Inverse Condemnation: Unintended Physical Damage

Arvo Van Alstyne
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By Arvo Van Alstyne**

Introduction

The law of inverse condemnation liability of public entities for unintended physical injuries to private property is entangled in a complex web of doctrinal threads.1 The stark California constitutional mandate that just compensation be paid when private property is taken "or damaged" for public use2 has induced courts, for want of more precise guidance, to invoke analogies drawn from the law of torts and property as keys to liability.3 The decisional law, therefore, contains numerous allusions to concepts of "nuisance,"4 "trespass,"5 and "negligence,"6 as well as to notions of strict liability without fault.7 Unfortunately, judicial opinions seldom seek to reconcile these

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** B.A. 1943, LL.B. 1948, Yale University. Professor of Law, University of Utah. Member of the California Bar.


divergent approaches. The need for greater uniformity, consistency, and predictability is particularly pressing in the physical damage cases, for they comprise the single most significant class of inverse condemnation claims, whether measured numerically or in terms of the magnitude of potential liabilities. Clarification also would be desirable in order to mark the borderline between the presently overlapping, and hence confusing, rules governing governmental tort and inverse condemnation liabilities.\(^8\)

The purpose of this article, therefore, is to explore and analyze in depth those areas of inverse condemnation law most in need of legislative clarification and correction, and to point out the theoretical guidelines needed to formulate a uniform, consistent, and predictable statutory inverse liability scheme.

I. Preliminary Overview

Before attempting to analyze those typical inverse condemnation claims based on unintended tangible property damage, it is necessary to conduct a preliminary review of the four major strands of doctrinal development most frequently encountered in these cases: (1) inverse liability without fault; (2) fault as a basis of inverse liability; (3) the significance of private law in the adjudication of inverse liability claims; and (4) the doctrine of *damnum absque injuria*.

A. Inverse Liability Without "Fault"

In 1956, a major landslide occurred in the Portuguese Bend area of Los Angeles County, triggered by the pressure exerted by substantial earth fills deposited by the county in the course of extending a county road through the area. Over five million dollars in residential and related improvements were destroyed by the slide. Although it was known to the county that the surface area overlay a prehistoric slide, competent geological studies had concluded that the land had stabilized and that further slides were not reasonably to be expected. In a suit against the county for damages, findings were specifically made to the effect that there was no negligence or other wrongful conduct or omission on the part of the defendant; plaintiff property owners, however, were awarded judgment on the basis of inverse condemnation. This judgment was affirmed on appeal by the California Supreme Court in *Albers v. County of Los Angeles*.\(^9\)

\(^{8}\) Liability for property damage has frequently been sustained in California cases upon alternative theories of inverse condemnation and tort as applied to the same facts. See, e.g., *Bauer v. Ventura County*, 45 Cal. 2d 276, 289 P.2d 1 (1955); *Granone v. Los Angeles County*, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

\(^{9}\) 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).
Albers thus reconfirmed the previously announced, but often forgotten, principle that liability may exist on inverse condemnation grounds in the absence of fault. Reviewing the prior decisions, the court pointed out that the California courts, from the earliest case interpreting the "or damaged" clause added to California's constitutional eminent domain provision in 1879, had repeatedly held public entities liable for foreseeable physical damage caused by a public improvement project undertaken for public use, whether the work was done carefully or negligently. The problem before the court in Albers was stated explicitly in these terms:

The issue is how should this court, as a matter of interpretation and policy, construe article I, section 14, of the Constitution in its application to any case where actual physical damage is proximately caused to real property, neither intentionally nor negligently, but is the proximate result of the construction of a public work deliberately planned and carried out by the public agency, where if the damage had been foreseen it would render the public agency liable. The conclusion announced was that, in general, "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."

This conclusion was supported, in the Court's view, by relevant policy considerations:

The following factors are important. First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the prox-

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10 Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885).
12 The Albers opinion appears to treat foreseeability as an element of fault. Cf. RESTATEMENT (SECOND) OF TORTS § 302 (1965). Foreseeability is more typically regarded, in the inverse liability decisions, as an element of proximate cause. See text accompanying notes 33-35 infra.
13 See Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941); Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court en banc denying hearing). These cases, all cited in Albers, do not discuss directly the matter of foreseeability of the damages claimed; the facts in each case, however, are consistent with actual or constructive foresight. For other examples of inverse liability without "fault," see text accompanying notes 225-31 infra.
15 Id. at 263-64, 398 P.2d at 137, 42 Cal. Rptr. at 97.
imate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged. Fifth . . . "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."16

A close reading of the Albers opinion indicates that the rule announced is not as favorable to inverse liability as might appear at first glance. It is clearly not a blanket acceptance of strict liability without fault.17 Three important qualifications are indicated. First, Albers supports liability absent foreseeability of injury (i.e., without fault) only when inverse liability would obtain in a situation involving the same facts plus foreseeability (i.e., plus fault). Secondly, the rule is limited to instances of "direct physical damage." Finally, the damage must be "proximately caused" by the public improvement as designed and constructed.

The first of these qualifications assumes that inverse liability ordinarily rests—although not invariably18—upon a showing of fault. Unfortunately, the nature of this "fault," and thus the dimensions of inverse liability under situations such as Albers where fault is not present, is rooted in decisional law that is less than crystal clear. It appears, however, that there are significant types of government projects which, while ultimately producing unforeseeable—or even foreseeable—damage to private property, may nevertheless be undertaken without risk of inverse liability. The Albers opinion explicitly withholds liability, for example, when the public entity's conduct is legally privileged, either under ordinary property law principles or as a non-compensable exercise of the police power.19

The second qualification limits the Albers approach to "direct physical damage," thereby excluding instances of non-physical "consequential" damages.20 The terms, "direct" and "physical," in this

16 Id. The quotation is from Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).
19 Illustrative decisions cited in Albers include Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) (privilege); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (police power); see text accompany notes 46-87 infra.
20 The ambiguous term "consequential damages" is often employed to describe generically the kinds of losses for which inverse condemnation lia-
context connotes a "definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value." The cases relied on in Albers, for example, involve structural injury to buildings, erosion of the banks of a stream, waterlogging of agricultural land by seepage from a leaking irrigation canal, and flooding and deposit of mud and silt by an overflowing river. The opinion indicates that non-physical losses, such as decreased business profits or diminution of property values due to diversion of traffic or circuitry of travel resulting from a public improvement, are not recoverable under this rationale.

The third qualification—requiring that the damage be proximately caused by the public improvement as designed and constructed—involves a troublesome conceptual premise. When the defendant's wrongful act or omission does not directly produce the injury, recoverability is denied, where no physical injury to, or appropriation of, tangible property is involved. See Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914); 2 P. Nichols, Eminent Domain § 6.4432, at 503 (rev. 3d ed. 1963). One of the purposes for which the "or damaged" clause was added to the constitution was to narrow the categories of injuries previously regarded as "consequential" and thus noncompensable. E.g., Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885) (recognizing that certain kinds of consequential damages were made compensable by the 1879 constitution); Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 57 P. 750 (1894) (semble). Thus, although some kinds of non-tangible damagings (i.e., loss of property values) resulting from public projects are now compensable, Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (loss of ingress and access), others are still deemed consequential and not within the purview of the just compensation clause. See cases cited note 26 infra. See generally 2 P. Nichols, supra § 6.4432[2], at 508-19.


22 Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

23 Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895).


plained of, California tort law generally refers to foreseeability of injury as the test of whether the act or omission is sufficiently "proximate" that liability may attach. Recognizing that "cause-in-fact" may, in strict logic, be traced in an endless chain of cause and effect relationships to exceedingly remote events, the reasonable foreseeability test is regarded as a useful mechanism for confining tort liability within rational limits. But the premise of the Albers decision is that neither the harmful consequences of the county's road building project nor the intervening landslide which produced them were foreseeable; the landslide damage was compensable even though wholly unexpected and unforeseeable, and the result of a reasonably formulated and carefully executed plan of construction. Manifestly, the term "proximate cause" must have a special meaning in this context.

Although no decision has been found analyzing in depth the proximate cause concept where inverse liability obtains without fault, the language of several opinions suggests that it requires a convincing showing of a "substantial" cause-and-effect relationship which excludes the probability that other forces alone produced the injury. For example, the decisions sometimes speak of the damage in such cases as being actionable if it is the "necessary or probable result" of the improvement, or if "the immediate, direct, and necessary effect" thereof was to produce the damage. Proof that the injurious consequences followed in the normal course of subsequent events, and were produced predominantly by the improvement, seems to be the focus of the judicial inquiry.


29 The term "substantial" is part of the vocabulary of tort law. See RESTATEMENT (SECOND) OF TORTS § 431, comment a at 433 (1965).


31 Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 470, 37 P. 375, 378 (1894). See also Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

32 Despite the generality of typical judicial language, see cases cited notes 30 & 31 supra, there appears to be an implication running through the deci-
The opinion in *Albers* rejects foreseeability as an element of the public entity's duty to pay just compensation when its improvement project directly sets in motion the natural forces (i.e., landslide), which results in damage to private property. Foreseeability still may be a significant operative factor in determining liability in other types of cases, however, such as cases in which independently generated forces, not induced by the entity's actions, contribute to the injury. For example, the construction by a public entity of a culvert through a highway embankment is, by hypothesis, the result of foresight that flooding is likely to occur in the absence of suitable drainage. If the culvert proves to be of insufficient capacity during normally foreseeable storms, inverse liability obtains because the flooding, as a foreseeable consequence of the project, was proximately caused by the inherently defective design of the culvert. But if at the same location flooding is produced by insufficiency of the culvert to dispose of the runoff of a storm of unprecedented and extraordinary size beyond the scope of human foresight, the project is regarded as not the proximate cause of damage that would not have resulted under predictable conditions. In other words, where there is an intervening force which cuts off and supersedes the original chain of causation, and the public improvement itself was planned and constructed in a manner reasonably sufficient to cope with foreseeable conditions without causing private damage, then the public entity should not be held responsible for damage that results from the independent, intervening force.

Situations that mere cause-in-fact, under the usual "but for" test, may not be sufficient unless accompanied by a showing that the injurious results were an inescapable or unavoidable consequence. *Great Northern Ry. v. State*, 102 Wash. 348, 173 P. 40 (1918); *Restatement* (Second) of *Torts* § 433, comment d (1965). Cause-in-fact in the usual sense must, of course, be shown. *Youngblood v. Los Angeles County Flood Control Dist.*, 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); *Janssen v. Los Angeles County*, 50 Cal. App. 2d 45, 123 P.2d 122 (1942).


Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); *Dick v. Los Angeles*, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). To constitute an unforeseeable "act of God" which cuts off the chain of causation, however, the storm must be truly unforeseeable. The mere fact that it may be a heavy storm of unusual intensity or volume, or even set local records for magnitude, is not enough if heavy storms are expectable in the area. *Southern Pac. Co. v. Los Angeles*, 5 Cal. 2d 545, 55 P.2d 847 (1936).

*Restatement* (Second) of *Torts* § 432(1) (1965). The fact that the storm was unprecedented and unforeseeable, however, does not absolve the public entity from liability for additional damage which would not have occurred in the absence of the improvement. *Jefferis v. Monterey Park*, 14 Cal. App. 2d 113, 57 P.2d 1874 (1936); *Nahl v. Alta Irr. Dist.*, 23 Cal. App. 333,
Albers, under this analysis, is clearly distinguishable from the "act of God" cases. In Albers, the county road project was planned and constructed with reasonable care in light of all foreseeable future conditions; yet, due to unforeseeable circumstances, the project directly set in motion, and thereby substantially caused, the property damage for which compensation was sought. Liability was thus imposed, since, for the policy reasons summarized in the court's opinion, the just compensation clause supports and requires such an imposition where a direct causal connection between a public project and private property damage is established. In the "act of God" cases, however, the direct causal connection is broken by the intervention of an unforeseeable force of nature which, of itself, was not set in motion or produced by the entity's improvement undertaking. Absent such direct, or proximate causation, compensation is not required. On the other hand, to the extent that the intervention of independent natural forces is reasonably foreseeable, the entity's failure to incorporate adequate safeguards for private property into the improvement plan remains a proximate, although concurrent, cause of the resulting damage, and thus a basis of inverse liability.

B. Fault as a Basis of Inverse Liability

Most of the pre-Albers decisions in California sustaining inverse liability for unintended physical injury to property are predicated expressly on a fault rationale grounded upon foreseeability of damage as a consequence of the construction or operation of the public project as deliberately planned. On the other hand, a substantial number of contemporaneous decisions seemingly affirm the proposition that negligence is not a material consideration if, in fact, a taking or damaging for public use has occurred. This apparent inconsistency of basic doctrine, however, appears to be reconcilable.

The key to an understanding of the cases, it is believed, is the fact that negligence is only a particular kind of fault. What the courts appear to be saying, although somewhat inexactly perhaps, is that it is not necessary to inquire into the exact nature or quality of the fault upon which inverse liability is predicated where the facts demonstrate that some form of actionable fault does exist. When the


36 There are two leading decisions on this point. Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

37 See cases cited note 13 supra.

38 See, e.g., Clement v. Reclamation Bd., 35 Cal. 2d 628, 641, 220 P.2d 897, 905 (1950), where it is stated that "[t]he construction of the public improvement is a deliberate action of the state or its agency in furtherance of public
probability of resulting damage is reasonably foreseeable, the adoption and non-negligent execution of a risk-prone plan of public improvement rationally can be deemed, with certain exceptions to be discussed, either: (a) negligence in adopting an inherently defective plan, or in failing to modify it or incorporate reasonable safeguards to prevent the anticipated damage; (b) negligent "failure to appreciate the probability that, functioning as deliberately conceived, the public improvement . . . would result in some damage to private property;" (c) "intentional" infliction of the damage by deliberate adoption of the defective plan with knowledge that damage was a probable result; or (d) inclusion in the plan, whether negligently or deliberately, of features that violate a recognized legal duty that the public entity, like private persons similarly situated, owes to neighboring owners as a matter of property law. But, in each instance, it is not materially significant whether the "inherently wrong" plan was the product of inadvertence, negligent conduct, or deliber-
eration, for the same result—inverse liability—follows unless there is a sufficient showing of legal justification for infliction of the harm.

