

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Sovereign Immunity

Number 10—Revisions of the Governmental Liability Act

Nuisance

Entries for Survey and Examination

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

September 1969

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

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NOTE

This pamphlet begins on page 801. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 9 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

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.

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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 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 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, entries for survey, ultrahazardous

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

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

activities, and the use of pesticides. This recommendation is concerned with revisions affecting each of these areas of governmental liability.³

³ In preparing this recommendation, the Commission has considered both the decisional law and other published materials. See, e.g., A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY (Cal. Cont. Ed. Bar 1964; Supp. 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); Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969); Note, *The Supreme Court of California 1967-1968*, 56 CAL. L. REV. 1612, 1756 (1968); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968); Note, *California Public Entity Immunity From Tort Claims by Prisoners*, 19 HASTINGS L.J. 573 (1968).

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.⁴ The Senate Judiciary Committee, in the official comment indicating its intent in approving Section 815, notes:⁵

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

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

First, public liability for nuisance originated in—and until relatively recently was restricted to—cases of injury to property or such interferences with the use and enjoyment of property as to substantially impair its value.⁶ Such liability, therefore, substantially overlapped liability based upon a theory of inverse condemnation, *i.e.*, liability based upon the directive of Section 14 of Article I of the California Constitution that compensation must be made for damage to *property* resulting from the construction of a public improvement for public use.⁷ The constitutional source of liability under the latter theory precludes its elimination by Section 815 and, therefore, to this extent “nuisance” liability still exists.

Second, several decisions prior to 1963 predicated nuisance liability for personal injury or wrongful death, as well as for property damage, on facts bringing the case within the common law based definition of nuisance in Civil Code Section 3479.⁸ Civil Code Sections 3491 and 3501 still expressly authorize a civil action as a nuisance remedy. Thus, although Government Code Section 815 was intended to preclude nuisance liability “*except as otherwise provided by statute,*” it is possible that Sections 3479, 3491, and 3501 provide the necessary statutory ex-

⁴The right to specific relief to enjoin or abate a nuisance was, however, expressly preserved. See GOVT. CODE § 814. See also A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 5.10, 5.13 (Cal. Cont. Ed. Bar 1964; Supp. 1969). The Commission believes this distinction between damages and injunctive relief should be maintained, and this recommendation is concerned only with the elimination of liability for damages.

⁵Legislative Committee Comment—Senate, GOVT. CODE § 815 (West 1966).
⁶See Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM’N REPORTS 1, 225–228 (1963).

⁷See *id.* at 102–108; Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

⁸*E.g.*, *Vater v. County of Glenn*, 49 Cal.2d 815, 323 P.2d 85 (1958); *Mercado v. City of Pasadena*, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); *Zeppi v. State*, 174 Cal. App.2d 484, 345 P.2d 33 (1959); *Mulloy v. Sharp Park Sanitary Dist.*, 164 Cal. App.2d 438, 330 P.2d 441 (1958).

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

Recommendations

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

The comprehensive governmental liability statute (supplemented by the provisions relating to ultrahazardous activity liability hereinafter recommended), together with inverse condemnation liability, provide a complete, integrated system of governmental liability and immunity. This carefully formulated system was intended to be the exclusive source of governmental liability. The possibility that liability could be imposed under an ill-defined theory of common law nuisance in circumstances where a public entity would otherwise be immune creates an uncertainty that is both undesirable and unnecessary.

⁹ The fact that these sections are general in language, and do not specifically refer to public entities, does not preclude their application to such entities. See A. VAN ALSTYNE, note 4 *supra*.

¹⁰ See, *e.g.*, *Lombardy v. Peter Kiewit Sons' Co.*, 266 Cal.App. 2d 599, 72 Cal. Rptr. 240 (1968) (nuisance liability denied on merits); *Granone v. County of Los Angeles*, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965) (availability of nuisance remedy affirmed, but without discussion of impact of 1963 legislation) (alternate ground).

DAMAGES ARISING FROM ENTRIES FOR SURVEY AND EXAMINATION

Background

Since the adoption of the Code of Civil Procedure in 1872, Section 1242 has authorized any condemnor¹¹ to enter land it is contemplating acquiring and to "make examinations, surveys, and maps thereof." The obvious purpose of this longstanding privilege is to enable the acquiring agency to determine the suitability of the property for public use. Section 1242 does not require any formalities such as notice to the property owner or a preliminary court order. Although the question appears never to have reached the appellate courts, presumably the condemnor could invoke the superior court's aid by way of a writ of assistance or other appropriate process.

In early appellate court decisions, the privilege conferred by Section 1242 was justified as a means of obtaining the property descriptions and other data necessary for the condemnation proceeding¹² and of complying with the statutory admonition that any public improvement "be located in the manner which will be most compatible with the greatest public good and the least private injury."¹³ These justifications, however, are insufficient in cases where the entry and activities would be considered a "taking" or "damaging" of property within the meaning of Section 14 of Article I of the California Constitution. Even though the condemnor may contemplate the total restoration of the property or the payment of damages, no condemnation proceeding has been commenced and compensation has not been "first made to or paid into court for the owner" as required by that section.

This problem was dealt with definitively in the leading case of *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923). The entry in the *Jacobsen* case involved occupation of the owner's property for some two months by a municipal water district and the use of power machinery to make borings and other tests to determine its suitability for use as a reservoir. The court held that the entry should be enjoined and that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."

The holding in the *Jacobsen* case has been partially overcome by a special statutory procedure, provided in 1959 by enactment of Section 1242.5 of the Code of Civil Procedure. Section 1242.5 is limited

¹¹ Although Code of Civil Procedure Section 1242 refers only to "the State, or its agents," Civil Code Section 1001 provides that "any person seeking to acquire property for any of the uses mentioned in . . . [Code of Civil Procedure Section 1238] is 'an agent of the State,' . . ."

¹² See *San Francisco & San Joaquin Valley Ry. v. Gould*, 122 Cal. 601, 55 P. 411 (1898).

