Ct. Cl. 1943), aff'd 266 App. Div. 1054, 46 N.Y.S.2d 104 (1943) (frostbite sustained by escaped mental patient).

Miscellaneous

The Commission also recommends a few technical or clarifying changes in the Government Code provisions that deal with liability in connection with police and correctional activities. The significant policy considerations involved in these changes are covered by the foregoing discussion.

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.[59] 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."[60] The California decisions indicate that blasting[61] and oil drilling[62] in a

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59 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).

60 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).

61 E.g., Balding v. D. B. Stutsman, Inc., 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966); Alonso v. Hills, 95 Cal. App.2d 778, 214 P.2d 50 (1950); McGrath v. Basich Bros. Const. Co., 7 Cal. App.2d 573, 46 P.2d 981 (1935).

62 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, 136 (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).

developed area, rocket testing,[63] and fumigation with a deadly poison[64] are ultrahazardous activities. Blasting in an isolated area,[65] earthmoving operations,[66] and building construction[67] are examples of activities that have been held to be not ultrahazardous.

California law as to liability without fault for escaping water is less than clear. In Sutliff v. Sweetwater Water Co.,[68] the California Supreme Court rejected liability without fault for damage from the escape of waters impounded in a reservoir. In Clark v. Di Prima,[69] 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, apparently squarely in point was an earlier case from the First District,[70] in which the doctrine of absolute liability was applied. Distinguishable perhaps are cases of irrigation seepage where relief has been

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

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

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

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

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

68 182 Cal. 34, 186 P. 766 (1920)(alternate holding).

69 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966).

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

granted but could have been based on a theory of continuing nuisance.[71] The California Supreme Court has noted the divergent lines of authority but has not resolved the uncertainty.[72]

Legal writers have discussed the applicability of the ultrahazardous activity doctrine to such technological advances as crop dusting,[73] artificial rainmaking,[74] operation of nuclear reactors,[75] and supersonic aircraft,[76] but there appears to be no definitive California Law in these areas.

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71 See, e.g., Parker v. Larsen, 86 Cal. 236, 24 P. 989 (1980); Fredericks v. Fredericks, 108 Cal. App.2d 242, 238 P.2d 643 (1951); Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (1922).

72 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.

73 Comment, 19 Hastings L.J. 476, 489-493 (1968); Note, 6 Stan. L. Rev. 69, 81-85 (1953). See also Agricultural Code Section 12972 (use of method of chemical pest control that causes "substantial drift").

74 Note, 1 Stan. L. Rev. 508, 534-535 (1949).

75 Seavey, Torts and Atoms, 46 Cal. L. Rev. 3, 7-10 (1958); Carvers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power, 77 Harv. L. Rev. 644, 652-653 (1964); Note, 13 Stan. L. Rev. 865, 866-868 (1961).

76 Baxter, The SST: From Watts to Harlem in Two Hours, 21 Stan. L. Rev. 1, 50-53 (1968).

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[77] or the intentional misconduct of a third person.[78] Recovery has also been denied for injuries that result from the unusually sensitive character of the plaintiff's property or activity.[79] 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.[80] Finally, although

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77 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) Torts § 522, Note to Institute (Tent. Draft No. 10, 1964).

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

79 See generally Restatement (Second) of Torts § 524A (Tent. Draft No. 10, 1964).

80 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.[81]

In California, a public entity is not liable in tort unless liability is imposed by statute.[82] 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 1963 California Tort Claims Act makes a public entity vicariously liable for the acts or omissions of its employees[83] and, subject to several significant immunities, public employees are liable to the same extent as private persons.[84] 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.[85]

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81 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).

82 Govt. Code § 815(a).

83 Govt. Code § 815.2.

84 Govt. Code § 820.

85 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).

"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."[86] 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 the enactment of the Tort Claims Act in 1963, common law nuisance was a basis of recovery for personal injuries as well as property damage.[87] The theory thus provided relief in cases where inverse condemnation liability would not exist. Although it has been suggested that Government Code Section 815 was intended to eliminate governmental liability based on common law nuisance,[88] it is uncertain whether the section actually has this effect.[89]

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

87 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 A. Van Alstyne, A Study Relating to Sovereign Immunity, 5 Cal. L. Revision Comm'n Reports 225-230 (1963).

88 See A. Van Alstyne, California Government Tort Liability § 5.10 at 126 (Cal. Cont. Ed. Bar 1964).

89 See discussion in text accompanying nn.3-9 supra.

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.[90]

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

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90 See discussion in text at nn.77-81 supra.

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.

LIABILITY FOR THE USE OF PESTICIDES

Background

The use of pesticides to control insects, vermin, weeds, and other nuisances[91] may be of great value to the user but can cause substantial harm to others. A chemical that destroys weeds may be equally effective in destroying cotton, grapes, or tomatoes. One that kills the boll weevil may also kill livestock and bees. Legislative recognition of this risk is reflected in California statutes[92] and administrative regulations[93] which provide a comprehensive regulatory scheme for adjusting the competing interests. Crop dusting pilots[94] and persons engaged in the pest control business for hire[95] are licensed. Persons who engage

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91. As used in this recommendation, "pesticides" include not only materials used to control, destroy, or mitigate "pests," but also weed and brush killers, defoliants, desiccants (drying agents), and similar agents. See the definition of "economic poison" in Agricultural Code Section 12753.

