

# Tort Liability of Agricultural Landowners to Recreational Entrants: A Critical Analysis

*This article examines a landowner's liability to recreational entrants, applying the reasonable person standard mandated by the California Supreme Court's decision in Rowland v. Christian. It criticizes a statutory exception to this standard and concludes that the legislative grant of immunity from suit for landowner negligence is both unfair and unnecessary.*

Agricultural landowners are responsible for maintaining their property so that entrants are not negligently injured.<sup>1</sup> The California Supreme Court adopted this standard of care for property owners in *Rowland v. Christian*.<sup>2</sup> Prior to this decision the state adhered to common law rules that based the landowner's duty of care on the classification of the entrant as an invitee, a licensee or a trespasser.<sup>3</sup> The *Rowland* court swept away this clutter of common law categories, defi-

---

1. CAL. CIV. CODE § 1714 (West 1973) reads, in pertinent part, "(e)very one is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property . . ."

2. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

3. The landowner owed invitees (entrants for business reasons) a duty of exercising ordinary care, which included warning against known dangers and reasonably inspecting to discover defects. *Smith v. Kern County Land Co.*, 51 Cal. 2d 205, 331 P.2d 645 (1958); *Miller v. Desilu Prods., Inc.*, 204 Cal. App. 2d 160, 22 Cal. Rptr. 36 (2d Dist. 1962). Licensees (non-business entrants, who enter with the owner's implied or express consent), with some exceptions for foreseeable entrants, took the property as they found it. The landowner had only the duty to refrain from wanton or willful conduct, plus the affirmative duty to warn of unusual dangers. *Palmquist v. Mercer*, 43 Cal. 2d 92, 272 P.2d 26 (1954); *Fisher v. General Petroleum Corp.*, 123 Cal. App. 2d 770, 267 P.2d 841 (2d Dist. 1954). The landowner owed a trespasser, with a few exceptions for foreseeable trespassers, the duty to refrain from wanton or willful misconduct. *Palmquist v. Mercer*, 43 Cal. 2d 92, 272 P.2d 26 (1954). A concurring opinion in *Palmquist* cited Civil Code § 1714 as a more reasonable standard of care than the rigid common law distinctions, auguring the *Rowland* decision that would come 14 years later. *Id.* at 103, 272 P.2d at 33. Exceptions to the classifications included the doctrines of attractive nuisance, frequent trespassers on a limited area, and concealed trap, as well as the active-passive negligence concepts. *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

nitions, principles and exceptions. The court reasoned that the common law rules must yield because of the difficulty in reaching just results by applying their ancient categories to a modern society.<sup>4</sup> Rigid classifications thus no longer determine whether plaintiffs will be permitted or denied recovery for negligently inflicted injuries in California.

A landowner's liability to entrants under *Rowland* is based on the reasonable person standard. There is, however, one glaring exception to this general rule.<sup>5</sup> Section 846 of the Civil Code<sup>6</sup> immunizes landowners from liability for negligence when a person has entered private land for a recreational purpose. The statute purports to encourage agricultural landowners to open up their land to recreational entrants by removing the tort liability for negligence to which they otherwise would be subject. There is some merit to the state's allowing such an exception to the *Rowland* rule. The public unquestionably benefits by having access to open agricultural land, particularly since the land available for public recreation is not sufficient for California's growing population.<sup>7</sup> The policy of encouraging the recreational use of open agricul-

---

4. 69 Cal. 2d 108, 114-19, 443 P.2d 561, 565-68, 70 Cal. Rptr. 97, 102-05.

5. CAL. CIV. CODE § 846 (1978 Cal. Legis. Serv.). This is the only real statutory exception to § 1714. The other limitations to recovery for negligent management of property under § 1714 are: 1) CAL. CIV. CODE § 2178 (West 1954) (limiting the liability of common carriers for loss of passengers' baggage to stated amounts); 2) CAL. CIV. CODE § 41 (West 1954) (holding minors, mental deficient, and the mentally ill liable for wrongs but not for exemplary damages); and 3) CAL. MILIT. & VETS. CODE § 392 (West 1955) (exempting military personnel on active duty from liability for any act done in the performance of duty). See also, Tort Claims Act, CAL. GOV'T CODE §§ 815.2-840.6 (West Supp. 1977), which prescribes the rights of recovery against the state of negligently injured entrants onto public lands. None of these limitations provides a total immunity for negligence, as does CAL. CIVIL CODE § 846.