¹³ See *Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604 (1891).

to public entities that have the power to condemn land "for reservoir purposes." The section is also limited to cases in which the public entity "desires to survey and explore certain property to determine its suitability for such purposes." In these cases, if the public agency cannot obtain the consent of the property owner, the agency may petition the superior court for an order permitting an exploratory survey. The order, however, must be conditioned upon deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorney's fees incurred by the owner. The section seems to authorize recovery by the property owner for "any damage caused by the [public entity] while engaged in survey and exploration on his property."¹⁴

In addition to Sections 1242 and 1242.5 of the Code of Civil Procedure, many California statutes authorize public officials to enter private property to conduct inspections, investigations, examinations, or similar activities. Most of these statutes have nothing to do with a proposed acquisition of the property for public use or the location or construction of public improvements. Moreover, most of them do not contemplate the kind of entry or type of investigatory activities that would, in any likelihood, cause appreciable damage to property or significant interference with the owner's use and possession. Typical provisions of this type are contained in the Agricultural Code, the Business and Professions Code, and the Health and Safety Code; they authorize the entry of public officers to inspect for health and safety menaces or for violations of regulatory legislation. These statutes were catalogued and considered by the Law Revision Commission in its study of governmental tort liability.¹⁵

Other statutes appear to contemplate a substantial amount of activity upon the property to which entry is privileged. For example, special district laws—especially those creating or authorizing the creation of water districts, irrigation districts, and flood control districts—typically authorize the district "to carry on technical and other investigations of all kinds, make measurements, collect data, and make analyses, studies, and inspections, and for such purposes to have the right of access through its authorized representatives to all properties within the district."¹⁶ These district laws also typically repeat the authorization conferred by Code of Civil Procedure Section 1242 to enter, survey, and examine property being considered for acquisition.

The law applicable to any damages that may result from these official entries and investigatory activities was partially clarified by the governmental tort liability provisions added to the Government Code in 1963. Section 821.8 provides, in part:

¹⁴ The procedure authorized by Section 1242.5 appears to have been considered by the appellate courts in only one instance. In *Los Angeles v. Schweitzer*, 200 Cal. App.2d. 448, 19 Cal Rptr. 429 (1962), the court held the order authorizing entry, survey, and exploration to be nonappealable. The decision, however, discusses the application of the section and the right of the property owner to recover damages.

¹⁵ See Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 1, 110-119 (1963).

¹⁶ Most of the statutes are cited *id.* at 111-119.

A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

That section, however, also states that:

Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

The public entity or agency itself gains a parallel immunity through Government Code Section 815.2(b), which provides that:

Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

This statutory immunity of both the public officer and the public entity from tort liability, however, does not absolve the public entity from "inverse condemnation" liability for substantial damage. Statutes authorizing privileged trespasses on private property have been held valid,¹⁷ but these holdings have been based upon the premise that the interference with property rights that they authorize ordinarily is slight in extent, temporary in duration, and *de minimis* as to the amount of actual damages.¹⁸ Thus, under existing law, while it is clear that the entry itself under Section 1242 of the Code of Civil Procedure or one of the other statutes authorizing entry for investigatory purposes is privileged and therefore nontortious, it remains for the decisional law to declare the quantum of damage or interference that may result without giving rise to the right to injunctive relief or to recovery in an "inverse condemnation" proceeding.

There are many types of entries and investigations that can be made, and should be made, without any significant interference with the property or the owner's rights. In these cases, to require a preliminary court order or to provide a system for assuring and assessing compensation would be unduly burdensome as well as constitutionally unnecessary. Thus, in connection with Section 1242 of the Code of Civil Procedure, it seems reasonable to permit condemnors, without formalities, to enter and survey property contemplated for public acquisition so long as the entry involves no likelihood of significant damage to the property or interference with the rights of the owner. Representatives of public agencies have advised the Commission that those agencies seldom have difficulty in obtaining the consent of property owners for the great bulk of the routine survey work accomplished by them.¹⁹

¹⁷ See *Irvine v. Citrus Pest Dist.*, No. 2, 62 Cal. App.2d 378, 144 P.2d 857 (1944); Annot., 29 A.L.R. 1409 (1924).

¹⁸ See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986 (1923), approved in this connection in *People v. Ayon*, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960), and *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 185 P.2d 597 (1947).

¹⁹ Section 53069 was added to the Government Code by Chapter 491 of the Statutes of 1968 to specify that any local public entity may agree to repair or pay for any damage incident to a right of entry or similar privilege obtained by the entity. In his background report, the Commission's research consultant had suggested that such a statute be enacted to facilitate the obtaining of property owners' consent to entries, surveys, and the like. See Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 510 (1969).

In other cases, however, it may not be possible to obtain the owner's consent through negotiation and the necessary exploration may involve activities that present the likelihood of compensable damage, including the digging of excavations, drilling of test holes or borings, cutting of trees, clearing of land areas, moving of earth, use of explosives, or employment of vehicles or mechanized equipment. Representatives of local public entities have suggested that the deposit-and-court-order system provided by Section 1242.5 be extended to all types of condemnors without limitation as to the purpose of the contemplated acquisition and that the section as thus broadened be limited to situations in which there is a reasonable likelihood of compensable damage to the property or a compensable interference with the rights of the owner.

The foregoing distinction between situations in which the condemnor would be permitted to enter property under the simple privilege conferred by Section 1242 and those in which resort must be had to the formal procedure of revised Section 1242.5 suggests the need for a statutory statement of the rule of liability that governs the condemnor's entry and activities. The governmental liability provisions of the Government Code should be revised to recognize liability on the part of the public entity for actual damage to private property and substantial interference with its use or possession. Such a provision, which would codify the "rule of reason" formulated in judicial decisions (and particularly in the *Jacobsen* case), would provide an explicit statement of the condemnor's liability incident to an entry under either Section 1242 or 1242.5 and would permit as precise a distinction as seems possible between cases in which entry may be made under Section 1242 and those in which resort must be made to Section 1242.5.