92. Agri. Code §§ 11401-11940, 12751-14098.

93. 3 Cal. Admin. Code §§ 2327-2472, 3070-3114.

94. Agri. Code §§ 11901-11913. The pilot is required to serve an apprenticeship, have prescribed agricultural flying experience, and pass an examination to demonstrate his competence in crop dusting techniques and his knowledge of the nature and effect of the chemicals he will use. See also 3 Cal. Admin. Code §§ 3075-3079, 3087-3088.

95. Agri. Code §§ 11701-11710; 3 Cal. Admin. Code §§ 3075-3079. See also Agri. Code §§ 11731-11741 (registration in county where business conducted).

in pest control operations must obtain a permit which specifies the conditions for conducting the operation.[96] Standards for equipment[97] and chemicals[98] and procedures for the use and application of pesticides[99] are prescribed in detail. Financial responsibility requirements are imposed.[100] The Director of Agriculture is given a broad authority to

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96. Agri. Code §§ 14006-14010, 14033,14035. See also 3 Cal. Admin. Code §§ 2451 (injurious herbicides), 2463 ("injurious materials"), 2463.3 ("restricted materials"), 3080 (neighborhood operators). Permits may be limited to particular farms or be of short duration. See 3 Cal Admin. Code § 2451(d).

97. For example, the regulations specify such limitations as the minimum nozzle diameter and maximum spray pressure that may be used to apply injurious herbicides in hazardous area operations. 3 Cal. Admin. Code §§ 2454(a)(4) (ground equipment), 2454(b)(3)(aircraft). For other equipment requirements and specifications, see, e.g., 3 Cal. Admin. Code §§ 2450(d), 3091(a). See also 3 Cal. Admin. Code §2451(b) (equipment inspection).

98. See 3 Cal. Admin. Code §§ 3110-3114. Often whether a permit is required depends upon whether the particular chemicals to be used fall within a standard specified in the regulations. See, e.g., 3 Cal. Admin. Code §§ 2451(a), 2463(a), 2463.3. In some cases, the precautions required to be taken by the user depend on whether the chemical is applied in a higher concentration than is specified in the regulation. E.g., 3 Cal. Admin. Code § 2462(e).

99. E.g., Agri. Code § 12972 (must use in such a manner as to prevent any "substantial drift"). The regulations prescribe in detail the manner of application and precautions to be taken. E.g., 3 Cal. Admin. Code §§ 2450-2455, 2462-2464, 3090-3098, 3110-3114. They may restrict or prohibit entirely activities in a particular area at a specified time or under specified conditions. E.g., 3 Cal. Admin. Code §§ 2450(g) ("Unless expressly authorized by permit, no application of an injurious herbicide shall be made when wind velocity exceeds 10 miles per hour; nor at a height greater than 10 feet above the ground when wind velocity exceeds five miles per hour."), 2453(e)("No injurious herbicide shall be applied by aircraft when the temperature five feet above the ground exceeds 80° Fahrenheit, except that operations may continue six hours after sunrise, regardless of temperature."), 2463.1(f)(various atmospheric conditions described in detail).

100. Agri. Code §§ 11931-11940.

adopt regulations,[101] and county agricultural commissioners have similar authority to deal with local conditions.[102]

Violation of the regulations governing the use of pesticides will almost always constitute a failure to use due care,[103] but compliance with the regulatory standards does not necessarily relieve the user from liability to others.[104] Moreover, Section 12972 of the Agricultural Code[105] imposes

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101. Agri. Code §§ 11502, 14005, 14006, 14033, 14063. See also Agri. Code § 12972. The Director has not hesitated to use his authority. For example, he has adopted regulations that prohibit the application of certain chemicals by aircraft in large areas of the state during the growing season and prohibit ground spraying within two miles of susceptible crops in certain areas during the growing season. E.g., 3 Cal. Admin. Code §§ 2454(b)(1)(aerial spraying), 2454(e)(1)(ground spraying).

102. Agri. Code § 11503. See also Agri. Code § 12972.

103. See Evidence Code § 669. Users are under a mandatory duty to conform to all applicable regulations. E.g., Agri. Code §§ 12972, 14011, 14032, 14063. Violation of the regulations is a misdemeanor. See Agri. Code § 9.

104. See Agri. Code §§ 14003 (injurious material), 14034 (herbicides).

105. Section 12972 provides:

> 12972. Unless otherwise expressly authorized by the director or the commissioner, the use of any economic poison by any person in pest control operations shall be in such a manner as to prevent any substantial drift to other crops and shall not conflict with the manufacturer's registered label or with supplementary printed directions which are delivered with the economic poison and any additional limitations applicable to local conditions which are contained in the conditions of any permit or the written recommendations that are issued by the director or commissioner.

a mandatory duty to prevent "substantial drift"[106] and appears therefore to impose "strict" liability for damage resulting from such drift.[107] The California cases involving liability for the use of pesticides have not, however, construed or discussed the effect of violation of the statutes or regulations.[108]

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106. See also 3 Cal. Admin. Code §§ 2450(d), (h), 2452.1(c), 2453(d), 2454, 2462(a), 3093(a), 3094(b), 3095(a), 3114.

107. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 504 (1969); Comment, 19 Hastings L.J. 476, 486 (1968). At the least, violation of Section 12972 will almost always constitute negligence under Evidence Code Section 669. In addition, since Section 12972 also imposes a duty to comply with any limitations in the user's permit, failure to comply with these limitations may be a basis for strict liability.