6. CAL. CIV. CODE § 846 (1978 Cal. Legis. Serv.) provides in pertinent part:

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 any recreational purpose or to give any warning of hazardous conditions. . . .

An owner of any estate in real property 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 . . . .

This section does not limit the liability which otherwise exists (a) for willful or malicious to guard or warn against a dangerous condition . . . ; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration . . . ; 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.

7. In 1960, the population of California was 16,970,000. THE ODYSSEY WORLD ATLAS 183 (1966); by 1970, it was 19,964,000. RAND McNALLY WORLD ATLAS, THE EARTH AND MAN 322 (1972).

tural land, however, should not effect a statutory immunity to landowners in direct contravention of the state's public policy as enunciated in *Rowland*. Moreover, the statute's application creates unjust consequences for plaintiffs and may result in the imposition of a more stringent standard on landowners. This article explains the general duty of landowners under *Rowland v. Christian* and Civil Code section 1714, examining how this duty applies to owners of undeveloped agricultural land. The article then critically examines section 846, which courts have construed as a statutory exception to this duty, and argues that the statute effectively defeats the policy of *Rowland* by reinstituting common law distinctions applied to entrants to land. Finally, the article suggests several challenges that could be made to section 846's grant of landowner immunity.

#### I. THE ROWLAND RATIONALE AND THE ANOMALY OF SECTION 846

The California Supreme Court in *Rowland v. Christian* declared that Civil Code section 1714, which holds landowners liable for failure to use ordinary care in managing their property, applies to all landowners regardless of the status of the persons who go upon the land. The status of the entrant, which was determinative of the outcome under common law, thus no longer provides landowners with a defense to their negligence.

The *Rowland* fact pattern does not initially appear applicable to an agricultural landowner. The case involved a plaintiff who was injured by a broken water faucet while a guest in the defendant's apartment.<sup>8</sup> In abrogating the common law distinctions that had served as the basis for landowner liability, however, the court made no distinctions as to the type of land owned. Apartment house, store, suburban home, and agricultural land were all drawn under the section 1714 umbrella.

In *Rowland*, the court replaced common law distinctions based on status with the fundamental principle of reasonableness, predicated on the balancing of several policy considerations.<sup>9</sup> Courts weigh these con-

---

8. For further analyses of the *Rowland* decision, see, e.g., Shindurling, *The Law of Premises Liability—Is a Reasonable Standard of Care Unreasonable?*, 13 IDAHO L. REV. 67 (1976); *Traditional Distinctions Between Trespassers, Licensees, and Invitees Abolished as Determinative of the Standard of Care Owed a Visitor*, 25 ALA. L. REV. 401 (1973); *California Applies Negligence Principles in Determining Liability of a Land Occupier*, 9 SANTA CLARA LAW 179 (1968); *Invitees, Licensees and Trespassers—A Trend Towards Abolishing Classifications of Entrants*, 76 W. VA. L. REV. 202 (1974).

9. These considerations include:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences in the community of imposing a

siderations to determine whether the defendant-landowner owes a duty of care to the plaintiff-entrant. Under the balancing test put forward in *Rowland*, if a court determines that a duty of care exists and that a jury reasonably could find that such duty was breached, the case proceeds to trial. While "status" may be a factor in the court's consideration of foreseeability, it alone cannot determine the outcome.

The California Supreme Court appears firmly committed to expanding the "duty of care" under the reasonableness standard.<sup>10</sup> A statutory anomaly exists, however, that has prevented broad application of the policy expressed in *Rowland*: section 846. That section allows landowners to escape liability because of the status of a plaintiff as a recreational entrant. The statutory immunity granted to agricultural landowners by section 846, however, is unnecessary. If the courts applied a *Rowland* analysis,<sup>11</sup> a summary judgment for the defendant-landowner would be likely even if section 846 did not exist. *Rowland* thus offers adequate protection to an agricultural landowner who is sued by an injured recreational entrant.<sup>12</sup> Section 846, in its attempt to pro-

---

duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100.

