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The End of Innocence: The Effect of California's Recreational Use Statue on Children at Play

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One hundred years ago, the idea that children deserved special protection from dangerous conditions found on private property was adopted by both the United States and California Supreme Courts. Due to the innocence of children and their inability to perceive possible dangers, landowners were required to provide a higher degree of protection to children than to adults. This new and revolutionary idea, later to be labeled the attractive nuisance doctrine, was adopted by the Restatement of Torts in what has been called its “most effective single section.” However, today in California, a recent decision has reversed a century of development in the law which had provided protection to children. The duty of care required of a landowner towards the children of this state has returned to that which existed over one hundred years ago.

INTRODUCTION

The State of California is blessed with an abundance of scenic treasures. Its natural landscape contains over 1,100 miles of Pacific shoreline, massive mountains, magnificent lakes and sweeping deserts. Such diversity and contrast lend to its appeal as a place where recreational pursuits may flourish, at times on realty owned by others.

The opening words of Ornelas v. Randolph demonstrate the California Legislature’s intent behind the state’s recreational use statute, California Civil Code section 846, which reduces the duty of care that landowners...
owe to those using the land for recreational purposes. Since its enactment in 1963, this statute has been subject to numerous interpretations by the appellate courts in their attempts to apply a law based on the term "recreation," a term so vague and subject to individual interpretation that a suitable legal definition for it may be impossible. The legislative history (or lack thereof) that accompanies the statute has provided little direction to the courts in deciding cases before them. As the Ninth Circuit recently noted, "[u]nfortunately the Legislature has been silent about its underlying intent in enacting section Civil Code 846." The appellate courts have generally been guided by attempting to balance the need for increased recreational area with the concern of landowners regarding liability to entrants who use private land for recreation. In the past, the courts based their decisions on whether immunizing a landowner from the general duty of care owed to entrants would support the presumed legislative intent of encouraging landowners to open their private lands for recreational use.

The Ornelas decision appears to depart from this approach, which had been followed for thirty years. In Ornelas, the court determined that a landowner owed no duty of care to a trespassing child who entered private property, presumably to play on old farm machinery stored by the owner. In discussing the "recreational opportunities offered by the property," the court employed an extremely broad interpretation of the recreational use statute and applied its benefit, an immunization from the duty of care, to private property that was neither suitable nor desirable for recreational purposes. This interpretation by the Ornelas court may have been influenced by a growing trend towards limiting the liability of landowners, possibly indicating a dissatisfaction with the inclusion of trespassers in the group towards whom one owes a duty of care. However, the Ornelas decision singles out the group of individuals least able to take responsibility for the decision to trespass and least able to protect themselves—children. One hundred years of progress in the duty

3. CAL. CIV. CODE § 846 (West 1982).
5. E.g., id. at 1117; Parish v. Lloyd, 82 Cal. App. 3d 785, 788, 147 Cal. Rptr. 431, 432 (1978).
6. Ornelas, 4 Cal. 4th at 1098, 847 P.2d at 561, 17 Cal. Rptr. 2d at 595. The defendant, Randolph, owned a large piece of property. On one open part he stored old farm equipment, machinery, and irrigation pipes. The plaintiff, eight-year-old Jose Ornelas, lived adjacent to the Randolph property in a residential subdivision. Ornelas and five other children entered the property uninvited and began playing on the old machinery. Although Ornelas was actually just sitting and watching the others play, a piece of pipe dislodged and fell on him. Id.
7. Id. at 1102, 847 P.2d at 564, 17 Cal. Rptr. 2d at 598.
of care society owes to its children may have been reversed by the application of the recreational use statute to children who trespass in order to play on private property.

This Comment will consider the history and purpose of California’s recreational use statute and the interpretations and revisions of the statute prior to Ornelas. The separate policy of protecting young children will also be discussed, considering how California advanced this policy with the adoption of the “attractive nuisance” doctrine—the Restatement of Torts position on the standard of care owed to trespassing children. Next, this Comment will discuss how the recreational use statute may now play a role in limiting a general duty of care owed to trespassing children by creating a special class of citizens to whom no duty is owed, conflicting with the long-standing policy of increased care toward children. Finally, this Comment will conclude by making recommendations on the steps that the California Legislature and/or courts should take in order to provide California’s children with the protection they received prior to Ornelas.

I. THE HISTORICAL DEVELOPMENT OF THE RECREATIONAL USE STATUTE AND LANDOWNER LIABILITY

Americans value the tremendous variety and opportunity for recreational activities this country provides. In 1962, the Outdoor Recreation Resources Review Commission released a report with proposals designed to “satisfy our outdoors needs into the next century,” however, a 1987 follow-up report found that “by the late 1970s, participation in some activities had surpassed the rates [the Outdoor Recreation Resources Review Commission] projected for the year 2000.”8 As anyone who has recently been to any of our more popular national parks knows, the strain on a limited number of facilities has become enormous. Reservation requirements, long lines, and large crowds have become the norm. An awareness of the need for additional recreational areas has turned attention to privately owned lands that could serve this demand.9

9. Id. at 19. The report recognizes that the competition for available land suitable for recreational use is increasing due to more people doing many different things. The private sector could help ease this burden, however, barriers to investment due to a “liability crisis” prevent landowners from increasing public access. Id. The commission
However, private owners have been wary of potential liability for entrants injured when using their property and have been unwilling to open their land for public use. Recreational use statutes were developed to ease this burden.

Michigan enacted the country’s first recreational use statute in 1953.\textsuperscript{10} Less than one-third of the states had enacted similar legislation by 1965, when the Council of State Governments proposed a model act for public recreation on private lands.\textsuperscript{11} However, by 1989, at least forty-nine states had enacted recreational use statutes.\textsuperscript{12} Many of the statutes are patterned after the model act, but there are wide variations among the statutes, especially among those that predate the model act.\textsuperscript{13} Aside from the individual differences, however, the basic effect is the same. As stated in the suggested legislation, such statutes are “designed to encourage availability of private lands by limiting the liability of owners.” Further, “where private owners are willing to make their land available to members of the general public without charge . . . every reasonable encouragement should be given to them.”\textsuperscript{14}

Section 846 of the California Civil Code was enacted in 1963, two years before the suggested legislation was proposed. The Act limited the liability of property owners toward persons entering their land for certain recreational purposes.\textsuperscript{15} The legislature did not include a statement of recommended increasing incentives to private landowners in order to increase public access and use for recreational purposes. \textit{Id.}

\begin{footnotes}
11. 24 SUGGESTED STATE LEGISLATION 150 (Council of State Gov’ts 1965).
14. SUGGESTED STATE LEGISLATION, supra note 11, at 150. The model act also suggests that the title conform to state requirements, such as: “An act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith.” \textit{Id.} Section 1 of the act specifies the purpose, and states: “The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.” \textit{Id.} The California act contains no such statement of purpose.
\end{footnotes}
purpose or further clarify the intent through legislative history.\textsuperscript{16} The statute, when enacted in 1963, read in full as follows:

An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for taking of fish and game, camping, water sports, hiking or sightseeing, or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes, except as provided in this section.

An owner of any estate in real property who gives permission to another to take fish and game, camp, hike or sightsee upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to take fish and game, camp, hike or sightsee was granted for a consideration other than the consideration, if any, paid to said landowner by the State; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.\textsuperscript{17}

As demonstrated by the wording of the statute, the original form of the act was very specific as to the activities that would constitute recreational use. The activities listed were limited to those activities for which state and national parks are normally used. It appears that the implicit purpose of the statute was to ease the burden on public recreational areas by easing the fear of liability for private landowners who allow such activities on their land.\textsuperscript{18} Private land that can be used for such recreational activities can provide additional space for people who would otherwise be using the limited number of public parks available. By

\textsuperscript{16} Id.; see also 38 CAL. ST. B.J. 647 (1963); Ornelas v. Randolph, 4 Cal. 4th 1095, 1105-06 n.8, 847 P.2d 560, 564 n.8, 17 Cal. Rptr. 2d 594, 601 n.8 (1993) (en banc) (legislative history inconclusive); Nelsen v. City of Gridley, 113 Cal. App. 3d 87, 91, 169 Cal. Rptr. 757, 759 (1980) (legislature silent about underlying intent); Donaldson v. United States, 633 F.2d 414, 418 (9th Cir. 1981) (history provides insufficient insight as to intent of legislature).

\textsuperscript{17} Act of July 17, 1963, ch. 1759, 1963 Cal. Stat. 3511 (codified as amended at CAL. CIV. CODE § 846 (West 1982)).

reducing the duty of care that a landowner might normally owe, the legislature is encouraging private owners to allow specific recreational activities on their land.\footnote{19}

At the time California’s recreational use statute was enacted, the duty of care required of a landowner was based on the traditional common law classification of the entrant. Prior to 1968 and California’s landmark decision of \textit{Rowland v. Christian},\footnote{20} the legal duty of a landowner was based on the status of the entrant—either an invitee, licensee, or trespasser.\footnote{21}

An invitee was owed a full duty of care. When a visitor entered an owner’s property upon invitation and for business concerning the owner, the owner had an affirmative duty to protect the visitor from known dangers and to use reasonable care to discover unknown dangers.\footnote{22} In other words, the owner had a duty to make the premises safe in exchange for the pecuniary benefit he expected to receive. An invitation to enter private land for the owner’s benefit justified the entrant’s expectation that the property would be safe. When no benefit was expected, the entrant did not qualify as an invitee, and a full duty of care was not owed. An additional definition of invitee was adopted by the Second Restatement of Torts in section 332.\footnote{23} An invitee would also include a person invited to enter or remain on land as a member of the public for purposes for which the land was held open to the public.\footnote{24} In such cases, an implied representation was made to the public that because the land was held open to them, it had been prepared for their safe entry.\footnote{25}

A licensee was a visitor entering by consent or permission.\footnote{26} In contrast to an invitee, a licensee came onto the premises for her own purpose or benefit, rather than for the landowner’s benefit. A social guest fell into this classification, as did those who entered with permission for purposes unrelated to the owner’s benefit, such as for recreational use, use as a shortcut, and use by sales persons and solicitors.\footnote{27} Permission could be express or could be implied by the

\begin{footnotes}
\footnote{19. See, e.g., \textit{Delta Farms}, 33 Cal. 3d at 708, 660 P.2d at 1173, 190 Cal. Rptr. at 499.}
\footnote{20. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). See infra note 42 for a discussion of facts.}
\footnote{21. E.g., 6 B.E. \textsc{witkin}, \textsc{summary of california law} § 894 (9th ed. 1988).}
\footnote{22. W. \textsc{Page Keeton et al.}, \textsc{prosser and keeton on the law of torts} § 61, at 419 (5th ed. 1984).}
\footnote{23. \textsc{Restatement (second) of torts} § 332 (1965).}
\footnote{24. Id.}
\footnote{25. \textsc{Keeton et al.}, supra note 22, at 422.}
\footnote{26. \textsc{Witkin}, supra note 21, § 909.}
\footnote{27. \textsc{Keeton et al.}, supra note 22, at 413.}
\end{footnotes}
owner's conduct, or even the condition of the land. Permission did not, however, elevate the status of the entrant to an invitee. Encouragement to enter without added assurance, implied or express, that the premises were safe for the visit did not make the owner fully liable for the condition of the land. The limited duty owed to the licensee was a duty to refrain from willfully or wantonly injuring the licensee, to refrain from conducting dangerous activities where the presence of the licensee was or should reasonably have been known, and to warn of dangerous conditions known by the landowner when there was reason to believe the licensee would not discover the condition by herself. In all other situations, a licensee assumed the risk of the condition of the premises and had no right to demand that the premises be safe. In the case of the social guest, the theory was that the guest was placed on the same footing as the family and was expected to use the property as the owner did, with no special inspection or preparation for the guest's safety.

The final category was that of the trespasser. In general, the landowner owed no duty of care to unknown, uninvited entrants. A landowner had a duty to refrain from intentionally harming the trespasser, but was under no duty to keep the premises safe. This exemption from general liability developed historically from a policy to allow unrestrained use of private land. A wide variety of privileges accompanied land ownership due to the importance of land throughout the development of law in England and America and due to the dominance of the English landowning classes in the social and political development of society and the common law. The landowner was given legally protected, exclusive possession, including the right to consent to entrants on the owner's terms. Where there was no right or

28. Id.
29. WITKIN, supra note 21, § 909.
30. KEETON ET AL., supra note 22, at 414.
31. WITKIN, supra note 21, § 905. Two classes of trespassers are distinguished. A landowner must only refrain from intentional harms and willful, wanton injury to an unknown trespasser. Once a trespasser becomes known, however, the landowner has a duty to warn of artificial conditions that are concealed dangers and to use reasonable care in hazardous activities.
33. Gulbis, supra note 32, at 299.
permission to enter, entrants were expected to look out for themselves. An exception to the no-duty rule for trespassers developed, however, in the special case of child trespassers. An adult trespasser was expected to understand the possible dangers and assume the risk of uninvited entry. However, young children were thought to be incapable of perceiving potential danger or making intelligent decisions regarding trespass. Society’s strong interest in the protection of children overshadowed the landowner’s interest in the unrestricted freedom to use his or her land, especially when the landowner might have been the only one available to protect children from a danger existing on the property. The *Restatement of Torts* adopted a special rule for child trespassers with the attractive nuisance doctrine, which bases liability on the foreseeability of harm to trespassing children and is actually simple negligence law. This section has been called the *Restatement’s “most

34. Id. at 294.
35. KEETON ET AL., supra note 22, § 59, at 399; Prosser, *supra* note 1, at 429.
36. KEETON ET AL., supra note 22, § 59, at 399.
37. *RESTATEMENT OF TORTS* § 339 (1934); Prosser, supra note 1, at 432. The rule for trespassing children was stated in the *Restatement* as follows:

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if:

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

*RESTATEMENT, supra.*

The term “attractive nuisance” is actually a misnomer. The term came about as the courts attempted to justify a special rule for trespassing children in terms of negligence even though a landowner ordinarily would have owed no duty of care toward a trespasser. *Prosser, supra* note 1, at 431. The idea was that if a dangerous condition attracted the child onto the land, the landowner could not claim immunity based on the trespass. *Id.* Due to this interpretation, the early cases applying the doctrine predicated liability on a finding that the child was lured or enticed onto the land. *E.g.,* United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922). The necessity of allurement was later discarded by the majority of courts, although the name “attractive nuisance” remained and is still commonly used. *Prosser, supra* note 1, at 448; *RESTATEMENT (SECOND) OF TORTS* § 332 cmt. b (1965). California courts continue to refer to the “attractive nuisance doctrine” even though attractive and nuisance are not requirements of the rule. *See, e.g.,* King v. Lennen, 53 Cal. 2d 340, 348 P.2d 98, 1 Cal. Rptr. 665 (1959); Reynolds v. Willson, 51 Cal. 2d 94, 331 P.2d 48 (1958); Smith v. Americania Motor
effective single section due to its adoption by a majority of courts. California has recognized the special duty of care owed to child trespassers since 1891, when the California Supreme Court decided \textit{Barrett v. Southern Pacific Co.}.\footnote{38}

In 1968, California became the first state to reject the common law entrant status classifications,\footnote{40} although Great Britain had imposed a general duty of care toward all entrants except trespassers in 1957.\footnote{41}

In \textit{Rowland v. Christian},\footnote{42} the California Supreme Court replaced the traditional liability rules based on entrant status with a duty of ordinary care. In doing so, the court stated that "[w]hatever may have been the historical justifications for the common law distinctions, it is clear that those distinctions are not justified in the light of our modern society."\footnote{43}

\begin{footnotes}
\footnote{91 Cal. 296, 27 P. 666 (1891). The defendant, a railroad company, maintained a railroad turntable within a quarter-mile of where several small children resided with their families. The turntable was secured by a latch and slot to keep it from turning, which was customary in the industry, but it was not protected by any inclosure or lock. Children frequently played on the turntable and had been observed by the defendant's employees. The plaintiff, an eight-year-old child, had gotten on the turntable for a ride and, while on it, caught his leg between the table and the rail. The leg had to be amputated. The California Supreme Court reasoned that if such an injury was reasonably to have been anticipated and the defendant did not provide adequate safeguards, the defendant railroad was guilty of negligence. The court acknowledged that young children were incapable of exercising the reasonable care of a more mature individual and that additional precautions were required to protect them from dangerous conditions. Id. at 302-03, 27 P. at 667. The California decision came 18 years after the leading United States Supreme Court case, Sioux City & Pac. R.R. v. Stout, 84 U.S. 657 (1873) (similarly involving children playing on a railroad turntable).}{39. Prosser, supra note 1, at 435.}
\footnote{5 & 6 Eliz. 2, ch. 31 (Eng.).}{40. Gulbis, supra note 32, at 296 n.2.}
\footnote{69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The plaintiff had been invited to defendant's apartment as a social guest. While using the bathroom fixtures, the plaintiff injured his hand on a cracked faucet. The defendant had been aware of the defect and had advised her lessors of the problem a month before the incident. Id. at 110, 443 P.2d at 562, 70 Cal. Rptr. at 98. The California Supreme Court found for the plaintiff, and, although it could have based its decision on the traditional duty of care owed toward a licensee (duty to warn of dangerous condition known by landowner when there is reason to believe that the licensee would not discover the condition by himself), the court went much further and declared that all landowners owed an ordinary duty of care as described by California Civil Code § 1714. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. For the text of § 1714, see infra note 44.}{41. Occupiers' Liability Act. 1957, 5 & 6 Eliz. 2, ch. 31 (Eng.).}
\footnote{252. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.}{42. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). The plaintiff had been invited to defendant's apartment as a social guest. While using the bathroom fixtures, the plaintiff injured his hand on a cracked faucet. The defendant had been aware of the defect and had advised her lessors of the problem a month before the incident. Id. at 110, 443 P.2d at 562, 70 Cal. Rptr. at 98. The California Supreme Court found for the plaintiff, and, although it could have based its decision on the traditional duty of care owed toward a licensee (duty to warn of dangerous condition known by landowner when there is reason to believe that the licensee would not discover the condition by himself), the court went much further and declared that all landowners owed an ordinary duty of care as described by California Civil Code § 1714. Id. at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104. For the text of § 1714, see infra note 44.}
\footnote{Id. at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.}{43. Id. at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.}
\end{footnotes}
The court adopted the general duty of care requirement of Civil Code section 1714 and ordinary negligence principles by stating:

The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others, and, although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative.

Civil Code section 1714, which was originally enacted by the legislature in 1872, provided the basic measure of liability. Exceptions to the ordinary duty of care were not allowed unless they were provided by a statutory provision or clear public policy. Entrant classifications no longer supported public policy.

The decision also affected the Restatement of Torts rule involving trespassing children. This rule described certain situations in which the landowner would owe a greater duty of care to trespassers if they were children. However, once a duty of ordinary care to all entrants was required of property owners, trespassing children no longer required the rule's special, although limited, protection. Rowland v. Christian imposed a duty of care not limited by the requirements of the Restatement rule. A trespasser, regardless of whether a child or an adult, would now be owed the same duty of care as any entrant onto an owner's land. Because entrant classifications were now immaterial in determining liability, it followed that the exceptions to the those classifications were also immaterial. Section 1714 provided a more favorable duty of care to all entrants, and so the limited protection afforded by the Restatement rule for trespassing children was no longer necessary.

Although Rowland v. Christian abolished the traditional entrant classifications of trespasser, licensee, and invitee, the decision had little

44. CAL. CIV. CODE § 1714 (West 1985). Subsection (a) states:
Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.
45. Rowland, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.
46. CAL. CIV. CODE § 1714 (West 1985).
47. Rowland, 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.
48. See supra note 37 for the text of RESTATEMENT § 339.
50. Beard, 4 Cal. App. 3d at 136, 84 Cal. Rptr. at 454.
51. Id.
effect on the recreational use statute. Prior to Rowland, section 846 was said to remove the legal classification of invitee or licensee (and the corresponding duty owed) from anyone permitted to enter an owner’s property for fishing, hunting, camping, or other recreational uses. The duty owed to such entrants was similar to the duty owed to a trespasser prior to Rowland. Even after the traditional classifications were no longer to be used in determining liability, if an entrant was considered a recreational user under the terms of the statute, then a different set of rules for determining liability would apply. The statutory limitations on liability provided by section 846, as an exception to the general duty of care required by section 1714, were not mentioned in Rowland. Additionally, the scope of Rowland did not involve recreational uses, and furthermore, the court did not have the power to invalidate that legislation unless it was in conflict with the California or United States Constitutions. The immunities granted to landowners who opened their land for recreational uses continued to exist.

Rather than narrowing landowner immunities after Rowland, the legislature broadened the scope of immunities granted by enacting a series of amendments to section 846. In 1970, the legislature amended section 846 to include riding among the enumerated activities. In 1971, rock collecting was added and in 1972, riding was expanded to include animal and all types of vehicular riding. In 1976, spelunking was added. In 1978, the wording of the statute was changed so that

[a]n owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose....

A “recreational purpose,” as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

Sport parachuting was added to the list of included activities in 1979.\textsuperscript{59} In 1980, the legislature amended the landowner definition to include “an owner of any estate or any other interest in real property, whether possessory or nonpossessory.”\textsuperscript{60} Finally, hang gliding was added to the list of activities in 1988.\textsuperscript{61} None of the amendments includes a statement of legislative intent, but it is apparent that the 1978 amendment marked a major move away from activities limited to those normally conducted on park land to include such diverse activities as recreational gardening and rock collecting, which have no association with the increasing burden on state and national park land. The legislature may have wanted to avoid artificially limiting the kinds of recreational activities that would trigger immunity on land held open, or it may have had a different intent. Until 1993 the courts continued, however, to assume a legislative intent consistent with the legislative

\textsuperscript{59} Act of June 27, 1979, ch. 150, § 1, 1979 Cal. Stat. 347.

\textsuperscript{60} Act of July 10, 1980, ch. 408, § 1, 1980 Cal. Stat. 797.

\textsuperscript{61} Act of June 1, 1988, ch. 129, § 1, 1988 Cal. Stat. 507. The full text of the current statute is:

\begin{quote}
An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

Nothing in this section creates a duty of care or ground of liability for injury to person or property.

\textsuperscript{CAL. CIV. CODE § 846} (West Supp. 1995).
intent articulated in other states’ statutes and with the suggested state legislation of 1965, that is, to encourage landowners to hold open their property for recreational use without fear of liability for injury due to that use.\textsuperscript{62} However, the new language, absent a statement of legislative intent, opened the door for a wide variety of interpretations that seemed to move away from the presumed original intent of the legislature.

II. JUDICIAL INTERPRETATION OF CALIFORNIA’S RECREATIONAL USE STATUTE

Despite the work of the legislature in broadening the scope of the recreational use statute between 1963 and 1978, little case law appeared prior to 1977.\textsuperscript{63} In fact, although approximately one-third of the states had enacted similar statutes prior to the appearance of the model

\textsuperscript{62} See, e.g., \textit{SUGGESTED STATE LEGISLATION}, supra note 14 (text of statement of purpose). Many states have enacted specific statements of purpose as part of the actual legislation. See, e.g., \textsc{ALA. CODE} \textsection 35-15-20 (1991); \textsc{COLO. REV. STAT. ANN.} \textsection 33-41-101 (West 1990); \textsc{IDAHO CODE} \textsection 36-1604(a) (1994); \textsc{MINN. STAT. ANN.} \textsection 87.01 (West 1995). The Alabama legislature expressed an intent similar to many states, stating:

\begin{quote}
It is hereby declared that there is a need for outdoor recreation areas in this state which are open for public use and enjoyment; that the use and maintenance of these areas will provide beauty and openness for the benefit of the public and also assist in preserving the health, safety, and welfare of the population; that it is in the public interest to encourage owners of land to make such areas available to the public for non-commercial recreational purposes by limiting such owners' liability towards persons entering thereon for such purposes; that such limitation on liability would encourage owners of land to allow non-commercial public recreational use of land which would not otherwise be open to the public, thereby reducing state expenditures needed to provide such areas.
\end{quote}


recreational use statute in 1965, and a majority had laws in place by 1972, little commentary or case law existed prior to 1976. Beginning in 1977, the California courts began to deal with the question of the constitutionality of section 846. However, in later years, the focus shifted to the application of the statute to specific circumstances. As the courts attempted to determine the meaning of such vague terms as “recreational purpose” and “owner,” they consistently drew upon the presumed intent of the legislature in enacting the statute. Rather than apply the statute literally to every situation that could come under the heading of recreation, the courts selectively granted immunity to landowners only when immunity would support the purpose of the statute—to reduce the growing tendency of landowners to withdraw land from recreational access by removing the risk of gratuitous tort liability that a landowner might run unless he could successfully bar any entry to his property for . . . recreational use.

As late as 1990, the California Supreme Court acknowledged this goal when it utilized the presumed statutory purpose of “constrain[ing] the growing tendency of private landowners to bar public access to their land for recreational uses” and “encourag[ing] property owners to allow the general public to engage in recreational activities” to decide that a grazing interest in federal property was a sufficient property interest to warrant the immunity of section 846. In 1993 the interpretation of the statute was

64. SUGGESTED STATE LEGISLATION, supra note 11, at 150.
65. Laing, supra note 62, at 316.
68. Hubbard, 50 Cal. 3d at 193-94, 785 P.2d at 1184-85, 266 Cal. Rptr. at 492-93. The court determined that the legislative intent was to expand statutory immunity, even if the interest holder could not exclude the public. Id. at 197, 785 P.2d at 1187, 266 Cal. Rptr. at 495. Even though the actual owner of the land was a public entity, the interest held by the defendant—a federal grazing permit—was sufficient to invoke the immunity of the statute. Id.
expanded even further to apply to land that had already been withdrawn from public use and was no longer suitable for public recreation. 69

A. Validity of the Recreational Use Statute

The original text of the 1963 recreational use statute declared that when a landowner gave permission to use private property for specific recreational activities, the landowner was not giving the user the legal entrant status of invitee or licensee. 70 In fact, as stated by the California State Bar Journal, the invitee or licensee status (and corresponding duty owed) did not apply to anyone entering the landowner’s property for recreational use. 71 However, in 1968, in Rowland v. Christian, the California Supreme Court abandoned the traditional entrant classifications and declared that a property owner owed a duty of ordinary care to all entrants, regardless of classification. 72 The Rowland decision did not mention the entrant status of a recreational user granted by legislation. In 1977, the First District Court of Appeal addressed the issue of whether the recreational user status and immunization from a requirement of due care remained in effect even after Rowland v. Christian. 73 The facts of English v. Marin Municipal Water District clearly fall within the requirements for immunity under section 846 as it existed at the time. A motorcyclist was riding for recreational purposes on the defendant water district’s land when he was injured falling over a man-made precipice. 74 The plaintiff did not dispute the applicability of the statute to the facts. He did, however, challenge the continued validity of section 846, contending that after Rowland v.

Christian, landowners owed a duty of reasonable care, as described by California Civil Code section 1714, to all entrants regardless of classification. The court determined that any exceptions to section 1714 must be based on legislative enactment or public policy, although a legislative enactment such as section 846 is a statement of public policy. The court stated it did not have the power to invalidate legislation unless it was determined to be unconstitutional. In addition, the court found that amendments to section 846 after the Rowland decision show a legislative policy to broaden the scope of immunity granted by expanding the list of recreational uses so that private land would continue to be available for public recreational use.

Although the English court did not address the issue of constitutionality, this question was raised soon afterward in two appellate court decisions, Lostritto v. Southern Pacific Transportation Co., decided in 1977, and Parish v. Lloyd, decided in 1978. In 1977, when the Lostritto case was decided, the recreational use statute listed specific activities to which the statute applied. A property owner was immunized only against entrants who came onto the property for fishing, hunting, camping, water sports, hiking, spelunking, animal and vehicular riding, rock collecting, and sightseeing. The plaintiff in Lostritto, a sixteen-year-old minor, had entered the defendant's property to dive into the San Lorenzo River from a railroad trestle that was owned by the defendant. He broke his neck and became a quadriplegic when he dove into the water, which was too shallow due to fluctuating currents. The court determined that diving was a water sport, and that the plaintiff's recreational purpose brought the case under section 846 and immunized the property owner from a requirement of due care. The plaintiff did not object to this finding, but instead based his challenge on the constitutionality of the statute. The plaintiff contended that the statute denied equal protection on the basis of underinclusion, because it singled out only certain types of recreation, and therefore limited classes of

75. Id. at 729, 136 Cal. Rptr. at 227. See Cal. Civ. Code § 1714(a) (enacted 1872), supra note 44.
77. Id.
78. Id. at 731, 136 Cal. Rptr. at 228.
80. 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978).
82. Lostritto, 73 Cal. App. 3d at 743, 140 Cal. Rptr. at 907.
83. Id. at 747, 140 Cal. Rptr. at 909-10.
persons who might recover damages.\textsuperscript{84} The plaintiff also made a claim of overinclusion, in that the immunity was granted unnecessarily to property unsuitable for recreation and so did not support the purpose of the legislation.\textsuperscript{85} The basis of the constitutional challenge was that the statute created unreasonable categories that violated equal protection and did not further the goal of limiting the withdrawal of private land from recreational use by the public.\textsuperscript{86}

The court responded to the challenge of underinclusion by stating that the specified activities were "mostly the major ones which would be undertaken by entrants to the property of another."\textsuperscript{87} The court stated that the activities appeared to have been singled out by the legislature because they are the activities in which accidents may be most likely to occur, due to the large number of people who participate in those activities and the large amount of area that is required to conduct such activities.\textsuperscript{88} In addition, the activities listed in the statute are the major ones that would be supported by having private land available to ease the burden on the demand for space in public areas. The simple fact that the statute omitted some lesser sports did not support the plaintiff's underinclusion argument. Accordingly, the court ruled that there was no "offensive discrimination" in the statute because it provided limited protection "for the benefit of landowner and visitor alike."\textsuperscript{89}

In addressing the challenge of overinclusion, the court stated that even though the statute might grant immunity in some cases that did not support the intent to discourage the withdrawal of private land, the statutory classification did have a rational relationship to a legitimate end and so would not be considered unconstitutional.\textsuperscript{90} In addition, the statute was limited to the described activities, and the legislature may have decided that it was unfair to hold the landowner liable when the property was used for those purposes.\textsuperscript{91}

\textsuperscript{84} Id. at 747, 140 Cal. Rptr. at 910.
\textsuperscript{85} Id. at 749, 140 Cal. Rptr. at 911.
\textsuperscript{86} Id. at 747, 140 Cal. Rptr. at 910.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 748, 140 Cal. Rptr. at 910.
\textsuperscript{89} Id. at 748, 140 Cal. Rptr. at 910-11.
\textsuperscript{90} Id. at 749, 140 Cal. Rptr. at 911.
\textsuperscript{91} Id.
A second constitutional challenge soon followed in 1978. In Parish v. Lloyd, the plaintiff claimed that because the statute immunized owners against recreational trespassers but required due care in the case of nonrecreational trespassers, the classifications were arbitrary and denied him equal protection. The court examined whether the classifications had a "rational relationship to a legitimate state purpose" and decided that exempting owners from a due care requirement only for recreational users furthered the goal of encouraging private owners to allow the public to recreate by limiting exposure to tort liability.

**B. Application Based on Legislative Intent: The Suitability Exception**

Following the legislature’s expansion of the recreational use statute in 1978 to include “any recreational purpose,” a series of decisions focused on how to apply this potentially broad immunization to specific cases where an uninvited entrant was injured on the landowner’s property. The recurring theme in the application of the statute was whether immunization supported the intent of the legislature to encourage recreational usage on private land in each instance.

The First District Court of Appeal was the first appellate court to decide whether to apply a broad, literal wording of the statute to a case that might not otherwise come under section 846. A minor slipped and fell while walking her bicycle across a bridge made of planks located on the defendant’s property. The court held that this activity would not be considered either hiking or riding, when the intent of the plaintiff was not recreational in nature. The court stated that the statute “must be

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92. 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978).
93. Id. at 787, 147 Cal. Rptr. at 432.
94. Id. at 788, 147 Cal. Rptr. at 432.
construed in light of the legislative purpose behind it and that "a purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation." This idea would form the basis for a consistent line of decisions applying the statute until the decision in 1993.

After the legislature broadened the wording of section 846 in 1978 to include any recreational purpose, the courts began to focus their attention on whether the property in question should be granted immunity from a due care requirement that would otherwise apply to nonrecreational entrants. The first such question raised regarding the applicability of the statute was decided by the Third District Court of Appeal in *Nelson v. City of Gridley.* When a motorcyclist was injured after striking a cable stretched across a public street, the issue raised was whether the immunity granted by the recreational use statute would apply to publicly owned property. The court based its decision that the statute did not apply to public property on previous decisions regarding the constitutionality of the statute, where the immunity granted was related to the legitimate goal of encouraging landowners to keep property open for recreational purposes. The court determined that immunity for public property would not support the purpose of the legislature—to encourage recreational usage. Granting immunity to recreational users of a public street would not encourage landowners to keep property open for recreational use. In such a situation, there would be no rational basis for the distinction between injuries to recreational users compared to users of the street for other purposes. This decision was approved by the California Supreme Court in *Delta Farms v. Superior Court.*

98. Gerkin, 95 Cal. App. 3d at 1025, 157 Cal. Rptr. at 615.
99. Id. at 1027, 157 Cal. Rptr. at 615.
100. 113 Cal. App. 3d 87, 169 Cal. Rptr. 757 (1980).
101. Id. at 91, 169 Cal. Rptr. at 759.
104. Id.
The Nelson rationale was further supported by the Second District Court of Appeal in a pair of decisions introducing a judicially created exception to the recreational use statute. In 1982, the appellate court decided that some types of property were not suitable for recreational purposes. In *Paige v. North Oaks Partners*, a ten-year-old boy was riding his bicycle over an open trench while playing a game with some friends at a construction site. The boy was injured when he fell into the trench. The court would not allow immunity for the construction site owners even though the nature of the activity was recreational and would come under the statute if interpreted literally. The court looked to the purpose of the recreational use statute in deciding that “the Legislature could not have intended to encourage owners and building contractors to allow children to play on their temporary construction projects.”

This exception to the immunity granted by the recreational use statute was solidified in *Potts v. Halsted Financial Corp.*, which involved a similar injury to a minor at a construction site. The court recognized that granting immunity in a situation where the property was unsuitable for recreation and had, in fact, already been withdrawn from recreational use by the public, would not support the legislature’s purpose of encouraging recreational access.

This suitability exception was utilized by the appellate courts for ten years in an attempt to avoid results that presumably could not have been intended by the legislature in enacting the statute. An owner of electrical lines was granted immunity when a minor was injured by a hanging guy wire even though the lines would not be considered suitable for recreation. The court’s theory was that the statute still applied because the property underneath the electrical wires was undeveloped and open to anyone for such recreational purposes as riding and hiking. The court believed this to be true even though the defendant electrical company did not own the property—it only had permission to use the land. Immunity for this nonpossessory interest would be granted under the 1980 amendment to the statute and would support the legislative purpose of keeping private property open for recreation. The

107. Id. at 862, 184 Cal. Rptr. at 868.
108. Id. at 863, 184 Cal. Rptr. at 869.
110. Id. at 730, 191 Cal. Rptr. at 162.
112. Id.
court wished to avoid a situation where the owner who grants the easement is protected by section 846 while the owner of a structure or facility on the property is not protected.\(^{114}\)

In a case similar to the *Paige* and *Potts* decisions involving minors trespassing on construction sites, the appellate court refused to grant immunity to the owner of land that had been graded for future development when a minor was injured while bicycle riding.\(^{115}\) Although the property had previously been undeveloped pasture land, the defendant’s action of grading withdrew the land from recreational use. The court recognized that when a developer begins work on land in preparation for construction, the developer is using his private property for his own purpose. Application of section 846, with its intent to keep private property open for recreational use, would interfere with the developer’s use of his land.\(^{116}\) The court noted that “section 846 may not be construed without considering the intent of the Legislature in enacting it”\(^{117}\) and that a “purely literal interpretation of any part of a statute will not prevail over the purpose of the legislation.”\(^{118}\) The Third

\(^{114}\) Colvin, 194 Cal. App. 3d at 1314, 240 Cal. Rptr. at 147.


\(^{116}\) Id. at 1066, 243 Cal. Rptr. at 315-16; see also Wineinger v. Bear Brand Ranch, 204 Cal. App. 3d 1003, 251 Cal. Rptr. 681 (1988). The incident in *Wineinger* took place in a residential housing tract that the defendant was developing. The streets in the development were in the process of being graded and paved. One night, the plaintiff and two friends drove on one of the streets in the development that had been paved, but was still unlighted. *Id.* at 1006, 251 Cal. Rptr. at 682. The plaintiff was injured when the vehicle drove over the edge of a 30-foot ravine where the road ended. *Id.* The court determined that § 846 did not apply because the property had been withdrawn from recreational use by the public, and, in fact, that “[t]here is no recreational use by the public during such development would interfere with that developer’s purpose and use of its private property and is consequently not encouraged.” *Id.* at 1009, 251 Cal. Rptr. at 684-85. But see Smith v. Scrap Disposal Corp., 96 Cal. App. 3d 525, 158 Cal. Rptr. 134 (1979). In *Smith*, immunity under § 846 was available to the defendant based on the right to bar ingress. The adult plaintiff had entered Scrap’s property allegedly to ride on a bulldozer. Without discussion of the owner’s intentions for the property (whether it was held open for or suitable for recreational use), the court held that whether the statute would apply would be based on the plaintiff’s intent in entering the property. *Id.* at 529, 158 Cal. Rptr. at 137.

\(^{117}\) Domingue, 197 Cal. App. 3d at 1067, 243 Cal. Rptr. at 316.

\(^{118}\) Id. at 1066, 243 Cal. Rptr. at 315 (quoting Gerkin v. Santa Clara Valley Water Dist., 95 Cal. App. 3d 1022, 1027, 157 Cal. Rptr. 612, 615 (1979), disapproved on other grounds by Delta Farms Reclamation Dist. No. 2028 v. Superior Court, 33 Cal. 3d 699, 707, 660 P.2d 1168, 1173, 190 Cal. Rptr. 494, 499 (1983)). See also infra notes 121-22 and accompanying text.
District Court of Appeal also raised the issue of withdrawal when it determined that an undeveloped urban lot could be considered suitable for recreation when the owner had done nothing to withdraw the land from public recreational use.\textsuperscript{119} Immunity would be granted to the owner when children climbing trees on the lot were injured.\textsuperscript{120}

The appellate courts have used many accepted doctrines of judicial interpretation in deciding recreational use cases. The statute began with a list of specific activities in which immunity would be granted to the landowner. Although the statute contained no explicit legislative purpose, application was not difficult when the list of possible recreational uses was so exclusive. The legislature further clarified its purpose by broadening the statute, at first through additional covered activities and finally by including any recreational use, as defined by (but not limited to) a list of recreational activities.\textsuperscript{121} Primarily, the appellate courts relied on legislative intent over a literal interpretation.\textsuperscript{122} The courts have also been aided by the examples of recreational uses provided by the statute. If the legislature had meant to immunize all owners from every recreational use of their property regardless of the type of property or the kind of recreation, a list of activities would be unnecessary. "[A] construction which implies that words used by the legislature were superfluous is to be avoided wherever possible."\textsuperscript{123} Even after section 846 was broadened to include "any

\textsuperscript{120} Id. at 371, 267 Cal. Rptr. at 62.
\textsuperscript{121} Act of Apr. 6, 1978, ch. 86, § 1, 1978 Cal. Stat. 221. Prior to 1978, the courts were faced with situations that involved the activities specified in the statute, but were not recreational. An appellate court considered, but rejected, a literal interpretation of the statute when it noted that, read literally, the statute would immunize any property owner from liability for the condition of his road when a person drove his car onto the property. Gerkin v. Santa Clara Valley Water Dist., 95 Cal. App. 3d 1022, 1027, 157 Cal. Rptr. 612, 616 (1979), disapproved on other grounds by Delta Farms Reclamation Dist. No. 2028 v. Superior Court, 33 Cal. 3d 699, 707, 660 P.2d 1168, 1173, 190 Cal. Rptr. 494, 499 (1983). The court decided that the legislature's intent controlled, meaning only to apply to recreational vehicle activity. Id.
\textsuperscript{123} Gerkin, 95 Cal. App. 3d at 1027, 157 Cal. Rptr. at 615.
recreational purpose,” the legislature continued to add to the list of examples following those words. Because the added list must be interpreted to provide meaning to the term “recreational purpose,” recreational purpose must include activities similar to those enumerated in the statute. Finally, the suitability exception was first applied by the courts with the Paige v. North Oaks Partners decision in 1982. For the next ten years, the courts continued to apply this exception to limit the immunity provided by section 846. During this period, the legislature amended the statute to include hang gliding in the list of enumerated activities. It could reasonably be presumed that the legislature, in discussing expansion of immunity, would have taken action on a judicial interpretation limiting the immunity if it had disagreed. In contrast, in 1980, the legislature took action after just two 1979 decisions denied immunity to holders of nonpossessory interests in land. The statute was amended to include any interest in land, “whether possessory or nonpossessory.”

In 1993, the California Supreme Court ended the judicial limitation placed on the recreational use statute by the suitability exception.
Ornelas v. Randolph\textsuperscript{131} involved an eight-year-old child who trespassed on property owned by a neighbor. Part of the property was made up of an open area where old farm equipment, machinery, and irrigation pipes were stored. Six children entered that area to climb and play on the equipment, from which a metal pipe broke off and struck the plaintiff.\textsuperscript{132} The court found that the children's purpose in entering the land was to play, and so their activity fell within the statute, based on its phrase "any recreational purpose." The court acknowledged the principle of \textit{ejusdem generis}, however, it could find no characteristic shared by the listed activities that would limit the meaning of "recreational purpose."\textsuperscript{133} The first conclusion of the supreme court was that "entering and using defendant's property to play on his farm equipment invokes the immunity provisions of section 846" and that "clambering about on farm equipment is no different in kind from scaling a cliff or climbing a tree."\textsuperscript{134} As the court stated, the child was taking "advantage of the recreational opportunities offered by the property."\textsuperscript{135}

The court then turned to analyze the history of the recreational use statute, especially the prior judicial recognition of the suitability exception. Section 846 contains only two statutory requirements: (1) an injury must result from the use of private property for a recreational purpose and (2) that injury must occur on land in which the owner has a possessory or nonpossessory interest. The suitability exception was developed by the courts to encourage owners to allow the public to use their land for recreational purposes. If the property was not suitable for recreation, then the goal in allowing immunity would not be served. The Ornelas court declined to recognize this interpretation, noting that the plain language of the statute provides no exceptions.\textsuperscript{136} The court held that a literal interpretation of the statute to include \textit{any} private property would not lead to the absurd results described by some of the appellate court decisions. Because the statute was determined to be clear and unambiguous, the court refused to allow a construction of the statute that included a nonstatutory element.\textsuperscript{137} Further, the court decided that the intent of the legislature could reasonably have been to provide immunity to any property owner when a trespasser is injured on that

\begin{itemize}
  \item \textsuperscript{131} 4 Cal. 4th 1095, 1098, 847 P.2d 560, 561, 17 Cal. Rptr. 2d 594, 595 (1993) (en banc).
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id. at 1101, 847 P.2d at 563, 17 Cal. Rptr. 2d at 597. \textit{See generally supra} note 124 and accompanying text.
  \item \textsuperscript{134} Ornelas, 4 Cal. 4th at 1101, 847 P.2d at 564, 17 Cal. Rptr. 2d at 598.
  \item \textsuperscript{135} Id. at 1102, 847 P.2d at 564, 17 Cal. Rptr. 2d at 598.
  \item \textsuperscript{136} Id. at 1105, 847 P.2d at 566, 17 Cal. Rptr. 2d at 600.
  \item \textsuperscript{137} Id. at 1105-06 n.8, 847 P.2d at 567 n.8, 17 Cal. Rptr. 2d at 601 n.8.
\end{itemize}
property (so long as the trespasser is "recreating"). The determination of whether property was suitable for recreation was to be placed on the user when the property was entered, and any potential injury would be at the user’s risk.

