A Review of Inverse Condemnation

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•ALONG THE North Carolina coast, a landowner sued the State Highway Commission for damages when the construction of a new by-pass blocked the ocean tides and flooded his land.[1] Near Sheridan, Wyoming, the owner of an outdoor drive-in theater sued the State, alleging that flashing lights from a new Interstate highway had contributed to the failure of his business.[2] Both of these lawsuits were brought on an inverse condemnation theory, an action in reverse eminent domain in which the landowner sues the highway agency for damages which are alleged to be traceable to the highway improvement.

Inverse condemnation has brought concern to many lawyers in State highway agencies, because of the role it plays in identifying new interests for which compensation is payable in condemnation law. Claims and interests of all kinds, that were not compensated in the original condemnation action, are liable to appear in the form of an inverse condemnation suit, as litigants press for compensation for a wide variety of claims, arising out of loss of view, loss of access, and damage from noise, dust, and fumes. The more conventional water damage cases are also common. Even more threatening, the inverse condemnation action is used increasingly as a dodge around sovereign immunity, and highway agencies face a growing number of lawsuits in which inverse condemnation is used to secure damages for what would usually be considered an ordinary tort. In this review of inverse condemnation problems, the relationships between tort and inverse causes of action are discussed.

A PERSPECTIVE ON INVERSE CONDEMNATION

The seemingly endless variety of inverse condemnation actions calls for some method of organizing what appears to be a chaotic and almost uncontrollable body of legal doctrine. An important first distinction should be taken between two different kinds of inverse condemnation claims. Some inverse suits seek damages for the compensation of interests that were clearly ascertainable at the time of the original taking, and that could have been compensated at that time had the highway agency chosen to do so. For example, if a new highway will deny access that was previously available, this fact is perfectly apparent at the time of the initial acquisition and damages for denial of access could have been paid at that time. Damage falling in this category is evident at the time of the initial improvement and, as it could have been compensated initially, the fact that the landowner seeks subsequent compensation in an inverse action does not change the substantive result.[3]

On the other hand, some damage for which compensation is sought by way of inverse condemnation is only probable at the time of the initial improvement, and could not have been paid for at that time under well-established rules forbidding the payment of compensation for speculative damage. Seacoast and drive-in examples will illustrate this point. In both cases the highway has obviously altered existing land-use relationships, but at the time the highway was built the damage to nearby property owners had not occurred. Of course, the highway agency might have chosen to acquire additional interests by way of easements or servitudes that would have avoided the damage. For ex-

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[1]Midgett v. North Carolina State Highway Comm'n, 132 S.E.2d 599 (N.C. 1963).
[2]Sheridan Drive-In Theatre, Inc. v. State, 384 P.2d 597 (Wyo. 1963).
[3]See the discussion in Netherton, R., "Control of Highway Access" (1963), pp. 233-39.

ample, it could have acquired a flowage easement in the North Carolina case. But it chose not to do so, and so the property owner must wait until damage occurs before he can bring his inverse action to seek compensation.

Analytically, of course, these distinctions can be challenged. In a case of denial of access, for example, the fact of injury may not be any more apparent at the time of acquisition than it is in what turns out to be a water damage case. Differences in result may be due to the way in which differing interests are categorized, and the different treatment of the access problem may be due solely to the fact that access has long been treated as a vested right which must be compensated as soon as it is disturbed. Nevertheless, the distinction is a useful one, as it separates those cases in which the highway improvement makes an immediately apparent alteration in pre-existing relationships between the highway and affected landowners, and cases in which the fact of damage is not finally ascertainable until some time after the highway is constructed.

