

## **INVERSE CONDEMNATION AS APPLIED IN FLOOD CASES**

### **I.**

#### **INTRODUCTION**

Over the years, California case law has articulated standards that have complicated a party's ability to obtain recovery against public entities in water loss cases. Subrogation actions brought under an inverse condemnation theory have had a low rate of success. Recently, however, two California Court of Appeal cases arrived to shed some light at the end of the litigation tunnel. In Arreola v. County of Monterey, (2002) 99 Cal. App. 4th 722, the Court clarified which public entities, in water loss cases, can successfully be sued for inverse condemnation and what standard of liability should apply to each. In Paterno v. State of California, (2003) 113 Cal. App. 4th 998, the Court fine tuned the duties owed by the State of California. This article will proceed to discuss in detail the significance of Arreola and Paterno.

### **II.**

#### **BACKGROUND**

Article I §19 of the California Constitution states that private property may be taken or damaged for public use only when just compensation has first been paid to the owner. When public use results in damage to private property without having been preceded by just compensation, the property owner may proceed against the public entity under an inverse condemnation cause of action.

The general rule, beginning in 1960's and through the 1980's, was that a public entity was strictly liable for inverse condemnation regardless of the reasonableness of its conduct. See Albers v. County of Los Angeles, (1965) 62 Cal.2d 250. The only exception to Albers was the traditional " common enemy " doctrine under which landowners were privileged to inflict

damage upon the property of others for the purpose of protecting his or her own property, including the erection of flood control waters and the discharge of surface waters into a natural watercourse. In 1988, beginning with Belair v. Riverside County Flood Control Dist., (1988) 47 Cal.3d 440, a series of cases began to modify the general rule by deciding that a rule of reasonableness rather than the extremes of strict liability or immunity was appropriate in cases involving flood control projects. Belair involved a failed county levee which flooded private property. The Court determined that the application of the Albers rule of strict liability would discourage needed flood control projects; and providing blanket immunity under the common enemy doctrine to public entities for failed projects would unfairly burden private landowners. Thus, under Belair a rule of reasonableness would apply across the board, meaning a public entity would be neither immune from suit or strictly liable. See Belair, 47 Cal.3d at 565.

In Locklin v. City of Lafayette, the Court applied Belair's rule of reasonableness in an inverse condemnation action, where defendants were alleged to have drained surface water into a natural watercourse increasing the volume and velocity of the watercourse and causing erosion of plaintiffs' downstream property. See Locklin v. City of Lafayette, (1994) 7 Cal.4th 327. Locklin explained that to determine reasonableness, the trial Court must consider what are now commonly referred to as the “ Locklin factors. ” They are: (1) the overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over

other beneficiaries of the project or is peculiar only to the plaintiff. See Locklin, 7 Cal 4th at 368-369.

The Locklin factors did not eliminate a strict liability standard as applied to inverse condemnation actions. Instead, traditional Locklin principles apply only in cases where improvements fail and damage property that has been historically subject to flooding. See Harry D. Miller, Basil S. Shiber, Miller and Starr California Real Estate, Chapter 30, Inverse Condemnation (3d ed.). Where a project was intended and designed to protect property historically subject to flooding from flooding, but the project fails and the lower property floods, the liability of the public agency depends on whether the public agency acted reasonably in the design, construction, and maintenance of the project improvements. Belair v. Riverside County Flood Control Dist., 47 Cal. 3d 550, 566-67. A public agency's reasonableness would be determined by weighing the traditional Locklin factors.

Locklin principles, however, do not apply to cases where improvements functioned as intended and designed (i.e., they did not fail) and damaged property that was not historically subject to flooding. See Harry D. Miller, Basil S. Shiber, Miller and Starr California Real Estate, Chapter 30 Inverse Condemnation (3d ed.). Under these circumstances, the reasonableness standard does not apply. Intentionally using private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from the flooded property owners a contribution in excess of the owner's proper share to the public undertaking and imposes strict liability for compensation on the public agency. See Odello Bros. v. County of Monterey, (1998) 63 Cal. App. 4th 778. In sum, if the property was historically subject to flooding, the owners were entitled to compensation by using the reasonableness test and applying the traditional factors. If the property was not historically subject to flooding, the reasonableness

standard did not apply, and the public agency was strictly liable for the damage. Atkins v. State, (1998) 61 Cal. App. 4th 1.

Irrespective of whether strict liability or a reasonableness standard applies, causation must necessarily be addressed in an inverse condemnation action. Flood water is, by definition, an extraordinary overflow of rivers and streams. As such, courts are often forced to look closely at the question of causation before imposing liability. See Harry D. Miller, Basil S. Shiber, Miller and Starr California Real Estate, Chapter 30 Inverse Condemnation (3d ed.). Generally, if the conduct of the public entity is found to be a substantial cause of the injury, it will be liable even if an unusual storm is also a substantial cause. Arreola v. County of Monterrey, (2002) 99 Cal. App. 4th 722, 760-762.

### III.

#### **NEW DEVELOPMENTS: ARREOLA & PATERNO**

##### **1. *Arreola***

As described above, legal decisions in inverse condemnation water loss cases have gradually and confusingly altered the standards of liability applicable to public entities. To remedy some of this confusion, the decision in Arreola v. County of Monterey arrived to shed some light on which public entities could successfully be sued for inverse condemnation and what standard of liability should apply to each. See Arreola v. County of Monterey, 99 Cal. App. 4th 722.