10. See, e.g., *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (California's automobile guest statute was held unconstitutional, ostensibly as violative of equal protection, but with an extensive *Rowland* public policy discussion); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (the court recognized an implied-by-law warranty of habitability of rented premises, charging residential landlords with an expanded duty of care toward their tenants); *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) (granted a wife the right to recover for loss of consortium against the employer whose negligence had caused her husband's injury); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (the court adopted the comparative negligence standard, abolishing the plaintiff classification scheme that formed the basis of contributory negligence).

11. Unless a landowner by willful misconduct has caused a recreational entrant's injury, or unless the condition on the land is extremely dangerous to such entrant, the summary judgment would probably be granted.

12. The prevailing fear was that abrogating the common law plaintiff distinctions would "open the floodgates." For example: "(T)oday's decision appears to open the door to potentially unlimited liability despite the purpose and circumstances motivating the plaintiff in entering the premises of another . . ." *Rowland v. Christian*, 69 Cal. 2d at 121, 443 P.2d at 569, 70 Cal. Rptr. at 105 (Burke, J. dissenting).

This fear has not proved to be realistic. For example, a study of the jury verdicts from January, 1976 through July, 1977 shows five pertinent cases. The only recovery (\$6000) against an agricultural landowner was granted to a party directed invited, a minor thrown from a bull. *Bielen v. Juargeui* (No. 193233, Nevada County Super. Ct., Aug. 5, 1976). In a suit brought by a recreational entrant who paid a fee (rider fell from horse), there was a defendant verdict. *Lauro v. Brown* (No. 73976, Marin County Super. Ct., April 9, 1976). Three non-paying recreational entrants were denied recovery against agricultural landowners. The cases involved: 1) a dog bite, *Gonzales v. Pacheco* (No. 79637, Tulare County Super Ct., July 27, 1976); 2) a shock from an electrified gate, *Arentz v. Wilson* (No. 22412, El Dorado County Super. Ct., Jan. 5, 1977); and 3) a landowner who shot an entrant's hunting dogs, *Griffin v. Teahon* (No. 131946, Stanislaus County Super. Ct., Feb. 17, 1977).

tect landowners when recreational entrants come upon their land, goes too far. Applying the more flexible *Rowland* analysis to all negligence claims against landowners reaches a more just result. A specific example serves to illustrate this point.

Suppose high school students enter agricultural land to swim in a spring-fed pond which the landowner uses to water stock. A few of the students pay a fee to keep their horses in the landowner's pasture. After a horseback ride, these students decide to go for a swim in the pond. If one of the swimmers is injured and brings a suit against the landowner for negligence, the judge would analyze the facts of the case in relation to the *Rowland* policy considerations.<sup>13</sup>

The court would first determine whether the plaintiff's injury was foreseeable. Foreseeability has replaced status as the major factor in determining a landowner's tort liability.<sup>14</sup> To establish liability, the injured swimmer must first demonstrate that the defendant landowner knew that students were swimming in the pond. Actual or constructive knowledge will suffice. Thus, while the status of the students as either invitees or trespassers is no longer determinative, it is pertinent. For instance, the foreseeability of harm to a trespasser is usually less than the foreseeability of harm to an invited guest.

Besides having to show that the landowner knew of the students' presence on the land, the entrant also has the burden of proving that the condition leading to the injury was dangerous and that the landowner was actually or constructively aware of this danger. If the landowner, for example, had dredged one area of the pond in order to install a pipe line system to irrigate his fields, a court would examine these facts to see if the injury that could result from the dredging was foreseeable. Assuming that the landowner knew both that the swimmers used the pond and that the condition created by the dredging was dangerous,<sup>15</sup> the

---

13. Under the common law, this plaintiff would have passed through three separate categories. While entering and leaving, and while caring for her horse, she would be an "invitee", there for business purposes because of the boarding fee paid. While riding, the plaintiff would be a "licensee". The decision to remain and swim changes plaintiff's status to "trespasser." The fact that the injury occurred because of negligent maintenance of the pond would be secondary. The primary concern would have been what plaintiff was doing at the time of the injury. If injured while washing down her horse, plaintiff probably would have recovered as an "invitee." If injured while riding across the pond, plaintiff possibly could have recovered as a "licensee." If injured while swimming, plaintiff would have been denied recovery as a "trespasser." It was this label-roulette aspect of the common law that led to the *Rowland* decision.

14. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 434-35, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).

15. The danger could manifest itself in several ways. Perhaps the landowner knew that the students, in order to reach their favorite place to swim, usually forded the pond at the spot where the dredging occurred. A sudden, unexpected drop-off could frighten both horse and rider, injuring one or both of them. Broken, jagged pipe lying under a favorite diving spot could create a dangerous condition.

foreseeability requirement would probably be satisfied. If the landowner could show that the injured swimmer had been warned of the danger, however, the necessary foreseeability probably would not be present. A plaintiff's injury is not foreseeable as a matter of law if she has been adequately warned of the condition that caused the injury. In such a case the court would grant the defendant landowner's motion for a summary judgment. If both the presence of the plaintiff and the dangerous condition were foreseeable to the landowner, however, the judge would proceed under *Rowland* to consider other factors.

One of these factors is the cost and practicability of fencing off the unsafe area of the pond and the cost of posting a warning of the danger. This is actually a factor which goes to the issue of foreseeability. Fencing off a dangerous condition or posting a warning presumes the landowner's knowledge of the likely presence of people near the dangerous condition and of the dangerous condition itself. When a landowner fails to warn such foreseeable recreational entrants of a known dangerous condition, particularly where it is inexpensive and practical to do so, he may be liable.<sup>16</sup>

Another factor a court would consider under *Rowland* is the nexus between the defendant's conduct and the plaintiff's injury. If the injury was caused by some definite act of the landowner, plaintiff is more likely to recover than if the landowner merely failed to act. Thus, if the dangerous condition that led to the swimmer's injury arose because of a natural condition such as a sudden sink hole or storm-caused shifting of the pond bottom instead of the landowner's dredging, the connection between conduct and injury would be relatively tenuous. If it were tenuous enough, in fact, the judge would grant the landowner's motion for summary judgment.

Another factor a court would examine under *Rowland* is the extent of the personal burden and the consequences to the community of imposing that burden on the landowner. The injury to the swimmer is weighed against the benefit received by community teen-agers who use the pond. The court would consider the fact that if the swimmer is allowed to recover, the landowner is likely to close the pond to all of the students. Agricultural landowners who allow public recreational access to their property significantly benefit the community. A court could reward this beneficence by using the *Rowland* analysis to absolve the

---

16. If a landowner is aware of a dangerous concealed condition, which presents an unreasonable risk of harm to known entrants, a failure to warn of the condition probably constitutes negligence. *Rowland v. Christian*, 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104; *Fitch v. LeBeau*, 1 Cal. App. 3d 320, 324, 81 Cal. Rptr. 722, 725-26 (4th Dist. 1969) (citing *Rowland v. Christian*); *Mark v. Pacific Gas & Elec. Co.*, 7 Cal. 3d 170, 177, 496 P.2d 1276, 1280, 101 Cal. Rptr. 908, 912 (1972) (citing *Rowland v. Christian*).

landowner of any responsibility for his actions.<sup>17</sup>

The flexible approach of the *Rowland* analysis as applied to agricultural landowners protects the rights of both the swimmer and the landowner. The plaintiff can recover if she can show that the condition of defendant's land was dangerous, that the dangerous condition was the cause of her injury, and that the landowner's conduct was directly connected to the injury.<sup>18</sup> The landowner's grant of public recreational access likewise merits, and would receive, judicial consideration.

Current California law would not allow the swimmer to recover, however, since Civil Code section 846 precludes recovery by a "recreational entrant," defined by the statute as one who has neither paid a fee nor received a direct invitation to enter onto the land. This statutory exception to the *Rowland* doctrine is inequitable. Furthermore, it reinstitutes the irrational distinctions between the types of land entrants that the *Rowland* court abrogated. Suppose that one of the students in the hypothetical is injured while horseback riding, the activity for which the landowner allowed this student on the land. If the rider has been directly invited to go upon the land, section 846 would not apply; instead, the general rule of section 1714 would govern the case. Recovery against the landowner would depend, under *Rowland*, on the facts and circumstances of the case. The landowner's laudable conduct in allowing recreational access to the community would be considered, but the right of the rider to recover the costs of a negligently inflicted injury would depend on the landowner's duty under section 1714.

