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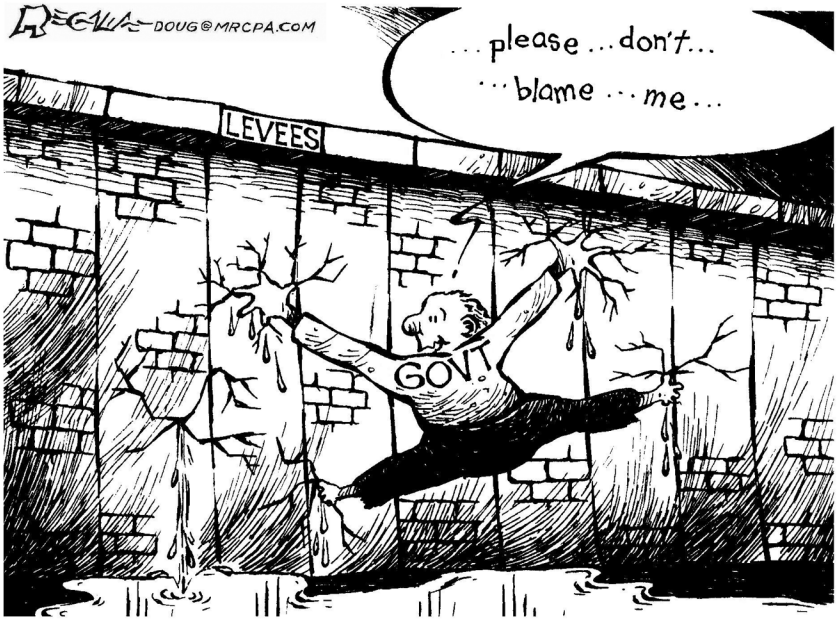
ARTICLE:

FLOOD CONTROL SYSTEM FAILURE, PROPERTY DAMAGE, AND THEORIES OF LIABILITY—INVERSE CONDEMNATION OR MERE NEGLIGENCE, IF ANY

By Christopher H. Doyle*



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I. INTRODUCTION

This article discusses three recent cases concerning the scope of public entity liability in inverse condemnation for damages associated with the rupture of flood control structures and resulting harm: *Paterno v. State*,[1] *Arreola v. County of Monterey*,[2] and *Tilton v. Reclamation Dist. No. 800.*[3] In general, such cases are premised upon the failure of public improvements built to control flood water. These three cases, which are quite fact-specific, essentially draw a distinction between negligence associated with a public entity's "deliberate plan" relative to public works construction and maintenance, on the one hand, and negligence that results in harm due to operation or maintenance of public works after construction, on the other. Damage resulting from the former kind of negligence is compensable under the theory of inverse condemnation; but damages due to the latter are not. Those damages may be recoverable under the theory of negligence—if at all.[4]

II. BACKGROUND

Today there is an increasing awareness of climate change and other causes of profound physical changes to our environment. One commonly discussed anticipated result of global warming is the rise in sea levels, which in turn is expected to cause flooding and the submersion of property in low lying areas. Many California cities, including Sacramento, for example, are vulnerable to flooding and accordingly, they have a strong interest in issues of causation and liability associated with flood damage.

Flooding associated with heavy rainfall, snow runoff, floods, and changes to rivers, dams, levees, and property reflect California's history dating back to the Gold Rush, which caused significant environmental problems, the repercussions of which the courts recognize today. As long ago as 1884, hydraulic gold mining practices were declared a nuisance.[5] In 2003 in *Paterno v. State*, Judge Morrison, writing for the panel of the Third District Court of Appeal, stated: "The environmental aftermath of the Gold Rush continues to plague California. Hydraulic mining debris caused flooding which led to the building of levees at the confluence of the Yuba and Feather Rivers. Almost a century ago, the Linda levee was built with uncompacted mining debris, and the use of that debris caused the levee to collapse on February 20, 1986."[6] *Paterno* details the history of California's flood control system, and provides the background of underlying issues concerning public policy, financial responsibility associated with flood control systems, and notions of fairness, which remain central issues in litigation generally.