108. In Adams v. Henning, 117 Cal. App.2d 376, 255 P.2d 456 (1953), the theory of liability is not indicated, but it was held error to grant a nonsuit where some of the chemical which defendants released from an airplane over defendant's land "was deposited on at least a part of the plaintiff's land, and . . . some damage resulted therefrom." Id. at 378, 255 P.2d at 457. Other cases base liability on failure to act as a reasonable and prudent person. See, e.g., Parks v. Atwood Crop Dusters, Inc., 118 Cal. App.2d 368, 257 P.2d 653 (1953). However, even under this standard, little in the way of negligence need be shown. E.g., Miles v. A. Arena & Co., 23 Cal. App.2d 680, 73 P.2d 1260 (1937)(crop dusting in "light wind" a half mile from plaintiff's land). None of the cases discuss the effect of failure to comply with standards set by statute or regulation. Several legal writers have suggested that strict liability for harm caused by crop dusting should be imposed on the theory that it is an ultra-hazardous activity. E.g., Comment, 19 Hastings L.J. 476, 489-493 (1968); Note, 6 Stan. L. Rev. 69, 81-85 (1953).

The liability of public entities for damage from pest control operations is not entirely clear. Before abolition of the doctrine of sovereign immunity in California, that defense barred recovery in one case.[109] However, it is now fairly clear that the statutory and regulatory provisions governing the use of pesticides apply to public entities,[110] and that liability will be imposed for damage resulting from the failure of a public entity to comply with their requirements.[111] If the California courts take this view, the burden of proof imposed on the plaintiff in an action against a public entity ordinarily will be met if he can establish that the pest control operation caused his loss.

Nevertheless, in the unlikely event that the statutes and regulations are held inapplicable to public entities or that their violation does not give rise to strict liability, several other theories might permit recovery of damages caused by the pest control operations of public entities. The

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109 Neff v. Imperial Irrigation Dist., 142 Cal. App.2d 755, 299 P.2d 359 (1956)(by implication).

110 Flournoy v. State, 57 Cal.2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962)(general statutory language imposing tort liability held applicable to public entities absent legislative intent to the contrary). It is significant, for example, that one of the regulations specifically provides that some--but not all--of its requirements are not applicable to certain public entities under certain circumstances. 3 Cal. Admin. Code § 2462(b), (d). See also Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969).

111 Govt. Code § 815.6 (liability for breach of mandatory duty imposed by statute or regulation). But see Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969), concluding that the scope of governmental tort liability under these circumstances is not entirely clear and suggesting that clarification by legislation would be helpful.

The fact that the public entity hired an independent contractor to conduct the pest control operation apparently would not relieve it from liability. See Govt. Code § 815.4. See also Miles v. A. Arena & Co., 23 Cal. App.2d 680, 73 P.2d 1260 (1937)(crop dusting); Van Arsdal v. Hollinger, 68 Cal.2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

1963 California Tort Claims Act makes a public entity vicariously liable for the acts or omissions of its employees[112] and, subject to several significant immunities, public employees are liable to the same extent as private persons.[113] It would appear, therefore, that a public employee would be liable if he is negligent or if he violates any applicable statute or regulation governing pest control operations and that the public entity would be vicariously liable.[114] If it could not be established that any particular employee was liable or if a specific immunity precluded recovery, liability might be imposed under some circumstances upon a theory of inverse condemnation.[115]

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112 Govt. Code § 815.2.

113 Govt. Code § 820.

114 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. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969).

115 Inverse condemnation liability cannot be based upon routine negligence. Neff v. Imperial Irrigation Dist., 142 Cal. App.2d 755, 299 P.2d 359 (1956). But a deliberately adopted plan for the use of pesticides that includes the prospect of damage as a necessary consequence of the use of such chemicals is a basis for inverse liability. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 481 (1969). Inverse liability is, of course, limited to property damage and would not provide relief in case of death or personal injury. As to the possibility of basing liability on a theory of nuisance, see discussion in text accompanying nn.3-9, supra.

Recommendations

The Commission concludes that there is no justification for differentiating the liability of a public entity engaged in pest control operations 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 or damage caused by the use of pesticides to the same extent as a private person. This clarification would eliminate any uncertainty that now exists and 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 the use of pesticides by public entities would be spread over the public generally rather than be left to be borne by an unfortunate few.

The Commission also recommends that the special "report of loss" procedure provided by Sections 11761-11765 of the Agricultural Code (which may limit the injured party's ability to establish the extent of his damages from pesticides) be made clearly applicable to actions against public entities.

PROPOSED LEGISLATION

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

An act to amend Section 14002 of the Agricultural Code, and to amend Sections 830.6, 844.6, 845.4, 845.6, 846, 854.2, 854.4, 854.8, 855.2, 856, and 856.2 of, and to add Sections 815.8, 854.3, 854.5 and to add Chapter 7 (commencing with Section 861) and Chapter 8 (commencing with Section 862) 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:

Agri. Code § 14002. Conforming amendment

Section 1. Section 14002 of the Agricultural Code is amended to read:

14002. Except as provided in Section 862 of the Government Code, ~~This~~ this chapter does not apply to any agency of the United States or of this state, or to any officer, agent, or employee of any such agency who is acting within the scope of his authority, while he is engaged in, conducting, or supervising research on any injurious material.

