Measure and Proof of Damages

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• Two main kinds of inverse condemnation actions are now developing. One may be called ordinary inverse condemnation. This deals with real and personal property. The other we must call extraordinary inverse condemnation because it deals with personal injury and wrongful death claims brought within the scope of the eminent domain concept.

In regard to the ordinary type of inverse condemnation, where property or a property right has been taken or damaged, I think the problems of proof and measure of damages are the same as those where the State proceeds directly to use its eminent domain power in a regular condemnation action. There is generally a slight difference in that the property owner or the party aggrieved has generally gone to the trouble of hiring an attorney, having an appraisal made, and securing engineers or other expert witnesses which he deems necessary to put on his case. This gives him an initial advantage over the attorney for the defendant-condemnor, who must on short notice scurry around, find expert witnesses, determine the facts, frame a defense, and get into a position to answer the complaint that has been filed. With us these complaints must be answered within 20 days. In Arizona the rules are parallel to the so-called Federal rules, and there are certain means of securing additional time to answer. If we are not successful in obtaining a stipulation from the landowner's attorney for an extension of the time to answer, we file such things as a motion for more definite statement, motions to strike and motions to dismiss, and others, so that by the time these motions have been disposed of the State's right-of-way personnel will have been able to make some investigation of the case. In this investigation they will, for example, determine such things as whether the State is in fact occupying the plaintiff's land, whether there is in fact any damage, and so on. All these may be important in helping determine what the State's defense will be.

The point is that in these inverse condemnation cases the plaintiff is always (or should always be) fully prepared before his case is filed, and the State needs a little time to find out the facts and prepare a position. This is an excellent opportunity to use what we have talked about earlier in connection with pre-trial discovery. This is extremely important in connection with preparing to answer the plantiff's theory, for frequently in inverse condemnation actions the plantiff brings his action on a new theory of law as to compensability or a new theory of valuation. So it is almost imperative for the inverse condemnor to discover these things before he makes any defensive moves of his own. For example, when we have an ordinary inverse condemnation case which involves damage to an incorporeal hereditament, or consequential damages—as in the case of a change in grade that interferes with the ease of access—the facts on which the action is based do not become readily apparent from reading the highway engineer's specifications or looking at the highway plans. Therefore it is important to discover what has actually happened that makes the landowner think he has a cause of action.

Our position has been that where the landowner shows that his property has suffered a depreciation in fact directly attributable to the highway improvement, and there has been

a legal right interfered with in this connection, then he has made a prima facie case.

Whether it is an ordinary condemnation case or an inverse condemnation case, the order of proof under Arizona law is identical. The property owner has the burden of proof and has the right to open and close.

We had a case of inverse condemnation involving land at the junction of two U.S. highways (US 60 and US 70) near a city of about 7,000 population in the western part of Arizona. The site was about 2 miles outside the city limits, and the subject property was about 1¾ miles from the intersection. The property abutted one of these primary routes. In the course of improving this highway a cut was made where it crossed a range of hills, and the dirt from this cut was placed in the right-of-way to change the grade in front of the plaintiff's property. None of this fill dirt was placed on plaintiff's land, since we (in those days before the Thelberg case) thought that changes of grade wholly within the right-of-way could be made without liability for consequential damage to abutting landowners. In this case the roadway was elevated between 7 and 22 ft throughout the section that was affected. We recognized the physical effect of the change in grade on the access of the plaintiff and built a ramp so that he could get on and off the highway from his property.

At that time the plaintiff's property was being used for cattle grazing and billboard advertising. The plaintiff had purchased his property in three parcels, assembling it into one holding just two years prior to bringing the inverse condemnation action, and paid in the neighborhood of $1,000 per acre. Now I am sure that westerners will tell you that you cannot graze many cattle on 16 acres of desert land, which is what the plaintiff had. We determined from the State's agricultural experts that you could support about one-half a cow per year on the grazing that this parcel of land provided. We also determined, or became convinced, that the highest and best use of this property was for grazing purposes, as it was in fact being used. Thus the influences that were at work in the previous purchase of this property were largely speculative influences which are very much in evidence in the Southwest.

