Inverse Condemnation and the Law of Waters

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This paper deals with research on recent trends of legislation and court decisions pertaining to actions of inverse condemnation and relates them specifically to factual situations involving land damage due to interference with or rearrangement of drainage. Rules of liability between adjacent private owners for damage due to interference with the flow of surface water or disruption of percolating water can be traced back into the common law. In the present era of highway construction, courts have tried to apply this body of private law to drainage claims against public agencies. Results have not always been successful as attested to by recent efforts to clarify and codify in statute law the legal responsibilities of public agencies in regard to drainage damage, and by the continued existence of uncertainty in doctrines developed through judicial decisions on inverse condemnation claims. Analysis of these trends suggests that the police power dimension to this problem has not been fully explored or appreciated either by legislatures or courts, and that strong reasons exist for assigning a greater role to this concept in the development of inverse condemnation doctrine for claims against public highway agencies.

•MODERN HIGHWAY CONSTRUCTION is massive, and in spite of the most careful attention to elements of design the construction of a new highway may alter existing drainage patterns. A property owner in the vicinity of the highway may then suspect, at the time of condemnation, that he will be flooded out, water-soaked, or injured in some other way because he may have reason to know that the highway will alter existing drainage patterns. If he goes into the initial condemnation action, however, and asks compensation for this type of damage, he will be told that he is too early, that his damage at this time is merely speculative, and that he must wait until the damage has occurred before he can sue.

He may suffer damage later, however, and if he goes to court at this time he will find again that he faces several hurdles to recovery, the most important of which is the doctrine that the sovereign is immune from liability in tort. Under this doctrine, the State is not liable in circumstances in which private parties normally are compelled by law to pay for their wrongdoing. But sovereign immunity has often been misconceived, and it never was as absolute as it often appears. Indeed, the immunity principle can best be described as an exception to the imposition of governmental liability for a variety of specific damagings that never were protected on immunity grounds. For example, liability was imposed from earliest times when a nuisance created by a governmental agency caused damage to another property owner. Highway embankments are frequently treated as nuisances in drainage cases, enabling injured landowners to sue the highway agency directly on a "nuisance-tort" theory. The governing doctrine of drainage law grew up not in a tort context even though the principles sound tortious, but as a branch of property law. This fact led to the characterization of the right to interfere with drainage as a property right, as easements, and servitudes that will allow the highway department to send water on to the land of another. These property

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rights may be acquired by the highway agency when it builds the highway, thereby purchasing the right to flood without incurring liability.

Because the courts grew used to talking about interests in drainage as property rights, another door to recovery was opened to the injured landowner, inverse condemnation. Essentially, inverse condemnation is a suit brought by a landowner for damage attributable to the highway improvement that was not compensated in the original condemnation proceeding. The inverse suit circumvents the sovereign immunity barrier because it is based on the eminent domain clause of the constitution, which commands that property that is taken or damaged by a governmental agency must be compensated. The inverse remedy has a position in law that is as high as or higher than the immunity principle because it is derived from the eminent domain clause, which is set forth as part of the basic law of the land.

If the State chooses to say—and practically all the states have said so—that the eminent domain clause is self-executing, then the property owner is able to sue in inverse condemnation for his property damage and not worry about sovereign immunity. This self-executing aspect of the inverse condemnation action is of considerable assistance to the landowner because it means that he may proceed to bring a suit in court for his damage without the benefit of enabling legislation. In about half the States this suit may take the form of a direct action at common law.

Additional perspective can be gained by looking at some of the history that surrounds the compensation problem in eminent domain, particularly at the so-called "consequential damage" issue. Beginning in the nineteenth century, consequential damage (i.e., damage not involving the physical taking of property) was not compensable. The cases that laid down this rule, however, arose in situations where the injury was nonphysical; such as a denial of access, or a change in street grade unaccompanied by loss of lateral support. In Illinois, where nonphysical consequential damage was at first noncompensable, the State Constitution was amended in the late nineteenth century to provide for compensation of the damaged property as well as for its taking. Illinois was the first State to make this change, and its constitution became a prototype for other States that similarly amended their constitutions on the theory that the damaging amendment would extend the basis of compensation in eminent domain cases. Before adoption of the damaging amendment, the Illinois court had found for the landowner in water damage cases even though the constitution at that time only required that takings be compensated. History shows then that the eminent domain clause began to move in the direction of allowing landowner recovery for water damage even before the language of State constitutions was amended to add the word "damage" to its guarantee of property rights. Landowners discovered early that the eminent domain clause could be used as grounds for an independent cause of action when water damage occurred.