Some form of fault is thus a conspicuous characteristic of inverse liability in most California cases. The Albers decision does not purport to overthrow this general approach or to reject entirely the frequently expressed position that a public entity defendant "is not absolutely liable" under the just compensation clause irrespective of its involvement in the plaintiff's damage. It merely recognizes an additional occasion for inverse liability by holding that lack of foreseeability does not preclude recovery for directly caused physical property damage which would have been recoverable under a fault rationale had that damage been foreseeable.

C. Private Law as a Basis of Inverse Liability

The concept of "fault" supporting inverse liability has been further expanded by the absorption of principles of private law into the law of eminent domain. Inverse liability of public entities often has been sustained on the ground that the entity breached a legal duty which it owed to the plaintiff, with such duty being determined by reference to those legal axioms governing private individuals. For example, a private person is under a duty to refrain from obstructing a natural stream so as to divert it upon his neighbor's lands. Correspondingly, a public entity that obstructs or diverts a stream may be liable in inverse condemnation for the resulting damages. Moreover, even when the entity is engaged in privileged conduct, such as the erection of protective works against flood waters, it, like private persons, must act reasonably and non-negligently.

The initial use of private legal concepts as a framework for resolving inverse condemnation claims was a reflection, in part, of the judicial expansion of inverse condemnation as a means for avoiding the discredited doctrine of sovereign tort immunity. The constitu-

45 See text accompanying notes 27-35 supra.
tional mandate to pay just compensation when private property was “damaged for public use” provided a strong and ready peg upon which to hang a cloak of liability despite a claim of governmental immunity. But the need to establish rational limits to the apparently unqualified constitutional mandate suggested the use of rules of law limiting private tort liability as analogues for denying inverse liability in similar situations. Not unexpectedly, then, the constitutional inverse condemnation clause came to be thought of as merely a waiver of governmental immunity, and an authorization for a self-executing remedy which the injured property owner would not otherwise have had against the state and its agencies. Moreover, as the edifice of governmental immunity began to crumble beneath the weight of exceptions admitted by judicial decisions and occasional legislation, a considerable degree of overlapping of inverse and non-immune tort liabilities became commonplace. Plaintiffs often sued alternatively on inverse and tort theories, with considerable success, thereby confirming the notion that inverse condemnation was merely a remedy to enforce substantive standards found in the law of private torts.

The Albers decision, of course, qualified this conception by reaffirming the original position that inverse liability has an independent substantive content which obtains even when private tort liability does not. Moreover, even before Albers, the underlying premise of the remedy approach had been largely removed by the judicial abrogation of sovereign immunity. Thereafter, in California, as in a number of other states, the old immunity rule was supplanted by a comprehensive statutory system of governmental tort liability that was in certain respects broader and in other respects narrower than its private counterparts. But while the legislature acted to divorce

51 See Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955): “Section 14 [of article I], however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property.... The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes.”
52 See, e.g., Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) where the liability was affirmed on the alternate grounds of inverse condemnation, nuisance, and statutory liability for dangerous condition of public property.
55 Judicial abrogation of sovereign immunity had taken place only four years prior to the Albers decision. See Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
56 California Tort Claims Act of 1963, CAL. GOV'T CODE §§ 810-95.8; A.
governmental tort liability from its inconvenient ties with private tort liability, no similar changes were made with respect to inverse liabilities. As a result, to the extent that the legal principles applied in inverse condemnation litigation remain tied to private tort law analogies, a significant incongruity and source of confusion can be observed between the scope of governmental tort and inverse liabilities. One conspicuous illustration is the different consequences flowing from defects in the plan or design of public improvements, which on private law principles support inverse liability, but which, under present statutory provisions, ordinarily provide no basis for governmental tort liability.

D. Damnum Absque Injuria

Some mention should also be made here of those situations where, irrespective of grounds for inverse liability under the above mentioned theories and principles, the injury suffered by the property owner is nevertheless held to be damnum absque injuria. In California, two lines of decisions recognize that public entities are privileged, in certain situations, to inflict physical damage upon private property for a public purpose without incurring inverse liability. In effect, these cases establish two judicially-created exceptions to the otherwise unqualified language of the constitutional command that just compensation be paid.

(1) The “Police Power” Cases

In sustaining the liability of Los Angeles County for landslide damage in the Albers case, the Supreme Court explicitly distinguished “cases . . . like Gray v. Reclamation District No. 1500 . . . where the court held the damage noncompensable because inflicted in the proper exercise of the police power.” In Gray, plaintiffs' lands were


See Cal. Gov't Code § 830.6, where public entities are exonerated from tort liability for personal injuries caused by defective plan or design of public improvements if the design or plan could reasonably have been approved by responsible public officials. This immunity has been given a broad interpretation. Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967); Cabell v. California, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); see Note, Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6, 19 Hastings L.J. 584 (1968).


Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).
threatened with temporary inundation from Sacramento River flood waters due to a partially completed system of levees being built by the defendant reclamation district. In the past, these flood waters had spread out harmlessly over lower lands, leaving the plaintiffs' property unharmed. In reversing an injunction against the maintenance of the levees, the court concluded that any damage sustained by the plaintiffs would be the consequence of a proper exercise of the police power for which the district was not liable. As an independent alternative ground of decision, it was determined that construction of the district's levees constituted the exercise of a legal right to protect the district's lands against the "common enemy" of escaping flood waters, and for that reason also was noncompensable. The latter ground alone adequately supported the result on appeal; but the opinion discusses, at some length, the scope of the "police power" rationale.

Briefly summarized, Gray reasons that (1) governmental flood control, navigational improvement, and reclamation work is "referable to the police power"; (2) damage resulting from a legitimate exercise of the police power is noncompensable, provided the "proper limits" of that power have not been exceeded; and (3) the balance of interests relating to the facts at hand required the conclusion that the damage in question was noncompensable under this test. The factual elements cited as persuasive of this conclusion included the temporary nature of the flooding complained of; the fact that future flooding would be eliminated as soon as the balance of the project was completed; the availability to the plaintiffs of the right of self-protection under the "common enemy" rule; the "vast magnitude and importance" of the flood control project to the state as a whole; and the fact that the plaintiffs, like other landowners within the project area,

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61 Similar conclusions had been reached on the basis of facts which occurred prior to adoption of the "or damaged" clause in the 1879 constitution. Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887); Green v. Swift, 47 Cal. 536 (1874).

62 The common enemy doctrine is discussed at text accompanying notes 110-30 infra.

63 Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 638, 163 P. 1024, 1031 (1917).

64 "[W]hether in any given instance, as in this instance, the proper limits of the police power have been exceeded, with the result that unlawful confiscation or damage is worked, remains still a question for consideration. . . . Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is damnum absque injuria." Id.

65 Id. at 645-46, 163 P. at 1034.
would derive substantial long-term benefits from the abatement of flood damage and the improvement of navigation which completion of the project would assure.\textsuperscript{66}

Manifestly, Gray does not stand for the proposition that property damage caused by a public improvement based upon the police power is necessarily \textit{damnum absque injuria}. It suggests, at most, that judicial classification of the project as an exercise of the "police power" adds persuasiveness to the public interest which must be weighed against private detriment in adjudicating compensability. The very term "police power" is inherently undefinable.\textsuperscript{67} Its semantic role in the present context is to serve only as a shorthand expression denoting the assertion of governmental power to advance public health, safety, and welfare in a qualitatively substantial sense. The interests represented by these public objectives simply outweighed those asserted by the property owners in Gray. Unfortunately, loose language in the opinion,\textsuperscript{68} when taken out of context, fails to convey a correct impression of the actual holding, a defect also perpetuated by some later decisions fully reconcilable on their facts.\textsuperscript{69}

The implications of the "police power" exception postulated in Gray were subjected to thorough reconsideration by the Supreme

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{See} Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), where it was stated that "we are dealing with one of the most essential powers of government—one that is the least limitable."; cf. Goldblatt v. Hempstead, 369 U.S. 500, 504 (1962), where it was stated that "[t]he term 'police power' connotes the time-tested conceptual limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness' this Court has generally refrained from announcing any specific criteria." \textit{See generally} Havran, \textit{Eminent Domain and the Police Power}, 5 Notre Dame Law. 360 (1930); Sax, \textit{Takings and the Police Power}, 74 Yale L.J. 36 (1964).

\textsuperscript{68} The court's police power discussion in Gray relies heavily upon decisions involving the noncompensability of losses of value resulting from police regulations, rather than cases like Gray itself, in which physical damage or destruction was in issue. The principal cases discussed include Hadacheck v. Sebastian, 239 U.S. 394 (1915) (decrease in exploitation value due to land-use regulation); Chicago & Alton Ry. v. Tranbarger, 238 U.S. 67 (1915) (regulation requiring construction of drainage culverts by railroad at its own expense); Chicago B. & Q. Ry. v. Illinois, 200 U.S. 561 (1906) (requirement that railroad deepen, widen, and bridge any natural watercourse crossing its right-of-way). The opinion seems to be oblivious to the distinction, clearly recognized as a significant one in more recent times, between property value diminution unaccompanied by physical invasion and losses caused by tangible injury to or interference with use or enjoyment of property. \textit{Compare} United States v. Causby, 328 U.S. 256 (1946) with Goldblatt v. Hempstead, 369 U.S. 590 (1962).

\textsuperscript{69} \textit{See}, e.g., O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941).
Court some twenty-five years later.\textsuperscript{70} The factual context was quite different, however. Property owners were seeking inverse recovery for losses of property values (i.e., non-physical damage) allegedly caused by highway improvements. Defendant public entities, relying upon dicta in \textit{Gray} and its progeny, sought refuge in the doctrine that losses caused by an exercise of the police power were \textit{damnum absque injuria}. The argument was rejected on the facts before the court, although the continued vitality of the doctrine, as properly conceived, was reaffirmed. The police power, said the court, "generally . . . operates in the field of regulation, except possibly in some cases of emergency. . . ."\textsuperscript{71} The constitutional guarantee of the just compensation clause would be vitiates by a broader view; hence, "the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists."\textsuperscript{72} This verbal equivalency of "emergency" and "police power" is not inconsistent with the interest-balancing approach taken in \textit{Gray}. It treats governmental action to cope with emergencies as entitled to judicial preference, although not necessarily controlling significance, in the interest-balancing process.

This judicial restatement of the police power theory was reaffirmed, and directly applied, in the 1944 decision of \textit{House v. Los Angeles County Flood Control District}.\textsuperscript{73} Physical damage attributed to levee improvements along the Los Angeles River, which allegedly caused flooding and erosion of the plaintiff's land, was held, on demurrer, to be recoverable in inverse condemnation. The court again cautioned that private property damage may be noncompensable when inflicted by government "under the pressure of public necessity and to avert impending peril."\textsuperscript{74} But the plaintiff had alleged that the improvements in question were constructed negligently, pursuant to a plan which was contrary to good engineering practice. From the pleadings, it was apparent that the "defendant district, with time to exercise a deliberate choice of action in the manner of its installation of the river improvements, followed a plan 'inherently wrong' and thereby caused needless damage" to the plaintiff's property.\textsuperscript{75}

\begin{footnotes}
\item\textsuperscript{70} Rose v. California, 19 Cal. 2d 713, 123 P.2d 505 (1942). \textit{See also} People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).
\item\textsuperscript{71} Rose v. California, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942).
\item\textsuperscript{72} \textit{Id.} at 730-31, 123 P.2d at 516.
\item\textsuperscript{73} 25 Cal. 2d 384, 153 P.2d 950 (1944); \textit{accord,} Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).
\item\textsuperscript{74} \textit{House v. Los Angeles County Flood Control Dist.}, 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944). \textit{See also} Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941).
\item\textsuperscript{75} \textit{House v. Los Angeles County Flood Control Dist.}, 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). O'Hara v. Los Angeles County Flood Control Dist.,
\end{footnotes}
less damage is not damage required by the public necessity that motivates the exercise of the police power. Thus, a cause of action for inverse condemnation was stated since “the principles of nonliability and damnum absque injuria are not applicable when, in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare.”

The House approach has been followed consistently in later decisions. Thus, in the absence of a compelling emergency, the police power doctrine will not shield a public entity from inverse liability where physical damage to private property could have been avoided by proper design, planning, construction and maintenance of the improvement. The kind of emergency which will preclude inverse liability is, moreover, narrowly circumscribed. Illustrations given in the House opinion itself are limited to “the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized.” In the generality of situations within the

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76 House v. Los Angeles Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). This position had the explicit concurrence of four members of the court. Mr. Justice Traynor, with Mr. Justice Edmonds concurring, wrote a separate opinion reaching the same result, but on the ground that the plaintiff’s complaint adequately alleged a negligent and unprivileged diversion of water flowing in a natural channel. Agreement with the majority view of the police power, however, was indicated by this statement: “Barring situations of immediate emergency, neither the property law nor the police power of the state entitles a governmental agency to divert water out of its natural channel onto private property.” Id. at 397-98, 153 P.2d at 957. A second concurring opinion was written by Mr. Justice Carter. He took the position that the majority had not gone far enough in recognizing inverse compensability for property damage resulting from public improvements; but he agreed in principle with what he regarded as a “commendable step” in the right direction. Id. at 398, 153 P.2d at 957. On limiting the scope of the police power doctrine the court was essentially unanimous.

77 Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957); Veteran’s Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1948). Although some of the cases intimate that the rule is limited to instances of damage resulting from defective design or construction, the Bauer case squarely holds that it obtains also with respect to a defectively conceived plan of maintenance and operation as distinguished from routine negligence in carrying out an otherwise proper plan. Bauer v. Ventura County, supra at 285, 289 P.2d at 7.

78 House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391,
purview of the present article, it seems evident that the police power exception is of negligible significance.

(2) The "Legal Right" Cases

Returning to the aforementioned analogies to private law, a second justification for denying compensation for physical damage caused by public improvements is adduced. When a private person would be legally privileged to inflict like damage without tort liability, a public entity also has a "legal right" to do so without obligation to pay just compensation. By hypothesis, such damage does not constitute the violation of any right possessed by the injured party. This rule, which is reaffirmed in Albers, has been applied to deny inverse liability in a variety of situations. Examples include cases involving damages caused by public improvements designed to accelerate the flow of a natural watercourse, control the overflow and spread of flood waters, and collect and discharge surface storm waters through natural drainage channels.

The rationale of these "legal right" cases, however, does not imply that the absence of a cause of action against a private person necessarily or invariably precludes a claim for inverse compensation against the state. Broad statements in several decisions, purporting to so declare, were expressly disapproved in the Albers case as stating the


71 See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 608, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961): "[I]f a property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 [of article I]." Accord, Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955).

