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2/26/69

Memorandum 69-35

Subject: Study 65 - Inverse Condemnation (General Approach)

In accordance with the directions of the Commission at the February meeting, the staff has prepared a series of memoranda dealing with several specific areas of inverse condemnation liability. At least two of these memoranda--Memorandum 69-36 (water damage) and Memorandum 69-37 (concussion, vibration, and interference with land stability)--contain some first steps toward codification of the applicable rules of liability. The staff believes that it is a sound decision to make a piecemeal analysis of the selected areas, but the staff has hope that from this process a statutory scheme of broad principles applicable generally can be obtained. Even if it is not possible to provide for rules stating the test of liability in all areas of inverse condemnation liability, it is likely that certain rules of a defensive or procedural nature applicable to all cases can be developed.

We do not suggest at this time that the Commission adopt the rules stated below, even on a tentative basis. However, we state below some rules that might be made general rules if, after considering the application of the rules in particular areas, it appears that they should be general rules substantially as set out below or as modified.

As a basic proposition, the staff believes that it is essential that the rules in any particular area--such as water damage--should be the exclusive basis of inverse condemnation liability in that area. This may involve some complex drafting problems, but we will fail to achieve our objective of providing a statutory statement of inverse liability in particular areas if we create a situation where the courts are free to impose liability in cases where liability does not exist under the rules

we provide. Does the Commission believe that this is the approach we want to take?

The following propositions are stated as some of the general rules that might be made a part of a fairly comprehensive statute governing inverse condemnation under a chapter or division entitled "General Provisions Relating to Liability."

General principles that might be adopted tentatively:

1. A public entity is not liable under Article I, Section 14, of the California Constitution for any damage to property which the public entity establishes could have been avoided if the owner of the property had used reasonable care to minimize or avoid the loss. This rule does not apply where the measures necessary to avoid or lessen the damages would involve an unreasonably great effort, risk or expense, or would be impractical.
2. The owner of property who complies with Rule No. 1, and attempts to minimize the damages, is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the threatened damage. The owner or property damaged or threatened with damage under circumstances where the public entity is or would be liable under Article I, Section 14, of the California Constitution is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert future damage.
3. Where a public entity is liable for damage to property under Article I, Section 14, of the California Constitution, any general or special benefit resulting by reason of the public improvement to the property damaged which has not been charged, directly or indirectly, against the property shall be offset against the damages otherwise recoverable.

4. A public entity is not liable under Article I, Section 14, of the California Constitution for trivial, minor, or inconsequential damage.
5. Prejudgment interest is not allowed on damages awarded under Article I, Section 14, of the California Constitution.
6. Where the total damage to property is the result of the actions of a number of persons, including a public entity, and the public entity is liable for such damage under Article I, Section 14, of the California Constitution, the public entity is liable only for the proportionate share of the total damages that the public improvement caused, taking into account all the improvements, both public and private, that caused the total damages.
7. The damages recoverable under Article I, Section 14, of the California Constitution, are limited to damages for injury to property, real or personal, and do not include consequential damages such as damages for loss of business or inconvenience nor do such damages cover personal injury or death.
8. Where an action is brought against a public entity for damages resulting from a public improvement and the harm for which damages is sought is a continuing or recurrent harm, the public entity at its election is entitled to have damages computed for all past and prospective harm, in which case the public entity acquires a right to maintain the improvement without future payment of damages for future harm.

There are, no doubt, other principles of the type stated above that can and will be developed in the course of our study of particular areas of inverse liability. In addition, the problem of whether there is a right to jury trial on a particular issue, is one that must be resolved. We will probably have to prepare background research studies on many of the points listed above as well as on other points.

With this background on the general approach that might be taken to inverse condemnation, we now direct your attention to Memorandum 69-36 and the succeeding memoranda relating to specific areas of potential liability. These memoranda are merely a starting point for discussion. It appears that a number of "brainstorming" sessions at the March and future meetings will be necessary if we are to work out the rules in these particular areas and--later--to determine which rules can be formulated as general rules. In other words, it is the staff's hope that the attempt to specify the rules in selected relatively narrow areas--rather than limiting discussion--will serve to generate discussion which will permit formulation of rules not only in those areas but will result in a broader inquiry into the possible formulation of more general rules.

As a preliminary matter, it should be noted:

(1) The 1963 governmental liability act is the basis for liability for damages for personal injury or death or property damage based on a negligent or wrongful act or omission.

(2) The staff proposal in Memorandum 69-38 (ultrahazardous activities) would be the basis for liability without fault for personal injury or death or property damage.

(3) Inverse condemnation liability under Article I, Section 14, of the California Constitution, should be the basis for liability without fault for actual physical injury to property, both real and personal.

That there are these three basis upon which recovery may be based under the facts of a particular case must be kept in mind.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary