#65 6/7/68

Memorandum 68-58

Subject: Study 65 - Inverse Condemnation (Denial Destruction)

Attached to this Memorandum is a tentative recommendation on denial destruction. It is designed to carry out the decisions reached by the Commission at the May meeting. If the tentative recommendation is satisfactory, we would like to send it out for comment after this meeting.

Attached as Exhibit I (pink) is a discussion, prepared by Mr. McClintock, of the collateral source rule as applied to public entities. We have concluded that a background study should be made of the collateral source rule so that a general statutory provision can be drafted to make clear the extent to which the rule applies in actions against public entities. We hope to persuade one of the law reviews that the topic merits law review analysis. Accordingly, we recommend that subdivision (d) of the proposed statute section be left unchanged until such time as a general statutory provision stating the extent to which the collateral source rule as applied to public entities can be enacted. In the interim, the Souza case will continue to apply.

The staff has some difficulty with the policy reflected in the tentative recommendation. The general rule under the 1963 governmental liability act is that neither the public entity nor the negligent public employee is liable where property is negligently and unnecessarily destroyed in fighting a fire. Yet, when the public employee acts without negligence and necessarily destroys property to prevent the spread of fire in an emergency, the public entity is liable under the

tentative recommendation.

When the Commission first undertook to study this particular aspect of inverse condemnation, the staff had some misgivings. We still have.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

COLLATERAL SOURCE RULE

Under the so-called "collateral source rule," compensation received by a plaintiff from a source wholly independent of the defendant-wrongdoer does not reduce the damages recoverable from the wrongdoer. The rule has been stated as follows:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. [Anheuser-Busch v. Starley, 28 Cal.2d 347, 349, 170 P.2d 448 (1946).]

The rule is generally applicable only in tort cases, although the Supreme Court recently indicated that the rule might be applicable in a contract case where the breach has a tortious aspect. Salinas v. Souza & McCue Const. Co., 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

Those items normally considered collateral so as to preclude a deduction from the damages sought are such things as accident insurance, disability pensions, wages from an employer, and pension payments from a public agency. Gratuities receive a varied treatment. In some states, gratuities are the only source considered collateral. Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (196x). See also Fleming, The Collateral Source Rule and Allocation in Tort Law, 54 Cal. L. Rev. 1478 (1966). In other states, gratuities are excluded from the collateral source rule. Thus, in one state, it has been held that the husband is precluded from recovering for nursing care where his wife, a registered nurse, gratuitously cared for him. (Id.)

In Salinas v. Souza & McCue Const. Co., supra, the California Supreme Court held that the collateral source rule does not apply in California to an action against a public agency. In that case, Souza was a contractor for the construction of a city sewer line. The City of Salinas sued Souza for breach of contract. Souza cross-complained for damages against the city for breach of warranty of site conditions. Souza also cross-complained against a supplier, Armco, for supplying defective equipment and on an indemnity agreement.

The city contended that any recovery from Armco should be deducted from damages recoverable against it. Souza contended that its claim against the city was based on fraud, but that against Armco was based on the liability of a supplier and indemnitor, and that therefore, the different wrongs and theories of recovery made the collateral source rule applicable. The court first observed that the city's liability for breach of warranty of site conditions was contractual, but that the collateral source rule might apply because the breach was a tortious one. No determination of that issue was made because the collateral source rule was held inapplicable in an action against a public entity. The court reasoned that since the collateral source rule is punitive in its effect--because it makes a wrongdoer pay damages for an injury that may already have been compensated in whole or in part--that application of the rule in this case would be to allow punitive damages against the city. Punitive damages are not recoverable against a public entity because the punishment would fall on innocent taxpayers. The court stated:

> As we cannot impose on a city any measure of direct damages which are punitive in nature, it necessarily follows that we are foreclosed from doing it by an indirect and collateral rule. [66 Cal.2d at 228.]

There are a number of significant problems involved in codifying the rule in Souza. The staff is now preparing a detailed analysis of the collateral source rule with a view to identifying the problems that would be involved in drafting a comprehensive provision precluding its application against a public entity.

Respectfully submitted,

Gordon E. McClintock
Junior Counsel

#65

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

INVERSE CONDEMNATION

Number 1--Denial Destruction

In times of extreme emergency or disaster, public officials may order the selective destruction of private property to protect the community from widespread and calamitous loss. The most typical examples of this so-called "denial destruction" are (1) the release of artificially impounded water onto private property to prevent or reduce general damage from a serious flood, (2) the destruction of property to deny its combustible elements to a conflagration, and (3) the destruction of private property to prevent it from falling into enemy hands in wartime.

Litigation concerning denial destruction is rare. However, present political and social conditions make it desirable to clarify the ambiguities that exist in case law. In the context, for example, of a large scale urban riot, destruction of a house to stop a conflagration or the destruction of privately owned inventories of guns and ammunition in sporting goods stores or pawn shops might be considered essential. In addition, the Commission is informed that the release of artificially impounded waters onto private property is sometimes effectuated to avoid the severe flooding of the rest of the community.

Denial destruction is not a basis of personal tort liability for the public officer.[1] This rule is justified by the general policies

1. See Surocco v. Geary, 3 Cal. 69 (1853); A. Van Alstyne, California Government Tort Liability § 7.29 (Cal. Cont. Ed. Bar 1964).

affording a public official statutory immunity for the exercise of official discretion; the fear of possible personal liability should not be permitted to deter vigorous official action necessary to the safety of the community.

Public entities apparently are immune from tort liability for denial destruction, but the extent of their liability under inverse condemnation law is unclear.[2] The general rule in other states is that, in the absence of statute, the public entity is not liable.[3]

The Commission has concluded that the same considerations that give the public employee immunity for denial destruction do not justify the same immunity for public entities. Destruction of private property to prevent it from falling into the hands of rioters or to deny its elements to a raging fire has all the earmarks of a taking of private property for public purposes within constitutional standards. As an early Georgia court held, "those for whose supposed benefit the sacrifice was made, ought, in equity and justice, to make good the loss which the individual has sustained for the common advantage of all." Bishop

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2. Compare Dunbar v. The Alcalde & Ayuntamiento of San Francisco, 1 Cal. 355 (1850)(dicta indicating no tort or inverse condemnation liability), with Lipman v. Brisbane Elementary School Dist., 55 Cal.2d 224, 229, 11 Cal. Rptr. 97, 99, 359 P.2d 465, 467 (1961) (citing, inter alia, Hall & Wigmore, Compensation for Property Destroyed to Stop the Spread of a Conflagration, 1 Ill. L. Rev. 501, 514 (1907), which argues for public liability).

3. Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 620 (1968); Sovereign Immunity Study, 5 Cal. L. Revision Comm'n Reports 480-481 (1963).

v. Mayor of Macon, 7 Ga. 200, 202 (1849). More than a century ago, Chief Justice Murray made a plea for legislation to ameliorate the situation in California:

> The legislature of the State possess [sic] the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty . . . . [Surocco v. Geary, 3 Cal. 69, 74 (1853).]

The Commission recommends that a new section be added to the California Governmental Liability Act of 1963 to provide a measure of damages where denial destruction has been accomplished by a public employee acting in the scope of his employment.[4] The new section should provide that the property owner can recover for that portion of the destroyed property which would have been preserved if the denial destruction had not been ordered. Thus, if a building directly in the line of an otherwise uncontrollable fire is destroyed to prevent the spread of the fire, the owner should not be able to recover compensation because the building would have been destroyed in any event. However, if the owner, through the exercise of ordinary care, could have saved part of the building, he should be entitled to the value of that portion of the building that could have been saved. This will provide a minimal level of protection to private interests against damage that would not otherwise have occurred.

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4. The statute should not spell out the occasions on which denial destruction is authorized because of the difficulty in predicting the need for such destruction.