72 San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920).

73 Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (alternative ground); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887) (alternative ground).

74 Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941).
rule "much more broadly than required by the facts." The court in Albers, in fact, expressly "assumed" that a private person in the position of the defendant county would not be liable. That assumption, however, was based on findings of fact that denied the existence of any fault whatsoever, a normal prerequisite to private tort liability in all but certain exceptional situations. It was not based on the premise—which is at the root of the "legal right" cases—that the defendant was legally privileged to inflict the particular injury. The court's conclusion in Albers thus represents an interpretation of the just compensation clause of the constitution as imposing a broader range of public responsibility than the law of private torts.

II. Scope of Inverse Liability in California

The foregoing discussion was intended to be merely a preliminary introduction to the basic doctrinal threads of inverse liability. The interweaving of these different theoretical strands into the finished tapestry that is inverse condemnation law is revealed only by a closer examination of the entire decisional pattern. For convenience, the cases in this section are grouped into four categories having similar factual characteristics. First, the water damage cases, probably the single most prolific source of inverse litigation, are examined. Second are cases dealing with physical disturbance of site stability by landslides, loss of lateral support, and like causes. The third group of cases involves the physical deprivation of advantageous conditions associated with land ownership, such as loss of water supply, annual accretions, or potability of water (i.e., water pollution). Finally, decisions relating to miscellaneous forms of temporary or "one-time" physical injury to property are reviewed.

A. Water Damage

A significant feature of the inverse condemnation decisions dealing with property damage caused by water—whether it be damage due to flooding, soaking, silting, erosion, or hydraulic force—is the tendency of the courts to rely upon the rules of private water law. Although the facts do not always lend themselves to this approach, inverse liability of public agencies is determined in the main by the peculiarities of private law rules governing interference with "sur-

86 Id. at 262 n.3, 398 P.2d at 136 n.3, 42 Cal. Rptr. at 96 n.3.
87 See generally W. Prosser, The Law of Torts 506-44 (3d ed. 1964). The court in Albers found it unnecessary to consider whether liability without fault could be supported by private law principles as applied to the facts before it.
face waters,” “flood waters,” and “stream waters.” This judicial disposition to blend the complex rules of water law with those governing inverse liability ordinarily is defended on the ground that public entities, in the management and control of their property, should not be subjected to different or more onerous rules of liability than private persons similarly situated. A review of the cases, however, suggests that treating public agencies as if they were private individuals, for the purpose of applying rules of water law, often has proved unsatisfactory and confusing. In a number of situations, therefore, the courts have departed from the strict letter of the private rules where overriding policy reasons have been perceived for according special treatment to public agencies.

(1) Surface Water

Water that is “diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs” is classified as surface water. Private liability for interference with surface water is governed by a wide range of diverse rules throughout the United States, each replete with its own variations. The so-called common law or “common enemy” doctrine accepted by many states, under which each landowner is privileged to fend off surface waters as he sees fit, without regard to the consequences for his neighbors, generally has been rejected by California decisions. Instead, the “civil law rule,” which recognizes a servitude of natural drainage as between adjoining lands and postulates liability for interference therewith, has been the traditional California approach. This has been true not only in cases involving private litigants but also in those dealing with public entities in inverse condemnation actions. Under this rule, the duty of both upper

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90 Keys v. Romley, 64 Cal. 2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); see H. Tiffany, Real Property, 740 (3d ed. 1939); Restatement of Torts § 846 (1939).
91 See Kinyon & McClure, Interferences With Surface Waters, 24 Minn. L. Rev. 881 (1940).
93 LeBrun v. Richards, 210 Cal. 308, 291 P. 825 (1930); Ogburn v. Connor, 46 Cal. 346 (1873).
94 Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213 (1911) (dictum); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum); Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Andrew Jergens Co. v. Los Angeles, 103 Cal. App. 2d 232, 229 P.2d 475 (1951).
and lower landowners is to leave the flow of surface water undisturbed.

In the recent important decision in Keys v. Romley, the Supreme Court, after careful reconsideration of the competing rules and their supporting policies, reaffirmed California's acceptance of the civil law rule. This rule, the court observed, was consistent with the normal expectation that buyers should take land subject to the burdens of natural drainage. It also had the advantage of greater predictability than the common law rule, and correspondingly diminished the opportunity for litigation. On the other hand, a rigid application of the civil law rule might inhibit property development, since improvements frequently would cause a change in the drainage pattern and thus invite potential liability, especially in urban areas. The court concluded, therefore, that the application of the civil law rule must be governed by a test of reasonableness, judged in light of the circumstances of each case. "No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability."

Under this modified civil law rule, the issue of reasonableness is "a question of fact to be determined in each case upon a consideration of all the relevant circumstances . . . ." Factors to be taken into account include the extent of the damage, the foreseeability of the harm, the actor's purpose or motive, and the relative utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow. In this balancing of interests, said the court,

[1]f the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule [and the upper landowner who changed the drainage pattern is liable for the resulting injuries].

Although the Keys decision involved only private landowners, presumably it affects public entities as well, since inverse liability actions based on interference with surface waters generally have been resolved in the past by a relatively strict application of the civil law rule. Obstructing the flow of surface waters by a street improvement

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97 Id. at 410, 412 P.2d at 537, 50 Cal. Rptr. at 281.
98 Id.
and thereby causing flooding of lands that otherwise would not have been injured has been held actionable on this rationale. A public entity that gathered surface waters together and discharged them upon lower lands with increased volume or velocity by a drainage system which did not conform to the natural drainage pattern was likewise liable. Similarly, public entities have been held not privileged to collect surface waters by the paving of streets and, without providing adequate drains, by conducting them to a low point where they are cast in unusual quantities upon private property that otherwise would not be flooded. But if the gathered waters were discharged into a natural watercourse that was their normal means of drainage, lower owners injured because the channel was inadequate to handle the increased flow were held to have no recourse.

The courts generally applied the civil law rule in a somewhat mechanical manner, apparently without weighing the competing interests identified as relevant to the new rule of reason. It is possible that different results might have been reached had the balancing process been used. For example, the construction of a drainage system by an upper improver that discharges surface waters upon adjoining property in a concentrated stream, where no other feasible alternative is available, may be reasonable and, if relatively slight harm results, noncompensable under the rule in Keys v. Romley. Conversely, the gathering of surface waters into a system of impervious storm drains which follow natural drainage routes may result in greatly increased volume, velocity and concentration of water, and

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90 Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885). See also Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1898); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum).


103 See Pagliotti v. Aquistapace, 64 Cal. 2d 873, 412 P.2d 538, 50 Cal. Rptr. 282 (1966), where the trial court's judgment enjoining the defendant from damming off the discharge of surface waters from the plaintiff's paved parking lot, where no other feasible means of disposal existed, was reversed for reconsideration under the modern "reasonableness" test. The dictum suggested that the same result may be found proper on remand after balancing the interests. Earlier cases on analogous facts have generally imposed liability. See notes 100-01 supra.
thus may constitute an unreasonable method for disposing of such water when weighed against the seriousness of the resulting harm to lower landowners whose property is damaged as a result.\(^\text{104}\)

The inverse condemnation cases decided prior to \textit{Keys} were not entirely consistent, however; some departed somewhat from the strict letter of the civil law rule. For example, a few decisions advanced the view that interferences with the flow of surface waters would not be a basis of inverse liability where the obstruction was erected in the exercise of the police power.\(^\text{105}\) Other like decisions, reflecting judicial concern that the development of an adequate system of public streets and highways not be deterred,\(^\text{106}\) tended to relieve public entities from liability when they blocked the ordinary discharge of

\(^{104}\) \textit{Compare} Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) with Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963). \textit{Inns} held that the district was inversely liable for the discharge of surface waters into a swale through a 28-inch concrete pipe. It was stated to the contrary in \textit{Archer} that “[a] California landowner ... may discharge [surface waters] for a reasonable purpose into the stream into which they naturally drain without incurring liability for damage to lower land caused by the increased flow of the stream”. Archer v. Los Angeles, \textit{supra} at 26-27, 119 P.2d at 6 (emphasis added). In other states, inverse liability has been imposed in similar fact situations without regard for fault. See, \textit{e.g.}, Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 238 (1958); Snyder v. Platte Valley Pub. Power & Irr. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944).

\(^{105}\) See \textit{O’Hara} v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 63-64, 119 P.2d 23, 24 (1941): “In the present case the plaintiffs would ... have a cause of action against a private person who obstructed the flow of surface waters from their land [in the manner that has been alleged]. A governmental agency, however, in constructing public improvements such as streets and highways, may validly exercise its ‘police power’ to obstruct the flow of surface waters not running in a natural channel without making compensation for the resulting damage ... . The defendant therefore is under no obligation to compensate for the damage caused by the obstruction;” Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954) (dictum) (same effect as \textit{O’Hara}). As noted above, text accompanying notes 70-78 \textit{supra}, the police power rationale has been modified substantially by decisions subsequent to \textit{O’Hara}.

\(^{106}\) See, \textit{e.g.}, Lampe v. San Francisco, 124 Cal. 546, 57 P. 461, 1001 (1899). The question whether street improvements represent a sufficiently urgent public interest to justify inroads upon the constitutional guarantee of just compensation for “damage” to private property appears not to have been considered fully in any of the surface water decisions. \textit{But see} Milhous v. Highway Dep’t, 194 S.C. 33, 8 S.E.2d 852 (1940), where it was said that the constitutional property interest prevails without regard for private liability rules. This required a holding of state liability for obstructing surface waters notwithstanding the “common enemy” rule under which private obstruction would be nonactionable. Loss of direct access, however—an intangible detriment often far less damaging than flooding—is regarded as compensable when caused by street improvements. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).
surface waters and caused flooding of private lands where such action was necessary for the grading and paving of streets. These decisions seem to imply a judicial balancing of interests, similar to the process required by the Keys case, but with the results formulated in different terminology. The label, "police power," for example, assimilates value judgments regarding the importance and social merit of the particular government conduct that would be appropriate under the Keys test.

It is thus possible to speculate that the Keys decision may not fully have impaired the authority of all the earlier surface water decisions; but such conjecture is a flimsy basis for prediction. It is probable, however, that future cases in this area will be resolved by a balancing of interests rather than by the mechanical application of arbitrary rules. The principal uncertainties appear to revolve around the degree of weight that will be assigned by the courts to the public interest objectives behind governmental improvement projects, and the extent to which a review of the reasonableness of the governmental plan or design that exposed the owner's land to the risk of surface water damage will be undertaken by these courts.

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107 Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). See also Womar v. Long Beach, 45 Cal. App. 2d 643, 114 P.2d 704 (1941) (semble). Surface waters flowing in a natural or artificial channel, however, cannot be obstructed with impunity where the result is to cast them upon lands which normally would not have received them. Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918).

108 The opinion in O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941), for example, intimates that construction of public improvements along a stream "for purposes of flood control is . . . essential to the public health and safety" and for that reason outweighs the private property interest at stake. Id. at 63, 119 P.2d at 24. Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892), suggests that the interest of a landowner in property below official street grade is subordinate to the public interest in grading and paving at grade, since any temporary injury due to impounding of surface waters may be alleviated by bringing the adjoining property up to grade. Id. at 4, 30 P. at 798. See Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (to the same effect as Corcoran). See also Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1896), where inverse liability was affirmed for injury due to the flooding of property above the street grade as a result of street improvements. Corcoran was distinguished as a case where the owner of the property assumed the risk of flooding by building below the grade.

109 See Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); text accompanying note 95 supra. The modified civil law rule adopted in Keys has been treated as applicable to inverse condemnation actions based on alleged damage from interference with surface waters. Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968) (holding, under Keys, that burden of pleading and proving that plaintiff lower owner unreasonably failed to take
(2) Flood Water

"It is well established," said Justice Traynor, "that the flood waters of a natural watercourse are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and that he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby." Governmental entities acting for landowners in a particular area likewise may provide flood protection against the common enemy without incurring inverse liability for resulting damages. For the purpose of applying this rule, flood waters are deemed the extraordinary overflow of rivers and streams. Although the term normally refers to waters overflowing the natural banks of a river, artificial banks or levees maintained over a substantial period of time are treated as natural banks where a community of property owners, in reliance upon their continued existence, has conformed thereto in its land-use activities and in the construction of improvements.

The "common enemy" rule reflects judicial apprehension that property development would be stifled unless an individualistic view were taken by the law. "Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy." The rule, taken literally, contemplates that each landowner has a reciprocal right to protect his own land without regard for the consequences which his acts may visit upon others. However, no landowner may permanently stereo-precautions to avoid or reduce injury is upon the defendant state as upper owner).


111 Id. See also San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887). The common enemy rule, first announced in California in Lamb, was originally developed in English cases. E.g., The King v. Commissioners, 8 B. & C. 355, 108 Eng. Rep. 1075 (K.B. 1828) (construction of groins by sewer commissioners to prevent erosion from ocean held privileged as protective measure against the "common enemy").

112 H. TIFFANY, REAL PROPERTY § 740 (3d ed. 1939).


type the condition of the river by erecting flood barriers adequate for the moment, and later seek to prevent others from putting up levees of their own that raise the water level and make the former works insufficient.\footnote{Jackson v. United States, 230 U.S. 1 (1913), cited with approval in Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).} In addition, an important corollary of the rule recognizes that no liability is incurred merely because flood control improvements do not provide protection to all property owners.\footnote{Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); cf. United States v. Sponenbarger, 308 U.S. 256 (1939); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1965).} Nor does the state, in undertaking to control floods, become an insurer of those lands which are given protection,\footnote{See Rose v. State, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942) (dictum); cf. Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 619-23 (1968) (“denial destruction” to prevent conflagration).} as there are practical limits to the degree of protection that can be provided.\footnote{Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961).} In effect, the law recognizes that some degree of flood protection is better than none.

