#65 2/25/69

Memorandum 69-39

Subject: Study 65 - Inverse Condemnation (Escaping Fire and Chemicals)

The problems in the areas of escaping fire and chemical drift are generally not so much "inverse" problems as questions of applicability of rules of tort liability. This is not to say that, in appropriate circumstances, liability could not be supported on inverse principles, but rather that there appears to be such a substantial overlap between tort and inverse liability that there is little, if any, pressure to pursue the inverse route. Accordingly, it might be noted that research discloses not a single California case recognizing inverse liability in a situation involving either escaping fire or chemical drift, and Professor Van Alstyne is led to conclude that, "under current statutory law,. . . an injured property owner today appears to have fully adequate remedial weapons in tort litigation with respect to both escaping fire and chemical drift." (Van Alstyne, Study, Part IV--Inverse Condemnation: Unintended Physical Damage at 50.)

With regard to escaping fire, it is necessary first to distinguish fire protection and fire fighting activities. This area is already covered by Sections 850-850.8 of the Government Code which provide broad, practically all-encompassing, immunities from liability for injuries arising out of such activities. Even in the absence of these sections, in this area it seems clear that inverse liability would generally founder either because of a refusal to accept jurisdiction to review basically legislative questions or on the "police power" exceptions. E.g., decisions concerning whether to furnish fire protection service at all, what appropriations to make and what equipment and personnel to provide, and so on, seem to be practically classic examples of political

or legislative decisions not subject to review by judge or jury; destruction of property to prevent the spread of fire is a recognized police power exception. Finally, single acts of negligence in routine operations without any deliberate intent to assert a proprietary interest or promote a public use have never supported inverse liability. See, e.g., Miller v. City of Palo Alto, 208 Cal. 74, 280 Pac. 108 (1929); Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 237 Pac. 59 (1925).

On the other hand, tort liability for negligently permitting fire to escape from the control of public employees now seems certain. The types of situations involved will be fires spreading from dumps, weed and brush clearing projects, and so on. Public entities are liable for the tortious acts and omissions of their employees. (Government Code Section 815.2). There is an express statutory liability for negligently or willfully permitting a fire to escape (Health and Safety Code Section 13007), which apparently applies to public entities and their employees. See Flournoy v. State, 57 Cal.2d 497, 20 Cal. Rptr. 627, 370 P.2d 331 (1962). Alternatively, negligently or deliberately permitting a fire under the control of a public employee to escape appears to constitute a failure to exercise reasonable diligence to discharge a mandatory duty imposed by statute (Public Resources Code Section 4422; Health and Safety Code Section 13000) and, thus, is a basis of governmental liability under Government Code Section 815.6. Finally, escaping fire would, in some cases, be actionable as a dangerous condition of public property. See Government Code Section 835; Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951). In short, it seems difficult to justify any further legislative activity in the "escaping fire" area. The Commission should, however, be careful to see that the law develops along the lines predicted above.

A similar conclusion is indicated with respect to the area of chemical drift. Here the trend of the private law cases appears to be toward imposition of strict liability in any event. See Note, 19 Hastings L.J. 476 (1968). Although governmental use of dangerous chemicals for pest control purposes is expressly authorized by statute (e.g., Agricultural Code Sections 14002, 14063, 14093), such authorization does not relieve the user from liability for property damage caused thereby. See Agricultural Code Sections 14003, 14034. Moreover, use of pesticides in such a manner as to cause "any substantial drift" is a misdemeanor (Agricultural Code Sections 9, 12972); in California, an unexcused violation of a criminal statute, the purpose of which is to promote safety, is negligence (see Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 (1947)); inasmuch as substantial drift may result from crop dusting notwithstanding the exercise of reasonable care, the end result of the statute may be to impose strict liability upon crop dusting activities producing substantial drift. Alternatively, the failure to prevent substantial drift as required by Section 12972 may result in liability on the same theory of failure to discharge a mandatory duty mentioned above in connection with the escaping fire cases. Finally, arguments can be advanced suggesting imposition of strict liability on crop dusting as an ultrahazardous activity. See Note, 19 Hastings L.J. 476, 489-493 (1968); Note, 6 Stan. L. Rev. 69, 81- (195_). See also Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1 (1948) (fumigation an ultrahazardous activity). See generally Memorandum 69-38 (to be sent) regarding governmental liability for ultrahazardous activities. In view of the above, further legislation expressly imposing strict inverse liability seems unnecessary. Concerning the existing statutory scheme, Professor Van Alstyne does suggest that "legislation would be helpful to clarify applicability of the relevant provisions to public entities" (Van Alstyne,

Study at 75; see also footnote 324), but the staff is satisfied that the existing statutes make clear their applicability to public entities. An area of concern may exist with respect to the application of the basic discretionary immunity. That is, to what extent may a public entity assert that the determinations to use a pesticide, and to use it in a given manner, are protected by the discretionary immunity granted by Government Code Sections 820.2 and 855.4. However, here it seems reasonably clear that the immunity will not obtain with respect to negligence in routine operations, nor will it prevent inverse liability for injuries to property necessarily and directly resulting from work done in accordance with specific directions. See Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., supra. In other words, the area of application of the discretionary immunity seems small, if not nonexistent.

In summation, the staff would concur with Professor Van Alstyne's estimate that the existing statutory remedies are adequate and would suggest that, for the time being, further activity in the area of escaping fire and chemical drift await the results of case-by-case judicial analysis.

Respectfully submitted,

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