First Supplement to Memorandum 69-139

Subject: Study 52 - Sovereign Immunity (Nuisance Liability)

Attached as Exhibit I is another letter from Mr. Kanner concerning proposed Government Code Section 815.8. He is very concerned that this section in its present form will be construed by some courts to eliminate inverse condemnation liability in nuisance type cases. As is pointed out in the recommendation and the Comment to Section 815.8, this is not the Commission's intent nor could the Commission eliminate such liability generally since it has a constitutional basis.

Nevertheless, if it is desired to make a clarifying amendment to Section 815.8 to deal with this matter, we suggest that the section be revised as follows (underscored material is new):

> 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 Article I, Section 14, of the California Constitution or under any statute other than Part 3 (commencing with Section 3479) of Division 4 of the Civil Code.

The staff does not consider the addition of the second sentence to be necessary or desirable.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 69-139
1st supp.

EXHIBIT I

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October 18, 1969

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Re: Proposed Government Code §815.8

Dear John:

Thank you for your letter of October 15, 1969.

Your letter underscores the semantic problem which I believe to be an important factor in the confusion which surrounds the interaction of the concepts of "nuisance" and "inverse condemnation."

"Nuisance" and "inverse condemnation" are not necessarily different things. Depending on the factual circumstances they may be the same. In other words, "inverse condemnation" is a generic term which encompasses a broad spectrum of damage to property inflicted by a government entity. That damage may occur by trespass, encroachment, flooding, deprivation of lateral or subjacent support, deprivation or impairment of access or view, physical ouster, infliction of physical damage to land or improvements, and interference with possession, use and enjoyment of property.

As Albers v. County of Los Angeles (1965) 62 C.2d 250, 257-260 makes abundantly clear, the mechanics of the "taking" or the "damaging" are unimportant. Thus, the damage may have been inflicted intentionally, negligently, or (as in Albers) without either intent or negligence, and yet not change the "inverse condemnation" character of the resulting litigation.

In other words, nuisance is not a cause of action in the classic Pomeroy sense of violation of a primary right. Nuisance is likewise not a term descriptive of the acts of a defendant. Nuisance is a lawyer's shorthand term - admittedly a poor term - to describe a species of interference with the use and enjoyment of property accomplished without a physical trespass in the classic (perhaps medieval would be a better word) sense.

The real problem, however, is that the confusion surrounding the use of the word "nuisance" in actual practice is enormous. If you won't take my word for it, surely you can take Prosser's. The confusion tends to be conceptual, i.e., many lawyers and judges do not understand that nuisance may also be negligence and it may also be inverse condemnation at the same time. Therefore, what happens in practice is that somebody applies the label of "nuisance" (rightly or wrongly) to a cause of action or a course of conduct by a defendant, and the case then goes off into a semantic morass of whether or not a cause of action "for nuisance" has been stated, or liability "for nuisance" established, as opposed to negligence, inverse condemnation, or what have you. Take a look at Burrows v. State (1968) 260 CA2d 29, for a textbook example of how lawyers and trial courts can focus their attention on a label and thereby lose sight of the legal principles controlling the case at hand.

I surmise that these problems which concern me so much are not as perceptible to the Commission. The Commission has the benefit of the efforts of a competent staff and of prominent consultants who are able to brief the Commission properly. As a result, the Commission may well see certain concepts as being perfectly obvious, i.e., that abrogation of governmental "nuisance" liability will have no impact on the right to compensation for "inverse condemnation". (Your own letter of October 15, 1969, is exemplary). Unfortunately, in actual practice before the courts, there is no conceptual clarity at all; confusion over nuisance is a daily fact of life. (See my comment on §815.8, p. 10). The Commission Recommendation Number 10, candidly and correctly notes that recent case law has failed to undertake "a careful analysis of the law."

As I noted before, this unfortunate situation is not of the Commission's making. No rational person can expect the Commission to re-educate the bench and bar and undo the confusion which - as Prosser reminds us - has taken centuries to reach its present state. However, the Commission should take conscious note of this confusion to the end that the confusion is not inadvertently compounded.

Out of the confusion surrounding the word "nuisance" one can carve out one clear point. There is one area of this fuzzy concept which overlaps with "inverse condemnation". To illustrate: when an objectionable activity takes place on A's land but it impacts on B's adjoining land in such a fashion that B is unreasonably deprived of the use and enjoyment of his property, B has a cause of action against A, albeit the activity is non-trespassory. And if A happens to be a governmental entity, we call that "inverse condemnation". Unfortunately, if A is a private citizen, we call the very same thing "nuisance". The danger of proposed Government Code Section 815.8 is that its language fails to acknowledge the overlapping use of these terms. By purporting to abrogate all liability under part 3 of division 4 of the Civil Code, §815.8 is susceptible to the interpretation that it abrogates liability for all kinds of nuisance, including the "inverse condemnation" kind of non-trespassory interference with the use and enjoyment of land. It is a certainty that governmental entities will so construe it and at least <u>some</u> courts will accept that argument, thereby further confusing the concept of nuisance, and denying to innocent people compensation for damage suffered.

The Commission comment to which you call my attention in your letter is fine as far as it goes. Unfortunately, it fails to acknowledge expressly that certain kinds of "nuisance" are also "inverse condemnation", thereby opening the door to arguments such as I alluded to above.

The change in the language of §815.8 which I suggest in my Comment would still accomplish your objective of elimination of "the concept of nuisance as a nuisance" in doing away with actions based "on the nebulous nuisance concept", and yet would unequivocally prevent the indiscriminate carrying over of the nebulous "nuisance" label into the area which overlaps with "inverse condemnation".

Sincerely yours,

Gideon Kanner

GIDEON KANNER

GK:pc