The “common enemy” rule, however, is not applied as an unlimited rule of privileged self-help. Mindful of the enormous damage-producing potential of defective public flood control projects, the courts have insisted that public agencies must act reasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property.\footnote{Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (no liability for damage resulting from inadequacy of culvert to drain waters from extraordinary and unforeseeable flood).} Reasonableness, in this context, is not entirely a matter of negligence, but represents a balancing of public need against the gravity of private harm.\footnote{Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 619-23 (1968) (“denial destruction” to prevent conflagration).} In an imminent emergency, for example, a reduction in stream level by the deliberate flooding of unimproved private lands in order to prevent substantial and widespread destruction of the entire community by otherwise uncontrolled flood waters may be regarded as a reasonable, and thus noncompensable, exercise of the police power.\footnote{Philpott v. Los Angeles County, 182 Cal. 2d 333, 14 Cal. Rptr. 428 (1959).} But a per-

1.\footnote{See Rose v. State, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942) (dictum); cf. Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 619-23 (1968) (“denial destruction” to prevent conflagration).}
manent system of flood control that deliberately incorporates a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed exceeds "the humane limits of the police power" and constitutes a compensable taking of an easement for flowage.\textsuperscript{122} The "common enemy" rule likewise does not permit a public entity to establish a system of improvements designed to divert both actual flood waters and natural stream waters out of their natural channel upon property that otherwise would not have been inundated.\textsuperscript{123} It is settled also that flood control improvements which are designed in accordance with a negligently conceived plan and which cause damage to private property while functioning as so conceived are a basis of inverse liability even though their object is to control the "common enemy," flood waters.\textsuperscript{124}

The noticeable judicial tendency to reject an unqualified application of the "common enemy" rule may be attributed, in part, to the difficulty of making a sharp factual distinction between flood waters and other waters. For example, when a watercourse which has been improved by flood control measures overflows, it is not always an easy matter to decide whether the flooding resulted from legally privileged efforts to repel the "common enemy" or from an unprivileged diversion of natural stream water.\textsuperscript{125} Another illustration of this difficulty is the well-known case of \textit{Archer v. City of Los Angeles},\textsuperscript{126} in which the prevailing opinion explicitly predicates denial of liability for downstream flooding upon the privilege of upstream owners to deposit gathered surface waters into natural watercourses. Later decisions, however, have explained \textit{Archer} as a case of non-liability un-
under the "common enemy" rule governing flood waters. But, apart from difficulties of classification, the trend also appears to represent a judicial conviction that the "common enemy" rule, unmodified by a test of reasonable conduct, would be an unacceptable basis for arbitrary disruption of rationally grounded expectations of private property owners. The courts have recognized that the magnitude of governmental projects often far exceeds the scope of flood protection works reasonably to be anticipated at the hands of neighboring private landowners. A strict and literal assertion of the rule, therefore, if applied to government flood control projects, could well be disastrous to private interests. Accordingly, it has been said, "No court has ever so abused the 'common enemy' doctrine as to constitute it the common enemy of the riparian owner." Finally, the modern approach appears to accept the fact that a rational ordering of duties and liabilities with respect to flood waters is better achieved by the balancing of interests represented in the varying circumstances of individual cases than by a more rigid and inflexible application of narrowly defined property rights.

(3) Stream Water

The prevalence of natural watercourses makes it inevitable that public improvements will affect the flow of stream waters in a variety of circumstances, causing flooding and erosion to private property. While early cases intimated that such consequences did not amount to a constitutional "taking," it is now accepted that injuries

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127 Compare Archer v. Los Angeles, 19 Cal. 2d 19, 28, 119 P.2d 1, 6 (1941) ("evidence . . . shows clearly that the storm drains constructed by defendants either followed the channel of natural streams . . . or discharged into the creek surface waters which would naturally drain into it") with Clement v. Reclamation Bd., 35 Cal. 2d 623, 642, 220 P.2d 897, 905 (1950) ("applicability of common enemy doctrine is set forth in Archer") and Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 747, 23 Cal. Rptr. 428, 437 (1962) ("[i]n . . . Archer . . . no one was preventing plaintiff . . . from protecting his lands from floods [under the common enemy doctrine]").


129 Id.


131 "[B]y a watercourse is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow." Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34, 35 (1920); see Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963) (swale through which surface water normally drained held not a watercourse).

132 See Green v. Swift, 47 Cal. 536 (1874).
of this kind, where shown to have been caused by public improvements, can amount to a "damaging" for which just compensation must be paid. The decisions appear to distinguish between: (a) governmental improvements that designedly divert stream waters onto private lands; (b) improvements that obstruct the stream and thus result in overflow and flooding of private lands; and (c) improvements that merely change the force of direction of the current with resulting erosion of channel banks.

As a general rule, "when waters are diverted by a public improvement from a natural watercourse onto adjoining lands the [public] agency is liable for the damage to or appropriation of such lands where such diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement." In such cases, the private property "is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or school." Permanently established artificial watercourses are treated like natural ones under this rule, whereby substantial reliance interests have been generated with the passage of time.

Judicial acceptance of inverse liability without fault in diversion cases appears to reflect the strength of the interests of property owners who have acquired and developed land in justifiable reliance upon the continuance of existing watercourses as means of natural drainage. The risk of damage from disturbance of the established stream

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137 Clement v. Reclamation Bd., 35 Cal. 2d 628, 638, 220 P.2d 897, 903 (1950), in which it was held that the state may not "without liability tear out a man-made flood protection that has existed for sixty-two years to the lands of plaintiff upon which substantial sums have been expended in reliance upon the continuance of the protection."
pattern is regarded as one that cannot be shifted with impunity to the property owner, even under a claim of exercise of the police power, merely to promote the community welfare. The detrimental impact of the contrary rule in discouraging private property owners from making improvements apparently is regarded as too onerous to permit a withholding of just compensation. Analysis and weighing of the respective interests in the light of the particular facts before the court, however, is not characteristic of these decisions; the rule of liability for diverting stream waters is generally applied in a strictly formal fashion.

Obstructing a natural or artificial watercourse by the construction of a public improvement, on the other hand, ordinarily has been regarded as a basis of inverse liability only when some form of fault is established. For example, the construction of a dam designed to store water which will foreseeably flood certain lands not directly condemned by the constructing agency constitutes a deliberate taking of those lands thereby inundated, as well as of downstream waters.

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139 This assumes, of course, that no state of emergency existed. As the court stated in Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "[S]imply because the district constructed the dikes in question for the purpose of flood control does not make it immune from liability for damage inflicted thereby upon the plaintiff. There was here no emergency requiring split-second action." If there had been such an emergency, the result would probably have been different. See text accompanying notes 72-78 supra.

140 See, e.g., Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897); Guerkink v. Petaluma, 112 Cal. 306, 44 P. 570 (1896). In litigation growing out of the great Feather River flood of December 1955, the state was adjudged liable upon the basis of ambiguous findings of fact that a levee on the west side of the Feather River, in the planning and design of which the state had "participated," had "caused waters of the Feather River to be diverted onto Plaintiffs' property east of the Feather River and thus caused harm to Plaintiffs' property." Pedrozo v. State, No. 41265, Findings of Fact and Conclusions of Law ¶ 4 (Butte County Super. Ct., Cal., Jan. 30, 1967).

141 Artificial and natural watercourses are treated alike in the obstruction cases, apparently without regard for the length of existence of the artificial channel. See, e.g., Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); cf. Bauer v. Ventura County, 45 Cal. 2d 278, 289 P.2d 1 (1955). See also notes 113 & 137 supra.

142 See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 603 (1961) (dictum recognized liability without fault for diversion of stream waters, but intimated that in other cases, including obstructions of watercourses, fault required); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (complaint held sufficient to state cause of action on ground of diversion, without fault, and alternatively, cause for negligent obstruction of stream waters).

rights that are destroyed, and is, therefore, a basis for inverse liability. The “fault” involved in this type of situation arises from the fact that the agency knew, or should have known, that these lands and interests would be taken, and yet had failed to provide compensation for these foreseeable “takings” through direct condemnation proceedings before the construction. Likewise, the construction, maintenance, or operation of drainage improvements according to a negligently conceived plan, which exposes private property to a substantial risk of damage by interfering with the flow of water therein, is actionable. Again, the building of a street embankment across a known watercourse without providing culverts or other means of drainage, so that foreseeable back-up flooding occurs, requires payment of compensation. Even if culverts are provided, inverse liability obtains if their design characteristics, contrary to sound engineering standards, are insufficient to allow the drainage of reasonably predictable volumes of water flowing in the stream from time to time. Mere routine negligence in maintenance, however, such as the negligent failure to clear debris from an improved flood control channel, where the accumulation of such debris is not part of a deliberately conceived program for controlling the flow of storm waters, is not a basis of inverse liability, although it may support liability on a tort theory.

The necessity for the pleading and proof of fault in the obstruction cases, while no fault is required for liability in the diversion cases, has caused a certain amount of confusion in the California case law. It is obvious that many kinds of stream obstructions may cause a

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145 Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955), in which a negligent plan for the maintenance of a drainage ditch which contemplated deposit and non-removal of stumps, debris, and intersecting pipe which obstructed the flow of water, was held actionable on the inverse theory. See Baum v. Scotts Bluff County, 169 Neb. 816, 101 N.W.2d 455 (1960) (to the same effect as Bauer).


diversion of stream waters, and, conversely, diversion normally requires an obstruction of some kind. Whether fault must be shown by the injured property owner thus depends, to some extent, upon how the facts are classified. A deliberate program intended to alter the course of a stream for a public purpose is ordinarily treated under the "diversion" rubric, while unintended flooding is usually attributed to a negligently planned project that creates an "obstruction."149 The distinction, however, is not a sharply defined one, and plaintiffs have sometimes sought recovery alternatively on both theories while pleading the same facts.150

Regardless of the factual approach employed, inverse liability for interference with stream waters depends upon a showing of proximate causation. In the principal litigation against the State arising out of the virtual destruction of the town of Klamath in the great flood of December, 1964, for example, the trial court denied liability on the alternative grounds that any obstruction to the flow of water allegedly created by either an old bridge, or a partially completed new bridge, located near the townsite "did not constitute a substantial factor" in causing plaintiffs' damages,151 and that in any event the damage was caused by the intervention of a superseding force consisting of an extraordinary and unprecedented storm.152

A third group of cases dealing with stream waters concerns the downstream consequences of natural channel improvement. For example, the narrowing and deepening of a natural watercourse and the construction of a concrete stream bed may increase greatly the total volume, velocity and concentration of water running in the channel by preventing absorption of stream waters and eliminating natural impediments to stream flow. This, in turn, would create a substantial risk of downstream damage due to overflow or intensified erosion of the stream banks. For policy reasons, centered upon the fear of discouraging upstream land development, this kind of channel improvement (at least insofar as downstream damage results from an increased volume of water) is not regarded as an actionable basis for inverse liability153 unless it is constructed according to an in-

150 Id. See also Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Pedrozo v. State, No. 41265 (Butte County Super. Ct., Cal., Jan. 30, 1967) (ambiguous findings).
152 Id. ¶ 5. Public improvement design standards are not required to provide adequate capacity or strength for storms of unforeseeable magnitude. Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); see notes 33–35 supra.
153 See Archer v. Los Angeles, 19 Cal. 2d 19, 27, 119 P.2d 1, 6 (1941); San
herently defective or negligently conceived plan. Here again, however, classification of the facts plays a significant role. If the improvements are regarded as causing an alteration in the direction of force of the normal current within the channel, they may readily be thought of as having “diverted” the stream. This approach supports a holding of inverse liability without fault for resulting downstream erosion of the banks. By describing the channel improvements as measures to fight off the common enemy of flood waters, however, attention is focused upon the issue of fault and the alleged defective nature of the improvement plan. The result is to make liability vel non turn ostensibly upon the unarticulated premises that control the classification process, rather than upon a conscientious appraisal of the relativity of public advantage and private harm in the particular factual situation.

(4) Other Escaping Water Cases

The prevailing ambivalent approach, under which some water damage situations are exposed to a “liability without fault” rationale, while others require a showing of intentional or negligent fault, is observable also in cases that do not fit neatly into the foregoing categories. Damage resulting from the overflow of sewers, for example, is recoverable in inverse condemnation if the plaintiff establishes that the sewers were deliberately or negligently designed so as

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Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). Although dictum in San Gabriel Valley Country Club suggests that nonliability attends an increase in both volume and velocity of downstream flow, the actual holding in both this case and in Archer is limited to damage resulting from increased volume only. This result may thus be consistent with the “common enemy” rule, under which individual efforts to stave off flood waters may increase downstream volume without incurring liability. The potential erosive effect of increased velocity, however, creates a hazard of greater destructive impact and possibly permanent devastation. Neither decision, it is submitted, should necessarily be taken as authoritative in the latter type of case.


155 See, e.g., Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895) (diversion of current by bridge abutment resulting in downstream erosion); cf. Green v. Swift, 47 Cal. 536 (1874) (not a “taking” under pre-1879 constitution). Cases in other states generally sustain inverse liability without fault in such cases. See, e.g., Dickinson v. Minden, 130 So. 2d 160 (La. 1961); Tomasek v. State, 196 Ore. 120, 248 P.2d 703 (1952); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Conger v. Pierce County, 116 Wash. 27, 196 P. 377 (1921).

to be inadequate to accommodate the volume of sewage and storm waters reasonably foreseeable in their service area. The element of fault as the basis of liability, however, is underscored by a corollary rule: inadequacy due to an unprecedented volume of water that could not reasonably be anticipated in the planning process constitutes no basis for inverse liability.

On the other hand, there are also many decisions that flatly approve inverse liability for property damage caused by the seepage of water from irrigation canals, "with or without negligence." The leading case to this effect involves a ruling of the District Court of Appeal that inverse liability for water seepage may be predicated upon a showing of negligent construction or maintenance by an irrigation district. On denying the district's petition for hearing, the Supreme Court, in a unanimous opinion, expressly disapproved the court's intimations as to the necessity of negligence. Where the damage is "caused directly" by seepage from the district's canal, inverse liability obtains without any showing of fault: "In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it." The sudden escape of water from a public entity's irrigation canal, however, has been held actionable only upon allegations and proof of defective design or operational plan.