The problem of proving that the plaintiff's valuation was vastly inflated was, however, more difficult. The jury had an extremely difficult time visualizing the speculative factors that have been operating to increase values throughout Arizona. But we did keep at it with our experts, and tried to demonstrate to the jury that the plaintiff's reasoning on the highest and best use of his land was faulty. In our evidence of value we used four sales of similarly-sized property immediately across the road from plaintiff. But down at the junction of the primary highways (1½ miles away) there was a prosperous commercial development including a restaurant, laundry, filling stations; and it did not occur to our people that the plaintiff's property should be compared with the value of these lots. Yet the plaintiff's witnesses testified that the highest and best use of his land was for commercial purposes in front and for a drive-in theatre in the back. They argued that these were specific highest and best uses since the plaintiff already had the plans drawn up and the survey done for these uses.

The result was to confront us with a new theory of valuation. We tried pre-trial discovery, but were not allowed to discover this. So we had to play by ear when the case went to trial. We found that there had not been a sale of property in this immediate area in 8 years. The commercial development at the junction had been by owners of individual lots. In the face of this, the plaintiff had taken each of these properties, capitalized the income from them, extracted the value of the improvements on the properties to get the raw undeveloped land, and then applied these values to the subject properties. As a result, the jury came back with

$84,000 whereas our appraisers had testified respectively to $4,200 and $5,700. Needless to say we appealed, partly because of the money involved, and partly because we had not been allowed to take depositions and submit interrogatories prior to the trial.

This is an example of the importance of relating the defense evidence to plaintiff's theory of law. Here we based our whole defense on a theory —change of grade within the right-of-way—which turned out to be wrong. The Thelberg case[1] was decided while this case was pending trial. Also, this decision for the plaintiff was based on what we regard as an erroneous theory of valuation which we were not able to anticipate in advance of trial. I am sure the verdict would have been different if we had been prepared to deal properly with this theory. You cannot rebut this type of evidence when it arises for the first time in the course of the trial. You cannot secure witnesses and prepare defensive evidence on that short notice. And once it is in the record, it is sure to influence the jury no matter what kind of instructions they get from the judge.

Now, turning to the unusual condemnation cases where personal property, personal injury and other forms of damages are the basis of the action, these had their genesis in Arizona in a case entitled *State v. Leeson,* 84 Ariz. 44, 323 P.2d 692 (1958). It involved an arroyo flooding out a laundry and dry cleaning establishment allegedly because of the manner in which a highway improvement was constructed. When plaintiffs brought suit against the State, they were thus claiming damages not only for their real property but also to their fixtures, personal property, and the personal property of their customers held by them under the terms of a bailment. Our supreme court held that the plaintiffs could not recover damages on the basis of goods left with them under a bailment, since this was a risk which was not reasonably foreseeable by the parties to the bailment and hence not within the bailee's responsibility. But, with respect to the rest of the alleged damages, and without discussing whether this taking or damaging was for a public use, the court held that the State was liable for damage to real property, personal property and fixtures.

Another Arizona case has involved the allegation that inverse condemnation authority can be used in situations where there is personal injury and wrongful death. The facts are as follows: a man and wife were driving north on Tucson Blvd. during a rainstorm, and the arroyo was flowing. As they crossed it they apparently hit a chuckhole so that the car was overturned and the wife was thrown out of the car into the stream and drowned. The husband suffered personal injuries. An action was brought against the State for damages based on this set of facts.

I do not know what the proof or measure of damages would be in this case. There were only four documents filed: the complaint, the motion to dismiss, the memorandum in support of the complaint and against the motion to dismiss, and the State's reply. Based on these the trial judge decided that the Supreme Court should rule on whether this theory of law should be sustained. This case is significant because it could become the one in which the doctrine of sovereign immunity is abolished in Arizona.