In discussing the suitability exception, the court found that all prior applications of the exception involved construction sites, most with injuries to minors. The *Ornelas* case appeared, however, to be the first time the appellate courts had extended the exception beyond such property. The supreme court majority noted that the land in this case was not developed, was indisputably agricultural, and questioned whether criteria for determining suitability could be found that would allow consistent and certain application of the statute. In addition, a suitability exception would have the anomalous effect of denying immunity to owners who had attempted to restrict trespassing. The court determined that the statute "applies to lands that are fenced as readily as those that are open." For these reasons, suitability for recreation as a criterion for immunity was rejected. Justice George, in a concurring opinion, agreed with the majority opinion due to the language of section 846. He acknowledged the dissent's argument that a child injured while trespassing on private property to play would be treated more severely than an adult trespassing on the same property for illegal purposes, but determined the same disparity would exist whether the property were suitable for recreation or not. Justice George concurred although the result was "unfortunate," because he believed only the legislature could rewrite the statute.

138. Id. at 1105, 847 P.2d at 567, 17 Cal. Rptr. 2d at 601.
139. Id. at 1106, 847 P.2d at 567, 17 Cal. Rptr. 2d at 601.
140. Id. at 1107, 847 P.2d at 567-68, 17 Cal. Rptr. 2d at 601.
141. Id. at 1107, 847 P.2d at 568, 17 Cal. Rptr. 2d at 602.
142. Id. at 1109, 847 P.2d at 569-70, 17 Cal. Rptr. 2d at 603 (George, J., concurring). Justice George also dissented from the appellate court decision in *Domingue v. Presley of S. Cal.*, stating that the mere grading of part of 10 acres of property did not make the land unsuitable for recreation. *Domingue v. Presley of S. Cal.*, 197 Cal. App. 3d 1060, 1079, 243 Cal. Rptr. 312, 324 (1988) (George, J., dissenting). Although his major argument appeared to be that the land was suitable for recreation, he also stated that application of the suitability exception to the facts of the case was not supported by the language of the statute or by precedent and was best left to legislative amendment. *Id.*
143. *Ornelas*, 4 Cal. 4th at 1110, 847 P.2d at 570, 17 Cal. Rptr. 2d at 604.
The three dissenting justices believed that the legislature had acquiesced to the suitability exception over a ten-year period that included legislative amendments to section 846. The immunity allowed by the recreational use statute, an exception to the ordinary duty of care owed to all entrants, is granted only after the trade-off of a gain in open, recreational areas. Without the suitability exception, immunity is granted in certain categories of accidents without supporting the legitimate state purpose of encouraging increased recreational areas. Justice Panelli noted that "[t]he majority's interpretation of section 846 permits the exception created by that section to swallow the general duty of care in practically all nonbusiness contexts." The Ornelas decision therefore appears to resurrect the traditional common-law categories of entrants and their corresponding no-duty rules abolished by the same court in Rowland v. Christian in 1968.

III. THE CURRENT STATUS OF TRESPASSING CHILDREN IN CALIFORNIA

When California's recreational use statute was first enacted, the traditional common-law entrant classifications of invitee, licensee, and trespasser determined the duty of care required by any landowner. Section 846 was geared toward these classifications, stating that granting permission to use a property for recreational purposes did not convey "the legal status of an invitee or licensee to whom a duty of care is owed." An exception to the no-duty rule for trespassers had, however, been accepted by the California Supreme Court since 1891 and had long been a part of the standard of care that landowners owed trespassers in California. Although the earlier cases strictly held the

144. Justices Panelli, Mosk, and Kennard.
145. Ornelas, 4 Cal. 4th at 1111, 847 P.2d at 570-71, 17 Cal. Rptr. 2d at 604-05 (Panelli, J., dissenting); see also text accompanying notes 126-30.
146. Ornelas, 4 Cal. 4th at 1112, 847 P.2d at 571, 17 Cal. Rptr. 2d at 605.
147. Id.
149. See WITKIN, supra note 21, § 912.
151. See supra note 21.
liability requirements of the attractive nuisance doctrine to its elements, the California Supreme Court began expanding application of the rule around the same time as the recreational use statute was enacted. In 1957, the California Supreme Court decided *Knight v. Kaiser Co.*,153 in which a sandpile was ruled not to constitute an attractive nuisance due to its common occurrence. Interestingly, in a dissenting opinion, Justice Traynor foreshadowed the change in entrant liability rules that would follow in the 1968 decision of *Rowland v. Christian*. Traynor disagreed that the sandpile, as a matter of law, did not constitute an attractive nuisance.154 He based his dissent on the facts of the case, stating that not all children would have been aware of the dangers presented by an industrial sandpile. He felt that each case should be decided on its specific circumstances, rather than creating a blanket “sandpile rule.”155 All of the other requirements for application of the attractive nuisance doctrine were present—children were accustomed to playing on the sandpile, the defendant knew or should have known of their presence, the children were unable to realize the risk due to their age, reasonable protections were not taken, and the protections were not so burdensome as to interfere with the use of the site. Traynor objected to the majority’s reliance on the categorizations of hazards as nuisances or common conditions in determining the required standard of care toward children. In quoting the Illinois Supreme Court, he stated that “‘[t]he naming or labeling of a certain set of facts as being an ‘attractive nuisance’ case or a ‘turntable’ case has often led to undesirable conclusions. . . . [T]he only proper basis for decision in such cases dealing with personal injuries to children are the customary rules of ordinary negligence cases.’”156

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153. 48 Cal. 2d 778, 312 P.2d 1089 (1957). In Knight, the defendant owned and maintained a large unenclosed industrial sandpile on which children were in the habit of playing. The court found that all the requirements for application of the attractive nuisance doctrine were met, however, an exception was made for common conditions whose danger was obvious even to children. *Id.* at 784, 312 P.2d at 1093.

154. *Id.* at 789, 312 P.2d at 1096 (Traynor, J., dissenting).

155. *Id.*

156. *Id.* at 792, 312 P.2d at 1098 (quoting *Kahn v. James Burton Co.*, 126 N.E.2d 836, 841 (Ill. 1955)). Traynor also recognized the possibility of extending Civil Code § 1714 to all trespasser cases; however, he stated the “dilemma of choosing between...”
The courts appeared to follow Traynor’s reasoning, expanding the protection available to trespassing children in the following years. In 1959, the California Supreme Court was faced with another case decided by the lower court for the plaintiff based on section 339 of the Restatement of Torts. Although the supreme court reversed the lower court’s decision, it stated that “liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories.” 157 Also in 1959, the California Supreme Court decided King v. Lennen, 158 in which the court repeated that each case must be decided on its own facts, expressly disapproving Knight v. Kaiser and other cases that had effectively established no-duty rules for children trespassing in certain circumstances. 159 As the First District Court of Appeal noted in 1960, the requirements of the attractive nuisance doctrine were being interpreted broadly in considering whether specific facts regarding trespassing children stated a cause of action. The decision would be up to the jury to decide liability based on whether the requirements were met. 160

During this period of expanding protection for children, the legislature enacted the recreational use statute. Although the statute did not specifically provide an exception for children using private land for recreation, the legislature may have decided that an exception in the nature of the attractive nuisance doctrine was not necessary, due to the limited activities to which the statute applied. In addition, because the entrant was labeled a trespasser (and the landowner thus had no duty of care), it is possible that the attractive nuisance doctrine would have

157. Garcia v. Soogian, 52 Cal. 2d 107, 110, 338 P.2d 433, 435 (1959). The plaintiff was injured while playing on defendant’s stacked, prefabricated panels containing windows. While holding that the 12-year-old plaintiff should have been aware of the danger, the court also stated that the commonness of a condition had no significance apart from the obviousness of the risk. Id. at 111, 338 P.2d at 435.


provided an exception that required a higher standard of care to children if the property contained a hazardous condition.