Recommendations

The Commission makes the following recommendations concerning Sections 1242 and 1242.5 of the Code of Civil Procedure and the problem of inverse condemnation liability in connection with privileged official entries upon private property:

1. Section 1242 should be revised to make clear that it does not immunize entries or activities that result in compensable damage to property or compensable interference with property rights; it should also provide that any such entries or activities be made or conducted pursuant to a revised Section 1242.5. As to any damage that might arise from entry and activities under Section 1242, the revised section should provide that the liability of a public entity is governed by Section 816 of the Government Code (to be added) and that liability of any condemnor other than a public entity is the same as that of a public entity. The provision with regard to the location of the public improvement should be retained without change.²⁰

2. Section 1242.5 should be expanded to cover entries for any purpose for which land may be acquired by condemnation. The revised section, however, should apply only where the entry and investigation is likely

²⁰ This requirement of proper location, as stated in Section 1242, is now considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn. See Code of Civil Procedure Section 1241(2) and Sparrow, *Public Use and Necessity*, CALIFORNIA CONDEMNATION PRACTICE 133, 153 (Cal. Cont. Ed. Bar 1960). This portion of Section 1242 will be considered in a subsequent recommendation of the Commission.

to cause compensable damage. Also, the procedure provided by the revised section should be available only where the owner's consent cannot be obtained. The order authorizing entry should be made only after such prior notice to the owner as the court deems appropriate. The court should fix a deposit in the amount of the estimated damage and the owner should be permitted to have the deposit increased where it appears that the deposit has become inadequate. Further, the court should be authorized to consider the techniques of exploration and survey that are contemplated and to impose appropriate limitations. The provision for the payment of attorney's fees should be eliminated. It is no more necessary or desirable that attorney's fees be paid in this situation than in any other action or proceeding and such payment can only serve to stimulate unnecessary litigation. The section should provide a summary procedure for disposing of the deposit and compensating the owner, but should not foreclose his resort to any other civil remedies available to him.

3. A new Section 816 should be added to the Government Code providing that, in connection with any entry upon private property to conduct surveys, explorations, or similar activities, a public entity is liable for "actual damage" to property or for "substantial interference" with the owner's use or possession. The Comment to the section should make clear, however, that, where the entry and activities are authorized by law, there is no liability for (1) the entry itself or examinations, testings, measurements, or markings of property that are superficial in nature, (2) trivial injuries or inconsequential damages such as superficial disturbance of grass or other vegetation, the taking of minor samples, or the placing of markers as is done in connection with aerial surveys, or (3) slight, transient interference with the owner's use and possession of the property that is reasonable under the circumstances of the particular case.

IMMUNITY FOR PLAN OR DESIGN OF PUBLIC IMPROVEMENT

Background

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

One of the most pervasive exceptions to the general rule of liability is the so-called “plan or design immunity” conferred by Section 830.6.⁵ Under that section, no liability exists for “an injury caused by the plan or design” of a public improvement if the plan or design was legislatively or administratively approved and the trial or appellate court (rather than the jury) determines that there was “any substantial evidence” to support the reasonableness of that official decision. Two recent decisions of the California Supreme Court hold that—at least under the circumstances of those cases—the plan or design immunity persists despite the fact that actual experience after construction of the improvement proves that it creates a substantial risk of injuring a person using it with due care.⁶ Cogent dissents from those decisions and several legal writers⁷ urge that the immunity should be considered

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

² GOVT. CODE § 810.8.

³ GOVT. CODE § 830(a).

⁴ GOVT. CODE §§ 835–835.4.

⁵ Government Code Section 830.6 reads as follows:

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

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

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

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

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

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

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

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

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

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

¹⁰ See Government Code Section 835.2.

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

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

There is nothing in the language of section 830.6 of the Government Code that would immunize governmental entities from their duty to maintain improvements free from dangerous defects or that would permit them to ignore, on the basis of a reasonable decision made prior to construction of the improvement, the actual operation of an improvement where such operation shows the improvement to be dangerous and to have caused grave injuries.

Undoubtedly section 830.6 granted a substantial extension of the immunity of public entities for the dangerous condition of public improvements compared to the liability which existed under prior law. This was its intent. [Citation omitted.] Under the former Public Liability Act, it was held in numerous cases that where a municipality in following a plan adopted by its governing body had itself created a dangerous condition, it was *per se* culpable, and that lack of notice, knowledge, or time for correction were not defenses to liability. [Citations omitted.] It is clear that the enactment of section 830.6 abrogates this rule by limiting liability for design or plan. This is a substantial change in the law. But it does not follow that merely because an improvement is constructed according to an approved plan, design, or standards, the Legislature intended that no matter what dangers might appear from the actual operation or usage of the improvement, the public agency could ignore such dangers and defects and be forever immune from liability merely on the ground that the improvement

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

There should be immunity from liability for the plan or design of public construction and improvements where the plan or design has been approved by a governmental agency exercising discretionary authority, unless there is no reasonable basis for such approval. While it is proper to hold public entities liable for injuries caused by arbitrary abuses of discretionary authority in planning improvements, to permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested. [4 CAL. L. REVISION COMM'N REPORTS 801, 823 (1963), quoted in *Cabell v. State*, 67 Cal.2d at 153, 430 P.2d at 36, 60 Cal. Rptr. at 473.]

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

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

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

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

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

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

Recommendations

The immunity conferred by Government Code Section 830.6 is justified and should be continued to the extent that it provides immunity for discretionary decisions in the planning or designing of public improvements. As a matter of simple justice, however, the immunity should be considered to have terminated when the court finds that (1) the plan or design, as effectuated, has actually resulted in a "dangerous condition" at the time of an injury, (2) prior injuries have occurred that demonstrate that fact, and (3) the public entity has had knowledge of these prior injuries and a reasonable time to protect against the dangerous condition. To facilitate proof by the tort claimant that the public entity had knowledge of the previous injuries, the California Public Records Act¹⁵ 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.¹⁶ Under the existing statutory definition, a "dangerous condition" is one "that creates a *substantial* (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with *due care* in a manner in which it is reasonably foreseeable that it will be used."¹⁷ If the court were not persuaded that the property actually was in a dangerous condition, the immunity provided by Section 830.6 would preclude recovery based on an allegedly defective plan or design. A public entity could thus avoid trying a case to a jury where the court could be persuaded that no dangerous condition existed even where there might be sufficient evidence to sustain a jury finding to the contrary. In addition, the fact that the court determined that the property was in a dangerous condition would not relieve the plaintiff of the burden of proving that fact to the satisfaction of the

¹⁵ GOVT. CODE §§ 6250-6260.