The statute should include two exceptions:

(1) No recovery should be allowed for any damage to or destruction of a building or structure in which a conflagration exists or for any property located in the building. This exception will prevent, for example, the owner of property located in a multistory building from recovering for water damage caused by flooding upper floors to prevent the spread of the fire from lower levels.

(2) A property owner should not be permitted to recover any damage that is covered by insurance. This exception will prevent a double recovery and will minimize the impact of the statute by providing for recovery only where the injury is uncompensated. The exception is consistent with the general California rule that the collateral source rule does not apply to an action against a public entity. See Salinas v. Souza & McCue Const. Co., 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

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

An act to add Section 816 to the Government Code, relating to denial destruction.

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

Section 816. Destruction of property in emergency

Section 1. Section 816 is added to the Government Code, to read:

816. (a) As used in this section, "denial destruction" means physical damage to or destruction of the property of one or more persons to protect the lives or property of others in an emergency. Denial destruction includes, but is not limited to, the destruction of a house to prevent the extension of a conflagration to the property of others and damage to property caused by the release of impounded waters onto the property to prevent or reduce damage to other property from a threatened flood.

(b) Notwithstanding Section 850.4, when denial destruction is committed by a public employee acting in the scope of his employment, the public entity for which the public employee acted is liable to the owner of the property for its denial destruction.

(c) No recovery may be had under this section for any loss that would have been incurred as a result of the conditions creating the emergency had there been no denial destruction.

(d) The amount recoverable under this section shall be reduced by any insurance proceeds received by the owner of the property for the same loss.

(e) No recovery may be had under this section for damage to

a building or structure in which a conflagration exists at the time of the destruction or to property located in such building or structure.

Comment. In times of great emergency or disaster, public officials may order the selective destruction of private property to protect the public safety and welfare. Surocco v. Geary, 3 Cal. 69 (1853). Section 816 provides minimal protection to the owner of the property damaged or destroyed by making the public entity responsible for damage that would not otherwise have been incurred.

Subdivision (a). Subdivision (a) defines "denial destruction." It is not intended to provide rules governing when property may be destroyed in an emergency or who may order the destruction. Rather, it merely provides a definition for determining when compensation may be recovered under subdivision (b). The definition is a restatement of the common law principle authorizing denial destruction under the police power.

Subdivision (b). Subdivision (b) states that a public entity will be liable for denial destruction committed by one of its employees acting in the scope of his employment. The subdivision controls over Section 850.4, which provides that a public entity is not liable for any injury caused in fighting fires. If, for example, a house is destroyed to prevent the spread of a conflagration and the owner proves that it would not have been destroyed by the fire, he can recover for the damage even though the public entity otherwise would not be liable for the destruction of the house because of the immunity provided by Section 850.4. The liability imposed by subdivision (b) is limited by subdivisions (c), (d), and (e).

Subdivision (c). Subdivision (c) limits the damages recoverable under this section to those that could have been avoided if the property had not been destroyed by the public employee. Thus, if a building directly in the line of an otherwise uncontrollable fire is destroyed to prevent the spread of the fire, the owner can recover no compensation because the building would have been destroyed in any event. However, if the owner, through the exercise of ordinary care, could have saved part of the building, he is entitled to the value of that portion of the building that could have been saved.

Subdivision (d). Under subdivision (d), to the extent that the owner's fire, flood, or other insurance compensates his loss, he has no right to compensation from the public entity. This departure from the so-called "collateral source rule" is in accord with the recent decision in Salinas v. Souza & McCue Const. Co., 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967). Under that decision, collateral benefits received by a claimant are taken into account to reduce his recovery against the public entity if the award would otherwise be an indirect method of allowing punitive damages against the public agency. Insurance proceeds are the usual source of secondary benefits in a property damage case. If other benefits are received, subdivision (d) does not preclude the deduction of the benefits from the award; in such case the Souza case will control.

Subdivision (e). Subdivision (e) limits the right of an owner to recover for damage to property that was destroyed to prevent the spread of a fire; the owner or tenant of a building in which a conflagration exists at the time of its destruction is not entitled to recover any damages under this section for damage to the building or property located in the building.