An indication that providing protection to children was very much a concern of the legislature is seen in the California Tort Claims Act,161 which was enacted in the same year as the recreational use statute. The Tort Claims Act addresses liability of public entities who open their property to recreational users. Section 831.2 of the California Government Code provides blanket immunity for injuries caused by natural conditions of unimproved public property,162 and section 831.4 provides immunity when certain unpaved public roads are used to provide access to "fishing, hunting, camping, hiking, riding . . . , water sports, recreational or scenic areas."163 However, section 831.8, which discusses liability for injuries caused by the condition of a reservoir, provides an exception for children under age twelve. Section 831.8(d) states:

Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if:

(1) The person injured was less than 12 years of age;
(2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used;
(3) The person injured, because of his immaturity, did not discover the condition or did not appreciate its dangerous character; and
(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.164

The comparison to the Restatement of Torts rule for trespassing children is clear.165 However, due to the fact that the property affected by the Tort Claims Act is public, entrant classifications such as trespasser (and the accompanying trespassing child exception) would not apply. A separate section would be required to provide a higher duty of care toward children, and that is exactly what the legislature enacted. In discussing section 831.8(d), the legislature noted the comparison to the

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161. CAL. GOV'T CODE § 831 (West 1980).
162. CAL. GOV'T CODE § 831.2 (West 1980).
163. CAL. GOV'T CODE § 831.4 (West 1980).
164. CAL. GOV'T CODE § 831.8(d) (West 1980).
165. See RESTATEMENT, supra note 37, for requirements of the attractive nuisance doctrine.
attractive nuisance doctrine, stating that "[p]rivate landowners are subject to liability under the same circumstances without regard to age of the injured child under the so-called ‘attractive nuisance’ doctrine."[166] It is apparent that the legislature felt the doctrine would provide sufficient protection for trespassing children in dangerous circumstances, even if the use was recreational.

In a comparison of section 846 and the Tort Claims Act, the California Supreme Court noted these differences when they decided that section 846 applied only to private property.[167] The court compared the history of both statutes and noted that they were enacted two days apart, were considered concurrently by the same committees, and contained similar language and purpose.[168] Additionally, subsequent amendments to both sections were passed as a single bill, and both sections have similar revisions regarding recreational use.[169] The court in Delta Farms compared the two statutes in order to support a holding that section 846 applied only to private lands because the Tort Claims Act was directed solely toward publicly owned lands.[170] The comparison was made to show that the legislature was aware of the differences in the provisions of each statute and would not have intended the requirements of one to overlap and even contradict the other.[171] However, this argument also supports the presumption that the legislature had in

166. CAL. GOV’T CODE § 831.8 cmt. (West 1980).
167. Delta Farms Reclamation Dist. No. 2028 v. Superior Court, 33 Cal. 3d 699, 709, 660 P.2d 1168, 1175, 190 Cal. Rptr. 494, 501 (1983). Two 15-year-old girls drowned in the defendant’s canal. The relatives of the victims claimed that the canal was a dangerous condition in that it dropped unexpectedly to a depth of 60 feet five feet from shore. They also claimed that the defendant was negligent in knowing of the condition, knowing that visitors frequented the area, and failing to provide proper protection. The defendant claimed immunity under both §§ 831.8 and 846. Id. at 702-04, 660 P.2d at 1169-70, 190 Cal. Rptr. at 495-96. The court declined to find immunity under either section. Id. at 704, 710, 660 P.2d at 1170, 1175, 190 Cal. Rptr. at 496, 501.
168. Id. at 705, 660 P.2d at 1171-72, 190 Cal. Rptr. at 497-98.
170. Delta Farms, 33 Cal. 3d at 710, 660 P.2d at 1175, 190 Cal. Rptr. at 501.
171. Id. The immunity provided by §§ 831.2 and 831.4 are similar to the recreational use statute in providing immunity for the natural condition of unimproved public property and unpaved roads and trails that provide access to certain recreational activities. However, § 831.4 provides a more limited immunity if the road leading to the recreational area is paved or is an unpaved city street. Section 831.8 immunizes public entities from the dangerous conditions of reservoirs when used for purposes for which they were not intended. However, § 831.8 also includes certain exceptions. The immunity is negated if the user is injured by a trap known to the owner, if the entrant is not guilty of criminal trespass. CAL. GOV’T CODE § 831.8(c) (West 1980). Immunity is also not applicable when the plaintiff is less than 12 years old, and requirements similar to the attractive nuisance doctrine are met. See CAL. GOV’T CODE § 831.8(d) (West 1980).
mind the desire to protect young children who cannot be expected to watch out for themselves (as shown by the inclusion of an exception for trespassing children in the Tort Claims Act) and was equally aware that additional language in the recreational use statute was not required.

The requirements for protection of young children (as well as all entrants) was further expanded with the California Supreme Court’s decision in *Rowland v. Christian*.\(^{172}\) The removal of the traditional entrant classifications defining duties of care also necessarily removed the exceptions to those duties of care. The recreational use statute, however, remained an exception to the general duty of care required, still reducing the level of care toward a recreational entrant to what was previously the level of care required toward a trespasser. The anomaly created is that by removing an exception to limited duties of care (trespassing children) because there were no longer such limited duties of care, a potential exception to the recreational use statute’s limited duty of care was also removed. This may not have been as important in 1968 when *Rowland* was decided, due to the limited applicability of the recreational use statute, but with the California Supreme Court’s recent holding in *Ornelas* and the expanded application of the recreational use statute, this omission becomes critical.

The *Ornelas* decision grants immunity to private landowners whenever an entrant has entered the property for any recreational purpose. Despite the decision’s opening words focusing on the state’s scenic treasures of shoreline, mountains, lakes, and deserts that contribute to the desire of the public to recreate and the demand for areas in which to do so, and despite the recognized intent of the legislature to encourage property owners to keep their land open to the public to help meet that demand, the court has extended immunity to any recreational purpose and to any private land. The court’s determination that the user determines, by his mere use, what land is suitable for recreation and therefore relieves the owner of liability for injury from that use, may in fact be in line with other recent trends showing a desire to relieve landowners of a duty of care toward trespassers.\(^{173}\) The court’s rationale could be justified

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172. See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); see also *supra* notes 42-47 and accompanying text.

when the user is able to make a determination of the risks involved in the use of a particular property, as is the case with adults. However, it ignores a long line of cases supporting the policy that children, who are unable to make realistic decisions, deserve special consideration. The injured plaintiff in the Ornelas decision was eight years old. The trial court granted summary judgment for the defendant based on the recreational use statute, and the court of appeal reversed, but the state supreme court reversed the appellate court's decision. The supreme court appears to have decided, as a matter of law, that an eight-year-old child is responsible for the determination as to whether a place that appears to the child to be a good place to play (including a place housing old, stored, farm machinery) is actually suitable for play.

Authorities acknowledge the purpose behind the implementation of the attractive nuisance doctrine as a desire to provide additional protection to children who were unable to protect themselves. As far back as 1891, the California Supreme Court recognized that children were less able to provide for their own protection. In considering section 339 of the Restatement of Torts, the court stated that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased.

Even in determining an ordinary duty of care, aside from any exceptions to the limited duty rules, it has been widely recognized that the duty of care is higher in a situation involving potential danger to children, due

4th 421, 20 Cal. Rptr. 2d 97 (1993); see also supra notes 185-90 and accompanying text; Irwin E. Sandler, Premises Liability in California; The Courts are Increasingly Protective of the Rights of Landowners, LOS ANGELES LAW., Jan. 1993, at 38 (discussing current trends in a variety of premises situations); David M. Ring, Premises Immunity? Courts Erect Daunting Barriers to Negligence Suits by Victims of Crime, LOS ANGELES DAILY J., Jan. 10, 1994, at 6 (discussing the state of business premises liability after the Ann M. and Nola M. decisions).

174. See supra discussion accompanying notes 149-60.


176. KEETON ET AL., supra note 22, § 59, at 399; Prosser, supra note 1, at 429.


178. Id. at 302-03, 27 P. at 667; see also Copfer v. Golden, 135 Cal. App. 2d 623, 627, 288 P.2d 90, 93 (1955) ("Children of tender years have no foresight and scarcely any apprehensiveness of danger . . . ."); Huggans v. Southern Pac. Co., 92 Cal. App. 2d 599, 611, 207 P.2d 864, 871 (1949) ("[T]he plaintiff was obviously a child and . . . the quantum of care to be exercised toward children, from whom is to be expected the natural heedlessness of youth, is always greater than that required to be exercised toward adult persons.").
to their inability to understand risk.\textsuperscript{179} Even after \textit{Rowland v. Christian} raised the duty of care required toward all entrants, the courts recognized that a landowner owed a duty of care even higher than the \textit{Rowland} standard when dealing with dangers to children.\textsuperscript{180}

It would appear that after the California Supreme Court decided \textit{Rowland v. Christian} the policy of protecting the state's children was advanced to a new level: the specific limitations on liability under the attractive nuisance doctrine were removed, while it continued to be recognized that children, who are unable to take care for themselves in all situations, deserve an extra duty of care from individuals responsible for the situation. However, the \textit{Ornelas} decision has effectively reduced the duty of care required toward children on private land to a level below that which was required by the attractive nuisance doctrine. The \textit{Ornelas} decision purports to apply only when an individual, who is not expressly invited, enters private land for recreational purposes. The