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

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

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

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 a sufficient time prior to the plaintiff's injury to have taken protective measures. 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.¹⁸ In connection with dangerous conditions of public property, and specifically in connection with the failure to update hazardous, 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."¹⁹ Nevertheless, in the *Cabell* and *Johnston* cases, the defendants and amicus curiae²⁰ suggested, and the court seemed to accept, the view that the potential scope of governmental responsibility is so great that the public entity alone must be allowed to weigh the priorities and decide what must be done first. It was further suggested that, if judicial review of such questions in tort

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

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

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

litigation were allowed, the judge or jury might merely superimpose its values without considering the entity's concomitant responsibility for other areas of public concern. This argument also urges that public budgets may well be insufficient to bring all public facilities up to modern standards. The argument does not make clear, however, why 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 specter of crippling governmental costs, it should be noted that—long before enactment of the comprehensive government tort liability statute in 1963—cities, counties, and school districts were liable for dangerous conditions of their property,²¹ and all other public entities were liable for dangerous conditions of property devoted to a “proprietary” function.²² Yet, no plan or design immunity was recognized in California until enactment of Section 830.6 in 1963. Also, as Justice Peters points out.²³ New York has imposed general sovereign tort liability since 1918, but its judicially created plan or design immunity has never barred liability where experience has shown the dangerous character of the improvement.²⁴ It is further notable that Illinois, another leading sovereign liability state, includes in the plan or design immunity section of its statute a provision that the public entity “is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it [*sic*] is not reasonably safe.”²⁵ In addition, it must be recognized that the plan or design immunity provided by Section 830.6 is limited to a design-caused accident; it “does not immunize from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident.”²⁶ Thus, for example, the plan or design immunity does not bar recovery for the wrongful death of a motorist whose car skids on an icy bridge where the theory of the plaintiff's cause of action is that the public entity “had knowledge of a dangerously icy condition (not reasonably apparent to a careful driver) and failed to protect against the danger by posting a warning.”²⁷

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

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

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

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

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

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

²⁶ *Flournoy v. State*, 275 Adv. Cal. App. 919, 924-925, 80 Cal. Rptr. 485, 489 (1969).

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

Constitution.”²⁸ Hence, the cost of such liability must already be absorbed and, to protect against the risk of such liability, a public entity must continually review its plan or design decisions. By comparison, the recommended revision of Section 830.6 is a relatively modest change and would result in a considerably less burdensome imposition of liability for injury *to persons*.

Admittedly, the cost of updating improvements that have proven or become dangerous can involve substantial sums of money. However, the cost consideration alone does not vitiate the essential justice of requiring the government either to take reasonable measures to protect against conditions of public improvements that create a substantial danger of injury when used with due care or to compensate the innocent victims. 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 commitment of funds, time, or personnel—may be sufficient.²⁹

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 one must realize that the very obviousness of the danger can defeat the tort claimant. 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.³⁰ As Justice Mosk has succinctly put the matter: ³¹

“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 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

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

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

³⁰ GOVT. CODE § 815(b).

³¹ Mosk, *The Many Problems of Sovereign Liability*, 3 SAN DIEGO L. REV. 7, 21 (1966) (discussing the New York highway cases).

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 property¹ and vicariously liable for the torts of its employees.² Subject to certain qualifications,³ a public entity is required to indemnify its employee against liability for acts or omissions within the scope of his employment⁴ 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.⁵ However, a public employee is given an overriding immunity from liability for injuries resulting from an exercise of discretion vested in him, and the vicarious liability of the public entity also is limited by this immunity for discretionary acts.⁶

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 activities⁷ and for medical, hospital, and public health activities.⁸ However, in these two major areas, a broad general immunity for all injuries by or to prisoners⁹ and mental patients,¹⁰ 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.

¹ GOVT. CODE § 835.

² GOVT. CODE § 815.2. *But see* GOVT. CODE §§ 844.6, 854.8.

³ See GOVT. CODE §§ 844.6, 854.8 (granting the public entity immunity but not granting 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).

⁴ GOVT. CODE §§ 825-825.6. See also GOVT. CODE §§ 995-996.6 (defense of public employee).

⁵ GOVT. CODE § 820.

⁶ GOVT. CODE § 820.2. The leading case interpreting the "discretionary" immunity provision is *Johnson v. State*, 69 Cal.2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

⁷ GOVT. CODE §§ 844-846.

⁸ GOVT. CODE §§ 854-856.4.

⁹ GOVT. CODE § 844.6.

¹⁰ 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."¹¹ 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, 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,¹² 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.¹³ 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,

¹¹ GOVT. CODE § 844.

¹² *E.g.*, Note, *California Public Entity Immunity From Tort Claims by Prisoners*, 19 HASTINGS L.J. 573 (1968).

¹³ 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. 82 (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 Yuba*, 247 Cal. App.2d 748, 751, n.1, 55 Cal. Rptr. 852, 584, n.1 (1967).

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

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 "certificated" rather than "licensed" and also might exclude certain medical personnel specifically exempted from licensing requirements.¹⁴ 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.

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.¹⁵ 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.

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 phrase might not be construed to cover all of the various procedures now used to effect the confinement of persons in mental institutions.¹⁶ 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) 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

¹⁴ 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).

¹⁵ *Apelian v. County of Los Angeles*, 266 Cal. App.2d 550, 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).

¹⁶ 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).

“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,¹⁷ (2) state hospitals for the care and treatment of the mentally disordered and mentally retarded,¹⁸ and (3) the California Rehabilitation Center for narcotic addicts.¹⁹ 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 or similar facility. 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 for injuries to patients should be restricted to those persons who are inpatients—as distinguished from outpatients—of a mental institution. The immunity for injuries caused by patients should cover all patients—both inpatients and outpatients. This would be consistent with the intent of the Legislature in enacting Section 854.8.

(2) The section should be revised to broaden the immunity to cover the wrongful death of an inpatient. This revision is analogous to that relating to prisoners and is 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. Although certain other jurisdictions imposed liability where a mental patient escapes and is injured because of his inability to cope with ordinary risks,²⁰ the Commission believes that such liability is inconsistent with the California scheme. Accordingly, 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 and with the policies behind Section 854.8.

¹⁷ See WELF. & INST. CODE § 7100.

¹⁸ See WELF. & INST. CODE §§ 7200, 7500.

¹⁹ See WELF. & INST. CODE § 3300.

²⁰ See, e.g., Callahan v. State, 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.¹ An activity is considered "ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."² The California decisions indicate that blasting³ and oil drilling⁴ in a developed area, rocket testing,⁵ and fumigation with a deadly poison⁶ are ultrahazardous activities. Blasting in an isolated area,⁷ earthmoving operations,⁸ and building construction⁹ are examples of activities that have been held to be not ultrahazardous.

California law as to liability without fault for escaping water is unclear. In *Sutliff v. Sweetwater Water Co.*,¹⁰ the California Supreme Court rejected liability without fault for damage from the escape of waters impounded in a reservoir. In *Clark v. Di Prima*,¹¹ the Court of Appeal for the Fifth District, in a case involving a *break* in an irrigation ditch, held that the normal or customary irrigation of crops does not constitute an ultrahazardous undertaking nor carry with it the risk of absolute liability. However, an earlier decision by the First District¹² applied the doctrine of absolute liability to that situation.

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

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

³ *E.g.*, *Balding v. D. B. Stutsman, Inc.*, 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966); *Alonso v. Hills*, 95 Cal. App.2d 778, 214 P.2d 50 (1950); *McGrath v. Basich Bros. Constr. Co.*, 7 Cal. App.2d 573, 46 P.2d 981 (1935).

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

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

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

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

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

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

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

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

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

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

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

The liability for an ultrahazardous activity usually is termed "absolute" or "strict," but it should not be assumed that the liability is unlimited or that application of the doctrine deprives a defendant of all defenses. On the contrary, recovery has been denied for injuries brought about by intervention of the unforeseeable operation of a force of nature¹⁹ or the intentional misconduct of a third person.²⁰ Recovery has also been denied for injuries that result from the unusually sensitive character of the plaintiff's property or activity.²¹ Moreover, the liability apparently extends only to such harm as falls within the scope of the risk that makes the activity ultrahazardous. For example, the storage of explosives in a city is ultrahazardous because of the risk of explosion, not the possibility that someone may trip over a box left lying around. Thus, in the latter case, absent an explosion, the doctrine would have no application.²² Finally, although

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

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

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

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

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

¹⁶ Note, 1 STAN. L. REV. 508, 534-535 (1949).

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

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

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

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

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

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

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

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

The governmental liability act makes a public entity vicariously liable for the acts or omissions of its employees²⁵ and, subject to several significant immunities, public employees are liable to the same extent as private persons.²⁶ It would appear, therefore, that where an injury results from an ultrahazardous activity (such as blasting in a residential area) engaged in by an identifiable employee, the public employee would be liable without fault because he is engaged in an ultrahazardous activity and the public entity would be vicariously liable.²⁷

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

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

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

²⁴ GOVT. CODE § 815(a).

²⁵ GOVT. CODE § 815.2.

²⁶ GOVT. CODE § 820.

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

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

²⁹ *E.g.*, *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959). See also *Mercado v. City of Pasadena*, 176 Cal. App.2d 28, 1 Cal. Rptr. 134 (1959); *Zeppi v. State*, 174 Cal. App.2d 484, 345 P.2d 33 (1959). See Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 CAL. L. REVISION COMM'N REPORTS 225-230 (1963).

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

Recommendations

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

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

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

LIABILITY FOR THE USE OF PESTICIDES

Background

The use of pesticides¹ to control insects, vermin, weeds, and other nuisances 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 statutes² and administrative regulations³ which provide a comprehensive regulatory scheme for adjusting the competing interests. Crop dusting pilots⁴ and persons engaged in the pest control business for hire⁵ are licensed. Persons who engage in pest control operations must obtain a permit which specifies the conditions for conducting the operation.⁶ Standards for equipment⁷ and chemicals⁸ and procedures for the use and application of pesticides⁹ are prescribed in detail. Financial responsibility requirements are im-

¹ 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.

² AGRIC. CODE §§ 11401-11940, 12751-14098.

³ 3 CAL. ADMIN. CODE §§ 2327-2472, 3070-3114.

⁴ AGRIC. 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.

⁵ AGRIC. CODE §§ 11701-11710; 3 CAL. ADMIN. CODE §§ 3075-3079. See also AGRIC. CODE §§ 11731-11741 (registration in county where business conducted).

⁶ AGRIC. 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).

⁷ 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).

⁸ 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).

⁹ E.g., AGRIC. 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).

posed.¹⁰ The Director of Agriculture is given a broad authority to adopt regulations,¹¹ and county agricultural commissioners have similar authority to deal with local conditions.¹²

Violation of the regulations governing the use of pesticides will almost always constitute a failure to use due care,¹³ but compliance with the regulatory standards does not necessarily relieve the user from liability to others.¹⁴ Moreover, Section 12972 of the Agricultural Code¹⁵ imposes a mandatory duty to prevent "substantial drift"¹⁶ and appears therefore to impose "strict" liability for damage resulting from such drift.¹⁷ 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.¹⁸

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.¹⁹ However, the statutory and regulatory provisions governing the use

¹⁰ AGR. CODE §§ 11931-11940.

¹¹ AGR. CODE §§ 11502, 14005, 14006, 14033, 14063. See also AGR. 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).

¹² AGR. CODE § 11503. See also AGR. CODE § 12972.

¹³ See EVIDENCE CODE § 669. Users are under a mandatory duty to conform to all applicable regulations. *E.g.*, AGR. CODE §§ 12972, 14011, 14032, 14063. Violation of the regulations is a misdemeanor. See AGR. CODE § 9.

¹⁴ See AGR. CODE §§ 14003 (injurious material), 14034 (herbicides).

¹⁵ 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.

¹⁶ See also 3 CAL. ADMIN. CODE §§ 2450(d), (h), 2452.1(c), 2453(d), 2462(a), 3093(a), 3094(b), 3095(a), 3114.

¹⁷ 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.

¹⁸ 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 ultrahazardous activity. *E.g.*, Comment, 19 HASTINGS L.J. 476, 489-493 (1968); Note, 6 STAN. L. REV. 69, 81-85 (1953).

¹⁹ *Neff v. Imperial Irrigation Dist.*, 142 Cal. App.2d 755, 299 P.2d 359 (1956) (by implication).

of pesticides probably now apply to public entities,²⁰ and liability probably will be imposed for damage resulting from the failure of a public entity to comply with their requirements.²¹ 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 1963 governmental liability act makes a public entity vicariously liable for the acts or omissions of its employees²² and, subject to several significant immunities, public employees are liable to the same extent as private persons.²³ 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.²⁴ 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.²⁵

Recommendations

The Commission concludes that the liability of a public entity engaged in pest control operations should be the same as that of a private person engaged in the same activity. The Commission therefore recommends 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 simple rule would eliminate any uncer-

²⁰ *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).

²¹ 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 Arsdale v. Hollinger*, 68 Cal.2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

²² GOVT. CODE § 815.2.

²³ GOVT. CODE § 820.

²⁴ 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).

²⁵ 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 notes 4-10, *supra* at 809-810.

tainty that now exists and would make it unnecessary to litigate particular cases to determine the theory, if any, upon which liability might be based. As a matter of policy, the measure would assure that losses resulting from the use of pesticides by public entities would be distributed to the wide range of the public that benefits from such activity rather than being left to be borne by the victims.

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 measures:

1

An act to amend Section 14002 of the Agricultural Code, and to amend Sections 830.6, 844.6, 845.4, 845.6, 845.8, 854.2, 854.4, 854.8, 855.2, 856, and 856.2 of, and to add Sections 815.8, 816, 854.3, 854.5, and 6254.5 to, 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. This chapter applies to all agencies of the United States and the State of California and its subdivisions or to their officers, agents, or employees, except when acting within the scope of their authority and while engaged in conducting or supervising research on any injurious material. *Nothing in this section affects the liability of a public entity under Section 862 of the Government Code.*

Comment. Section 14002 is amended to make clear the relationship of that section to the provision of the Government Code imposing liability upon public entities 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 nuisance

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

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

Comment. Section 815.8 expressly eliminates the liability of a public entity for damages based on a theory of common law nuisance under the Civil Code provisions—Part 3 of Division 4—which describe in very general terms what constitutes a nuisance and permit recovery of damages resulting from such a nuisance. It makes clear and carries out the original intent of the Legislature when the governmental liability statute was enacted in 1963 to eliminate general nuisance damage recovery and restrict liability to statutory causes of action. See Section 815 and the Comment thereto; *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 809 (1969); A VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.10 (Cal. Cont. Ed. Bar 1964, Supp. 1969).

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

Govt. Code § 816 (new). Privileged entry on property

SEC. 3. Section 816 is added to the Government Code, to read:

816. Notwithstanding Section 821.8, a public entity is liable for actual damage to property or for substantial interference with the possession or use of property where such damage or interference arises from an entry upon the property by the public entity to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities.

Comment. Section 816 is added to clarify the application of Division 3.6 (Sections 810–996.6) to claims for damages that may arise from privileged entries upon private property to conduct surveys, examinations, explorations, and similar activities. In general, this section codifies the decisional law that gives content, as to these entries and activities, to the assurance of Section 14 of Article I of the California Constitution that compensation will be made for the “taking” or “damaging” of property. See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923).

This section does not *authorize* any entry upon property or the conducting of investigatory activities. Rather, the section provides a “rule of reason” to govern the liability of the public entity where such entries and activities are authorized by other statutory provisions. As to entries upon private property to determine its suitability for acquisition by eminent domain proceedings, see Sections 1242 and 1242.5 of the Code of Civil Procedure.

In cases where a condemnation proceeding eventually is filed to take the property, or a portion of it, the damages mentioned in this section may be recovered by cross-complaint in the condemnation proceeding. *Cf. People v. Clausen*, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967).

In imposing liability for “actual” damage to property and for “substantial” interference with possession and use of the property,

this section provides only a general standard that must be applied with common sense to the facts of the particular case. The term "actual damage" is commonly used in similar statutory provisions in other states. See, e.g., KAN. STAT. ANN. § 68-2005 (1964); MASS. LAWS ANN., Ch. 81, § 7F (1964); OHIO REV. CODE ANN. § 163.03 (Page 1969); OKLA. STAT. ANN., Tit. 69, §§ 702, 703 (1969); PA. STAT. ANN., Tit. 26, § 1-409 (Supp. 1969). Judicial decisions from other states have also given sensible applications to the phrase. See, e.g., *Onorato Bros. v. Massachusetts Turnpike Authority*, 336 Mass. 54, 142 N.E.2d 389 (1957); *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So.2d 546 (1962). A specific consequence of the use of the term "actual" is to preclude recovery of the purely "nominal" or "constructive" damages that are presumed in tort law to flow from any intentional tort.

Use of the phrase "substantial interference" recognizes that any entry upon private property causes at least a minimal "interference" with the owner's use, possession, and enjoyment of that property. The very presence upon property of uninvited "guests" would be deemed by some property owners to be an interference with their property rights. The term "substantial," however, is intended to exclude liability for entries and activities that, to quote the leading California decision (*Jacobsen v. Superior Court, supra*), "would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property." See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 811 (1969).

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

SEC. 4. Section 830.6 of the Government Code is amended to read:

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

(b) *Nothing in subdivision (a) exonerates a public entity 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 other injuries had occurred a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.*

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

Comment. 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 opinion in those decisions. See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 816-823 (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, 79 Cal. Rptr. 33 (1969)), or if there is no substantial evidence to support the reasonableness of the planning decision (see subdivision (a)), the additional factors mentioned in subdivision (b) need not be considered by the court. However, if the trial judge determines that subdivision (a) would apply to the case, he must also determine whether the three factors mentioned in subdivision (b) have been established. The immunity is not overcome unless the trial judge is persuaded by a preponderance of the evidence that the plan or design actually created a "dangerous condition" at the time of the accident in question. Thus, he 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 foreseeable that it will be used." See Section 830(a). Similarly, he must be persuaded by a preponderance of the evidence that previous "injuries" (defined in Section 810.8) had occurred, that those injuries demonstrated to his satisfaction that the property was in a dangerous condition, and that the defendant public entity or defendant employee had knowledge of the occurrence of those injuries for a sufficient period of time to take remedial measures. The term "injuries" includes the singular "injury." That is, in some circumstances, a single prior injury may be sufficient to demonstrate the dangerousness of a condition. Of course, one injury may not be conclusive and even a number of injuries may fail to demonstrate dangerousness. Moreover, the mere fact that prior injuries have occurred at the place in question is not determinative unless the plaintiff proves that these injuries were proximately caused by the assertedly dangerous condition. 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.

