65.25 4/28/69

Memorandum 69-62

Subject: Study 65.25 - Inverse Condemnation (Water Damage)

A few months ago, you received Professor Van Alstyne's study as printed in the Hastings Law Journal. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431 (1969). In preparation for the May meeting, you may find it valuable to review this background, particularly pages 448-465, relating to water damage.

For the May meeting, the staff has prepared a draft statute (Exhibit I attached - pink sheets) which attempts to codify the principles which have either received tentative Commission approval or exhibited sufficient worth or sheer tenacity to at least escape Commission rejection.

With respect to liability generally, Section 870.4 continues to state a rule of strict liability for all water damage caused by an improvement as designed and constructed by a public entity. Needless to say, this rule has not yet been wholeheartedly embraced by the Commission, and it might be desirable at this point to pause and note again some of the considerations relevant here. First, the objective, it seems, is to resolve satisfactorily the basic and inevitable conflict between one individual's (property owner's) security in person and property and another's (public entity's) freedom to engage in gainful activities. Initially, the former bears the burden of losses resulting from the latter's interference with his security. Traditionally, the question whether these losses will be shifted to the latter, with certain notable exceptions, has been answered with reference to fault concepts. A persuasive argument could perhaps be advanced that the fault rule generally is in some danger of being eclipsed by its exceptions (e.g., Workmen's Compensation, products liability,

liability for independent contractors, ultrahazardous liability); but without regard to this broader inquiry, in our limited area of concern--inverse condemnation--it seems that it has already been discarded. In its place, the courts from Reardon to Albers have interpreted Article I, Section 14, to require compensation for a taking or damaging if the property owner "if uncompensated would contribute more than his proper share to the public undertaking." Application of this policy has been inconsistent at best but the thrust towards enterprise liability seems clear. Moreover, the staff believes that application of the enterprise theory here, if not actually required, would be desirable in achieving the most satisfactory end product. Analysis of the rules provided in Section 870.4 in terms of the enterprise theory suggests that these rules are basically sound.

Often one of the major problems in applying this theory is identifying the proper enterprise. (For example, which enterprise--railroading or motoring, or both--should bear the cost of preventing or compensating for grade-crossing accidents?) However, with respect to the draft statute, liability is only imposed where there has been a disturbance of the natural conditions by the public improvement. Moreover, liability for damage which would have resulted had the improvement not been constructed is expressly excluded (§ 870.6). Thus, it seems that only those losses caused by the improvement alone will be transferred to the public entity and we have therefore identified the proper enterprise. The transfer of such losses appears not only inherently fair, but essential to a proper allocation of resources.

One of the recurring concerns of the Commission is that the rules made applicable to a public entity should conform to those applicable to private

persons. The staff agrees, but we must be careful not to let the tail wag the dog. We believe the better approach is to develop a satisfactory scheme dealing with public entity liability, bearing in mind that it must be both practical and constitutional, and then work towards bringing the law in the private sphere into conformity with this standard.

Enterprise liability works perfectly only if all benefits and all costs are internalized, i.e., "whenever an [enterprise] imposes costs for which it is not required to pay, or bestows a benefit for which it is unable to charge, the mechanism will not ensure a proper allocation of resources, . . . unless, by unlikely coincidence [benefits and costs] exactly offset one another." We think it is clear that the suggested scheme of liability will be imperfect in this regard. It is unlikely that the public entity responsible for a given project will represent either all those benefited by the project or only those benefited. Nevertheless, we do believe that there will be a reasonably close correspondence between representation and benefit and that the scheme, though imperfect, would perform adequately in this regard.