Under the cases, then, inverse liability for water that escapes from irrigation channels or other conduits is based sometimes on fault and obtains sometimes without fault; the choice of rule appears to be a function of classification of the facts, rather than the application of a consistent theoretical rationale. Liability without fault in these situa-


\[158\] See Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aqueduct—rule recognized but held inapplicable on facts). See also notes 33–35 supra.


\[161\] Id. This statement is quoted approvingly in the recent case of Albers v. Los Angeles County, 62 Cal. 2d 250, 258, 396 P.2d 129, 133, 42 Cal. Rptr. 89, 93 (1965).

\[162\] Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 189 P.2d 674 (1948). See also Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aqueduct caused by storm which was foreseeable).
tions appears in theory to be an application of the doctrine announced in the famous English case of Rylands v. Fletcher,163 under which a landowner is strictly liable without fault for damage done to the property of others by the escape of substances with a mischief-producing capacity, such as water, collected and impounded upon his land for some "non-natural" purpose.164 The theory, however, has little support in California decisional law, for the California courts appear to have rejected the Rylands doctrine as applied to escaping waters.165 The use of water for irrigation purposes in a semi-arid state such as California, it is said, is not only a "natural" use of land but is useful and beneficial to a degree that should not be deterred by threat of strict liability.166 Yet, as noted above, the same courts have displayed no reluctance in approving inverse liability for irrigation water seepage without regard for negligence,167 and also, upon similar facts, regularly have imposed tort liability without fault on a nuisance theory.168

This seeming inconsistency of approach may possibly be reconcilable. An irrigation ditch built and maintained in a careful manner may, nonetheless, necessarily be located where natural conditions (e.g., porous subsoil) make percolation or seepage a predictable risk

163 L.R. 3 H.L. 330 (1868); see Bohlen, The Rule in Rylands v. Fletcher, 59 U. Pa. L. Rev. 298, 373, 423 (1911).
167 See cases cited note 159 supra.
of the improvement.\textsuperscript{169} Proof of fault may then be regarded as immaterial from either an inverse liability or a nuisance law viewpoint, because the existence of damage caused by the irrigation improvement supports an inference, as a matter of law, that the defendant either deliberately exposed the plaintiff to the risk of foreseeable harm or negligently adopted a defective plan of improvement that incorporated that risk.\textsuperscript{170} Moreover, statutory policy supports the view that seepage damage should be treated as a cost of the water project.\textsuperscript{171} On the other hand, when the escaping water is not attributable to some inherent risk of the project as planned, but results from an unexpected deficiency in its practical operation, a specific factual showing of fault may be necessary because the basis for the legal inference is no longer present.\textsuperscript{172}

B. Interference With Land Stability

As in water damage cases, the judicial process has had little success in bringing order and consistency to the law of inverse condemnation for damage caused by a disturbance of soil stability. Here, too, the California cases exhibit a schizophrenic tendency to vacillate between


\textsuperscript{170} See Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 587, 159 P.2d 674, 676 (1945), where it is said that “[a]n examination of the foregoing cases [including Powers, Hume, and Ketcham] . . . show[s] that in the majority of them the landowner sought recovery for damages caused by seepage from canals constructed through porous soil that did not confine and hold water . . . . Although the canal was constructed carefully and according to specifications this has been referred to as improper designing or improper planning which would make the irrigation district liable for damage. In some cases it is pointed out that this seepage of water may be prevented easily by puddling the canal with clay, by the use of oil on the banks and bottom, or by other simple means.” See also Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921).

\textsuperscript{171} See Cal. Water Code § 12627.3: “It is declared to be the policy of the State that the costs of solution of seepage and erosion problems which arise or will arise by reason of construction and operation of water projects should be borne by the project.”

\textsuperscript{172} Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945). But see Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941), where the unexpected opening of an underground spring in the course of gravel operations created a resultant necessity for drainage in which the county was held inversely liable without fault when excess waters were directed over the plaintiff’s property.
a theory of liability based on fault and one that admits liability without fault.

In *Reardon v. San Francisco* (the earliest California decision interpreting the "or damaged" clause of the 1879 constitution), the city, in the course of a street grading and sewer installation project, deposited large quantities of earth and rock upon the street surface to raise its grade, causing the unstable subsurface to shift and thereby damage the foundations of the plaintiffs' abutting buildings. Although the damage was both foreseeable and foreseen (the city had been warned that it was occurring), the city took no steps to protect the plaintiffs' property. The Supreme Court affirmed a judgment for the plaintiffs, but did not predicate its decision upon fault. On the contrary, it held that when a landowner is damaged as a consequence of public work, "whether it is done carefully and with skill or not, he is still entitled to compensation for such damage" under the command of the just compensation clause of the constitution. The opinion is a square holding on this point, as the court had concluded preliminarily that the plaintiffs could not recover on common law tort principles since no breach of a duty owed them was shown. Moreover, they could not recover inverse damages for a "taking," since no physical invasion of their land had occurred. Thus, the plaintiffs' judgment was sustained solely upon the ground that their property had been constitutionally "damaged."

The approach taken in *Reardon*, making fault immaterial to inverse liability for physical damage directly caused by public improvement projects, was widely accepted in states which, like California, had expanded the just-compensation clause of the state constitution to include "damaging" as well as "taking." On almost identical

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173 66 Cal. 492, 6 P. 317 (1885).
174 Id. at 505, 6 P. at 325.
175 A recent student work has classified *Reardon* as "dictum". Note, 13 U.C.L.A.L. Rev. 871, 872 (1966). This analysis ignores the reasoning of the court's unanimous opinion, as summarized in the text. Text accompanying notes 158–61 supra. Moreover, subsequent decisions of the Supreme Court have explicitly treated *Reardon* as a holding on the point here being discussed. See, e.g., Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court on denial of hearing).
176 See, e.g., Atlanta v. Kenny, 83 Ga. App. 223, 64 S.E.2d 912 (1951) (house collapsed into trench for fire communications); Brewitz v. St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (gullying and erosion due to loss of support after street grade lowered); Great N. Ry. v. State, 102 Wash. 348, 173 P. 40 (1918) (slides and earth deposits resulting from uphill blasting and road work). A contrary view is often taken in states limiting inverse compensation to "takings." Hoene v. Milwaukee, 17 Wis. 2d 209, 116 N.W.2d 112 (1962) (damage to foundation of building due to inadequately constructed highway unable to sustain heavy traffic); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 87 N.W.2d 279 (1958) (displacement of soil as result of
facts, for example, the Supreme Court of Washington has reached the same result as in *Reardon*.\(^7\) This approach also has been followed in subsequent California decisions,\(^7\) but in an uneven pattern. The collapse of a building due to the construction of a tunnel beneath it, for example, has been regarded as a basis of inverse liability without fault.\(^7\) Moreover, affirmance of landslide liability in the recent *Albers* decision makes it clear that the *Reardon* doctrine of inverse liability without fault is part of the current constitutional law of California.\(^8\) Yet, numerous other California decisions exist that seem to affirm fault as an essential prerequisite, at least in some circumstances, to inverse liability.\(^8\)

Even in cases closely analogous to *Reardon*, dealing with damage resulting from shifting soil, fault has been emphasized as a criterion of inverse liability. For example, damage to a house caused by excavation in the street for the installation of a sewer, which removed lateral support for the plaintiff's land, was held recoverable because the city's construction plans were "intrinsically dangerous and inherently wrong" according to expert engineering testimony adduced by plaintiff.\(^8\) In sustaining inverse liability under similar circum-

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\(^7\) Hinckley v. Seattle, 74 Wash. 101, 132 P. 855 (1913). See also Department of H'ways v. Widner, 388 S.W.2d 583 (Ky. 1965) (destruction of home in landslide caused by removal of lateral support during downhill road project held compensable without proof of negligence); Newport v. Rosing, 319 S.W. 2d 852 (Ky. 1958) (similar facts and holding as in *Widner*).


\(^10\) Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); see text accompanying notes 9-35 supra.


\(^12\) Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929). The court here observes that it is unnecessary to determine whether liability was based on
stances, however, an attempted police power justification for destruction of lateral support was rejected on the ground that "there is no reason to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance." These cases may possibly be explained as a product of unnecessary judicial preoccupation with private law analogies in the development of inverse condemnation law. The opinions themselves, however, contain no intimation of a judicial willingness to recognize inverse liability on any basis other than fault; only by a subtle and sophisti-

tort or inverse condemnation principles, for the same result would obtain in either event.


184 The common law rule of absolute liability for deprivation of lateral support, RESTATEMENT OF TORTS § 817 (1939), has been modified in California. CAL. CIV. CODE § 832. Under this statutory rule, except in the case of very deep excavations, the adjoining owner is liable only if loss of lateral support results from negligence or from failure to notify one's neighbor so that he may take protective measures. See Wharam v. Investment Underwriters, 58 Cal. App. 2d 346, 136 P.2d 363 (1943); Conlin v. Coyle, 19 Cal. App. 2d 78, 64 P.2d 1128 (1937). Section 832, however, applies only to lateral support situations; it does not impair the former rule of strict liability for loss of subjacent support. Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 82, 61 Cal. Rptr. 520 (1967); RESTATEMENT OF TORTS § 820 (1939); cf. Porter v. Los Angeles, 182 Cal. 515, 189 P. 105 (1920). Accordingly, Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929), and Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1946), may arguably be regarded as consistent with the fault rationale required in lateral support cases by section 832, while Porter v. Los Angeles, supra, and Reardon v. San Francisco, 66 Cal. 492, 6 P. 318 (1885), may be understood as instances of strict liability for loss of subjacent support. This explanation, however, is inconsistent with explicit language in Reardon that "there could be no ... recovery at common law." Id. at 505, 6 P. at 325. It has no formal support or recognition in Kaufman, Veteran's Welfare Board, or Porter.

It is not entirely clear whether section 832 governs excavation work by public agencies. It has been said to be inapplicable to street excavation work by a municipal contractor which impairs lateral support of abutting land. Cassell v. McGuire & Hester, 187 Cal. App. 2d 579, 593, 10 Cal. Rptr. 33, 42 (1960) (dictum); cf. Gazzera v. San Francisco, 70 Cal. App. 2d 833, 161 P.2d 806 (1945) (city held not liable for loss of lateral support in absence of showing that street excavation work caused plaintiff's damage; section 832 neither cited nor discussed). On the other hand, previous uncertainty whether general statutory provisions governing tort liability were applicable to governmental entities has now been resolved, since sovereign immunity has been abrogated in California, in favor of applicability. E.g., Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (wrongful death act held applicable to state). Under the latter view, it seems that section 832 would be regarded today as apropos in a lateral support case maintained against a public entity either on an inverse or tort theory.
cated analysis can they be reconciled with the rationale of the Reardon and Albers decisions.

C. Loss of Advantageous Conditions

The value of real property is often directly dependent upon advantageous conditions physically associated with it, such as an adequate supply of potable water. Government activities, however, may impair or terminate the existence of such physical attributes and thereby substantially diminish the sum total of the value-enhancing features that comprise the owner's property interest. In a California case, for example, the construction of a tunnel as part of a municipal water supply project diverted an underground stream which fed natural springs used by a farmer for irrigation purposes. Loss of this valuable water supply source was held to be a compensable damaging of property, although there was no evidence that the city had acted negligently or unreasonably.\footnote{185}{De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915). A landowner's interest in spring water located on his premises is recognized, ordinarily, as being equally protectible with his ownership of the surface. State v. Hansen, 189 Cal. App. 2d 604, 11 Cal. Rptr. 355 (1961). The interest of a surface owner in percolating underground waters, however, has traditionally been subject to a rule of correlative reasonable use. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1903); cf. Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949), cert. denied, 339 U.S. 937 (1950). See generally Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1938), where the city was held liable for the diminution of artesian well pressure resulting from extensive pumping and exportation of water from an underground basin.}

Similarly, upstream improvements, such as a dam, that divert stream water to governmental purposes in derogation of established water rights of downstream riparian owners also may constitute a basis of constitutional liability.\footnote{186}{Loss of water supply, however, is recognized as a basis of inverse liability only so far as the injured party is recognized to possess a property right therein.\footnote{187}{Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915); Volk-mann v. Crosby, 120 N.W.2d 18 (N.D. 1963) (city held inversely liable for impairment of private artesian well supply by drilling of municipal well); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936) (similar to facts in Volk-mann); Griswold v. Weathersfield School Dist., 117 Vt. 224, 88 A.2d 829 (1952) (school district held inversely liable for diversion of underground stream, with consequent drying up of plaintiff's spring, due to blasting in course of district improvement project). Judicial enforcement of property rights in water, however, may be unavailable where conflicting prescriptive rights have matured. See Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949).}}

Loss of water supply, however, is recognized as a basis of inverse liability only so far as the injured party is recognized to possess a property right therein.\footnote{187}{Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915); Volk-mann v. Crosby, 120 N.W.2d 18 (N.D. 1963) (city held inversely liable for impairment of private artesian well supply by drilling of municipal well); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936) (similar to facts in Volk-mann); Griswold v. Weathersfield School Dist., 117 Vt. 224, 88 A.2d 829 (1952) (school district held inversely liable for diversion of underground stream, with consequent drying up of plaintiff's spring, due to blasting in course of district improvement project). Judicial enforcement of property rights in water, however, may be unavailable where conflicting prescriptive rights have matured. See Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949).}
disposition of cases of this kind is underscored by the recent state Supreme Court case of Joslin v. Marin Municipal Water District.\(^{188}\) This decision denied compensation to downstream riparian owners for damage caused by loss of accretions of commercial sand and gravel deposits upon their land, which formerly had been carried in suspension by the waters of Nicasio Creek. The defendant district, in order to develop a municipal water supply, had constructed a dam across the creek which obstructed the normal flow of waters and thus terminated the periodic replenishment of sand and gravel used by the plaintiffs in their business. The value of the plaintiffs' land allegedly was diminished in the amount of $250,000. Inverse liability was denied under the prevailing California doctrine of reasonable beneficial use which governs the relative property interests of riparian owners (such as the plaintiffs) and upstream appropriators (such as the defendant district).\(^{189}\) The plaintiffs' use of the stream waters for acquisition of commercial sand and gravel—commodities in plentiful supply for which no significant interest in development and conservation by stream water usage could be identified—was held to be clearly unreasonable and therefore subordinate, as a matter of law, when contrasted with the district's interest in the beneficial use of those waters for domestic and industrial purposes. In effect, no compensable property right of the plaintiffs had been taken or damaged.\(^ {190}\)

In Joslin, the court distinguished two important cases relied upon by the plaintiffs. The first, a decision of the United States Supreme Court, declared that loss of natural irrigation through seasonal overflow of riparian lands, caused by the construction of an upstream dam, constituted a compensable "taking" of the landowners' riparian property interest.\(^ {191}\) Reliance on seasonal flooding of a stream for agricultural irrigation purposes was regarded there as a reasonable beneficial use of river water by a riparian owner, and thus a compensable

188 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).
189 See Cal. Const. art. XIV, § 3 (1928), which modified the strict doctrine of superiority of riparian to appropriative rights as applied in cases like Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 P. 607 (1926). By the 1928 amendment, the rule of reasonable beneficial use became firmly established as the legal framework for adjudication of competing claims to water in California. Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); Cal. Water Code §§ 100-01.
190 See Peabody v. Vallejo, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935). But see Miramar Co. v. Santa Barbara, 23 Cal. 2d 170, 143 P.2d 1 (1943); Note, Eminent Domain: Damage Without Taking, Damnnum Absque Injuria, 32 Calif. L. Rev. 91 (1944) (court evenly divided as to existence, as against the state, of property right in littoral owner to uninterrupted sandy accretions from natural ocean currents).
interest. Use by the plaintiffs in *Joslin* for sand and gravel accretions, however, was deemed not reasonable under the circumstances.102

The second case, a California decision, held that loss of accretions of sand and gravel as the result of the construction of a concrete flood control channel in the bed of a natural watercourse, thereby preventing overflow of the waters and deposit of their contents upon the plaintiffs’ land, constituted the taking of a property right the value of which was required to be included in severance damages in the flood control district’s eminent domain suit to condemn the channel easement.193 This decision, however, did not involve a clash between a riparian owner and an upper appropriator in light of the “reasonable and beneficial use” test, but was concerned only with the question of the extent to which the land not taken for flood control purposes, on which plaintiff’s long-established gravel business was situated, had sustained severance damages by reason of the flood control channel project. The Supreme Court in *Joslin* expressly disapproved any language in the earlier case which intimated that the use of stream flow for replenishment of sand and gravel accretions was a reasonable one or could be regarded as giving rise to a property right as against an appropriator who was putting the water itself to reasonable and beneficial use.194

According to the *Joslin* opinion, the critical determination whether a particular use of water is reasonable and beneficial “is a question of fact to be determined according to the circumstances in each particular case.”195 Ample latitude for the weighing of policy

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102 Cf. Cal. Water Code § 106: “It is hereby declared to be the established policy of the State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.” The *Joslin* opinion, it should be noted, does not constitute a clear approval of the *Gerlach* decision; it may be read, instead, as merely explaining and distinguishing *Gerlach* as based on a determination, which the *Joslin* court was not required to reexamine, that the riparian use there in question was in fact “reasonable” under the circumstances. In any event, *Joslin* strongly intimates that “reasonableness” is a relative concept, to be determined by comparing the relative social utility of the competing water uses before the court. For example, it would not be inconsistent with *Joslin* for a court, under some circumstances, to conclude that agricultural irrigation purposes (a secondary priority of use under section 106) may be unreasonable when in conflict with water supply for domestic consumption. Moreover, the hierarchy of priorities as between other forms of water usage not mentioned in section 106 remains uncertain and subject to case-by-case elaboration, absent additional legislative clarification.


195 Id. at 139, 429 P.2d at 894, 60 Cal. Rptr. at 382. Accordingly, a use
factors judicially regarded as relevant to the compensability issue is thus allowed. For example, in *City of Los Angeles v. Aitken*, the court’s opinion, after emphasizing the importance of natural recreational facilities both to the state’s economic well-being and to the health and welfare of its citizens, concluded that the use of navigable lake waters for recreation and as an adjunct to the scenic and recreational use of littoral lands (whose value for that purpose directly depended upon the continued existence of the lake) was a reasonable beneficial use entitled to judicial protection. A secondary factor supporting this conclusion was the virtual unusability of the lake waters in question for domestic or irrigation purposes, due to excessive impregnation with minerals and alkali. Finally, the *Aitken* opinion stresses the fact that substantial investments had been made along the lake shore in reasonable and good-faith reliance upon the continuance of the natural lake level. Accordingly, the diversion of the waters of tributary streams feeding the lake, even though for the concededly reasonable and beneficial purpose of augmenting a municipal water supply, was held to constitute the damaging of property rights of littoral owners for which just compensation was required to be paid.

Although a careful perusal of *Aitken* suggests that the frustration of substantial investment-backed expectations, reasonably grounded in experience, was the pivotal factual element of the decision, *Joslin* seemingly rejects the view that the magnitude of private loss is of legal significance. The destruction of a valuable, long-standing, and socially useful business enterprise grounded upon reasonable expectation that periodic replenishments of sand and gravel would continue to be supplied by natural river flow, was countenanced as not a compensable damaging because of the general preference shown by California law for domestic water use. Unlike *Aitken*, the *Joslin* result seems to reflect a judicial disposition to permit decision in cases of this kind to turn upon abstract classifications of water use priorities, thereby making unnecessary the more difficult task of assessing the weight of the competing interests revealed by the adjudicative facts. Absent a comprehensive legislative scheme of relative priorities, however, this approach scarcely improves predictability. In any event, it appears to disregard significant factual and policy considerations which, in other contexts (e.g., *Albers*), have been regarded as determinative of the public duty to pay just compensation for economic losses caused by governmental activities.

It could be argued that the inherent uncertainty of the reason-
able beneficial use criterion of compensable water rights has been reduced at least partially by statutory provisions. The result in the Aitken case, for example, apparently has been codified in somewhat expanded form. Section 1245 of the California Water Code makes every municipality that appropriates water from any watershed or its tributaries fully liable to persons within the watershed area for "injury, damage, destruction or decrease in value of [their] property, business, trade, profession or occupation" caused by the appropriation. The Joslin opinion, however, considered the quoted language as indicating only a legislative intent to provide statutory compensation in those limited situations in which a constitutionally secured right to just compensation already existed. In holding that the plaintiffs' business and occupational losses were not compensable under section 1245, the court reasoned that "since there was and is no [constitutionally cognizable] property right in the instant unreasonable use, there has been no taking or damaging of property. Since by constitutional fiat no property right exists, none is created by statutory provisions intended to provide compensation for the deprivation of protectible property interests."197 This view, which treats the statute as a useless and redundant exercise of legislative power, wholly ignores clear language in section 1245 suggesting that the legislature was not attempting to formulate a rule of compensation enmeshed in technical notions of what is a constitutionally protectible property interest, but was seeking to protect against economic loss (i.e., "decrease in value") caused by water appropriation to any previously established "business, trade, profession or occupation" in the watershed. The Joslin sand and gravel enterprise may not have been "property" in the constitutional sense, but it is difficult to understand why it was not a "business" or "occupation" in the statutory sense. Moreover, the court in Joslin ignored the possibility that section 1245 is simply another proviso in the extensive array of statutory mandates requiring compensation to be be paid for governmentally caused economic losses despite the absence of a constitutional compulsion to do so.198


198 See Van Alstyne, Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction, 20 Stan. L. Rev. 617, 630-32 (1968), collecting and discussing numerous statutes. The most directly analogous statutory pattern of required compensation for economic losses caused by public improvements, absent constitutional compulsion to compensate, relates to the reimbursement of costs incurred by private utility companies in relocating underground facilities and structures in order to make room for, or accommodate, public projects (e.g., sewers, water mains, drainage facilities, street improvements). See Van Alstyne, Government Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. L. Rev. 463, 501-02 (1963). The constitutional validity of statutory indemnification in such situations is, of course, well-
It should be noted that other legislation relating to water resources, from a practical viewpoint, may have an impact upon inverse liability claims for interferences with water uses, although the nature and extent of the impact cannot be evaluated on an abstract basis. Claims of appropriative rights to surplus stream water, for example, are now subject to an application-permit procedure made applicable to all appropriators, including municipalities, and designed to allocate such claims on "terms and conditions . . . [which] will best develop, conserve, and utilize in the public interest the water sought to be appropriated." The relativity of water uses also has been given partial definition by statutory declarations that "domestic use is the highest use and irrigation is the next highest use of water," together with statutory preferences for appropriations by municipalities for domestic consumption purposes. Finally, provision is made for administrative adjudication of competing claims to water by the State Water Rights Board, as well as for court referral of water rights controversies to this agency.

Although the statutory framework appears to provide an orderly basis for the determination of water rights, it leaves the determination of compensability for governmental "takings" or "damagings" of interests in water in a state of uncertainty. The only explicit legislative effort to deal with the problem has been nullified by the exceedingly narrow interpretation of Water Code section 1245 announced by Joslin. The "reasonableness" test (which Joslin indicates applies to all competing water claims and not merely to disputes between appropriators and riparian users) is derived ultimately from the language of article XIV, section 3 of the California Constitution, but this fact settled. Dittus v. Cranston, 53 Cal. 2d 284, 347 P.2d 671, 1 Cal. Rptr. 327 (1958). See also Southern Cal. Gas Co. v. Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958).

199 CAL. WATER CODE § 1252.5. See generally id. §§ 1200-1801.
200 Id. § 1253. See also id. §§ 10000-507, where the "State Water Plan" and "California Water Plan" provisions, under which the state has assumed a primary interest in the orderly and coordinated conservation, development, and utilization of all water resources in the state, has been codified.
201 Id. §§ 108, 1254.
202 Id. §§ 109.5, 1460-64. But see id. §§ 10505, 11460-63 ("county of origin" and "watershed of origin" preferences); Note, State Water Development: Legal Aspects of California's Feather River Project, 12 STAN. L. REV. 439, 450-55 (1960).
203 CAL. WATER CODE §§ 2000-76 (references); id. §§ 2500-2866 (administrative adjudication subject to court review).
204 CAL. CONST. art. XIV, § 3 (1928), provides in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the con-
should not and does not preclude legislative clarification of the criteria to be used by the courts in applying this test to specific circumstances. Indeed, the Joslin decision itself relies heavily upon legislative provisions which declare the predominant importance of domestic water use in the socio-economic environment of California, as well as the absence of such legislative standards respecting sand and gravel accretions, as support for its conclusion that the latter interest was not a reasonable and beneficial use as contrasted with the former. More explicit and comprehensive legislative clarification, including possible amendment of Water Code section 1245 in order to make its basic intent indisputably clear, would seem to be a desirable legislative objective.

The recognition of certain aspects of water rights as compensable "property" interests has been accompanied in recent years by a growing body of law likewise giving effect to the landowner's compensable interest in the purity of both water and air. Pollution, ordinarily comprised of domestic and industrial wastes, and sometimes of silt, often is attributable to governmental functions, such as the collection of waste matter in sanitary sewer systems for concentrated discharge (ordinarily after some form of treatment) at a relatively few outlets, or (in the case of silting) public construction projects conducted without adequate erosion controls. Sewage disposal, in addition, sometimes produces pollution of the atmosphere by noxious odors which drastically impair the usability and value of property subjected there-to.

Governmental liability for environmental pollution often has been sustained on a tort theory of nuisance. California case law
has provided support for this approach in the past.\textsuperscript{200} However, it is no longer entirely clear whether governmental nuisance liability will be recognized in California in light of the legislative decision in 1963 placing all governmental tort liability upon a statutory basis while omitting to provide explicitly for liability on a nuisance theory.\textsuperscript{210} Inverse condemnation appears to offer an acceptable alternate remedy that would survive legislative disapproval.\textsuperscript{211} Before abrogation of sovereign immunity from tort liability, the California cases recognized nuisance liability as an exception to the general rule of tort immunity; but the exception was largely an evolutionary development rooted in inverse condemnation liability for property damage.\textsuperscript{212} To the extent that nuisance and inverse liability overlap one another, the inverse remedy still would be available in pollution cases.\textsuperscript{213}

Elsewhere, public entities have been held liable on inverse condemnation grounds in such diverse situations as sewage contamination of oyster beds,\textsuperscript{214} pollution of private water resources,\textsuperscript{215} ocean salt water intrusion upon agricultural lands riparian to a river because of upstream diversion of fresh water,\textsuperscript{216} siting of a private lake

\textsuperscript{200} See Hassell v. San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (injunction against maintenance of comfort station in public park on showing that nuisance would result); Adams v. Modesto, 131 Cal. 501, 63 P. 1083 (1901) (open sewer ditch nuisance); Ingram v. Gridley, 100 Cal. App. 2d 815, 224 P.2d 798 (1950) (sewage pollution of stream).


\textsuperscript{211} See Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Law. 1, 11 (1967).


\textsuperscript{214} Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938).

\textsuperscript{215} Game & Fish Comm'n v. Farmers Irr. Co., 149 Colo. 318, 426 P.2d 562 (1967) (pollution by waters discharged from fish hatchery); Cunningham v. Tieton, 60 Wash. 2d 434, 374 P.2d 375 (1962) (percolation from sewage lagoon to underground wells); Snively v. Goldendale, 10 Wash. 2d 453, 117 P.2d 221 (1941) (sewage discharge into stream).

from erosion of an unstabilized highway embankment, and persistent pollution of the atmosphere by noxious and offensive odors from a sewage disposal plant. Negligence or alternative findings of fault are not regarded as essential to liability in these cases; regardless of the care with which the public improvement is operated, if it in fact creates a condition that substantially damages property values, the public entity must absorb the resulting cost. In addition, by grounding these decisions upon the constitutional mandate to pay just compensation, the courts have blocked municipal contentions that liability should not attach to the performance of essential “governmental” functions, such as sewage disposal, or that liability should not be recognized for governmental activities expressly authorized by statute.

The persistence of a nuisance rationale at the heart of the inverse condemnation decisions dealing with environmental pollution damage introduces into the law of inverse liability the same vagaries, uncertainties, and obscurities of decisional processes that plague ordinary tort litigation pursued on a nuisance theory. In addition, it may blur significant distinctions between the interests represented by public agencies and those which pertain to private persons. For example, a comparison of public and private defendants may disclose substantial differences of size, legal responsibility, territorial impact, fiscal resources, and available practical alternatives. All these differences should be considered in a rational balancing process. On the other hand, the nuisance analogue does usefully direct attention to the remedial resources inherent in the powers of equity to abate the source


222 "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem . . . .” W. Prosser, THE LAW OF TORTS 592 (3d ed. 1964).
of harm rather than merely award just compensation and thereby confirm the permanence of the injury.\textsuperscript{223}

D. Miscellaneous Physical Damage Claims

The factual setting of inverse liability claims is not complete without at least brief attention to a variety of other circumstances in which physical injuries to property have been conceptualized as constitutional "damagings."