Subdivision (c) has been added to permit the court or any party to the action to require that the issue presented when the special defense provided by this section is pleaded be tried separately and prior to the trial of any other issues in the case. If the 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 this section have any further bearing in the case. Specifically, elimination of the plan or design immunity by operation of subdivision (b) does not relieve the plaintiff of the basic evidentiary burden of proving to the satisfaction of the trier of fact that the several conditions necessary to establish liability—including the fact that the property was in a dangerous condition—existed. Nor does it preclude the public entity from establishing (under Section 835.4) the immunizing reasonableness of its action or inaction (see *Cabell v. State, supra*) or affect any other immunity or defense that might be available to the public entity under the circumstances of the particular case.

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

SEC. 5. 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 dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(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 introductory clause of subdivision (a) of Section 844.6 is amended to make clear that the limited liabilities 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 Cal. App. 2d 550, 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 (compensation 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 in a wrongful death action for the death of a prisoner if 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 Yuba*, 247 Cal. App.2d 748, 751 n.1, 55 Cal. Rptr. 852, 854 n.1 (1967) (*dictum*). The amendment makes clear the legislative intent in enacting this section.

The amendment to subdivision (d) makes clear that the 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 institutions), 2147 (medical students), 2147.5 (uncertified interns and residents).

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

SEC. 6. 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 claims 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. 7. 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 § 845.8 (amended). Parole or release of prisoner; escape of prisoners or arrested persons

SEC. 8. Section 845.8 of the Government Code is amended to read:

845.8. Neither a public entity nor a public employee is liable for:

(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release.

(b) Any injury caused by : ~~an~~

(1) *An escaping or escaped prisoner ;*

(2) *An escaping or escaped arrested person; or*

(3) *A person resisting arrest .*

Comment. Subdivision (b) of Section 845.8 has been amended to extend the immunity to include persons resisting or escaping from arrest. 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 Cal.2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

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

SEC. 9. 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 commitment 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 Rehabilitation 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 WELF. & INST. CODE § 6326) and farms, road camps, and rehabilitation centers under county jurisdiction (see WELF. & INST. CODE §§ 6404, 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. 10. 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. 11. 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, 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, or in a similar facility.

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 WELF. & INST. CODE § 5150), or in any similar facility.

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. 12. 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. 13. 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 a patient 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 dangerous condition of public property under Chapter 2 (commencing with Section 830) of this part.

(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 terms "patient" and "inpatient" are used in place of "any person committed or admitted." The term "inpatient" refers only to inmates of mental institutions and not outpatients; the broader term "patient" refers to both inpatients and outpatients.

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

SEC. 14. 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. 15. 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. & INSTR. 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. 16. 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~~ :

(1) An injury caused by an escaping or escaped person who has been ~~committed~~ *confined* for mental illness or addiction.

(2) An injury to, or the wrongful death of, an escaping or escaped person who has been *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 the addition of paragraph (2) to subdivision (a)—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.

Govt. Code § 861 (new). Liability for damages from ultrahazardous activities

SEC. 17. 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

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—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 829-832. (1969). This liability is not based upon any intention to cause injury nor upon negligence. On the contrary, the person responsible for the activity is liable despite the exercise of reasonable care. The liability arises out of the activity itself and the risk of harm that the activity creates. The liability is based upon a policy which requires an ultrahazardous enterprise to pay its way by compensating for any injury it causes.

Section 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 result-

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

Govt. Code § 861.2 (new). 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*, 247 Cal. App.2d at 785, 56 Cal. Rptr. at 137. As to activities that have been held to be ultrahazardous in California, see *Luthringer v. Moore*, *supra* (fumigation with a deadly poison); *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952 (1928) (oil drilling in a developed area); *Smith v. Lockheed Propulsion Co.*, *supra* (rocket testing); *Balding v. D. B. Stutsman, Inc.*, 246 Cal. App.2d 559, 54 Cal. Rptr. 717 (1966) (blasting in a developed area). Contrast *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 P. 82 (1907) (blasting in an undeveloped area); *Clark v. Di Prima*, 241 Cal. App.2d 823, 51 Cal. Rptr. 49 (1966) (normal irrigation); *Beck v. Bel Air Properties*, 134 Cal. App.2d 834, 286 P.2d 503 (1955) (grading and earthmoving); *Sutliff v. Sweetwater Water Co.*, 182 Cal. 34, 186 P. 766 (1920) (alternate holding) (collecting water in reservoir). See also *Recommendation*

Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act, 9 CAL. L. REVISION COMM'N REPORTS 801, 829-830 (1969).

Govt. Code § 862 (new). Liability for injuries from pesticides

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

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—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801 833-836 (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 AGRIC. 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—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 833-836 (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 *County of Contra Costa 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(a) (6) (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. AGRIC. 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.

II

An act to amend Sections 1242 and 1242.5 of the Code of Civil Procedure, relating to eminent domain.

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

Code Civ. Proc. § 1242 (amended)

SECTION 1. Section 1242 of the Code of Civil Procedure is amended to read:

1242. (a) In all cases where land is required for public use, ~~the State, or its agents in charge of such use, may survey and locate the same;~~ but *if such use* must be located in the manner which will be most compatible with the greatest public good and the least private injury; ~~and subject to the provisions of Section 1247. The State, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof.~~

(b) *Subject to Section 1242.5, a person having the power of eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.*

(c) *The liability, if any, of a public entity for damages that arise from the entry and activities mentioned in subdivision (b) is determined by Section 816 of the Government Code.*

(d) *Any person that has the power of eminent domain, other than a public entity, is liable for damages that arise from the entry and activities mentioned in subdivision (b) to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.*

(e) *As used in this section, "public entity" means a public entity as defined in Section 811.2 of the Government Code.*

Comment. Section 1242 has been amended to modernize its language and to make clear that the condemnor's liability for any damage that may result from an entry and activities under the privilege conferred by the section is governed by Section 816 of the Government Code.