If, however, someone who had not been directly invited or paid a fee to come upon the land had been injured, section 846 would apply to preclude any recovery. Suppose the swimmer, about to execute a dive, and the rider, preparing to water her horse, are standing next to each other on the bank above the landowner's pond. Due to negligent dredging, known to the landowner, the bank collapses, injuring both of the entrants. The rider may have a cause of action against the landowner, under *Rowland*, since she paid a fee to pasture her horse and the landowner thus "invited" her to use the land. The swimmer, on the other hand, faces an automatic summary judgment because the landowner will invoke Civil Code section 846. This code section precludes

---

17. Landowner's grant of public access to the pond also serves as a plus factor when the court considers the "moral blame attached to the defendant's conduct." Under this *Rowland* factor, the judge balances the dredging conduct against the fact that the landowner allows the community teen-agers to swim in the pond.

18. If the dangerous condition arose from natural causes, the landowner would benefit from analogizing to the system of recovery allowed for injury on public lands. Because of the policy of allowing public access to as much unimproved government land as possible, and because of the cost factors involved in inspection and repair, California allows no recovery for an injury caused by a natural condition of the land. CAL. GOV'T CODE § 831 (West 1966).

recovery for the landowner's negligence toward the swimmer, who is defined under the statute as a "recreational entrant." The rider, who also entered the land for recreation, avoids the bar to recovery presented by section 846 because she paid a fee to keep her horse in the landowner's pasture. In order to understand this somewhat confusing result, it is necessary to examine the operation of section 846.

## II. CIVIL CODE SECTION 846

Both the swimmer and the rider may fail to reach trial in their respective tort suits against the landowner. The rider's cause of action, however, receives judicial consideration under *Rowland* since the rider is an invited entrant, and thus at least the possibility of recovery exists. The swimmer, on the other hand, is barred from the courthouse altogether because of California Code Section 846. Section 846 grants the landowner immunity from any potential action by the swimmer for negligent maintenance of the pond. Further, the statute absolves the landowner from any duty to warn the swimmer that the pond is dangerous.

A landowner may invoke section 846 whenever the plaintiff has come upon the land to engage in a recreational activity.<sup>19</sup> A 1978 amendment to section 846 replaced a specific list of exempt activities<sup>20</sup> with a general requirement that the entrant have come onto the land for "any recreational purpose." This amendment is in accord with the *Rowland* rationale. Whether or not a landowner is liable under section 846 should not depend upon the activity in which the injured plaintiff was engaged.

While the legislature cured this flaw in section 846, it overlooked a more important defect. The statute treats entrant/plaintiffs as if they were common law trespassers.<sup>21</sup> Section 846 thus retains its pre-*Rowland* basis without legislative qualification or explanation. The legislature enacted section 846 in 1963, five years before the court decided *Rowland*. The statute contains no statement of legislative purpose. A contemporaneously published comment states that section 846 "removes from the legal status of licensee or invitee anyone who enters a landowner's property with his permission for hunting, fishing, etc."<sup>22</sup>

---

19. CAL. CIV. CODE § 846 (1978 Cal. Legis. Serv.). See note 6 *supra* for the full text of the statute.

20. These activities included fishing, hunting, camping, water sports, hiking, spelunking, riding, including animal and all types of vehicular riding, rock collecting, and sightseeing.

21. "In short, the duty owed is similar to that owed a trespasser." 38 CAL. ST. B.J. 647 (1963).

22. *Id.*



Thus, when someone enters land with or without the owner's knowledge and consent, under section 846 he is considered to be a mere trespasser.

The statute's reliance on common law plaintiff categories has led to a challenge to its validity in two recent cases.<sup>23</sup> These cases, however, upheld the statute as constitutional. One court specifically found section 846 to be neither overinclusive nor underinclusive and rationally related to a legitimate state purpose.<sup>24</sup> The legislature enacted the statute, according to the courts, to encourage freedom of recreation and to protect landowners from those who use lands for recreational purposes.<sup>25</sup>

As the hypothetical indicates, however, section 846 does have unfair consequences. It allows a recreational entrant who is directly invited or pays to enter the land to seek recovery under *Rowland*, but allows no such cause of action to other recreational users of the land. A critical examination of section 846 reveals that it not only creates inequities, but also fails to fulfill the purpose the courts have attributed to it.