Congress formed the California Debris Commission (CDC) in 1893 to counter the effects of hydraulic mining—the process in which potentially gold-bearing earth is excavated by high-pressure jets of water and the debris is pushed into riverbeds. The Sacramento River Flood Control Project was based on the Grant Report, which California approved in 1925 and

Congress approved in 1928. It consisted of a detailed plan for works designed for flood control, including levees, and in 1953, that project was transferred to the State. Before the project's mechanisms were in place, flood control primarily consisted of a mixture of public and private projects protecting small areas, and occasionally in conflict with each other, as historically, floods were considered a "common enemy," and a landowner was privileged to protect himself as needed, and could repel flood waters regardless of the effect on other lands without being liable for harm to downstream or neighboring landowners.

The California Constitution, which provides authority for inverse condemnation liability, states that the government may take or damage property for "public use."[7] As Justice Traynor stated, "The destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement."[8] Often, such cases are based upon the failure of public improvements to control flood water, and courts have recognized that a landowner should not bear a disproportionate share of damage directly caused by a flood control project's failure due to an "unreasonable plan."

In 1994, the California Supreme Court issued a ruling in *Locklin v. City of Lafayette.*[9] In that case, plaintiffs, who owned properties along a creek, sued the City of Lafayette (and other entities) in tort and inverse condemnation. They alleged that defendants had made improvements which increased the volume and velocity of creek water beyond that which the creek normally would have carried, and that was a substantial factor in damaging plaintiffs' properties. *Locklin* explained that the privilege to discharge surface waters into a natural watercourse (the natural watercourse rule) was a conditional privilege, and stated that in determining "reasonableness" in such a case, the trial court must consider what have become known as the *Locklin* factors, which include: (1) the overall purpose served by the project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public of feasible alternatives with lower risks; (4) the severity of plaintiff's damages in relation to risk-bearing capabilities; (5) the extent to which the damage of the kind plaintiff suffered is generally considered a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large among other project beneficiaries, or is peculiar to plaintiff.[10] A plan's reasonableness is not determined under tort principles, as it might be in a case concerning a public property's dangerous condition, but is determined by weighing such factors in balancing the need for flood control projects against damages due to their failure to assess the damage such projects cause.

Paterno, discussed below, is noteworthy because it acknowledges the long, rather disordered history of California's construction and control of

flood systems, the extraordinary public needs they satisfy, the benefits they offer, and the severity of the loss individuals may suffer when they fail.

III. *PATERNO v. STATE*[11]

Paterno concerned the 1986 failure of the Linda levee at the confluence of the Yuba and Feather Rivers. It involved a large number of parties and a complicated procedural posture concerning many years of litigation. As mentioned above, hydraulic mining debris from the Gold Rush caused flooding and environmental damage in the nineteenth century and led to the building of levees. One of several levees and works designed for flood control that are part of the Sacramento River Flood Control Project ("SRFCP"), the Linda levee was built in 1904, from porous mining debris prone to seepage. In 1953, the SRFCP works were transferred to the State of California. As part of the transfer, the parties entered into a memorandum of understanding confirming the State's obligation to operate and maintain the works and to hold the federal government harmless. Reclamation District 784 ("the Reclamation District") was responsible for ordinary maintenance, but did not have authority regarding the levee's overall structure. The use of the mining debris in the levee's construction caused it to collapse in 1986. The neighboring landowners' property was extensively damaged, and Paterno and approximately 3,000 other property owners ("the owners") filed suit against the State and the Reclamation District.

The Court of Appeal for the Third Appellate District held that the State of California's operation of an unreasonable and unstable flood control levee rendered it liable for inverse condemnation for the damages the broken levee had caused to the nearby private property. According to the court, although the State had not built the levee, when it assumed operation of the system, the State accepted the liability for it.

The court had previously affirmed a defense jury verdict finding no dangerous condition of public property, reversed the award in an inverse condemnation liability action against defendants, and remanded for another trial on inverse liability. The trial court entered judgment in favor of the Reclamation District and the State. The owners appealed, contending that the trial court's factual findings established, as a matter of law, liability for inverse condemnation against the State. The court of appeal agreed. It stated: "California Supreme Court precedent dictates that a landowner should not bear a disproportionate share of the harm directly caused by failure of a flood control project due to an unreasonable plan."

Considering the factors enumerated in *Locklin,*[12] to determine whether the flood control plan was reasonable, the court decided that the State was liable for inverse condemnation as a matter of law. The court relied on the fact that the levee system had benefited all of California and had saved a significant amount of money over many years. The court emphasized that the levee had failed because of the manner in which it had been built;

the use of uncompacted mining debris was inherently unreasonable because the debris was susceptible to seepage and collapse.