(1) Concussion and Vibration

Property damage caused by shock waves from blasting and other activities has resulted in varying judicial views.\textsuperscript{224} In jurisdictions that recognize inverse liability only for a "taking," structural damage as the result of vibrations from heavy equipment (e.g., a pile driver)\textsuperscript{225} or from shock waves caused by blasting,\textsuperscript{226} ordinarily is held to be noncompensable. Consistent with the widely recognized rule that injuries caused by blasting in a populated area are an occasion for absolute tort liability,\textsuperscript{227} however, California regards such injuries as an

\textsuperscript{223} See, e.g., Jones v. Sewer Improvement Dist., 119 Ark. 166, 177 S.W. 888 (1915); Lakeland v. State, 143 Fla. 761, 197 So. 470 (1940); Briggs v. Viroqua, 264 Wis. 47, 58 N.W.2d 546 (1953). The limited availability of remedies other than damages, where inverse takings or damagings have occurred, is surveyed in Note, Eminent Domain—Rights and Remedies of an Uncompensated Landowner, 1962 Wash. U.L.Q. 210. See also Horrell, Rights and Remedies of Property Owners Not Proceeded Against, 1966 U. Ill. L.F. 113.

\textsuperscript{224} In private tort law, a division of authority exists as to whether such damage is actionable without fault. Annot., 20 A.L.R.2d 1372 (1951); see notes 227 and 232 and accompanying text infra for the California position.

\textsuperscript{225} State ex rel. Fejes v. Akron, 6 Ohio St. 2d 47, 106 N.E.2d 970 (1952). This result is also reached in some "damaging" states by narrow construction. See, e.g., Klein v. Department of H'ways, 175 So. 2d 454 (La. App. 1965), writ refused, 248 La. 369, 178 So. 2d 658 (1965) (collapse of roof due to vibration from pile drivers held noncompensable since not an intentional or purposeful infliction of damage); Beck v. Boh Bros. Constr. Co., 72 So. 2d 765 (La. App. 1954) (similar).

\textsuperscript{226} Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1963) (atomic test detonations); Sullivan v. Commonwealth, 355 Mass. 619, 142 N.E.2d 347 (1957) (non-negligent blasting during aqueduct tunnel project); Crisafi v. Cleveland, 169 Ohio St. 137, 158 N.E.2d 379 (1959) (single blast during park improvement project). Some of the holdings of noncompensability for blast and vibration damage appear to be based on the view that the resulting injuries were de minimis. See, e.g., Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959); cf. Louden v. Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914) (severe and prolonged blast and vibration damage may amount to a "taking").

inversely compensable “damaging” of property regardless of the care or the negligence of the public entity in causing them. Moreover, the California decisions have rejected efforts to limit strict liability to damages from blast-projected missiles, ruling that the plaintiff’s right to recovery does not turn on whether the damage was caused by atmospheric concussion, vibration of the soil, or throwing of debris, but upon the extrahazardous nature of the defendant’s activities. The same conclusions have been reached with respect to subterranean damage caused by the vibration of a large rocket motor undergoing testing.

The rationale of strict inverse liability for concussion and vibration damage caused by blasting or similar activities has recognized limits; thus, California requires a showing of negligence as a basis of liability where the blasting occurred in a remote or unpopulated area. Activities of this type undertaken in a residential area are deemed to create a risk of substantial harm which cannot be eliminated entirely even by the use of utmost care. Thus, the policies of negligence deterrence and loss distribution support a rule imposing strict liability upon the enterprise which exposes property owners to that risk and which is ordinarily in a position best able to absorb the loss. In remote and unsettled areas, however, the risk is minimized

228 Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass’n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961) (vibration damage from pile driver). Cases in other “damaging” states are in substantial agreement. See, e.g., Richmond County v. Williams, 109 Ga. App. 670, 137 S.E.2d 343 (1964) (physical damage from pile driver vibration held compensable, while annoyance from dust, fumes and noise held noncompensable); Muskogee v. Hancock, 58 Okla. 1, 158 P. 622 (1916) (concussion damage from blasting during sewer construction); Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W. 2d 1022 (1935) (vibration and concussion damage from blasting).

229 Inverse liability for damage caused by rocks and debris thrown upon private property by construction blasting is generally recognized. See, e.g., Jefferson County v. Bischoff, 238 Ky. 176, 37 S.W.2d 24 (1931); Adams v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917).


231 Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967) (loss of underground water supply due to subterranean vibration and earth shifting caused by test of rocket engine of unusual power and size). Where inverse liability is limited to a “taking”, however, contrary results have been reached. See, e.g., Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964) (jet engine test).


233 The strict liability rule, however, has been strongly criticized as in-
by environmental conditions. The social utility of property development overrides the relatively slight risk of damage and justifies the withholding of liability unless fault is established. This dual rationale incorporates a rough balancing technique of limited scope that could well achieve equitable results, as well as predictability, in allocating losses from blasting and like conduct by private individuals. The cases, however, indicate a judicial disposition to apply the same rules that govern private activities to the solution of inverse liability claims against public entities, without taking into account the significant differences between private and public undertakings that may alter the balance of interests.

(2) Escaping Fire and Chemicals

Claims against public entities for negligently permitting fire to escape from the control of public employees and damage nearby property are deemed to be grounded upon tort theory in California. Until recently, such claims ordinarily have withered on the vine of sovereign immunity. However, while the courts generally have refused to regard escaping fire as a basis for inverse liability when only mere negligence is involved, it is clear that in a proper case the inverse remedy would be fully applicable. For example, it has been held that a public rubbish disposal dump operated pursuant to a plan that deliberately keeps fire burning to consume trash deposited consistent with a rational balancing of the competing interests in the light of modern technology. See, e.g., Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 602 (1950); Smith, Liability for Damage to Land by Blasting (pts. 1-2), 33 Harv. L. Rev. 542, 667 (1920).


236 Cf. Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961). But see Pumphrey v. J. A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959), where no liability was incurred for concussion damage caused by non-negligent blasting by a government waterway project contractor under government supervision and in accordance with government-approved plans.


239 See Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929), in which the inverse condemnation theory was held inapplicable where the complaint alleged a single act of negligence that permitted escape of fire from the city dump. See also McNell v. Montague, 124 Cal. App. 2d 326, 268 P.2d 497 (1954); Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 237 P. 59 (1925).
therein can expose the public entity to statutory tort liability for intentionally maintaining a dangerous condition of public property.\textsuperscript{240} The deliberate adoption of such a plan, however, also clearly supports inverse condemnation liability where damage results.\textsuperscript{241} Fault, in the form of an inherently defective plan involving the use of fire for a public purpose, is the conceptual basis of this application of the just compensation clause. The water seepage cases, which typically impose inverse liability without fault, are regarded as distinguishable.\textsuperscript{242} Water seeping from an irrigation ditch creates a relatively permanent condition reducing the utility of the affected land as a direct consequence of the functioning ("public use") of the ditch; fire escaping from control of public employees, however, does not produce such "direct" consequences unless the plan of use itself includes the risk of its escape as an inherent feature of the project functioning as conceived.\textsuperscript{243}

Judicial disposition of inverse liability claims resulting from the drifting of chemical sprays employed for such public objectives as weed or insect control follows the same approach as the escaping fire cases. Mere routine negligence will not support inverse liability,\textsuperscript{244} but a deliberately adopted plan of use that includes the prospect of property damage as a necessary consequence of the application of chemicals is recognized as actionable.\textsuperscript{245} It should be mentioned, how-

\begin{footnotes}
\item[241] See Bauer v. Ventura County, 45 Cal. 2d 276, 284-85, 289 P.2d 1, 7 (1955), expressly distinguishing Miller, McNeil and Western Assurance Co. as instances of escaping as a result of a single act of negligence in routine operations, and sustaining the sufficiency of a complaint for inverse condemnation (for flood damage) based on an inherently defective plan of construction and maintenance of a governmental project. See text accompanying notes 38-43 supra. This distinction was also noted in Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 66, 77, 237 P. 59, 63 (1925), where the court observed that inverse liability would obtain if the work that caused the fire had been done "in accordance with specific directions of . . . plans and specifications" approved by the district and the damage had resulted "necessarily and directly" therefrom.
\item[243] See note 241 supra.
\end{footnotes}
ever, that the trend of the private law cases involving damage from chemical sprays appears to be toward imposition of strict liability.\textsuperscript{246} The tendency of the courts to employ private law analogies in inverse liability cases suggests that the latter decisions may follow suit.

The escaping fire and chemical drift cases further illustrate the overlap of tort and inverse remedies against public entities in California. Under current statutory law, however, the overlap is of little importance because an injured property owner today appears to have fully adequate remedial weapons in tort litigation with respect to both escaping fire\textsuperscript{247} and chemical drift.\textsuperscript{248} There may be some procedural advantages, however, in pursuing the inverse remedy in certain situa-

\textsuperscript{246} See Note, Crop Dusting: Two Theories of Liability?, 19 HASTINGS L.J. 476 (1968). Technical data cited in this note suggest that substantial drift from chemical applications is an inherent risk of dusting and spraying operations notwithstanding use of reasonable care.

\textsuperscript{247} The former doctrine of sovereign immunity has been supplanted by a statutory rule making public entities liable, except where otherwise provided by statute, for the tortious acts and omissions of their employees. CAL. GOV'T CODE § 815.2. Although there is a specific statutory immunity for "any injury caused in fighting fires," CAL. GOV'T CODE § 850.4, this immunity would not preclude governmental tort liability for negligently permitting a fire started or attended by public employees to escape. There are four theories that are available to supplant immunity. First, negligently permitting the fire to escape is probably not within the purview of the immunity for "fighting fires." A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 7.29 (Cal. Cont. Educ. Bar ed. 1964). Secondly, there is an express statutory liability for negligently or willfully permitting a fire to escape. CAL. HEALTH & SAFETY CODE § 13007. This section, although framed in general terms, applies to public entities and their employees. Flournoy v. State, 57 Cal. 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962). This section supersedes (that is, "otherwise provides") the immunity provisions of the Government Code. CAL. GOV'T CODE § 815 (introductory exception); A. VAN ALSTYNE, supra §§ 5.11, 5.28. Thirdly, negligently or deliberately permitting a fire under the control of a public employee to escape appears to constitute a failure to exercise reasonable diligence to discharge a mandatory duty imposed by statute. CAL. HEALTH & SAFETY CODE § 13000; CAL. PUB. RESOURCES CODE § 4422. This is a basis of governmental liability under CAL. GOV'T CODE § 815.6. Fourthly, escaping fire would, in some cases, be actionable as a dangerous condition of public property. Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951); CAL. GOV'T CODE § 835.

\textsuperscript{248} Although governmental use of dangerous chemicals for pest control purposes is expressly authorized by statute, CAL. AGRIC. CODE §§ 14002, 14063, 14093, such authorization does not relieve the user from liability for property damage caused thereby. Id. §§ 14003, 14034. Moreover, use of pesticides in such a manner as to cause "any substantial drift" is a misdemeanor, the commission of which appears to be an actionable tort. Id. §§ 9, 12972; Note, Crop Dusting: Two Theories of Liability?, 19 HASTINGS L.J. 476, 486-87 (1968). However, the applicability of the Agricultural Code provisions to governmental entities, and their interrelationship to the Tort Claims Act of 1963, are in need of clarification. See note 330 infra.
Privileged Entry Upon Private Property

In the course of performing their duties, public officers often have need, and commonly are authorized by statute, to enter private property to make inspections and surveys, abate public nuisances, and perform other governmental functions. These official entries and other related activities on private property, if restricted to reasonable performance of public duties, are privileged and do not constitute a basis of personal tort liability of the public officer. If, however, the privilege is abused by the commission of a tortious act in the course of the entry, the common law regards the officer as personally liable ab initio for both the original trespass and all resulting injuries. The Tort Claims Act of 1963 rejects the ab initio approach, but does recognize liability of both the public entity and its employee for tortious injuries inflicted by the latter during an otherwise privileged entry.

249 Actions to impose statutory tort liability for a dangerous condition of public property, note 247 supra, are subject to certain defenses not available in inverse condemnation. See, e.g., CAL. GOV'T CODE §§ 835.2, 835.4 (lack of notice and reasonableness of entity's actions after notice). See also id. § 830.6 (immunity for injury resulting from defective plan or design where not wholly unreasonable at time of adoption); Note, Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6, 19 HASTINGS L.J. 584 (1968).

250 See, e.g., CAL. CODE CIV. PROC. § 1242 (surveys of land required for public use); CAL. HEALTH & SAFETY CODE § 2270(f) (investigations and nuisance abatement work by mosquito abatement district); CAL. WATER CODE § 2229 (surveys for irrigation district purposes). For a comprehensive list of citations, see Van Alstyne, A Study Relating to Sovereign Immunity, in 5 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 110-19 (1963). Entries into private buildings, unless consent is given by the owner, must be supported by a valid search warrant. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). Under the cited decisions, however, the warrant may authorize an “area inspection,” and need not be particularized to individual structures.

251 Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1957); Commonwealth v. Carr, 312 Ky. 393, 227 S.W.2d 904 (1950); Johnson v. Steele County, 240 Minn. 154, 60 N.W.2d 32 (1953); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.20, at 56-57 (1956); RESTATEMENT OF TORTS § 211 (1934).


253 The California Tort Claims Act of 1963 declares public entities and public employees immune from tort liability for authorized official entries upon private property, but this immunity does not extend to injuries caused
Freedom from trespass liability, however, does not absolve the public entity from inverse condemnation liability. For example, although a public entity may be privileged to enter and remove obstructions from drainage channels running through private property as a means of promoting flood protection, damage sustained by adjoining private property as a result of the work performed (e.g., piling of rock and debris on channel banks) is compensable. Similarly, a public entity acts fully within its rights in undertaking to install storm drains within an easement traversing private land, until its operations substantially obstruct normal use of the land in ways not shown to be essential to the performance of the work.

The fact that the entry is pursuant to statutory authority does not alter the result. Statutory authorizations for official entries upon private lands generally are held to be valid on their face since the courts feel constrained to assume that the contemplated interference with private property rights ordinarily will be slight in extent, temporary in duration, and de minimis in amount. As the leading California case of Jacobsen v. Superior Court declares, the privilege of entry for official purposes is available only for "such innocuous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property." Minor and trivial injuries, in effect, are noncompensable; the public purpose to be served by the entry requires subordination of private property rights to this limited by the employee’s “own negligent or wrongful act or omission.” Cal. Gov't Code § 821.8; see A. Van Alstyne, California Government Tort Liability § 5.62 (Cal. Cont. Educ. Bar ed. 1964).