CHOICE OF LAW PROBLEMS

Courts faced with inverse condemnation problems have been able to use a wide variety of legal doctrines in arriving at their decisions. Variety in the choice of concept has been structured by the eminent domain clauses in State constitutions, which typically require the payment of compensation for a "taking," or a "taking and damaging," of "property." Inasmuch as the constitution makes explicit reference to property rights, a property analysis can and has often been used by inverse condemnation cases. Especially in those cases which arise out of floodings and soakings and other forms of water damage, the courts can resort to property law doctrines surrounding the use of water in order to fix inverse liability. Although a ready-made body of private water law is available to aid the courts in finding answers in these cases, its applicability to inverse problems may well be questioned, however. As an early Wisconsin opinion pointed out,[4] a highway does not use water, it intercepts water. Private law doctrine that evolved in connection with the joint private exploitation of a common resource may not be able to provide the analytical tools that are needed to resolve the liabilities of public agencies, which occupy an entirely different status.

Even more difficult is the relationship between the law of tort and the law of inverse. Although sovereign immunity is a well-established American legal concept, it has been marked by deep exceptions that, at least in the local government area, make immunity the exception to a wide variety of rules of liability rather than the rule on which a series of exceptions have been grafted. Perhaps the most familiar exception to immunity at the local level is the rule of liability for negligence in the performance of proprietary, as distinguished from governmental functions. Although the proprietary-governmental distinction is difficult to apply in practice, and has come under increasing criticism, it has nonetheless resulted in a finding of municipal liability in a wide variety of situations in which streets are involved. Liability has usually been imposed, for example, for damage caused by inadequately planned culverts.[5]

At the State level, however, exceptions to the immunity doctrine have not been as pervasive. As a result, litigants have had to resort more frequently to inverse condemnation in order to find a way around the immunity principle that will allow them to recover for their damage. Practically all the courts now hold that the eminent domain clause is self-executing, which means that suit can be brought against the State without the necessity of enabling legislation. Whereas less than one-half of the jurisdictions permit a suit directly against the State for damages, alternative procedures are usually available by which the liability of the State can be determined.

The result is continuing tension and conflict between the immunity principle, which bars suits against the sovereign for damages, and the constitutional command to pay compensation. Either the court relies on the addition of a "damaging" amendment to the eminent domain clause, or it construes its "taking" clause to include an interference with the use of land, which is a damaging because it affects less than the full title.

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[4] Peck v. Baraboo, 141 Wis. 48, 122 N.W. 740 (1909).
[5] 18 McQuillin, "Municipal Corporations" §§ 53.121-53.123, 53.134 (3rd ed. 1949).

Either way, tort doctrines have been able to filter into inverse condemnation decisions, and plaintiffs have been allowed to recover on inverse grounds in cases which would be explainable on a tort theory were it not for the immunity barrier. Confusion may then be twice compounded, because related tort doctrines in the private law field have suffered from long-standing ambiguities.

THE ACT-OF-NEGLIGENCE CASES

Cases in which inverse liability is sought on the basis of a single act of negligence provide a good example of some of the doctrinal problems encountered in this area. A negligent act is nonrecurring and produces a one-time injury. In these cases the courts tend to classify the damage as a tort, and to deny recovery on sovereign immunity grounds. Damage compensable through inverse condemnation arises out of a permanent condition (the highway) that produces recurring property damage, and the courts tend to classify this damage as a taking under the eminent domain clause. Although these distinctions are clear at the extremes, they have a tendency to blur at the middle and may confuse the basis of inverse condemnation recovery.

An important borderline case is V. T. C. Lines v. City of Harlan,[6] a Kentucky opinion. Plaintiff sued the city by way of inverse for damage to its diesel bus engines caused by dust from sandblasting operations in a municipal pool. Earlier decisions in which inverse recoveries had been allowed by the court were discussed, and difficulties of distinction were noted. For example, in one of these earlier cases the court had appeared to allow recovery for negligent maintenance of a culvert.[7] In the Harlan decision the court concluded, somewhat broadly, that "whenever any property is damaged by a sovereign, whether it is the result of common acts of negligence or is related to the exercise of the police power, damages must be paid by the sovereign."[8] This case, however, fell "more properly"[9] with those in which recovery was sought for a negligent act, and so recovery was denied.