The court considered the facts that the trial court had determined, and applied the *Locklin* factors; it found that the owners' damages had been directly caused by the State's "unreasonable plan," which caused the Linda levee to fail. Recognizing that the levee system had benefited all of California and saved billions of dollars, the court noted that it would violate *Locklin* to force the owners to bear the cost of the levee system's partial failure. This was particularly important since an essential aspect of the State's flood plan was to accept existing levees to the greatest extent possible in order to minimize the cost of an extensive flood control system.

The court observed that although the State had not designed the levee, by taking over the project, it had accepted liability for the system *as if* it had built it. Also, the court recognized that the record indicated that long before the levee's failure, feasible cures could have fixed the problems. The court noted that an entity assuming control of the project was not responsible for system "upgrades," but the cures in this case would not have constituted "upgrades." The court decided that the State was liable to the owners because it had failed to remedy the levee's inherently unsound structure.

The *Paterno* court reasoned that the public had received the levee's benefits without having to bear the expense of insuring that it had satisfied the design standards and was capable of handling the water channeled to it. Furthermore, since the cost savings from not correcting the levee's problems had benefited the State, it would not be fair to require the owners alone to bear the risk. The court observed that state law provides that the project itself must bear the costs of correcting seepage and erosion problems in a given water project. Moreover, where the seepage led directly to the levee's collapse, the court found no reason why the flood damages should not be attributed to the project as a whole, since the State had essentially gambled that the location and construction of the levee would be sufficient. Furthermore, the court stated that the levee had been poorly constructed and, according to testimony, had never satisfied engineering standards. The court stated that the levee had been "destined to fail" and the owners should not have to bear the burden of the deferred costs of maintenance, but rather the costs should be spread among the public at large, which had benefited from the system for many years. The court affirmed the judgment in the Reclamation District's favor, however, because it lacked authority to alter the structure although it had been responsible for the levee's day-to-day maintenance.

Like *Paterno, Arreola,* discussed below, involved the failure of a levee, this time, on the river along Santa Cruz and Monterey County boundaries.

IV. *ARREOLA v. COUNTY OF MONTEREY*[13]

Arreola involved the 1995 failure of the Pajaro River levee on the river which formed the boundary between Santa Cruz and Monterey County. It

involved six consolidated actions that 300 individuals had filed against various public entities after a levee project failed during a heavy rain and the resulting flood damaged their property. The plaintiffs sued the state, county, its flood control and water conservation district, and a second county and its water resources agency. Plaintiffs complained against the counties that the failure to keep the project channel clear diminished its capacity and caused the levee to fail during a storm. They alleged that the state failed to design the highway with adequate flood provisions, in that the drainage culverts under Highway 1 were too small to drain the flood and the resulting damming effect caused higher floodwaters and destructive ponding. The jury found all defendants liable on the tort claims, and the court found all defendants liable on the inverse condemnation claims. The trial court entered judgment for the plaintiffs. The court of appeal affirmed, holding that the trial court had correctly found the county defendants liable in inverse condemnation based on their failure to maintain the levee, since their knowing failure to clear the channel, despite repeated warnings, was not the mere negligent execution of a reasonable maintenance plan, but the long-term failure to mitigate a known danger.

The appellate court held that the trial court had not erred in defining the levee's water capacity, and that substantial expert evidence supported the jury's findings, which were pertinent to plaintiffs' tort claims against the county defendants, that peak flows during the rainstorm did not exceed the project's design capacity. The appellate court also held that the trial court had not erred in finding the State liable in inverse condemnation based on its unreasonable design of the highway (which had failed to account for a foreseeable flood) and that design immunity failed to provide the defendant a defense to plaintiffs' tort claims.[14] Finally, the court determined that the county defendant and its water resources agency were properly liable to plaintiffs, since the county was directly liable. The court emphasized that in order to prove the type of governmental conduct that will support liability in inverse condemnation, it is sufficient to show that the entity knew of the risk its public improvement posed, and that it deliberately chose a course of action (or inaction) despite that known risk.