As to the extent of the "examinations" authorized by Section 1242, see *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986, 29 A.L.R. 1399 (1923), holding that the privilege conferred by Section 1242 extends only to "such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property." See also *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 811-815 (1969). The statutory procedure for entries that will result in compensable damage (under Government Code Section 816)

is provided by Section 1242.5. Even where no damage is contemplated from the entry, the entity will ordinarily obtain the voluntary consent of the owner to enter.

The requirement of proper location stated in subdivision (a) is retained without change. This requirement is considered to be one of the elements of "public necessity" that must be shown in the condemnation proceeding or, more typically, by the condemnor's resolution to condemn.

Code Civ. Proc. § 1242.5 (amended)

SEC. 2. Section 1242.5 of the Code of Civil Procedure is amended to read:

1242.5. In any case in which the State, a county, city, public district, or other public agency in this State has the power to condemn land for reservoir purposes, and desires to survey and explore certain property to determine its suitability for such purposes, and in the event such agency is unable by negotiations to obtain the consent of the owner to enter upon his land for such purposes, the agency may undertake such survey and exploration by complying with the requirements of this section. It shall petition the superior court for permission to undertake such survey and exploration. The court shall ascertain whether petitioner in good faith desires to enter the land for this purpose, and, if it determines this issue in the affirmative, shall require that petitioner deposit with the court cash security in an amount sufficient to compensate the landowner for any damage resulting from the entry, survey, and exploration. Upon deposit of such security, the court shall issue its order granting permission for such entry, survey, and exploration.

The court shall retain such cash security for a period of 90 days following the termination of the entry, survey, and exploration activities or until the end of any litigation commenced during that period relating to such entry, survey and exploration activities and shall award to the landowner out of the cash security on deposit an amount equal to that necessary to compensate him for any damage caused by the State, county, city, public district, or other public agency while engaged in survey and exploration on his property as well as for any costs of court and reasonable attorney fees, to be fixed by the court, incurred in the proceeding before the court. Any suit for damages by a landowner under this section shall be governed by the applicable provisions of Part 2 of the Code of Civil Procedure. Such cash security shall be held, invested, deposited, and disbursed in the manner specified in Section 1254 of the Code of Civil Procedure, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

(a) In any case in which the entry and activities mentioned in subdivision (b) of Section 1242 will subject the person having the power of eminent domain to liability under Section 816

of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(1) The written consent of the owner to enter upon his property and to undertake such activities; or

(2) An order for entry from the superior court in accordance with subdivision (b).

(b) The person seeking to enter upon the property shall petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case. Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.

(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

(d) The court shall retain the amount deposited under this section for a period of six months following the termination of the entry. Such amount shall be held, invested, deposited, and disbursed in accordance with Section 1254.

(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs in the proceeding under this section. Where a deposit has been made pursuant to this section, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this subdivision. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount. Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1242.5 has been amended to make the procedure it provides available in all proposed acquisitions for public use, rather than only to acquisitions for reservoir purposes.

Subdivision (a) requires a person desiring to make an entry upon property to secure either the permission of the landowner or an order of the court before making an entry that would subject it to liability under Section 816 of the Government Code. In many cases, the entry and activities upon the property will involve no more than trivial injuries to the property and inconsequential interference with the owner's possession and use. In such cases, neither the owner's permission nor the court order is required. However, where there will be compensable damage, subdivision (a) is applicable.

Under subdivision (b), the court should examine the purpose of the entry and determine the nature and scope of the activities reasonably necessary to accomplish such purpose. Its order should provide suitable limitations by way of time, area, and type of activity to strike the best possible balance between the needs of the condemning agency and the interests of the property owner. The order also must require the condemning agency to deposit an amount sufficient to reimburse the owner for the probable damage to his property and interference with its use.

Under subdivision (c), if, after an entry has been made and activities commenced, it appears either that the activities must be extended to accomplish the purpose or curtailed to prevent unwarranted damage or interference or that greater or lesser damage to the property will occur, the owner or the entity may apply to the court for a redetermination and appropriate changes in the previous order.

Subdivision (d) continues the former requirement that deposits are to be held, invested, and disbursed in the same manner as deposits made after judgment and pending appeal and also specifies the period the deposit is to be retained on deposit.

Subdivision (e) provides a simplified procedure for determining the amount to which the owner is entitled. The deposit will be held for up to six months after the agency has finished its survey and investigation. In the usual case, the owner, after notice to the agency, will apply during this period to the court for the amount necessary to fully compensate him. This amount will include court costs in addition to damages for the entry. It is contemplated that the owner will be paid out of the amount on deposit, but this does not preclude an award greater than the deposit if this is necessary to fully compensate him. An award under this section will, however, be finally determinative of the owner's right to compensation. It should be noted that the six-month period is in effect a statute of limitations for recovery utilizing the procedure provided by this section and the landowner must be alert to the cessation of activities which commences the running of the period. However, the property owner is not foreclosed, either before or after expiration of the six-month period, from pursuing any other civil remedy available to him.

When act becomes effective

SEC. 3. This act shall become effective only if ["Senate" or "Assembly"] Bill No. -- is enacted by the Legislature at its 1970 Regular Session and in such case this act shall take effect at the same time that ["Senate" or "Assembly"] Bill No. -- takes effect.

Comment. Both Sections 1242 and 1242.5 of the Code of Civil Procedure, as amended by this act, include references to Section 816 of the Government Code. Section 816 would be added to the Government Code if legislation recommended by the Law Revision Commission becomes law. See *Recommendation Relating to Sovereign Immunity: Number 10—Revisions of the Governmental Liability Act*, 9 CAL. L. REVISION COMM'N REPORTS 801, 838 (1969). Accordingly, Section 3 is included in this act so that it will become law only if the legislation that adds Section 816 becomes law.