A perfect scheme should also permit the entity to make a completely informed decision as to whether to proceed with the project or not. In order to make such a determination, the entity must be able to identify and evaluate both benefits and costs, and thereby determine whether a net gain can be achieved. Our scheme does not always permit this. To be identified and evaluated, a cost must be predictable. As used here, "predictability" does not require the degree of specificity as to who, when, what, and where that marks foreseeability in the tort law generally, but, predictability does exclude the totally unforeseeable. The suggested scheme makes the entity liable for losses to property whether predictable

or not. Where liability is not coextensive with predictability, presumably there will be instances where resources will be wasted in an attempt to make a project super-safe, and where desirable projects will not be undertaken because of the spectre of liability. However, the alternative of making liability coextensive with predictability would not only improperly distribute losses under the enterprise theory but run directly counter to the constitutional mandate set forth in Albers. Thus, despite its shortcomings, the staff believes that the principle expressed in Section 870.4 is at least preferable to any suggested to date.

The Commission directed the staff to determine whether, under existing law, "alteration of the natural flow of surface waters" would include both augmentation as well as diversion of flow. I.e., would augmentation alone subject an upper landowner to liability? The staff has been unable to find any case where this question has been answered. Perhaps not surprisingly the cases speak invariably of collection and diversion or simply diversion alone. A few cases suggest unsuccessful attempts by a defendant to show that he has preserved the natural contours and done no more than prevent absorption. See, e.g., Stanford v. City and County of San Francisco, 111 Cal. 198, 43 Pac. 605 (1896); Andrew Jergens Co. v. City of Los Angeles, 103 Cal. App.2d 232, 229 P.2d 475 (1931). However, these attempts have not stimulated discussion that would suggest that a successful showing would or would not prevent liability.

Section 870.8 remains in the form presented at the April meeting. This section states the existing doctrine of avoidable consequences

believed to be applicable in an action for inverse condemnation. At the April meeting, the Commission directed the staff to consider here exclusion of liability for "trivial expenses." General damage principles would exclude so-called "de minimus" harm. It is believed that the cost to a claimant of recovering truly minor expenses would as a practical matter discourage all but the most litigious and these expenses would not seem to be a significant problem. If "trivial expenses" means something beyond what would be embraced by the foregoing, then it seems we would be faced with a constitutional problem. If desired we could adopt language used in the recommendation relating to the privilege to enter and survey. There we excluded public entity liability for "(2) Trivial injuries to property or damages that are inconsequential in amount. (3) Interference with the possession or use of the property that is slight in extent, temporary in duration, and reasonable and necessary under the circumstances of the case." There, however, we necessarily were dealing with at least a technical trespass and we had some limited case law indicating what was intended. Here as far as can be determined we have no such background. In short, inclusion of a section covering this problem seems as likely to create litigation as to forestall it.

The staff was also directed to consider the problem of notice to and cure by the public entity prior to mitigation by the potential plaintiff. The staff believes here that there is a danger of making rules either too inflexible for the myriad of situations that might arise or too general to be an improvement on the case-by-case judicial discretion provided by Section 870.8. The Comment to this section now includes a statement that the reasonableness of the owner's conduct might be affected by his willingness to accept a "physical solution" paid for by the entity

and his giving notice to the entity of threatened danger where circumstances warranted and permitted such notice. Is greater specificity desired? For example, is notice ever mandatory, to whom must notice be given, in what form, is actual notice required or constructive notice sufficient, what is effect of notice, e.g., is this all that is required, can owner then abdicate any responsibility, what is affect of no notice, e.g., no notice but owner otherwise acts reasonably and does exactly what entity would have done. Perhaps this is a misunderstanding of human nature, but the staff believes that it would be quite unusual for a property owner (who knew damage was threatened and knew which entity was responsible) to incur substantial expenses without first attempting to have the entity do the work or pay the bill. We believe therefore that a notice requirement is both unnecessary and undesirable.

We have not included in this draft a section specifically excluding liability for damage brought about by the intervention or operation of an unforeseeable force of nature. It appeared to be the consensus of the Commission that such a section would be undesirable. Moreover, the section would perhaps have to be so limited in scope as to be unnecessary. Quite possibly, the types of cases that would be covered by such a section would receive identical treatment by virtue of the requirement of proximate causation. If the Commission does wish to include a section covering this issue, the following is suggested as a starting point for discussion.