In contrast to *Paterno* and *Arreola*, in our next case, *Tilton*, discussed below, it appears that to some extent, form dictated substance and that case highlights the importance of the manner in which the pleadings frame the issues. *Tilton* ostensibly pertains to "ordinary" levee problems. It is noteworthy also for *how* those problems are addressed—as the case was decided on demurrer, which the court sustained without leave to amend. The court made clear that a party cannot recover in inverse condemnation for "garden variety" negligence (i.e., inadequate maintenance of a flood control system), which was how the pleadings framed the issues. But *Tilton* is unusual and the decision was in some respects unexpected in light of the cases of preceding years.

V. *TILTON v. RECLAMATION DIST. NO. 800*[15]

Tilton involved two residences built on an "urban levee" in Contra Costa County's Discovery Bay community. The homes were located on top of the levee, which was owned by Reclamation District No. 800; the levee, in turn, was located on real property owned by the Tilton Family Trust ("the owner"). In June 2003, the owner claimed it had learned from a report that the Reclamation District had prepared that in 1985 and 1997 (or 1998) the levee had failed and damaged the property. In 2003, it failed again. The owner sued the Reclamation District. It alleged that the failures had occurred because the Reclamation District had not properly maintained the levee, and that because of the three failures over twenty years, the homes on the lots were pulling away from the substructures and those structures were sliding into the bay. The owner sought to recover $1 million and asserted seven causes of action: (1) inverse condemnation; (2) negligence; (3) trespass; (4) nuisance; (5) failure to provide lateral and subjacent support; (6) maintaining public property in a dangerous condition; and (7) violation of 42 U.S.C. § 1983. The owner alleged that the Reclamation District was formed pursuant to Water Code section 50000, *et. seq*., it was a government entity located in Contra Costa County, and it was responsible for supervising the maintenance and operation of reclamation works within its boundaries. The court sustained the Reclamation District's demurrer without leave to amend as to six causes of action, and allowed leave to amend one: alleged dangerous condition on public property. The owner voluntarily dismissed the remaining cause of action and filed an appeal.

The Court of Appeal for the First District affirmed the trial court's judgment of dismissal. It held that the damage caused by the alleged negligence in maintaining the levees did not constitute a taking for inverse condemnation or a section 1983 cause of action, and held that the Reclamation District was under no "mandatory duty" to prevent levee leakage, thus failing to support tort liability for damage to the owner's property. Furthermore, in response to the owner's inverse condemnation claim, in which it claimed that the damage constituted a taking in violation of the California Constitution, the court stated that the words "or *damaged*" (added to "private property may be taken for public use only when just compensation has been paid") had been added to the California Constitution to *clarify* that the government was obligated to pay just compensation for property damaged *in connection with public improvements*. It was not intended to expand the scope of compensation beyond the ambit of eminent domain and public improvements.

Although the owner relied on recent cases to support liability for inverse condemnation—including those discussed here, *Arreola*[16] and *Paterno*[17]—the court was not persuaded. It distinguished those cases and stated that while they also concerned the failure of the levees and the public entities' potential liability, they were consistent with historical case law.

It stated that the instant case was merely a "garden variety" inadequate *maintenance* case. The other cases, in contrast, were distinguishable in that they concerned a faulty *plan* for levee design, construction, and maintenance. Essentially, the court held that simple negligence *cannot* support a constitutional claim—unlike *Arreola*, which held that just compensation will be owed if "the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk."

In addition, *Tilton* addressed four tort causes of action (negligence, nuisance, trespass, and failure to provide lateral and sub-adjacent support) and concluded that the owner had not alleged the required "mandatory duty" for maintenance by the Reclamation District. The court noted that without that duty, the California Tort Claims Act shielded the Reclamation District, a public entity, from liability.[18]

Section 815 of the Government Code provides that a public entity is not liable for an injury whether it arises out of an act or omission on its part. As relevant to this case, Government Code section 815.6 provides that where a public entity is under a *mandatory duty* imposed by a law that is intended to protect against the risk of a particular kind of injury, it is liable for an injury of that kind (unless it exercised reasonable diligence). Here, the owner did not contend that any state or federal statute imposed a mandatory duty on the Reclamation District. Instead, the owner argued that regulations adopted by Federal Emergency Management Agency, the Army Corps of Engineers, and the California Reclamation Board created the duty. The court explained, however, that the regulations were discretionary, and did not pertain to *maintenance* of levees, but involved design and construction. Without a mandatory duty, the Reclamation District could not be liable in tort.

Tilton is unusual to the extent that the court seems to imply that the outcome might have been different if the appellants had made different allegations and arguments. Since the case was resolved on demurrer, sustained without leave to amend, the pleadings must be accepted as true *and* there was no reasonable possibility that the plaintiff could cure any defects in the complaint by amendment.