### III. CIVIL CODE SECTION 846: A CRITICAL EXAMINATION

Admittedly, the constitutionality of section 846 has recently been upheld because the statute has a conceivably rational basis. The statute serves to encourage landowners to open up their undeveloped agricultural land to recreational entrants by exempting them from potential tort liability to such entrants. This judicially conceived rationale for the statute, however, is inaccurate. Section 846 does not encourage landowners to allow public recreational access to their lands. It allows

---

23. *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 136 Cal. Rptr. 224 (1st Dist. 1977). (Plaintiff, one of numerous motorcyclists whose presence was known to the landowners, was injured after catapulting over a 25 foot precipice created by defendant landowner's excavation of the far side of the hill.) *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App. 3d 737, 140 Cal. Rptr. 905 (1st Dist. 1977). (Plaintiff was rendered a quadriplegic after diving from defendant's railroad trestle).

24. *Lostritto v. Southern Pac. Transp. Co.*, 95 Cal. App. 3d at 747-49, 140 Cal. Rptr. at 910-11.

25. *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d at 731, 136 Cal. Rptr. at 228; *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App. 3d at 749, 140 Cal. Rptr. at 911. There is an alternative to the judicially ascribed legislative purpose of § 846. Rather than to provide landowners with an incentive to allow their lands to remain open, the statute could have been passed to provide financial protection to owners of large parcels of undeveloped land. When enacted, the statute merely codified the existing common law in treating recreational entrants as if they were trespassers. The legislature cast this language in statutory concrete, so that the validity of § 846 was unaffected when the *Rowland* court abrogated its common law foundation. Subsequent to *Rowland*, the legislature had five opportunities to remove the archaic language when it amended § 846. The legislature, however, merely modified the list of exempted activities. Arguably, the amendments sparked no reconsideration of § 846 in light of *Rowland* because they were summary, and not substantive, procedures. They were enacted, to quote Justice Traynor, "without adequate (legislative) knowledge or consideration of (their) objectives or implications." Traynor, *Statutes Revolving in Common-Law Orbits*, 43 CAL. ST. B.J. 509, 537 (1968).

all landowners to invoke the section regardless of whether they have decided to open up their lands for recreational uses.<sup>26</sup> In other words, section 846 simply grants immunity from suit for negligence to all owners of land which might be used for recreational purposes, including agricultural land. The immunity does not in any way directly encourage agricultural landowners to devote their land to recreational uses.

Besides the failure of the judicially conceived rationale for section 846 to conform to the statute's actual operation, section 846 also operates unfairly. The statute effectively transmutes any person who enters agricultural land for a recreational purpose and pays no fee for such entrance into a trespasser in the common law sense. This makes a defendant landowner's liability dependent upon the status of the plaintiff, the very thing the *Rowland* court disavowed. Section 846 also treats persons who trespass for a recreational purpose differently from all other trespassers. Thus, despite one court's rejection of a constitutional challenge, a viable equal protection attack on section 846 possibly can be made.

#### A. A Constitutional Challenge to Section 846

Section 846 would violate the constitutional guarantee of equal protection<sup>27</sup> if it creates a classification scheme that is wholly arbitrary and bears no rational relation to the object of the legislation.<sup>28</sup> The statute does distinguish between two different types of entrants onto undeveloped agricultural land. One class, recreational entrants, falls within the granted immunity, and all other entrants fall outside of it. Accepting the judicially conceived rationale for the statute, that it was intended to encourage landowners to open their lands to recreational uses,<sup>29</sup> arguably this classification scheme bears no rational relationship to that purpose. The statute prohibits recovery to any recreational entrant regardless of the landowner's intent. The statute thus does not encourage landowners to open their lands since even landowners who refuse to open their lands are granted the immunity. Moreover, two entrants may be injured by the same highly dangerous condition yet one will recover, having entered for a non-recreational use, and another will not recover.

While it is true that there is some relationship between the purpose of the statute and the classification, the California Supreme Court has used

---

26. "(§ 846) applies to those who without it would fence their lands, to those who, with it, fence them anyway, and to those who do not know of its existence." *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App. 3d at 749, 140 Cal. Rptr. at 911.