Comment. Section 14002 is amended to make clear the relationship of that section to the provision of the Government Code imposing liability upon public entites for damage resulting from the use of injurious material. Section 14002 merely provides an exception to the requirement that a permit be obtained, and authorizes departures from the standard prescribed by the regulations governing the manner and use of injurious material, when research is being conducted on such materials. As amended, the section does not provide an immunity from liability for damage or loss to others. The construction of the section made clear by the amendment apparently accords with prior law. See Section 14003 ("This article does not relieve any person from liability for any damage to the person or property of another person which is caused by the use of any injurious material."); 3 Cal. Admin. Code § 3114.

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

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

815.8. A public entity is not liable for damages under Part 3 (commencing with Section 3479) of Division 4 of the Civil Code. Nothing in this section exonerates a public entity from any liability that may exist under any statute other than 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 thereof; Recommendation Relating to Sovereign Immunity: Number 10--Revisions of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 [pages supra] (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. 3. 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, and 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 or public employee from liability for an injury caused by the plan or design of a construction of, or an improvement to public property if the trial court determines that:

(1) The plan or design actually created a dangerous condition at the time of the injury;

(2) Prior to such injury and subsequent to the approval of the plan or design, or the standards therefor, other injuries had occurred which demonstrated that the plan or design resulted in the existence of a dangerous condition; and

(3) The public entity or the public employee had knowledge that such injuries had occurred.

Comment. Subdivision (b) has been added to Section 830.6 to eliminate the "plan or design immunity" in cases where previous injuries have demonstrated the existence of a dangerous condition (notwithstanding the reasonable adoption or approval of the original plan or design) and the occurrence of those injuries has been made known to the public entity. See 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); the dissenting opinions in those decisions; and see Recommendation Relating to Sovereign Immunity: Number 10--Revision of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 [pages supra] (1969).

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] 274 Cal. App.2d , Cal. Rptr. (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 court determines that subdivision (a) would apply to the case, it must also determine whether the three factors

mentioned in subdivision (b) have been established. The immunity is not overcome unless the court is persuaded by a preponderance of the evidence that the plan or design actually created a "dangerous condition" at the time of the accident in question. Thus, the court must be persuaded that the plan or design 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 forseeable that it will be used." See Section 830(a). Similarly, the court must be persuaded by a preponderance of the evidence that previous "injuries" (defined in Section 810.8) had occurred, that those injuries demonstrated to the satisfaction of the court that the property condition was dangerous, and that the defendant public entity or defendant employee had knowledge of the occurrence of those injuries. Whether a defendant public entity had knowledge of the occurrence of injuries is determined under the usual rules governing the imputation of knowledge of an employee to his employer.

If the three 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 that 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 or preclude the public entity from establishing (under Section 835.4) the immunizing reasonableness of its action or inaction (see Cabell v. State, supra). Nor does it affect any other immunity or defense that might be available to the public entity under the circumstances of the particular case.

Govt. Code § 844.6 (amended). Injuries to, or caused by, prisoners

Sec. 4. Section 844.6 of the Government Code is amended to read:

844.6. (a) Notwithstanding any other provision of ~~law~~ this part , except as provided in ~~subdivisions (b), (c), and (d) of~~ this section and in Sections 814, 814.2, 845.4, and 845.6 , a public entity is not liable for:

(1) An injury proximately caused by any prisoner.

(2) An injury to , or the wrongful death of, any prisoner.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Except for an injury to, or the wrongful death of, a prisoner, ~~Nothing~~ nothing in this section prevents ~~a person, other than a prisoner, from recovering~~ recovery from the public entity for an injury ~~resulting from the~~ proximately caused by:

(1) The dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(2) A negligent or wrongful act or omission of a prisoner within the scope of his employment as an employee of the public entity.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment on a claim against a public employee ~~licensed in~~ who is lawfully engaged in the practice of one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed.

Comment. The introductory clause of subdivision (a) of Section 844.6 is amended to make clear that the limited liability imposed by Section 845.4 (interference with right of prisoner to seek judicial review of legality of confinement) and Section 845.6 (failure to summon medical care for prisoner in need of immediate medical care) also constitute exceptions to the general principle of nonliability embodied in Section 844.6. The courts have held that the liability imposed on a public entity by Section 845.6 exists notwithstanding the broad immunity provided by Section 844.6. Apelian v. County of Los Angeles, 266 Adv. Cal. App. 595, 72 Cal. Rptr. 265 (1968); Hart v. County of Orange, 254 Cal. App.2d 302, 62 Cal. Rptr. 73 (1967); Sanders v. County of Yuba, 247 Cal. App.2d 748, 55 Cal. Rptr. 852 (1967). Under the reasoning of these decisions, Section 845.4 also creates an exception to the immunity granted by Section 844.6.

This amendment to subdivision (a) is also designed to eliminate uncertainty. As originally enacted, this subdivision appears to preclude liability (except as provided in this section) elsewhere provided by any law. Taken literally, this would impliedly repeal, at least in some cases, Penal Code Sections 4900-4906 (liability up to $5,000 for erroneous conviction). Moreover, as a specific provision, it might even be construed to prevail over the general language of Government Code Sections 814 and 814.2, which preserve nonpecuniary liability and monetary liability based on contract and workmen's compensation. The amendment clarifies the section by expressly limiting the "notwithstanding" clause to "this part" and excepting Sections 814 and 814.2. The exception for subdivisions (b), (c), and (d) has been deleted as unnecessary.