The court noted that the complaint's allegations did not satisfy the tests distinguishing "garden variety" inadequate maintenance from "faulty plan" involving design, construction, and maintenance of the levee. Indeed, the court recognized that appellants never suggested that they could allege anything regarding the Reclamation District's involvement in any underlying "flawed plan" for the levee's maintenance. That raises the question of how the court would have ruled had the plaintiff alleged that the Reclamation District's construction, maintenance, and repair of the levee was part of a larger "faulty plan," as opposed to mere "garden variety" negligence. Conceivably, if the plaintiff had made such arguments and allegations, it could have survived demurrer.

VI. CONCLUSION

If the awareness of climate change and other causes of profound environmental change lead to additional pressures upon levees and flood control systems (and their failures), the courts will find themselves entangled in even more property owner claims asserted against government entities. Many cities have keen interests in issues of liability associated with flood damage. If government flood control structures are not designed and built to accommodate the anticipated changes in the environment and the inevitable results associated with them, the government will face increasing liability burdens, and the taxpayers will bear the economic burden.[19]

NOTES

1. *Paterno v. State, 113 Cal. App. 4th 998, 6 Cal. Rptr. 3d 854 (3d Dist. 2003), as modified on denial of reh'g, (Dec. 24, 2003)*.
2. *Arreola v. County of Monterey, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (6th Dist. 2002), as modified on denial of reh'g, (July 23, 2002)*.
3. *Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366, 36 Envtl. L. Rep. 20179 (1st Dist. 2006), review denied, (Nov. 29, 2006)*.
4. *Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366, 36 Envtl. L. Rep. 20179 (1st Dist. 2006), review denied, (Nov. 29, 2006)*.
5. *Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (C.C.D. Cal. 1884)*.
6. *Paterno v. State, 113 Cal. App. 4th 998, 1002, 6 Cal. Rptr. 3d 854 (3d Dist. 2003), as modified on denial of reh'g, (Dec. 24, 2003)*.
7. Cal. Const., art. I, § 19. ["Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner"].
8. *House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 396, 153 P.2d 950 (1944)* [Conc. Opn. of Traynor, J.].
9. *Locklin v. City of Lafayette, 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994)*.
10. *Locklin v. City of Lafayette, 7 Cal. 4th 327, 368-369, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994)*.
11. *Paterno v. State, 113 Cal. App. 4th 998, 6 Cal. Rptr. 3d 854 (3d Dist. 2003), as modified on denial of reh'g, (Dec. 24, 2003)*.
12. *Locklin v. City of Lafayette, 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994)*.
13. *Arreola v. County of Monterey, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (6th Dist. 2002), as modified on denial of reh'g, (July 23, 2002)*.
14. *Arreola v. County of Monterey, 99 Cal. App. 4th 722, 757-760, 122 Cal. Rptr. 2d 38 (6th Dist. 2002), as modified on denial of reh'g, (July 23, 2002)*.
15. *Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366, 36 Envtl. L. Rep. 20179 (1st Dist. 2006), review denied, (Nov. 29, 2006)*.
16. *Arreola v. County of Monterey, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (6th Dist. 2002), as modified on denial of reh'g, (July 23, 2002)*.
17. *Paterno v. State, 113 Cal. App. 4th 998, 6 Cal. Rptr. 3d 854 (3d Dist. 2003), as modified on denial of reh'g, (Dec. 24, 2003)*.
18. *Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 859-864, 48 Cal. Rptr. 3d 366, 36 Envtl. L. Rep. 20179 (1st Dist. 2006), review denied, (Nov. 29, 2006)*.
19. Cartoon at the beginning of the article drawn by Doug Regalia (dougr@mrcpa.com).

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Edmund Regalia, Marvin Starr, and Harry Miller founded the law firm of Miller Starr Regalia headquartered in Walnut Creek. Mr. Regalia's litigation practice has concentrated on complex real estate and business litigation for over 40 years. Mr. Starr is the original co-author (with Harry Miller) of the Current Law of California Real Estate (1965-1967), later revised as California Real Estate 2d (1990) and California Real Estate 3d (2000-2001). His practice has included all aspects of real property law including the income tax aspects of real estate transactions. Both received an LL.B. (later J.D.) from Boalt Hall in 1958.

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