27. U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7, para. a.

28. *McGowan v. Maryland*, 366 U.S. 420 (1961).

29. See text accompanying note 25 *supra*.

the "rational relationship" test to strike down a similar classification. The court invalidated the state's automobile guest statute, holding that it denied non-paying guests equal protection.<sup>30</sup> In doing so, however, the court did not apply the conventional "rational basis test" analysis which permits a court to uphold a statute if it can come up with any conceivable rationale for the statute. Instead, the court required a realistic and "substantial" relationship between the purpose and the classification.<sup>31</sup> Under this standard, a court may very well find that section 846 violates the equal protection clause. The statute denies recovery to all recreational entrants without any realistic guarantee that such a denial actually will cause owners of undeveloped land to provide recreational land to the public.

### B. A Public Policy Challenge to Section 846

Another possible challenge to section 846 is that it violates public policy because it abrogates the landowner's duty to warn. As long as landowners expect only recreational entrants to come upon their land, they need not warn of highly dangerous conditions to escape negligence. This abrogation of the duty to warn is unjust to the recreational entrant. Furthermore, in actual operation, section 846 hurts landowners as much as it hurts recreational entrants.

Section 846 does not protect a landowner whose behavior is adjudged "willful." Recreational entrants, aware of the statute's bar to recovery for negligence, thus will charge that the landowner's failure to warn constitutes willful misconduct. Usually, a failure to warn in the face of an existing duty to do so constitutes mere negligence.<sup>32</sup> If a court accepts the recreational entrant's argument that a failure to warn constitutes willful misconduct, section 846 then effectively will have escalated a knowing failure to warn, usually only negligence, to the level of willful misconduct. By so doing, landowners may suffer punitive damages simply because they invoke section 846.<sup>33</sup>

---

30. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). The *Brown* court stated that "however laudable the motives of a hospitable host . . . , it is irrational to reward that generosity by subjecting beneficiaries to a greater risk of uncompensated injury than is faced by other individuals." *Id.* at 871-72, 506 P.2d at 223, 106 Cal. Rptr. at 399.

31. "The question of constitutional validity is not to be determined by artificial standards (confining review "within the 4 corners" of a statute). What is required is that state action . . . through one enactment or more than one, shall be consistent with the restrictions of the . . . Constitution." *Id.* at 862, 506 P.2d at 217, 106 Cal. Rptr. at 393.

32. See text accompanying note 16 *supra*.

33. For example, the jury in the *Lostritto* case awarded a \$3,000,000 recovery to the plaintiff. 73 Cal. App. 3d at 741, 140 Cal. Rptr. at 907. (A new trial was granted on the willful misconduct issue, based on new evidence indicating that plaintiff had been warned of the danger. *Id.*)

Recreational entrants will be able to cite two precedents for the proposition that the landowner's failure to correct, or to warn of, a known dangerous condition constitutes willful behavior under section 846. The first is contained in the single contemporaneous legislative comment on the statute.<sup>34</sup> This comment equates negligent failure to warn with the section 846 definition of willful misconduct. The second possible precedent is contained in one court's construction of the statute.<sup>35</sup> The court found that the facts indicating a knowing failure to warn supported the jury's finding of willful misconduct.<sup>36</sup>

If the legislature intended willful misconduct to have a different meaning under section 846 than it ordinarily does in tort law,<sup>37</sup> it effectively enacted an exception within an exception. Logically, the statute must then state: "landowners generally can be liable in negligence to all entrants upon their land *except* when an entrant comes upon their land for a recreational purpose, *except* when the landowner fails to warn the entrant of a known dangerous condition." Section 846 is thus a truly confusing statute.

The necessity for a recreational entrant to plead willful misconduct under section 846 creates another problem for landowners. A recovery for willful misconduct allows an award of punitive damages. If a landowner's conduct has transcended mere negligence, the penalty certainly should include more than mere recompense for a plaintiff's injury. However, if *Rowland* governed the cases now decided under section 846, a failure to warn would only constitute negligence, not willful misconduct, and no punitive damages would be recoverable. In some instances, therefore, landowners would be better off relying on *Rowland* than on section 846.

---

34. The comment states:

Civil Code § 846 does not appear to relieve the landowner from all liability for his negligence, however. He may still be liable where he knows, or should know, of the "permitee's" presence and fails to notify him of known concealed dangers, or to carry on his activities with reasonable care. This might be construed as "willful" conduct.