Paragraph (2) of subdivision (a) and the first part of subdivision (c) have been amended to provide immunity from liability in a wrongful death action for the death of a prisoner in a case where the prisoner himself would have been precluded from recovering if the injuries had been nonfatal. Although there was some conflict in the cases, this amendment probably changes the former law. Compare Garcia v. State, 247 Cal. App.2d 814, 56 Cal. Rptr. 80 (1967) with Datil v. City of Los Angeles, 263 Cal. App.2d 655, 69 Cal. Rptr. 788 (1968)(alternate holding)(semble); Sanders v. County of Yolo, 247 Cal. App.2d 748, 751 n.1, 55 Cal. Rptr. 852, n.1 (1967) (dictum). The amendment makes clear the legislative intent in enacting this section.

Subdivision (c) is further amended to make clear that nothing in this section prevents a person, other than a prisoner or his heirs, from recovering for an injury caused by a prisoner while acting in the course and scope of employment as an employee of the public entity. There is no reason why, if the entity elects to use its prisoners in an agency or servant relationship, e.g., prison trustee or prisoner engaged in custodial duties, it should not also assume responsibility for their torts to third persons. Cf. Reed v. City & County of San Francisco, 237 Cal. App.2d 23, 46 Cal. Rptr. 543 (1965).

The amendment to subdivision (d) makes clear that the mandatory indemnification requirement in malpractice cases covers all persons lawfully engaged in the practice of one of the healing arts. The language of the section, as originally enacted, was unduly restrictive since it referred only to medical personnel who were "licensed" under the Business and Professions Code. This excluded, under a possible narrow interpretation, physicians

and surgeons who are "certificated" rather than licensed, as well as "registered" opticians, physical therapists, and pharmacists and excluded persons licensed under other laws, such as the uncodified Osteopathic Act. In addition, the use of the term "licensed" precluded application of subdivision (d) to medical personnel lawfully practicing without a California license. E.g., Bus. & Prof. Code §§ 1626(c) (out-of-state dental licensees teaching in dental colleges), 2137.1 (out-of-state medical licensees practicing in state institution), 2147 (medical students), 2147.5 (uncertified interns and residents).

Govt. Code § 845.4 (amended). Interference with prisoner's right to judicial review

Sec.5. Section 845.4 of the Government Code is amended to read:

845.4. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his confinement; but a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury ~~may be commenced~~ shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment. Section 845.4 is amended to refer to the time of the accrual of the cause of action. This amendment clarifies the relationship of this section to the claim statute. As originally enacted, the statute of limitations might have expired before illegality of the imprisonment was determined--a determination that must be made before the action may be commenced.

Govt. Code § 845.6 (amended). Medical care for prisoners

Sec. 6. Section 845.6 of the Government Code is amended to read:

845.6. Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care. Nothing in this section exonerates a public employee ~~licensed in~~ who is lawfully engaged in the practice of one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state from liability for injury proximately caused by malpractice or exonerates the public entity from ~~liability for injury proximately caused by such malpractice~~ its obligation to pay any judgment, compromise or settlement that it is required to pay under subdivision (d) of Section 844.6 .

Comment. Section 845.6 is amended to expand the group of public employees who are referred to as potentially liable for medical malpractice to include all types of medical personnel, not merely those who are "licensed" under the Business and Professions Code. This conforms Section 845.6 to amended Section 844.6. The amendment also clarifies the relationship of Section 845.6 and subdivision (d) of Section 844.6.

Govt. Code § 846 (amended). Arrest or release of arrested person

Sec. 7. Section 846 of the Government Code is amended to read:

846. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody. "Failure to retain" includes, but is not limited to, the escape or attempted escape of an arrested person and the release of an arrested person from custody.

Comment. The second sentence has been added to Section 846 to make clear that "failure to retain" includes not only discretionary release of an arrested person but also negligent failure to retain an arrested person in custody. This probably codifies former law. See Ne Casek v. City of Los Angeles, 233 Cal. App.2d 131, 43 Cal. Rptr. 294 (1965)(city not liable to pedestrian injured by escaping arrestee). But see Johnson v. State, 69 Adv. Cal. 813 (1968).

Govt. Code § 854.2 (amended). "Mental institution"

Sec. 8. Section 854.2 of the Government Code is amended to read:

854.2 As used in this chapter, "mental institution" means any ~~facility-for-the-care-or-treatment-of-persons committed-for-mental-illness-or-addiction~~ state hospital for the care and treatment of the mentally disordered or the mentally retarded, the California Rehabilitation Center referred to in Section 3300 of the Welfare and Institutions Code, or any county psychiatric hospital .

Comment. Section 854.2 is amended to specify more precisely the institutions that are embraced within the definition. Formerly, the definition included only facilities "for the care or treatment of persons committed for mental illness or addiction." The amendment makes clear that the designated institutions are "mental institutions" even though they are used primarily for persons voluntarily admitted or involuntarily detained (but not "committed") for observation and diagnosis or for treatment. See, e.g., Welf. & Inst. Code §§ 703 (90-day court-ordered observation in state hospital of minors appearing to be mentally ill), 705 (temporary holding of minor in county psychiatric hospital pending hearing), 5206 (court ordered evaluation for mentally disordered persons), 5304 (90-day court-ordered involuntary treatment of imminently dangerous persons), 6512 (detention of mentally retarded juvenile pending committment hearings).