Recovery is not usually allowed in the act-of-negligence cases, although the basis of the decisions may not always be clear. In a common and typical case, suit is brought when highway employees spray the roadside with pesticides that drift over an adjacent farm and injure growing crops. Sometimes the decisions can deny liability on the ground that an inverse recovery cannot be based on single tortious acts.[10] But while the temporary-permanent distinction is plausible, not all courts will accept it and some have allowed recovery for damage not caused by permanent conditions.[11]

Results in these cases may then depend on the way in which the court chooses to categorize the facts. In Boitano v. Snohomish County,[12] plantiff's land was flooded by a spring uncovered during operations in defendant's adjoining gravel pit. After the spring was uncovered, it was directed by means of a channel onto plaintiff's land. There is no indication that any of the work was done negligently, nor was the condition necessarily permanent. Yet the Washington court found for the plaintiff:

> The taking or damaging of property to the extent that it is reasonably necessary to the maintenance and operation of other property devoted to a public use is, likewise, a taking or damaging for a public use.[13]

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[6] V.T.C. Lines v. City of Harlan, 313 S.W.2d 573 (Ky. 1958).
[7] Commonwealth v. Kelly, 314 Ky. 581, 236 S.W.2d 695 (1951).
[8] V.T.C. Lines v. City of Harlan, 313 S.W.2d 577 (Ky. 1958).
[9] Id., at 578.
[10] Harris v. United States, 205 F.2d 765 (10th Cir. 1953); Crisafi v. Cleveland, 169 Ohio 137, 158 N.E.2d 379 (1959).
[11] Nelson v. Wilson, 239 Minn. 164, 58 N.W.2d 330 (1953); Patrick v. City of Bellevue, 164 Neb. 196, 82 N.W.2d 274 (1957).
[12] Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941).
[13] Id. at 668, 120 P.2d at 492.

The Boitano language is broad enough to bring negligence in the operation of a public facility within the inverse category, and would permit a contrary result in the Harlan case. Most of the act-of-negligence cases are simpler, however, and the attempted use of a single act of negligence to fasten liability on the highway agency has allowed the courts to deny recovery. But the conceptual basis on which they do so is not clear.

THE TRESPASS-NUISANCE APPROACH

In tort law, the position of the private landowner has always been favored. Direct physical invasion of land is actionable as a trespass and recovery was had historically under absolute liability principles. If the physical entry was indirect, actual damage had to be proved and the entry had to be either intentional or negligent. The modern cases have shifted to this position in the direct trespass cases as well. Nuisance, on the other hand, is a non-trespassory action based on a condition on defendant's land that is injurious to plaintiff's property.[14] Although the nuisance action did not originally require intentional or negligent wrongdoing on the part of the defendant, it did require a showing of actual harm.

Trespass doctrine has clearly had its effect on inverse condemnation. When the inverse injury has been a physical and direct invasion, the trespass analogy has been available to construct the taking of a servitude on the basis of a continuing treaspass.[15] The absolute liability background of the trespass action may also explain the absolute approach which some courts take when fixing liability through the inverse action on the basis of the eminent domain clause.

Nuisance doctrines founded in tort were also incorporated at an early date into inverse condemnation law. Permanent conditions created in the construction of streets and highways can easily be analyzed as constitutional takings or damagings which require compensation. In fact, the close relationship between nuisance doctrine and inverse condemnation may well explain the puzzling nuisance exception to sovereign immunity. Regardless of immunity principles, public agencies have always been responsible for damage inflicted by the maintenance of a nuisance. Early California cases[16] had indeed suggested that the payment of damages for a nuisance is mandated by the constitutional eminent domain provision. Governmental liability for maintenance of a nuisance has since taken a path separate from inverse condemnation, but its inverse origins are evident.

How nuisance theory can support an inverse recovery can be illustrated by the North Carolina example. In that case, so the plaintiff alleged, the construction of the bypass highway created a "dam" which backed up the ocean and caused it to inundate plaintiff's land. The highway was treated as a nuisance and plaintiff was allowed to recover:

> But if a governmental agency maintains a nuisance, permanent in nature, causing damage to and diminution in the value of land, the nuisance is regarded and dealt with as an appropriation of property to the extent of the injury inflicted.[17]

An interesting conflict over the relationship between nuisance and inverse law has arisen in the airplane overflight cases. Inverse recoveries have been allowed against publicly-owned airports for damage due to recurring flights of airplanes over private property situated near the runways. When airplanes have flown near to but not over the property alleged to have been damaged, liability has been controverted on the ground that a trespass is an essential ingredient to a recovery. The courts are divided on this point,[18] but the long-established basis of inverse condemnation in nuisance doctrine could easily support recovery on a nuisance theory in cases like these.