##### **a. Who Can Be Sued?**

The Arreola decision is significant in that it clarifies who is a proper defendant in an inverse condemnation water loss action, regardless of whether the standard of liability is

reasonableness or strict liability. An entity is a proper defendant if the entity substantially participated in the planning, approval, construction, or operation of a public project or improvement that proximately caused injury to private property. Arreola, 99 Cal. App. at 761. So long as the plaintiffs can show substantial participation, it is immaterial which sovereign holds title or has the responsibility for operation of the project, whether it's a flood control project or other. A public entity is a proper defendant if it has the power to control or direct the aspect of the public improvement that is alleged to have caused the injury. The basis for liability in such a case is that in the exercise of the governmental power, the entity either failed to appreciate the probability that the project would result in some damage to private property, or that it took the calculated risk that damage would result. See Harry D. Miller, Basil S. Shiber, Miller and Starr California Real Estate, Chapter 30 Inverse Condemnation (3d ed.).

**b. What Is The Standard of Liability That Applies?**

In Arreola, private landowners instituted an inverse condemnation action against Santa Cruz, Monterey County and the State of California, for the failure and collapse of a flood control levee that occurred in 1995. Santa Cruz and Monterey County were responsible for performing regular maintenance of the flood control levee. After the collapse, Santa Cruz County and Monterey County were found to have onerous duties and were held liable in inverse condemnation for damages resulting from the flooding of property historically subject to flooding. The trial court properly considered and applied the Locklin factors, finding that a public entity is liable in inverse condemnation if the design, construction or maintenance of a public improvement poses an unreasonable risk of harm to plaintiff's property, and the unreasonable aspect of the improvement is a substantial cause of damage. Arreola, 99 Cal. App. 4th 722. Among other things, the evidence showed that there was inadequate project

maintenance, and an awareness of the risk posed by the public improvements, and this was sufficient to support inverse condemnation liability.

With respect to the claim against the State of California, liability was not founded on the Locklin reasonableness factors. Instead strict liability applied to the State. The State had built an elevated portion of Highway 1 on an earthen embankment, which did not have adequate drainage and as such exacerbated the resulting flooding . The Court reasoned that the rule of reasonableness recited in Locklin should not apply because Highway 1 was not a flood control project that would implicate public policy considerations of not discouraging flood control projects or of not providing blanket immunity to conduct historically privileged for private landowners under the common enemy doctrine. See Arreola, 99 Cal. App. at 751-52. Exempting it from a reasonableness analysis, a rule of strict liability was applied to the State for deliberately building a highway which functioned as intended and in such capacity obstructed the course of waters that caused flooding. Id. at 751.

## 2. *Paterno*

In Paterno v. State, 113 Cal. App. 4th 998, damage to private property historically subject to flooding was caused by the failure of a levee originally designed and built by Yuba County, but thereafter accepted and maintained by the State of California as one component of a larger flood control system. The damaged landowners sought to impose inverse condemnation liability on several defendants, including the State of California and Yuba County. The Court held that when a flood control project fails to function as intended, causing damage to properties historically subject to flooding, strict liability for a taking does not apply. Paterno, 113 Cal. App. 4th 998. Rather, the rule of reasonableness should apply by weighing the Locklin factors

including: (1) the overall purpose served by the project, (2) to what extent losses are offset by reciprocal benefits provided by the project, (3) the availability of alternatives to the plan adopted; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities, (5) the extent to which the damage is a normal risk of land ownership and (6) the degree to which damage is distributed at large over the project or is peculiar to the plaintiff.

Further, the Court in Paterno agreed that in addition to the Locklin factors it would also weigh five Albers factors including whether (1) damage to property, if reasonably foreseeable, would have entitled the property owners to compensation, (2) the likelihood of public works not being engaged in because of unforeseen possible direct physical damage to real property is remote, (3) the property owners did suffer direct physical damage to their properties as a proximate result of the work as deliberately planned/carried out, (4) the cost of such damage can better be absorbed by taxpayers as a whole than by the owners of individual damaged parcels and (5) the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. Paterno, 113 Cal. App. 4th at 1017.

**a. Significance of *Paterno***

Analysis of the above factors militated in favor of imposing liability on the State of California which had accepted and operated the levee that failed. The Linda levee had been constructed in the early 1900 's with porous, uncompacted mining debris, in a location which encouraged seepage. In 1953 the State took control of and accepted the obligation of operating and maintaining the Linda levee. The State made an effort to make periodic repairs to the levee, but it did not test its structural integrity so as to discover inadequate construction. The Court found that original poor construction of the levee had led directly to its 1986 failure, and that the State could have remedied the problem long before the failure occurred, with several alternative

methods of construction. By accepting the obligation to operate and maintain the flood control system built by Yuba County, the Court found that the State accepted liability as if it had planned and built the system itself.

Under the “ acceptance doctrine, ” when a public entity accepts responsibility for an improvement, it becomes that entity’s public improvement regardless of who built it. Approval and acceptance by a public agency are implied by official acts of dominion or control over the property and by continued acts of maintenance and improvements over the years. The doctrine applies equally to strict liability cases and to those utilizing a reasonableness standard.

Thus, the significant development in Paterno was the Court’s application of the “ acceptance doctrine ” to the State of California. The State’s acceptance of responsibility for the levee and its exercise of dominion and control over it, made it liable for the failure of the levee even though the levee was originally designed and built by Yuba County. Liability was not placed on Yuba County who had been responsible only for ordinary maintenance and could not have altered the structure of the levee as would have been necessary to prevent its collapse. Only the State could have and should have remedied the levee’s structural inadequacy. As such, damages were determined to be caused directly and solely by an unreasonable State plan that resulted in failure of the levee.