Section 7200 of the Welfare and Institutions Code lists the state hospitals for the care and treatment of the mentally disordered and Section 7500 of the Welfare and Institutions Code lists

the state hospitals for the care and treatment of the mentally retarded.

The principal purpose of the California Rehabilitiation Center, established by Section 3300 of the Welfare and Institutions Code, is "the receiving, control, confinement, employment, education, treatment and rehabilitation of persons under the custody of the Department of Corrections or any agency thereof who are addicted to the use of narcotics or are in imminent danger of becoming so addicted." Welf. & Inst. Code § 3301.

"County psychiatric hospital" is defined in Section 854.3 of the Government Code. See also Goff v. County of Los Angeles, 254 Cal. App.2d 45, 61 Cal. Rptr. 840 (1967)(county psychiatric unit of county hospital as "mental institution").

Not included within the scope of Section 854.2 are certain units provided on the grounds of an institution under the jurisdiction of the Department of Corrections (see Welfare and Institutions Code Section 6326) and farms, road camps, and rehabilitation centers under county jurisdiction (see Welfare and Institutions Code Sections 6404 and 6406). These facilities, however, come within the ambit of Government Code Section 844 and the broad general immunity for liability for injuries to mental patients conferred by Section 854.8 is extended to cover liability to inmates of these facilities by Section 844.6.

Govt. Code § 854.3 (new). "County psychiatric hospital"

Sec. 9. Section 854.3 is added to the Government Code, to read:

854.3. As used in this chapter, "county psychiatric hospital" means the hospital, ward, or facility provided by the county pursuant to the provisions of Section 7100 of the Welfare and Institutions Code.

Comment. The term "county psychiatric hospital" is defined to include the county facilities for the detention, care, and treatment of persons who are or are alleged to be mentally disordered or mentally retarded. See Welf. & Inst. Code § 7100. The definition takes the same form as in other statutes. See, e.g., Welf. & Inst. Code §§ 6003, 7101.

Govt. Code § 854.4 (amended). "Mental illness or addiction"

Sec. 10. Section 854.4 of the Government Code is amended to read:

854.4. As used in this chapter, "mental illness or addiction" means ~~mental illness, mental disorder bordering on mental illness, mental deficiency, epilepsy, habit forming drug addiction, narcotic drug addiction, dipsomania or inebriety, sexual psychopathy, or such mental abnormality as to evidence utter lack of power to control sexual impulses~~ any condition for which a person may be detained, cared for, or treated in a mental institution or in a facility designated by a county, pursuant to Chapter 2 (commencing with Section 5150) of Part 1 of Division 5 of the Welfare and Institutions Code.

Comment. Section 854.4 is amended to eliminate the specific listing of mental or emotional conditions for which a person could, at the time the section was enacted, be committed to a public medical facility and to substitute general language that includes all mental or emotional conditions, including addiction, for which a person may be voluntarily admitted or involuntarily detained in a mental institution (see Section 854.2, defining "mental institution"), or in a "72-hour" evaluation facility (see Section 5150 of the Welfare and Institutions Code).

Since enactment of Section 854.4 in 1963, the Welfare and Institutions Code has been revised to make a number of changes in the categories of mental illness previously specified in this section. The amendment eliminates the inconsistency between Section 854.4 and the revised provisions of the Welfare

and Institutions Code relating to mental illness and minimizes, if not eliminates, the possibility that future revisions of those provisions will create a similar inconsistency.

Govt. Code § 854.5 (new). "Confine"

Sec.11. Section 854.5 is added to the Government Code, to read:

854.5. As used in this chapter, "confine" includes admit, commit, place, detain, or hold in custody.

Comment. Section 854.5 has been added to make clear that Sections 856 and 856.2 apply to all cases within the rationale of those sections.

Govt. Code § 854.8.(amended). Injuries to, or caused by, mental patients

Sec. 12. Section 854.8 of the Government Code is amended to read:

854.8. (a) Notwithstanding any other provision of ~~law~~ this part , except as provided in ~~subdivisions (b), (c) and (d) of~~ this section and in Sections 814, 814.2, 855, and 855.2 , a public entity is not liable for:

(1) An injury proximately caused by ~~any person committed or admitted to~~ an inpatient of a mental institution.

(2) An injury to , or the wrongful death of, ~~any person committed or admitted to~~ an inpatient of a mental institution.

(b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.

(c) Except for an injury to, or the wrongful death of, an inpatient of a mental institution, ~~Nothing~~ nothing in this section prevents ~~a person, other than a person committed or admitted to a mental institution, from recovering~~ recovery from the public entity for an injury ~~resulting from the~~ proximately caused by:

(1) The dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(2) A negligent or wrongful act or omission of an inpatient of a mental institution within the scope of his employment as an employee of the public entity.

(d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission. The public entity may but is not required to pay

any judgment, compromise or settlement, or may but is not required to indemnify any public employee, in any case where the public entity is immune from liability under this section; except that the public entity shall pay, as provided in Article 4 (commencing with Section 825) of Chapter 1 of this part, any judgment based on a claim against a public employee ~~licensed in~~ who is lawfully engaged in the practice of one of the healing arts under ~~Division 2 (commencing with Section 500) of the Business and Professions Code~~ any law of this state for malpractice arising from an act or omission in the scope of his employment, and shall pay any compromise or settlement of a claim or action , based on such malpractice , to which the public entity has agreed.