870.7. (a) As used in this section, "unforeseeable force of nature" means a force of nature:
(1) not reasonably anticipated by the public entity; and
(2) not set in motion by the public improvement.

(b) A public entity is not liable under Section 870.4 for damage brought about by the operation of an unforeseeable force of nature.

It is our hope that at the May meeting we can make sufficient progress to enable the staff to prepare a tentative recommendation for the June meeting.

Respectfully submitted,

Jack I. Horton
Associate Counsel

EXHIBIT I

DRAFT STATUTE

Chapter 8. Inverse Condemnation

Article 1. Water Damage

Section 870. Water damage defined

870. As used in this article, "water damage" means damage to property caused by:

(a) The alteration of the natural flow of surface waters;

(b) The diversion, obstruction, acceleration, or augmentation of the natural flow of stream waters; or

(c) Waters escaped from a natural or artificial watercourse.

[No comment yet.]

Section 870.2. Exclusive basis of liability

870.2. This article is the exclusive basis of liability of a public entity under Article I, Section 14, of the California Constitution for water damage proximately caused by an improvement as designed and constructed by the public entity.

Comment. Section 870.2 makes clear that, for the areas of liability covered by this article, this article provides the exclusive basis for "inverse condemnation" liability.

Section 870.4. Conditions of liability

870.4. Except as provided by this article, a public entity is liable for all water damage proximately caused by an improvement as designed and constructed by the public entity.

Comment. Section 870.4 states the basic rule of liability of public entities for water damage resulting from public improvements as deliberately designed and constructed. The section complements the existing statutory liability for specific dangerous conditions either created by the negligent or wrongful act or omission of a public employee or allowed to exist after adequate notice (Section 835) and for the negligent or wrongful acts generally of public employees (Sections 815.2, 820). Thus, remaining within the ambit of the latter sections is liability for damage resulting from negligent maintenance.

"Water damage" is defined in Section 870 and implicit in the definition is the intention here to deal with problems generally of "too much" rather than "too little" water. In any event, Section 871.2 makes clear that nothing in this article is intended to affect the existing law relating to the right to the use of water.

Without regard to fault, and subject only to the owner's duty to take reasonable steps to minimize any damage (see Section 870.8), Section 870.4 imposes liability on the public entity for all damage to property proximately caused by the disturbance of the natural water conditions by a public improvement. Eliminated is any distinction between surface, stream, and flood waters, as well as any necessity to classify a disturbance or change as an obstruction, diversion, or merely a natural channel improvement. With respect to surface water, Section 870.4 basically

restates former law. See Burrows v. State, 260 Adv. Cal. App. 29, ___ Cal. Rptr. ___ (1968). See also Keys v. Romley, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Pagliotti v. Acquistapace, 64 Cal.2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966). Similarly, with respect to stream waters diverted by an improvement thereby causing damage to private property, this section merely continues former law. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961). Former law may, however, have required pleading and proof of fault with respect to the obstruction of stream waters. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., supra; Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). The distinction between diversion and obstruction was not, however, a sharply defined one and may have merely reflected the difference between a deliberate program (inverse) and negligent maintenance (tort). Compare Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), with Hayashi v. Alameda County Flood Control and Water Conservation Dist., 167 Cal. App.2d 584, 334 P.2d 1048 (1959). This latter distinction is preserved in the present statutory scheme. On the other hand, under former law, there was no inverse liability for improvement of the natural channel--narrowing, deepening, preventing absorption by lining--even though it greatly increased the total volume or velocity resulting in downstream damage. See, e.g., Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 Pac. 554 (1920). There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 870.4 changes the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions.

With respect to flood waters, the so-called general rule formerly was that flood waters are a "common enemy" against which an owner of land may defend himself with impunity for damage to other lands caused by the exclusion of flood waters from his land. See Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625 (1887). However, this rule was qualified by a requirement of reasonableness. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). Further, the rule was subject to the condition that a permanent system of flood control that deliberately incorporated a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed constituted a compensable taking. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). In essence then, while Section 870.4 rejects the "common enemy" rule with respect to flood waters, it may do little more than focus proper attention on the proximate results of a deliberate, planned public improvement.