There is another case. We have touched on this nuisance element in inverse condemnation and proof of damages. I recently had a borrow pit inverse condemnation which started when the adjacent property owners sought to enjoin it. In Arizona we rarely condemn a materials site. If we cannot negotiate with the property owner we generally go to another location where we can negotiate. But in this case we were virtually in the downtown Tucson area. We negotiated what we call a license-royalty agreement with the property owner whereby we would remove the over-

[1] State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960).

burden material and leave the sand and gravel for him. When we got into the area with our contractor the neighboring property owners started an injunction action to have the operation shut down. We argued that this was the wrong remedy, because what we can condemn we can lease or purchase; if they have any remedy it is inverse condemnation, and they cannot shut us down.

The judge did not accept this, and we could not get the case removed to Federal Court where I felt the doctrine of sovereign immunity might be on better ground. Ultimately we let the injunction issue and filed a direct condemnation action against the material pit, naming as defendants all the property owners who had been involved in the original action. We tried to avoid admitting these people's interest in the material pit property, and alleged that they "may claim some damage" by reason of the smoke, fumes, dust, vibrations, and so on emanating from the operations in the pit.

We anticipate being able to complete our operations in this pit in two months time, so that this is a temporary arrangement from our point of view. The property owners are talking about depreciation of the value of their property, and that may well be. However, under the ordinary rules of evidence in condemnation I do not believe they can show this for a temporary operation. It is our theory that the inconvenience is temporary and noncompensable.

But there is another problem. If the property owners' theory is correct (*i.e.*, that we cannot remove the materials from this site), they have something in the nature of a beautification easement created by implication on the land of their neighbors. They are not really concerned—and some of the property owners have admitted to me—about this two-month period of excavations; they are concerned about the hole that will be left afterwards. If they have something in the nature of an easement or right over this other man's land to have it remain substantially as it was for an indefinite period, then we have created a new form of property right that must be reckoned with. I do not know whether anyone else has encountered this same situation, or not. But if anyone has any ideas about it I would like to know.

In this inverse condemnation field there are a number of related problems none of which have been really touched in our discussion. One of these is the special statute of limitations. We are now trying this issue before our Arizona court. Other aspects of this subject are discussed in 18 Am. Jur., *Highways,* §394; 30 A.L.R. 1190 *et seq.*; 129 A.L.R. 1288; 123 A.L.R. 676; 1 NICHOLS, EMINENT DOMAIN. §4.102 [1].

These contain general discussions of inverse eminent domain relating to the statute of limitations. In Arizona we have a two-year statute of limitations, and our problem is whether it is constitutional. Our constitution provides that "no private property may be taken or damaged for a public use without compensation first having been paid." The property owners' attorneys take the position that if this constitutional provision has any validity no statute of limitations can ever run against an inverse condemnation action. The general rule, according to my research, is that where there is a specific statute of limitations, as our two-year statute in Arizona is, it will govern and bar the action after it has elapsed.

DISCUSSION

Lindas.—When does the taking occur in an inverse condemnation action? Is it at the time the injury occurs or at the time the facility is constructed?

Amey.—We have taken the position that it is when the injury occurs. And, in this connection, we have also taken the position that where there

has been a sufficient physical change in the highway facility to apprise the owner that his property rights have been damaged, then the cause of action commences to run, until the statute bars the action. For example, in the change of grade case, I described earlier, it may be that when the construction was half-completed the property owner could see that he was not going to be able to get on and off his land as he had before. He should then have been apprised of his damage, and in fact was.

This landowner had been dickering with us trying to get us to take this property, and he wanted too much. The State would just not deal and that is why it was decided to keep all the highway construction within the right-of-way. As a matter of fact, the landowner had hired an appraiser prior to the time any of our highway construction began. Shortly after construction began, the contractor who got carried away and sent a man with a bulldozer over onto the adjacent property and widened the natural drainage ditches that were there. The resident engineer on the job discovered it about 5 o'clock. He had to get the approval of the contractor to have the bulldozer operator work overtime, but that same night, working by artificial illumination, the property was put back in substantially the same condition that it was in before. Two years later it was impossible to tell that a bulldozer had been over on that property. The property owner's appraiser, who resided some 250 miles from where the property in question was located, was there with his camera to take photographs of what happened during the short span of a few hours that the property was torn up. This all went into evidence, not because they were claiming damages for the temporary trespass, but because our witnesses had not seen the property as it was in the before condition.