At the Federal level the classic decision on this point is Pumpelly v. Green Bay Co.[1] This case employed a very simple analysis of the Federal eminent domain provision, which only contains a taking clause. Here, the plaintiff's land was permanently flooded when a dam blocked a watercourse. As he was totally deprived of the use of his land, the court merely had to resort to a constructive taking theory to allow recovery even though title had not been formally appropriated. Since the Pumpelly decision the Federal cases have been fairly conservative in allowing recovery, but damages have been allowed if the flooding was sufficiently permanent and sufficiently attributable to the public improvement. Procedural problems are eliminated at the Federal level by the Tucker Act (28 U.S.C. § 1491) which gives consent to sue for cases arising under the Federal Constitution.

In addition to relying directly on the eminent domain clause as a basis for recovery in the inverse cases, the courts have also turned to private water law concepts. First, the principles of water law have been worked out in a context of private litigation and the background has been that one of the parties to the lawsuit has wished to make a developmental use either of the water in dispute, or of property that affects the drainage system in the area. Second, the decisional law in these cases has been worked out as a series of rules that have been somewhat mechanically applied. For example, it has been indicated that liability may be incurred in many States for stopping up a water-

[1] 80 U. S. (13 Wall.) 166 (1871).

course, but not for interfering with surface drainage even though the landowner is equally damaged in both cases.

Private water law doctrine came into inverse condemnation cases because of an early court applied limitation to these actions. They recognized, of course, that to allow without limit suits under inverse condemnation—eminent domain theory might broaden the responsibilities of public agencies too far. Hence many courts said, especially in the early cases, that the public agency would be liable in inverse condemnation cases in which a private defendant would have been liable. Obviously, if this approach is taken, and the court applies to the highway agency the very same doctrines of water use that apply to private defendants, highway agencies will be held liable with the same artificial results as indicated earlier.

Because these categories of private water use are not airtight, and because many States have modified their absolute water law principles to adopt more flexible doctrines based on reasonable use, the scope of inverse liability is confused in many States. From case to case, it is difficult to tell how the decision will come out, partly because of the fuzziness of the doctrine relied on by the court. In addition, the characterization of the affected water resource is critical, but the distinctions are factual, and until a case is tried it may not be possible to determine with certainty whether the highway has increased surface runoff or has blocked a watercourse.

A solution of the highway agency's liability which is not as dependent on the nature of the affected water resource has been suggested. Some jurisdictions have enacted statutes trying to codify the common law rules governing drainage, and in some instances have pushed the responsibility of the public agency even a little further. It is felt that these statutes have not succeeded in clarifying the basis of liability, because they have had to work against a fairly mechanical, fairly chaotic, common law pattern. In one instance, a statute applicable to municipalities and counties requires that the public agency provide sufficient surface drainage to take care of surface waters whenever the provision of drainage is "necessary or desirable."

In addition, two trends that are beginning to affect the more orthodox private water law principles that are used in the inverse cases have been detected. First, several States have now abolished sovereign immunity. To some extent, of course, drainage cases were always triable under tort principles. Apart from nuisance doctrine, municipal liability has always been imposed for building inadequate culverts that caused flooding. As sovereign immunity is abolished, however, the question of whether all the cases that are now brought under inverse water law principles will be shifted over to a tort theory must be asked.

There are some interesting clues that should be noticed. One is the Federal Tort Claims Act (28 U.S.C. § 1291) that waives sovereign immunity in tort. This statute contains an exception to liability that is stricter than recovery under inverse condemnation. Federal agencies are therefore better off under the statute waiving sovereign immunity than they were before. Another clue is provided by a recent North Carolina case[2] that without abolishing sovereign immunity in that State shifts the substantive context of water cases from a property to a tort setting. In this case, sea waters that had previously flowed over the plaintiff's property were backed up by a highway and caused flood damage. Liability was indicated, but most interesting was that the North Carolina court started by analyzing this case on water law property principles. They pointed out that they followed the civil law rule not the common enemy rule. It was noted that all of these concepts are beginning to merge into the reasonable-use doctrine.

