Inverse Condemnation and the Doctrine of Sovereign Immunity

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•INVERSE condemnation cases offer a challenge on two very different levels. On the one hand they present extremely practical problems of settlement and litigation, and on the other they present some of the most difficult theoretical questions imaginable. The discussion in this paper relates chiefly to water damage cases. The problems in this area are not by any means all resolved, but the water cases constitute a substantial body of law, and appear to be among the most difficult.

A typical water case might be as follows: A highway is built over a creek on a new location. Something has to be done with the creek, so a culvert is placed under the highway to take the creek through. From the engineering standpoint there is nothing else to be done except to make the surveys and select the kind of culvert that conditions require. But this may not be the end of the matter. If the culvert is too small to contain the creek, water may back up and permanently flood a field. The farmer then files a claim.

This case can be varied slightly, but realistically, to make it more difficult. Let us assume that the culvert is adequate. Later it becomes blocked with brush and other debris for lack of maintenance, and the temporary obstruction is the immediate cause of the flooding. Litigation in cases like this is grounded on the broadly stated "taking or damaging" provision, and for this reason raises the issue of state responsibility in its most abstract sense.

In actual practice I do not think that judicial results vary substantially under the two forms of the eminent domain clause. In the states which have a "damaging" provision the landowner may have an easier time of it. But in the long run, the landowner in a "taking" state may come out just as well. The clue lies in the interpretation, stretching back to the famous Eaton case, that finds a taking whenever there has been an interference with the use or enjoyment of property.[1]

So we start with a constitutional provision which says that property may not be taken or damaged without compensation. The trouble is that a constitutional provision of this kind calls down for decisional purposes all of the legal doctrines that have ever been used to solve problems of public responsibility for private injuries. Obviously, plaintiffs' attorneys and highway lawyers can use eminent domain concepts, and through them the law relating to consequential damages, in order to solve inverse problems. Lawyers also are likely to start talking about the police power cases, because the police power is the other half of the eminent domain power. Since the constitution also says that "property" may not be damaged without compensation, a reference is quite naturally made to various principles in the property law field. Property law contains a large body of doctrine on water rights, which is applicable to inverse cases. And finally, since the constitution may also have the word "damaging" in it, or may be interpreted to include the damaging principle, it is possible to call forth all of those doctrines which deal with damage to others, and which are subsumed under the category of law called tort.

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[1] Eaton v. Boston, C. & M.R.R., 51 N.H. 504 (1872). An interference with the use of property, short of taking of the fee, is equivalent to a "damaging."

Paper presented at the Highway Research Board's Second Annual Workshop on Highway Law, held at the University of Wisconsin, July 1963.

Difficulties come when the courts try to decide which body of doctrine to use in solving inverse claims. Inconsistencies arise within as well as between jurisdictions, and the same court may shift from property, to tort, to eminent domain concepts as it moves from case to case. As a result, inverse condemnation law is as chaotic as any you will find. The reason for this, I think, is that the courts are faced with the bar of sovereign immunity, and are bucking at it all the time, trying to find ways of allowing recovery. But they do not want to admit it, and so they simply may not explain themselves very well in order to avoid facing the impact of what they are doing.

WHAT IS INVERSE CONDEMNATION?

This, then, is the theoretical focus for the policy problem that is presented by inverse condemnation. The second question is: What is the nature of the inverse condemnation action? Is it merely a procedural device to collect certain specific kinds of damage, or is it by itself an independent body of substantive law? Some contend that the inverse action is merely a procedural device for collecting certain kinds of damage that would have been compensable in the original condemnation proceeding, had the state seen fit to pay. For example, prior to 1960 in North Carolina all condemnation actions were inverse. The state merely turned its bulldozers loose on a site and waited for the landowners to sue. And much inverse damage can be reduced to a condemnable property interest. For example, the state can avoid paying flooding damage by condemning sufficiently extensive flowage easements contemporaneous with construction. So in many situations the inverse action is used to collect damage, that would have been compensable originally.

But not all inverse claims cover damage that would have been compensable in the original condemnation action. I refer to the well-established doctrine that no compensation will be paid for damage that is speculative and conjectural. Consequently, some inverse damage is not compensable in the original proceeding because at that time there is only a probability that it will occur. A highway embankment, for example, may or may not slide. So it seems to me that some inverse actions present substantive as well as procedural issues, and that there is a body of substantive law being generated by these cases.

What is the nature of the substantive issue? Is it the consequential damage issue? Not all inverse damage is consequential. Inverse claims may arise on remainders and even on severed parcels following a partial take, because of the rule prohibiting the award of speculative damage. So it is not entirely true to say that the consequential damage issue is the inverse issue.

Is the body of substantive law relating to inverse condemnation merely a series of specific and very troublesome damage claims arising out of noise, dust and fumes, loss of access, and the like? There is some tendency to look to the inverse condemnation action as a means of taking care of new forms of damage as they develop. The accelerating impact of the highway program has brought forth new and novel claims, and when the administrative policy is not to pay them they will be brought into the courts for adjudication. In California, for example, the law of access was first developed through inverse condemnation, but well-established access claims are now paid in the original condemnation proceeding. But it is mistaken to confuse passing controversies with the basic problem underlying the inverse condemnation issue. It is true that the inverse action probably has a role to play in domesticating new kinds of damage claims and new types of substantive rights, but it is more than that.

On what basis can we isolate the substantive issue that inverse condemnation raises? It seems to me that the inverse action presents us with two kinds of claims, and I have designated these as "evident claims" and "probable claims." An evident claim would be based on a taking or damaging that is fully evident on the completion of the highway, and for which the highway agency refused to pay. For example, loss of access could be determined at the time of the original proceeding. While the measurement of damage may be the subject of further negotiation, the basic question of whether access is or is not going to be cut off is clearly ascertainable. This sort of claim ought to be capable of being handled in the original condemnation and should not be dealt with in a

later inverse action. The more difficult claim is the one based on a taking or damaging which is only probable at the time of the original proceeding, and which the agency did not recognize at that time, or for which payment could not have been made under the speculative damage rule. Damage from landslides or floods falls in this category.

APPROACHES TO PROBABLE INVERSE DAMAGE

I would like to put the category of evident claims aside for purposes of this analysis, and concentrate on claims that were only a probability at the time of the improvement. My purpose is to indicate how the several different doctrinal approaches—tort, property, nuisance, eminent domain—have been used to determine liability for claims that have arisen in the probable damage category.

A property rights analysis is often used. The court will begin with one of the historic approaches to inverse liability, which holds the public agency liable only if in the same situation a private party would have been liable. Since the eminent domain clause affords compensation for "property" taken or damaged, a convenient private law analogy for inverse cases is the law governing private rights in water. In cases in which adjacent land has been flooded by the highway, inverse decisions frequently take the law governing private rights in water, and apply it to the highway agency to determine its liability.

In my opinion it is neither equitable nor proper to apply to a public agency the same rules of liability that govern private individuals. The public agency has a responsibility to the whole community and must concern itself with an equitable distribution of the burden of loss from highway improvements. A private individual has no such duty. Apparently the California courts have felt the same way, because in some cases they have suggested that private water law is not fully applicable to public agencies. California follows the common enemy rule, which is based on the premise that a private individual may protect himself against surface water passed on by another. But a private individual has no such right in the case of a public improvement. So the California courts have had to modify traditional property law doctrines in order to fit them realistically into the situations in which inverse claims have arisen, and have tended to expand inverse liability.[2]

What about tort solutions? The analogy of the recent airport overflight cases[3] suggests that the taking of a servitude may be based on a continuing trespass. Another possibility is nuisance. The nuisance approach is quite interesting, because the nuisance liability of local governments grew up as an exception to immunity in tort in cases which could also have been handled on inverse condemnation grounds. For example, California has a long line of cases holding that if water backs up in a public street and damages adjacent land the municipality can be held on a nuisance theory. No talk about taking or damaging property, no talk about sovereign immunity, just a nuisance action. By taking one short step further, the court can find a taking or damaging when a condition created by the municipality has damaged adjacent property. Indeed, the development of inverse condemnation law and municipal liability for a nuisance has been interwined in the California cases.[4]

A related development in the overflight cases deserves comment. In some of the recent cases, planes flew across adjacent land rather than over the claimant's property, and the claimant has alleged that these flights amounted to a nuisance which took or damaged his property. There has been a lot of fuss over these cases in the courts and in the law reviews, because the grounding of inverse condemnation recovery on a nuisance basis has been thought unusual. But a look at the older street liability cases reveals a sizable and respectable body of law on which this theory can be based. Clip the wings off the airplanes and put them on the highway and what have you got? The

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[2]Beckley v. Reclamation Bd., 205 Cal.App.2d 734, 23 Cal.Rptr. 428 (1962).

[3]Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

[4]See Van Alstyne, A Study Relating to Sovereign Immunity 225-30 (California Law Revision Commission, Jan. 1963).

construction of the highway, leading to traffic noise, dust, and fumes, may very well give rise to inverse actions by adjacent landowners. Nuisance theory is one possible basis for these lawsuits.

Negligence may also be used as the basis for inverse recovery, although it is not often attempted. It is a half-tort, half-taking theory, and consequently courts have generally been wary of it because it forced them to face problems of sovereign immunity. Therefore, most courts have said that they will not base inverse liability strictly on a negligence theory. One example is an Oregon irrigation district case,[5] although the Oregon court changed its mind later. The California court took the other point of view in Bauer v. County of Ventura,[6] a leading case. In the Bauer case, the county raised the bank of a ditch subsequent to the construction of the ditch so that the bank was higher than plaintiff's land, and as a result his property flooded. Stumps and debris which clogged a culvert were also partly responsible. Plaintiff sued in negligence and recovered. While the court held that it would not impose liability for what it called "negligence in the routine operation," they did say that they would allow recovery for "deliberate acts of negligence." But an analysis of the Bauer opinion would indicate that recovery could not have been based on an act, since the raising of the bank was not of itself negligent. Liability must have been placed on an omission—the failure to take additional steps protective of the plaintiff. But when liability is placed on a failure to take a series of protective measures, the necessity of balancing the cost of protection against the risk of harm requires a weighing of utilities, a balancing process that belies the simplicity of the "deliberate" negligence analysis.

SOVEREIGN IMMUNITY AND THE UTILITY APPROACH

The road leads back to tort and to sovereign immunity, and the retreat from immunity in Arizona, California, Wisconsin, and other states suggests open recourse to tort liability as the basis for handling inverse claims. Is the tort liability of public agencies going to solve all of the problems of the landowner? Our analysis of the Bauer opinion points to limitations on recovery under the tort approach.

Many inverse cases arise in the exercise of discretionary functions of the highway agency, often in connection with the approval, preparation, or implementation of plans. Bauer falls in this category. The Federal Tort Claims Act, which waives Federal immunity in tort, excepts cases in which damage arises out of the exercise of a discretionary function, and the exception has been applied to bar liability in conventional cases of inverse damage. Most cases of probable inverse damage arise from a failure in design or in the implementation of a design, and the Federal courts have seen fit to apply the discretionary function exception to cases of this character. Consequently, Federal liability for damage that would be handled on an inverse basis has, if anything, been restricted by the Federal Tort Claims Act. Legislative and judicial acceptance of the discretionary function exclusion at the state level points to a similar result.

With this background in mind, we can look more closely at eminent domain doctrine to see if it provides a more satisfactory basis for inverse liability. A clue is provided by Thornburg v. Port of Portland,[7] a recent Oregon overflight case in which planes flew near to but not over plaintiff's property. The court imposed liability on the airport in language that requires the weighing of utilities in an explicit eminent domain context:

> Inverse condemnation . . . provides a remedy where an injunction would not be in the public interest, and where the continued interference amounts to a taking for which the constitution demands a remedy. If reparations are to

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[5] Patterson v. Horsefly Irr. Dist., 157 Ore. 1, 69 P.2d 282, 70 P.2d 36 (1937).
[6] 45 Cal.2d 276, 289 P.2d 1 (1955).
[7] 376 P.2d 100 (Ore. 1962).

> be denied, they should be denied on grounds of policy which are themselves strong enough to counterbalance the constitutional demand that reparations be paid.[8]

The court then resorted to nuisance theory to ground liability:

> [N]uisance theory provides the jury a useful method for balancing the gravity of the harm to the plaintiff against the social utility of the airport's conduct.[9]

This opinion offers a possible solution to problems of inverse liability, an approach that may not be attractive to all, but which is worth nothing. Thornburg suggests that the real basis of the inverse action lies not in an analysis of property rights thought entitled to protection, nor in fault notions common to negligence law. Inverse condemnation rests instead on the role of eminent domain in underwriting the burden of loss that public improvements place on private landowners. This role, in turn, requires the weighing of utility that is implicit in the Bauer case, the balancing of harm to the plaintiff against the social utility of the public improvement. Substantive clarification of inverse condemnation can well use the weighing of utilities as a starting point for analysis.

If doctrinal improvement is to come, however, it most likely will be achieved through court decision. In an area like this, in which decisions have turned so frequently on the equities of the case and on ad hoc considerations, substantive definition through statutory codification has real limitations. With no satisfactory judicial guideline to start with, statutes have not been very successful in delineating the scope of inverse liability. Pragmatic statutory isolation of claims, for which liability can be imposed on a near-absolute basis, appears as the only possibility in this direction. It should also be possible to proceed administratively to reduce the risk of liability after construction. Acquisition of slope and flowage easements is another possibility, and could be made to operate as a release of future damage.

There are no easy answers, and the doctrinal chaos in the cases reflects an attempt by the courts to reach a rough level of justice in the face of conflicting directions. I feel that the inverse action has a role to play as a dispenser of equity, but I also think that highway counsel have a responsibility to make sure that the courts are called upon to draw consistent and clearly explained lines between cases in which compensation should be paid, and cases in which it should not. Otherwise, the danger of expanding and erratic liability in the inverse field is very real.

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[8] Ibid. at 106.
[9] Ibid. at 107.