Comment. The changes in subdivision (c) and (d) and in the introductory portion of subdivision (a) of Section 854.8 parallel the similar amendments to Section 844.6 and are explained in the Comment to that section. See also Moxon v. County of Kern, 233 Cal. App.2d 393, 43 Cal. Rptr. 481 (1965)(no liability for death of mental patient killed by fellow patient. Subdivision (a) is further amended to clarify the scope of the immunity. The term "inpatient" is used in place of "any person committed or admitted," thus making clear that the immunity covers only inmates of mental institutions and not outpatients.

Govt. Code § 855.2 (amended). Interference with mental patient's right to judicial review

Sec. 13. Section 855.2 of the Government Code is amended to read:

855.2. Neither a public entity nor a public employee acting within the scope of his employment is liable for interfering with the right of an inmate of a medical facility operated or maintained by a public entity to obtain a judicial determination or review of the legality of his confinement; but a public employee, and the public entity where the employee is acting within the scope of his employment, is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for such injury ~~may be commenced~~ shall be deemed to accrue until it has first been determined that the confinement was illegal.

Comment. The amendment to Section 855.2 is similar to that made to Section 845.4. See the Comment to Section 845.4.

Govt. Code § 856 (amended). Mental patients: confinements, parole, or release

Sec. 14. Section 856 of the Government Code is amended to read:

856. (a) Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment:

(1) Whether to confine a person for mental illness or addiction.

(2) The terms and conditions of confinement for mental illness or addiction ~~in a medical facility operated or maintained by a public entity~~ .

(3) Whether to parole , grant a leave of absence to, or release a person ~~from confinement~~ confined for mental illness or addiction ~~in a medical facility operated or maintained by a public entity~~ .

(b) A public employee is not liable for carrying out with due care a determination described in subdivision (a).

(c) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out:

(1) A determination to confine or not to confine a person for mental illness or addiction.

(2) The terms or conditions of confinement of a person for mental illness or addiction ~~in a medical facility operated or maintained by a public entity~~ .

(3) A determination to parole , grant a leave of absence to, or release a person ~~from confinement~~ confined for mental illness or addiction ~~in a medical facility operated or maintained by a public entity~~ .

Comment. Section 856 is amended to make reference to "leave of absence" since the Welfare and Institutions Code appears to consider such leaves equivalent to paroles. See Welf. & Inst. Code § 7351. The phrase "in a medical facility operated or maintained by a public entity," which appeared four times in the section, has been deleted because, to the extent that this phrase had any substantive effect, it resulted in an undesirable limitation on the immunity provided by Section 856.

Govt. Code § 856.2 (amended). Escaped mental patients

Sec. 15. Section 856.2 of the Government Code is amended to read:

856.2. (a) Neither a public entity nor a public employee is liable for an injury caused by or to an escaping or escaped person who has been ~~committed~~ confined for mental illness or addiction.

(b) Nothing in this section exonerates a public employee from liability:

(1) If he acted or failed to act because of actual fraud, corruption, or actual malice.

(2) For injuries inflicted on an escaping or escaped mental patient in recapturing him.

Comment. The amendment of Section 856.2--by insertion of the words "or to"-- makes clear that the injury or death of an escaping or escaped mental patient is not a basis of liability. Other jurisdictions have determined that, when a mental patient escapes as a result of negligent or wrongful acts or omissions of custodial employees, injuries sustained by the escapee as a result of his inability due to mental deficiency or illness to cope with ordinary risks encountered may be a basis of state liability. See, e.g., Callahan v. State of New York, 179 Misc. 781, 40 N.Y.S.2d 109 (Ct. Cl. 1943), aff'd 266 App. Div. 1054, 46 N.Y.S.2d 104 (1943)(frostbite sustained by escaped mental patient); White v. United States, 317 F.2d 13 (4th Cir. 1963)(escaped mental patient killed by train). The immunity provided by Section 856.2 makes certain that California will not follow these cases.

Formerly, Section 856.2 covered only persons who had been "committed" for mental illness or addiction. The substitution of "confined" for

"committed" makes clear that the immunity covers all persons who are confined for mental illness or addiction, whether or not they are "committed."

Subdivision (b) has been added to limit the immunity under subdivision (a) for injuries to an escaping or escaped mental patient to cases where such immunity is appropriate. Paragraph (1) adopts language used in other provisions of the Governmental Liability Act. See, e.g., Section 995.2 (grounds for refusal to provide for defense of action against public employee). Paragraph (2) is consistent with the general rule that a public employee is liable for his negligent or wrongful act in caring for mental patients.

Sec. 16. Chapter 7 (commencing with Section 861) is added to Part 2 of Division 3.6 of the Government Code, to read:

Chapter 7. Ultrahazardous Activities

Govt. Code § 861. Liability for damages from ultrahazardous activities

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

Comment. Section 861 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--Revision of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 [pages supra] (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 861 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 861.2 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. 1011 (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 § 861.2. Classification as ultrahazardous activity a question of law

861.2. 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.

Comment. Insofar as Section 861.2 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 at 785, 56 Cal. Rptr. at 137. As to activities that have been held to be ultrahazardous in California, see Balding v. D. B. Stutsman Inc., 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966)(blasting in a developed area); Smith v. Lockheed Propulsion Co., supra (rocket testing); Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952 (1928) (oil drilling in a developed area); Luthringer v. Moore, supra (fumigation with a deadly poison). Contrast Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82 (1907) (blasting in an undeveloped area); Beck v. Bel Air Properties, 134 Cal. App.2d 834, 286 P.2d 503 (1955) (grading and earthmoving); Clark v.

Di Prima, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966)(normal irrigation); Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766 (1920)(alternate holding)(collecting water in a reservoir). See also Recommendation Relating to Sovereign Immunity: Number 10--Revision of the Governmental Liability Act, 9 Cal. L. Revision Comm'n Reports 801 [pages supra] (1969).

Sec. 18. Chapter 8 (commencing with Section 862) is added to Part 2 of Division 3.6 of the Government Code, to read:

Chapter 8. Use of Pesticides

Govt. Code § 862. Liability for injuries from pesticides

862. (a) As used in this section, "pesticide" means: (1) An "economic poison" as defined in Section 12753 of the Agricultural Code; (2) An "injurious material" the use of which is regulated or prohibited under Chapter 3 (commencing with Section 14001) of Division 7 of the Agricultural Code; or (3) Any material used for the same purpose as material referred to in paragraphs (1) and (2).

(b) A public entity is liable for injuries caused by the use of a pesticide to the same extent as a private person except that no presumption of negligence arises from the failure of a public entity or a public employee to comply with a provision of a statute or regulation relating to the use of a pesticide if the statute or regulation by its terms is made inapplicable to the public entity or the public employee.

(c) Sections 11761 to 11765 of the Agricultural Code, relating to reports of loss or damages from the use of pesticides, apply in an action against a public entity under this section.

Comment. Section 862 is added to clarify the law as to the liability of public entities for injuries resulting from the use of pesticides. The section probably codifies former law. See Recommendation Relating to Sovereign Immunity: Number 10--Revision of the Governmental Liability Act, 801 [pages supra] (1969). Enactment of the section has no effect

on the rules that determine the liability of public entities for injuries arising from the use of a chemical that is not a "pesticide."

Subdivision (a). The term "pesticide" is broadly defined in subdivision (a) to include not only materials used to control, destroy, or mitigate "pests," but also materials used to eliminate or control weeds, brush, and the like. See Agri. Code §§ 12753, 14001, 14031, 14061, 14091.

Subdivision (b). Although it appears that the effect of the California statutes and regulations relating to the use of pesticides is to impose "strict" liability for injuries resulting from such use, this conclusion will remain uncertain until there has been a judicial determination of the question in California. See Recommendation Relating to Sovereign Immunity: Number 10--Revision of the Governmental Liability Act 801 [pages supra] (1969). At any rate, subdivision (b) makes clear that the standard of liability applicable to private persons applies equally to the public entities. However, subdivision (b) also makes clear that the presumption of failure to exercise due care that arises upon violation of a statute, ordinance, or regulation designed to protect life or property does not apply to a public entity or public employee if the entity or employee is exempted from the particular statute or regulation. See Evidence Code § 669. For example, the requirement of Agricultural Code Section 11701 that a person obtain an agricultural pest control license if he is "to engage for hire in the business of pest control" would not be applicable to a public employee who is engaged in pest control in the course of his employment since he is not engaged "for hire in the business of pest control." See Contra Costa County v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d 606 (1932). On the other hand, statutes such as Agricultural Code

Section 12972 (prevention of any substantial drift of chemicals to other crops) and Sections 14001-14011 (application of chemicals to be in accordance with regulations issued by Director of Agriculture) are applicable to public entities.

To a considerable extent, the regulations adopted by the Director of Agriculture governing the use of injurious agricultural chemicals are applicable to public entities. However, some regulations by their terms are made inapplicable to certain public entities or their employees. E.g., 3 Cal. Admin. Code §§ 2451 (permit not required by state or state employees to engage in research on injurious herbicides), 2462(b), (d) (public agencies engaged in mosquito control under cooperative agreement with California Department of Public Health exempt from some, but not all, of the conditions prescribed by regulation governing time and conditions for use of pest control chemicals). Compare 3 Cal. Admin. Code § 3114 (departure from certain requirements, but no substantial drift, permitted when pesticide used for experimental purposes under direction and supervision of qualified federal, state, or county personnel).

Subdivision (c). Subdivision (c) makes clear that the provisions relating to a report of loss or damage apply in an action against a public entity. Failure to file the report within the time prescribed in the Agricultural Code is evidence that no loss or damage occurred. Agri. Code § 11765. The general statute that governs claims against public entities is, of course, also applicable. See Govt. Code § 911.2 (claim for "death or for injury to person or to personal property or growing crops" must be presented not later than the 100th day after the accrual of the cause of action).

Govt. Code § 6254.5 (new). Inspection of public records where immunity for plan or design of public project claimed

Sec. 19. Section 6254.5 is added to the Government Code, to read:

6254.5. Notwithstanding Section 6254, any person who suffers an injury while using public property is entitled to inspect public records to obtain information needed for the purposes of subdivision (b) of Section 830.6.

Comment. Section 6254.5 is added to facilitate proof of knowledge on the part of a public entity of previous injuries related to the plan or design of a public improvement. Proof of such knowledge may be necessary to overcome the "plan or design immunity" conferred by Section 830.6. See subdivision (b) of that section.