Another question is whether private water law doctrine can be applied to a public agency as applied to a private defendant who interferes with drainage resources. A more open recognition of the eminent domain clause as an allocator of loss is suggested. The more explicit use of the eminent domain clause to shift the burden of loss when property owners suffer undue injury due to highway improvements is also suggested. As an early Wisconsin case pointed out, the highway does not use water, it intercepts water. A distinction should be made between private cases in which there is a joint use of water resources by private individuals, and an interference with these resources by a superior public agency.

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

Another problem in the handling of damage claims under eminent domain provisions has been overlooked. The converse to the imposition of public liability under the eminent domain clause is public "nonliability" under police power principles. In highway access cases, the courts have frequently used police power analysis to hold that a public agency is not liable for deprivation of access. Similarly, police power analysis should be available to solve some of the water damage cases.

Two recent cases that move in this direction are briefly mentioned. One is a California case, Beckley v. Reclamation Bd.[3] In this case, the plaintiff's land had been inundated following the construction of levees by the board. California had previously followed the common enemy rule, and as these were flood waters, liability would not previously have been imposed. However, the court held that the common enemy rule was inapplicable, and found for the plaintiff because, they said, he could not protect himself. In private cases, the lower landowner could always take protective measures when his neighbor shifted flood waters to him, and his neighbor who received the waters was able to take remedial measures in turn. In the Beckley case, however, the defendant was a flood control agency that was entitled by law to make the improvement, and then prohibit the plaintiff from making any changes in his own land that would have interfered with its scheme. The California court used police power analysis to find that the flood control agency had cast too great a burden on the plaintiff, and held that his damage was compensable in eminent domain.

Another case in this vein is Dudley v. Orange County.[4] Here a temporary dam built by the county to deal with flood conditions had inflicted water damage on the plaintiff. The temporary nature of the dam was not the decisive factor, however. The court compared the construction of the dam to any other instance of government action to remedy emergency conditions, making an analogy to cases in which a city tears down buildings to control the spread of fire. Building the dam became an action in aid of the county's police power. The fact that one or two property owners were damaged is not important, the court held, because the purpose of the dam was to prevent even greater damage to the rest of the community.

The discussion raises this question: if water law is put aside as the basis of settling inverse claims, as some of the courts are beginning to do, what should be put in its place? It is suggested, first of all, that a distinction be made between physical injuries occurring after construction of the highway and nonphysical injuries that can be discerned at the time of construction. Damage claims in the second category raise special problems. However, when physical injury has occurred to property following construction of a highway improvement, an examination of the eminent domain clause points to recognition of an absolute liability on the part of the highway agency. This conclusion is reached by looking at what the highway authority can do at the time of initial construction. They can, of course, take all precautions found necessary to avoid all possible risks to surrounding landowners. Precautionary steps at this time might include the building of culverts with more excess capacity, the taking of flowage easements on an overly extensive scale, etc. In the normal case, the highway agency stops short of full precautions and by so doing, it insures itself. That is, by avoiding the expense of complete protection, the highway agency effectively purchases its own insurance; and on this basis, absolute liability should be imposed in cases of physical injury.

It is then necessary to examine some way of limiting the liability of the highway agency. It is not suggested that the highway agency should become an insurer of all damage occuring in the vicinity of the highway improvement. Two limitations on absolute liability can be suggested; and when these limitations are applied to a range of factual situations, the results closely approximate those that are reached by the courts on other grounds. One such limitation is the "cause in fact" test. If the damage was not in fact caused by the highway improvement, the highway department should not be liable; and many of the cases that have been troublesome to highway lawyers are cases in which it is impossible to tell why flood damage occurred. Some highway agencies

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[3] 205 Cal. App 2d 734, 23 Cal. Rptr. 428 (1962).

[4] 137 So. 2d 859 (Fla. App.), appeal dismissed, 146 So. 2d 379 (Fla. 1962), Cert. denied, 372 U. S. 959 (1963).

collect data on water cycles and conduct aerial surveys before construction, in order to have the necessary data to show (if damage occurs) that the damage would have happened even if the highway had not been built. Second, some policy limits will have to be imposed on public liability. Certainly one such limitation is the "Act of God" rule that is applicable to hurricanes and floods that no one could have expected. In those cases, no one would suggest that liability should be imposed on the highway agency.

In conclusion, the rules governing the liability of State highway agencies for water damage are in a period of transition, as the courts abandon mechanical rules of liability for a more flexible and fairer approach. Equity and clarity in the doctrinal law governing liability for water damage will come, but only as the loss-distribution function of the eminent domain clause is recognized as the starting point for analysis, and as doctrines developed in a nonpublic setting are gradually put aside.