38 CAL. ST. B.J. 647 (1963).

35. *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App. 3d at 745, 140 Cal. Rptr. at 908-09.

36. *Id.* at 744, 140 Cal. Rptr. at 905. The facts included: 1) there was easy access via a stairway to defendant's trestle, which crossed a river near a popular swimming area; 2) the trestle had a railing but no real barrier to diving; 3) two lifeguards had informed several of defendant's employees of the diving; 4) in 1963, a diver's death was reported in the local newspaper.

37. "Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results." *Id.* at 744, 140 Cal. Rptr. at 908, citing BAJI No. 3.52 (5th ed. 1969).

*C. Redrafting Section 846*

If the legislature believes that agricultural landowners need the special protection of section 846, it should amend and clarify the statute. The redrafted statute should include a clear statement of legislative intent, noting the policy considerations discussed above. It should be rewritten in light of *Rowland*, deleting outworn common law terminology and distinctions.<sup>38</sup> Only landowners who allow public recreational access should benefit from the granted immunity. Moreover, the legislature should seriously consider reinstating a duty on the part of landowners to warn of known dangerous conditions. The expense to landowners of posting warnings is not great. The statute could provide for no affirmative duty to inspect for dangerous conditions, which does

---

38. A suggested redrafting of the statute:

California Civil Code § 846:

It is the policy of the Legislature to encourage landowners to allow public recreational access to their unimproved land. To achieve this objective, it is the intent of the Legislature to regulate the extent of the duty of care owed by landowners to recreational entrants.

A. Landowners:

1. have no duty to maintain their property in a safe condition for the benefit of recreational entrants. Therefore,
2. have no duty to
  - a. inspect for dangerous conditions on the land;
  - b. repair any defect; or
  - c. fence off any dangerous areas.
3. have a duty to warn recreational entrants of a dangerous condition on the land. The duty to warn is contingent upon the landowner's knowledge, either actual or constructive, that such a dangerous condition exists.

B. Nothing in this code section relieves a landowner from liability for wanton or willful misconduct.

C. Landowners who allow public recreational access must file a statement of intent under this Code section.

D. Definitions:

1. A recreational entrant is one who:
  - a. enters onto the property of another, who has filed an intent statement under § C, to pursue any recreational activity;
  - b. pays no consideration for the privilege of entering the land; and
  - c. is not issued a direct invitation to enter by the landowner.
2. A dangerous condition is a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.
3. Actual notice means that the landowner had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
4. Constructive knowledge exists only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the landowner should have discovered it.

involve a greater effort and expense on a landowner's part. The amended statute would show a balancing of the interests involved. Landowners would be held to minimal standards of care, necessitating minimal expense, in return for the benefit they grant the community. Additionally, the interests of an injured entrant would receive some consideration.

### CONCLUSION

The California Supreme Court, in *Rowland v. Christian*, held the reasonable person standard of Civil Code section 1714 to govern a landowner's duty of care. This standard mandates a judicial weighing of the facts of each case. The status of the entrant onto the land, although pertinent, does not determine the landowner's liability. As a statutory anomaly to the general rule, Civil Code section 846 bases a landowner's immunity from negligence on the status of the entrant. A "recreational entrant," under section 846, has no cause of action against a negligent agricultural landowner. Furthermore, the landowner has no duty to warn recreational entrants of any dangerous conditions existing on the land.

As a result of its judicial construction, section 846 allows injured recreational entrants to charge that a landowner's failure to warn of a known danger, usually mere negligence, constitutes willful misconduct. Since section 846 does not protect a landowner against his own willful misconduct, this redefinition of what constitutes willful behavior serves as a safety valve for the blanket immunity otherwise granted by the statute. A legal redefinition of willful misconduct, however, is a drastic method of mitigating harsh results. Moreover, a finding of willful misconduct allows an award of punitive damages, turning an apparent boon to landowners into a potential booby trap.

The solution to the problem lies in repealing section 846 and basing recovery, instead, on the application of the *Rowland* policy factors to each case. If the legislature believes that agricultural landowners need special protection from tort liability, it should amend and clarify section 846.

*Gretchen Brambach*