Section 870.6

870.6. A public entity is not liable under Section 870.4 for damage which would have resulted had the public improvement not been constructed.

Comment. Section 870.6 may merely make explicit what is implicit in the requirement of proximate causation under Section 870.4. Nevertheless, this section makes clear that nothing in Section 870.4 alters the former rule that liability is not incurred merely because flood control improvements do not provide protection to all property owners. See Weck v. Los Angeles County Flood Control Dist., 80 Cal. App.2d 182, 181 P.2d 935 (1947). In short, the law recognizes that some degree of flood protection is better than none. Secondly, this section insures that a claimant may not recover for any more damage than that caused solely by the improvement. Thus, property subject to inundation in its natural state may be damaged by a public improvement but it is only the incremental change that is compensable. However, an improvement that has been in existence for a long period of time may form the basis of reasonable reliance interests and be considered a natural condition. Damage resulting from a subsequent improvement, though no worse than would have resulted if neither improvement had ever been constructed, may therefore properly form the basis of a claim for damages.

Section 870.8

870.8. (a) A public entity is not liable under Section 870.4 for damage which the public entity establishes could have been avoided by reasonable steps available to the owner of private property to minimize his loss.

(b) A public entity is liable under Section 870.4 for all expenses which the owner establishes he reasonably and in good faith incurred in an effort to minimize damage to his property proximately caused or imminently threatened by the public improvement.

Comment. Section 870.8 states the former rule that an owner whose property is being taken or damaged by a public entity is under a duty to take all reasonable steps available to minimize his loss, and the corollary to this rule that expenses reasonably and in good faith incurred are recoverable from the entity. Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 42 Cal. Rptr. 89, ___, 398 P.2d 129, ___ (1965), citing with approval 18 Am. Jur., Eminent Domain, § 262 at 903; 29 C.J.S., Eminent Domain, § 155 at 1015 n.69; 4 Nichols, Eminent Domain § 14.22 at 525 (3d ed. 1962). The form of the respective statements ensures that the proper party will bear the burden of pleading and proving any breach of the requisite duty or obligation.

This section does not attempt to particularize with regard to what constitutes reasonable steps available for mitigation. The myriad of situations that can arise precludes such an attempt. Nevertheless, it should be noted that in appropriate circumstances the reasonableness of an owner's conduct could be affected by his giving notice to the entity of threatened danger and by his willingness to accept preventive measures provided by the entity.

Section 871

871. In determining any damages recoverable under Section 870.4, the trier of fact shall deduct the value of any benefit conferred by the improvement upon the owner of the property damaged.

Note: Section 871 states a rule of offsetting benefits. The rule provided here will, however, be consistent with that to be provided for direct condemnation after this aspect of direct condemnation has been studied by the Commission. The rule stated in Section 871 is analogous to the general tort rule that, in determining damages suffered as a result of a tortious act, consideration may be given where equitable to the value of any special benefit conferred by that act. See Maben v. Rankin, 55 Cal.2d 139, 10 Cal. Rptr. 353, 358 P.2d 681 (1961) (action for assault and battery and false imprisonment stemming from psychiatric care); Estate of de Laveaga, 50 Cal.2d 480, 326 P.2d 129 (19)(interest beneficiary received benefit of interest paid on interest erroneously held as principal); Hicks v. Drew, 117 Cal. 305, 314-315, 49 Pac. 189 (1897)(flooding case); Restatement, Torts § 920. It is also reflected in the set-off of special benefits against severance damage in a direct condemnation case. See Code of Civil Procedure Section 1248(3); Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Adv. Cal. App. 215 (1968).

Section 871.2

871.2. Nothing in this chapter affects the law governing the right to the use of water.

Comment. Section 871.2 makes clear that neither Section 870.4 nor any other provision of this article is intended to affect in any way the rights governing the use of water. Water rights in the latter context remain governed by Article XIV of the California Constitution and the various provisions of the Water Code relating thereto.