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[14] For discussion see Note, 1961 Wash. U.L.Q. 62.

[15] United States v. Causby, 328 U.S. 256 (1946).

[16] The California story is told in Van Alstyne, "A Study Relating to Sovereign Immunity" California Law Revision Commission (January 1963) pp. 225-30.

[17] Midgett v. North Carolina State Highway Comm'n, 132 S.E.2d 599, 606 (N.C. 1963).

[18] Compare Batten v. United States, 306 F.2d 580 (10th Cir. 1962), noted, 111 U. Pa. L. Rev. 837 (1963), denying liability, with Thornburg v. Port of Portland, 376 P.2d 100 (Ore. 1962) contra.

SOLVING THE TORT-INVERSE RIDDLE

This exploration into the relationship between tort and inverse doctrine has necessarily been incomplete, but has been sufficient to pinpoint some of the areas of difficulty. Recent developments in the private law of torts have tended to obscure further the traditional bases of nuisance, trespass, and negligence. Conventional distinctions between entry by tangible objects (trespass), and by intangible objects (nuisance), have become harder to sustain in view of modern theories about the form and content of matter. In borderline cases, nuisance and trespass theory have coalesced. Modern authority has also abandoned the absolute liability approach to nuisance, and has likewise abandoned the notion that nuisance is an independent tort unconnected with traditional doctrine. Nuisance has become an effect, an unreasonable interference with the use of land which results from conventionally tortious conduct which may be intentional, ultrahazardous, or even negligent.

What these developments mean is that distinctions between liability in tort, which is blocked by immunity principles, and liability by way of inverse condemnation, which is compensable under the constitution, become harder and harder to defend. A growing trend toward abolition of sovereign immunity, which has now been abolished in many jurisdictions and which has not been available to the Federal Government since 1946, has complicated the solution of these problems. Some observers have felt that abolition of immunity principles could solve the inverse question, as claims prosecuted by way of inverse could then be recovered without restriction in tort. But this expectation will not easily be fulfilled.

A real question exists as to whether the repeal of sovereign immunity is meant to replace inverse condemnation in cases in which the inverse remedy has traditionally been available. More important, exclusions from liability have been adopted by statute or judicial construction in States in which immunity has been abolished, and one of the more important exclusions would avoid governmental liability for damage flowing from the exercise of discretionary functions. Inasmuch as the planning of a highway is classed in the discretionary function category, damage due to defects in construction that can be traced to defective planning has been placed within the discretionary function exclusion, and liability has been denied.

The author offers no easy solutions to the tort-inverse problem. A judicial tendency to adapt to the inverse action the weighing of advantage and harm that is so common to nuisance suits, a development too complex to discuss here, would suggest that courts will increasingly approach the decision of inverse cases on an explicit policy level. It has been suggested that policy considerations, embedded in constitutional provisions for compensation in eminent domain, point to the imposition of an absolute liability on highway agencies in cases in which physical injury to land can causally be connected to the highway improvement. Absolute liability does not make the highway agency an insurer of every loss, however, and the courts should be able to fashion a series of policy limitations to the imposition of inverse liabilities. For example, liability would not be imposed for flooding damage arising out of hurricances or other Acts of God.

Adoption of an absolute liability approach to inverse condemnation may well lead to a continuing coalescence of tort and inverse theories, gravitating toward a more-inclusive theory of responsibility which can achieve a fairer solution of the problem of public liability. Cause-in-fact problems, for example, would be common both to the tort and to the inverse cause of action. In the meantime, questions about the highway agency's liability for property damage will have to be answered both in the inverse and in the tort context.

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