\textsuperscript{179} See \textit{57A AM. JUR. 2D Negligence} § 205 (1989); \textit{1 COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, CALIFORNIA JURY INSTRUCTIONS, CIVIL 66} (Charles A. Loring ed., 7th ed. 1986). In California, the jury instruction for the standard of care required toward children is as follows:

\begin{quote}
Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result.
\end{quote}


\textsuperscript{180} E.g., \textit{McDaniel v. Sunset Manor Co.}, 220 Cal. App. 3d 1, 7, 269 Cal. Rptr. 196, 199 (1990). In \textit{McDaniel}, a two-year-old child slipped through a gap in the fence at the housing project where she lived. She then slipped into a creek that bordered the fence and suffered brain damage and quadriplegia. \textit{Id.} at 4, 269 Cal. Rptr. at 197. The project owners were found negligent in failing to maintain the fence when it was foreseeable that injuries to children could occur due to gaps in the fence. \textit{Id.} at 10, 269 Cal. Rptr. at 201. In discussing the landowner's duty of care toward children, the court stated: "A landowner similarly shares that duty to 'protect the young and heedless from themselves and guard them against perils that reasonably could have been foreseen.'" \textit{Id.} at 7, 269 Cal. Rptr. at 199 (quoting \textit{Copfer v. Golden}, 135 Cal. App. 2d 623, 629, 288 P.2d 90, 93-94 (1955)).
court’s broad interpretation of recreation appears, however, to encompass any activity that might be considered play by a child. The situations in which a landowner would owe an ordinary duty of care to a child entering private property to play are limited to:

- (a) willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or
- (b) for injury suffered in any case where permission to enter for the above purpose was granted for consideration . . . ; or
- (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. 181

It currently appears that if a child suggests to a friend that they go and play in the friend’s back yard, the parents of the friend would be immune from liability for any injury to the child due to the condition of the back yard. A duty of care would not be owed to this child regardless of how foreseeable it was that the children would play there, and regardless of how dangerous it might be in the back yard, because the child was not “expressly invited.” Even in cases where a child is expressly invited, the child should not be expected to know that the property can be assumed to be safe only in those specific instances when the child is expressly invited. For example, if a child is expressly invited to play in a neighbor’s back yard on a swing set, the neighbor owes a duty of due care to assure that the premises are safe. One could imagine, however, a situation in which the swing set breaks, but the neighbor leaves it in a hazardous condition while he goes away on vacation. The child, unaware of the condition of the swing set, enters the neighbor’s property during that time and is severely injured when the swing set collapses on top of him or her. Was the child expressly invited onto the property that particular time? If so, the landowner would have been under a duty to keep the premises safe. If not, the landowner would have no duty. It seems a bit much to expect a young child to be able to know the difference.

The extension of the statute beyond the suitability requirement to any private property means that any time a child wanders onto private property to play, the owner of that property is absolved of any negligence regarding the condition and safety of his land. This seems to create a special class of individuals to whom no duty of care is required in the maintenance of one’s property—the trespassing child. Although adults may enter another’s property for a variety of reasons, including travel shortcuts, curiosity, recreation, and even illegal activities, the landowner would be immunized from liability for the condition of the property only for recreation. Adults who use another’s property for

181. CAL. CIV. CODE § 846 (West 1982).
recreational purposes usually have planned intentions and may be expected to be aware of and accountable for any risks they may encounter. In contrast, it would be very easy to extend the landowner’s immunity to many situations involving child trespassers other than preplanned recreational uses, knowing the propensity of children to stop and play. A child’s business is play and is likely to occur during any other activity. The courts have recognized that children have a propensity to intermeddle and that a trespassing child’s “activities usually are recreational.”182

The court’s decision in Ornelas may reflect a general dissatisfaction with the duty of care required by a landowner toward a trespasser that was established after Rowland. As noted by Prosser and Keeton, the movement toward abolition of entrant classifications lost momentum in the 1970s and in 1979 “came to a screeching halt.”183 They noted as a possible explanation that it “appears that the courts are gaining a renewed appreciation for the considerations behind the traditional duty limitations toward trespassing adults.”184 Similar trends also appear in a number of recent California decisions involving duty of care. Although Becker v. IRM Corp.185 established strict liability for the landlords of defective premises, the courts of appeal declined to extend this holding in Muro v. Superior Court186 and Hahn v. Superior Court,187 both determining that such strict liability did not apply to


183. KEETON, supra note 22, § 62, at 433.
184. Id. at 434.
185. 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985). In Becker v. IRM Corp., the plaintiff asserted causes of action for both negligence and strict liability when he slipped and fell against a glass shower door in an apartment he had leased from the defendant. Id. at 457, 698 P.2d at 117, 213 Cal. Rptr. at 214. The court compared the activity of the landlord to that of a lessor of products (to whom strict liability would apply), holding that the landlord was strictly liable for injuries resulting from a latent defect that existed when the apartment was initially leased to the tenant. Id. at 465, 698 P.2d at 122, 213 Cal. Rptr. at 219.
187. 1 Cal. App. 4th 1448, 3 Cal. Rptr. 2d 502 (1992). In Hahn, the plaintiff was injured by a tree that fell while he ate lunch in an outdoor courtyard of a commercial
commercial premises. In addition, in *Ann M. v. Pacific Plaza Shopping Mall*, the court overturned a prior ruling which held that foreseeability in determining negligence could be determined without showing prior incidents. Now, a finding of negligence by a landowner in failing to provide proper security precautions can only be shown by a high degree of foreseeability, which can rarely be proven in absence of prior similar incidents on the landowner’s premises. It seems clear that the trend of the California Supreme Court is to limit a landowner’s liability. Placing the burden of responsibility for any injury on the user must, however, be accompanied by the user’s ability to accept responsibility for that injury. This ability is lacking in children who have yet to develop knowledge and experience of risks that may accompany their desire to play.

**IV. RECOMMENDATIONS**

Ideally, a clarification of the intent of the legislature in the current application of the recreational use statute is needed. The amendments to the statute over the years have allowed the courts to go beyond the original intent to encourage landowners to keep their private property open for recreational use by the public. In looking at the current application of the statute it appears that the policy has shifted to a desire to immunize landowners in all instances where their property is used for...
recreation. The legislature should look carefully at the ramifications of this policy as it applies to the possible negligent maintenance of dangerous situations. It appears that construction site owners are no longer required to keep their sites safe from children who enter to play and that private property owners may keep hazardous conditions on their property, as long as it is only playing children who are exposed to the danger.

Statutory exceptions for children are already part of the Tort Claims Act. The legislature specifically included an exception for immunity under section 831.8 of that Act. This part of the Tort Claims Act applies to reservoirs, which are the only public property addressed in the Act likely to contain dangers to children that could reasonably be controlled and limited by human intervention. The statute does not limit governmental liability in this case if the person injured is under twelve years of age. The other sections, which deal with unimproved public property and unpaved public roads, are far less likely to contain dangerous conditions that are as easily controlled or limited. The legislature obviously felt it important to protect young children when it was possible to do so.

Similar protections could be adopted for children trespassing on private land where dangerous conditions exist. A specific statutory exception was not necessary when the recreational use statute was adopted. Both the limited activities included under the statute and the existence of protection for trespassing children under the attractive nuisance doctrine provided adequate protection for children. However, this is no longer the case. Due to the way the law has developed, a specific exception for young children is necessary, just as it was necessary in the Tort Claims Act. The legislature should add a section to the recreational use statute along the lines of section 831.8(d) of the Tort Claims Act. This would replace the protection originally provided by the attractive nuisance doctrine and bring the duty of care owed to children in line with that of the Tort Claims Act. Children who are unable to reasonably make the determination that a property is suitable for play need to be protected by those who are in control of the property and reasonably able to provide safety, when that owner is aware that children may be there.

Alternatively, the courts could incorporate a higher duty of care requirement into their interpretations of the recreational use statute when children are involved. Even though the statute takes away the duty of
care required of landowners toward recreational users and makes no explicit exception for children, the broad application of the rule that a higher duty of care is required toward children could provide an exception to the no-duty requirement toward adult trespassers.

V. CONCLUSION

This Comment has traced the application of two distinct policies in California. The policy to provide increased space for recreation to combat the ever-increasing pressure on public land led to the legislative enactment of California's recreational use statute. The separate policy to provide protection to children too young to assume responsibility for their actions led the courts to adopt the attractive nuisance doctrine. Due to the limited application of the recreational use statute, the two were able to coexist over a period of time. However, the broadening of the application of the recreational use statute, as it currently applies any time a child trespasses on private property to play, puts the policy of encouraging open spaces in direct conflict with the policy of protecting children. In fact, it appears that a new category of individuals toward whom almost no duty is owed has been created in the trespassing child. The supreme court does not appear to have taken into consideration the desire of society to protect young children in its Ornelas decision; however, the precedent has now been established so that landowners may no longer be encouraged to maintain safe conditions in areas where children may be expected to play. A step by the legislature to clarify its intent in the application of the recreational use statute or the addition of an exception in favor of young children should be taken to support the duty of society to care for its children.

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