There are many examples of actionable interferences. Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (substantial temporary interference with access to adjoining property by storage of construction materials and erection of sheds upon and in front of plaintiff’s land); O’Dea v. San Mateo County, 139 Cal. App. 2d 659, 294 P.2d 171 (1956) (obstruction of surface for over ten months by storing drainage pipes on easement while awaiting underground installation).


Id. at 329, 219 P. at 991. See also Dancy v. Alabama Power Co., 198 Ala. 504, 73 So. 901 (1916); 2 P. Nichols, Eminent Domain § 6.11, at 379-83 (rev. 3d ed. 1963).
The threatened entry that the owner was seeking to prevent in *Jacobsen* contemplated the occupation of parts of the owner's ranch for two months by municipal water district employees, and the use of power machinery to make test borings and excavations to determine the suitability of the premises for use as a possible water reservoir. Recognizing that the resulting damages could not be a basis of tort liability, absent negligence, wantonness, or malice, the supreme court nevertheless concluded that they would constitute a compensable damaging of the owner's right to possession and enjoyment of his property. The district's argument of necessity was rejected. The fact that extensive soil testing, to depths up to 150 feet, was deemed essential to an intelligent evaluation of the suitability of the site for reservoir purposes—a determination that necessarily must precede any decision to institute condemnation proceedings—was held insufficient to justify an uncompensated interference of this magnitude with private property.

The specific holding in the *Jacobsen* case has been obviated by a special statutory procedure, enacted in 1959, as section 1242.5 of the Code of Civil Procedure. Public entities with power to condemn land for reservoir purposes are authorized to petition the superior court for an order permitting an exploratory survey of private lands to determine their suitability for reservoir use, when the owner's consent cannot be obtained by agreement. The order, however, must be conditioned upon the deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorneys fees incurred by the owner.

While section 1242.5 is limited to reservoir site investigations, other types of privileged official entries may also cause substantial private detriment. But, as discussed below, this provision constitutes a useful starting point for generalized legislative treatment of the problem of damage from privileged official entries upon private property.

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Physical Occupation or Destruction by Mistake

It is well settled that, absent an overriding emergency, the intentional seizure or destruction of private property by a governmental entity acting in furtherance of its statutory powers subjects it to inverse condemnation liability. De facto appropriations of this type, however, often represent an erroneous exercise of governmental power based upon a negligent, or otherwise mistaken, assumption that the government owns the property taken. In such cases, the view that the entity's actions are merely tortious (and thus nonactionable as against the immune sovereign) generally has been rejected where the dispossession is a permanent one to which a public use has attached. For example, inverse liability obtains where the entity constructs public improvements upon private land which its project officers negligently assume has been acquired for that purpose. The same result has been reached where the mistake was purely one of law, in that the officers acted in the mistaken belief that under pending condemnation proceedings an immediate entry was authorized. Destruction of buildings and other improvements on a private ranch by naval personnel engaged in aerial gunnery and bombing practice, in the erroneous belief that the ranch was included within a naval gunnery range, has also been held a compensable taking.

Although the cited cases appear to be analogous to private trespass actions, significant differences may be noted. Although the

262 See, e.g., Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965).
263 Napa v. Navoni, 56 Cal. App. 2d 289, 132 P.2d 566 (1942) (water pipeline laid in plaintiff's land under mistaken belief that easement had been acquired); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965) (contractor in good faith reliance proceeded with improvement work on land which highway engineer mistakenly staked out); cf. Road Dep't v. Cuyahoga Wrecking Co., 171 So. 2d 50 (Fla. App. 1965) (highway contractor removed building from land not yet condemned, apparently by mistake).
264 Bridges v. Alaska Housing Auth., 375 P.2d 696 (Alas. 1962) (owner awarded value of building, attorneys fees, and damages for mental anguish when private structure destroyed). See also R.J. Widen Co. v. United States, 357 P.2d 988 (Ct. Cl. 1966) (United States Corps of Engineers mistakenly commenced flood control work under joint federal-state project three months before state, pursuant to agreement, "took" the property by condemnation).
265 Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).
public trespass may be capable of being discontinued, the injured party does not have the option, ordinarily open to private litigants, to seek recovery for past damages together with specific removal of the offending structure or condition. Where a public use has intervened, the courts ordinarily refuse to enjoin continuance of the invasion, and relegate the plaintiff instead to recovery of compensation for whatever property damage inflicted, both past and future. In addition, the plaintiffs in factually similar private tort litigation may recover not only for property damage but also for personal discomfort and annoyance caused by the trespassory invasion, while these elements of damage generally are excluded from the purview of inverse condemnation. The overlap of the tort and inverse remedies under present California law is thus somewhat less than complete duplication.

III. Conclusions and Recommendations: A “Risk Analysis” Approach to Inverse Liability

The foregoing review of California inverse condemnation law, as applied to claims based on unintentional damaging of private prop-

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271 Although common law governmental immunity is no longer a defense to trespass as a remedy against California public entities for mistaken occupation or destruction of private property, relief in tort may not always be available in light of the special defenses included in the California Tort Claims Act of 1963. See, e.g., CAL. GOV’T CODE §§ 820.2 (discretionary conduct), 820.4 (non-negligent enforcement of law), 821.8 (trespass within express or implied authority).
roperty, discloses three major areas of difficulty discussed below to which legislative reform efforts should be directed.

A. Clarification of the Basis of Inverse Liability

One of the most striking features of California decisional law is the dual approach to inverse liability. In some types of cases (e.g., landslide, water seepage, stream diversion, concussion), present rules appear to impose inverse liability without regard for fault; in others (e.g., drainage obstruction, flood control, pollution) an element of fault is required to be pleaded and proved by the claimant. The confusion produced by this judicial ambivalence has been compounded, in part, by an understandable tendency of counsel to pursue the “safe” course of action. Faced by appellate dicta to the effect that an inverse liability claimant cannot recover against a public entity without the pleading and proving of a claim actionable against a private person under analogous circumstances,272 plaintiffs’ lawyers often have proceeded, it seems, on the erroneous assumption, readily accepted by defense counsel and thus by the court, that a showing of fault was indispensable to success. Appellate opinions in such cases, after trial, briefing, argument, and decision predicated upon that assumption, do little to dispel the theoretical cleavage.273 Only occasionally have reported opinions explicitly noted, ordinarily without attempting to reconcile, the interchangeability of the “fault” and “no fault” approaches to inverse liability.274 Even the recent Albers decision, which at least set the record straight by revitalizing the position that inverse liability may be imposed without fault, did not undertake a thorough canvass of the law, but rather left many doctrinal ends dangling. Uniform statutory standards for invocation of inverse condemnation responsibility thus would be a significant improvement in California law, both as an aid to predictability and counseling of claimants and as a guide to intelligent planning of public improvement projects.

It already has been suggested above that the concept of fault as a basis of inverse liability includes a broad range of liability-producing acts and omissions that, in individual cases, are not required to be

272 See, e.g., Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941). Statements to this effect in Archer and other cases were characterized as dicta in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).


identified with precision, provided the operative facts are located within the extremes. If private property is damaged by the construction of a public improvement, the cases relate that "the state or its agency must compensate the owner therefore . . . whether the damage was intentional or the result of negligence on the part of the governmental agency." In this typical pre-Albers statement, the kind of fault becomes immaterial, but fault is assumed to be essential. Yet the case cited in principal support of the quoted statement is also the chief authority relied upon in Albers to sustain liability without fault. Reconciliation of the seeming inconsistency, it is believed, is possible in a manner consistent with acceptable policy considerations.

Each of the variant kinds of fault that are recognized as a potential basis for inverse liability includes the fundamental notion that the public entity, by adopting and implementing a plan of improvement or operation, either negligently or deliberately exposed private property to a risk of substantial but unnecessary loss. Negligence in this context often appears to be an after-the-fact explanation, couched in familiar tort terminology, of what originally amounted to the deliberate taking of a calculated risk. Foreseeable damage is not necessarily inevitable damage. Plan or design characteristics that incorporate the probability of property damage under predictable circumstances may later be judicially described as "negligently" drawn; yet, in the original planning process, the plan or design with its known

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275 See text accompanying notes 38-43 supra.
277 See Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "During this [six year] period the district had ample time and opportunity to make adequate provision for the care of the diverted waters and for the protection of plaintiffs' property. It was simply a choice of means deliberately made by the governing board of the district in selecting one method of controlling possible future floods as against another." (Emphasis added). See also Lubin v. Iowa City, 257 Iowa 383, 391, 131 N.W.2d 765, 770 (1965), where the court said in affirming an order granting plaintiff a new trial in an action for damages to a flooded basement caused by a break in an 80 year old water main installed six feet beneath the surface without a reasonable inspection capability that "[a] city . . . so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damages. . . . The risk from such a method of operation should be borne by the water supplier who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs." (Emphasis added). Cf. Broeder, Torts and Just Compensation: Some Personal Reflections, 17 HASTINGS L.J. 217, 224 (1965).
inherent risks may have been approved by responsible public officers as being adequate and acceptable for non-legal reasons. For example, the damage, although foreseeable, may have been estimated at a low order of probability, frequency, and magnitude, while the added cost of incorporating minimal safeguards may have been unacceptably high in proportion to available manpower, time and budget.\textsuperscript{270} Again, additional or supplementary work necessary to avoid or reduce the risk, although contemplated as part of long-term project plans, may have been deferred due to more urgent priorities in the commitment of public resources. The governmental decision (whether made by design engineers, departmental administrators, budget officers, or elected policy-makers) to proceed with the project under these conditions thus may have represented a rational (and hence by definition non-negligent) balancing of risk against practicability of risk avoidance.\textsuperscript{270}

\textsuperscript{270} The legislative approach to governmental tort liability for dangerous conditions of public property includes directly analogous considerations. There are several examples. First, tort liability cannot be based upon defects in the plan or design of a public improvement where reasonable grounds for official approval thereof existed at the time the plan or design was accepted. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); Cal. Gov't Code § 830.6; Note, Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6, 19 Hastings L.J. 584 (1968). Secondly, a condition of public property which causes injury is not regarded as “dangerous” if the court determines, as a matter of law, that the risk of harm thereby created was minor, trivial, or insignificant in light of the surrounding circumstances. Cal. Gov't Code § 830.2; see Barrett v. Claremont, 41 Cal. 2d 70, 256 P.2d 977 (1953). Thirdly, even if the condition is a dangerous one, liability is not imposed if the public agency establishes that either “(a) . . . the act or omission that created the condition was reasonable . . . [as] determined by weighing the probability and gravity of potential injury . . . against the practicability and cost of taking alternative action . . .” or “(b) . . . the action it took to protect against the risk . . . or its failure to take such action was reasonable . . . [as] determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury . . . against the practicability and cost of protecting against the risk of such injury.” Cal. Gov't Code § 835.4; see A. Van Alstyne, California Government Tort Liability §§ 6.29, 6.30 (Cal. Cont. Educ. Bar ed. 1964).

\textsuperscript{280} See Restatement (Second) of Torts § 302, comment a (1965). Evidence that planners or designers failed to employ sound engineering practices, e.g., Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (expert testimony), may thus be explainable on grounds other than negligence. The deficient culverts in Granone, for example, may have represented an intermediate or temporary stage of the channel improvement project; the county may have elected to bridge the stream by a less expensive technique (earth fill pierced by culverts) within current budget appropriations, rather than the more expensive expedient of a wide-span steel and concrete bridge. On the other hand, the decision to culvert rather than bridge may, in fact, have been due to negligence or incompetence of the responsible
When the government, acting in furtherance of public objectives, has thus taken a calculated risk that private property might be damaged, and such damage has eventuated, a decision as to inverse liability should be preceded by a discriminating appraisal of the relevant facts. The usual doctrinal approach surely is consistent with this view: "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." But whether the loss constitutes more than a "proper" share depends upon a careful balancing of the public and private interests involved, so far as those interests are identified, accepted as relevant, and exposed to factual scrutiny.

Assuming foreseeability of damage, the critical factors in the initial stage of the balancing process relate to the practicability of preventive measures, including possible changes in design or location. If prevention is technically and fiscally possible, the infliction of avoidable damage is not "necessary" to the accomplishment of the public purpose. The governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents more than a mere determination that effective damage prevention is not expedient. It is also a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however, the present analysis suggests that those costs should be recognized as planned costs in-

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282 See House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944): "In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and damnum absque injuria are not applicable when in the exercise of the police power, private and personal property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."
flicted in the interest of fulfilling the public purpose of the project, and thus subject to a duty to pay just compensation.\textsuperscript{283}

On the other hand, if the foreseeable type of damage is deemed technically impossible or grossly impracticable to prevent within the limits of the fiscal capability of the public entity, the decision to proceed with the project despite the known danger represents an official determination that public necessity overrides the risk of private loss. The shifting of the risk of loss to private resources is not sought to be supported on grounds of mere prudence or expedience but on the view that the public welfare requires the project to move ahead despite impossibility of more complete loss prevention. In this situation, an additional variable affects compensation policy. The magnitude of the public necessity for the project at the particular location, with the particular design or plan conceived for it, must be assessed in comparison to available alternatives for accomplishing the same underlying governmental objective with lower risk, but presumably higher costs (i.e., higher construction and/or maintenance expense, or diminished operational effectiveness).\textsuperscript{284} Unavoidable damage of slight or moderate degree, especially where widely shared or offset by reciprocal benefits, does not always demand compensation under this approach. Such damage may be reasonably consistent with the normal expectations of property owners and with community assumptions regarding equitable allocation of public improvement costs. But relevant reliance interests ordinarily do embrace an understanding that the stability of existing property arrangements will not be disturbed arbitrarily, or in substantial degree, by governmental improvements, and that project plans ordinarily will seek to follow those courses of action that will minimize unavoidable damage so far as possible.\textsuperscript{285}


\textsuperscript{284} Cf. Bacich v. Board of Control, 23 Cal. 2d 343, 359, 144 P.2d 818, 828 (1943) (Edmonds, J.) (concurring opinion): “The factors to be considered in deciding an inverse condemnation claim are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. . . . In addition, before compensation may be denied, the court must find that the particular improvement be not unreasonably more drastic or injurious than necessary to achieve the public objective.” (Emphasis added).

The importance of the project to the public health, safety and welfare, in relation to the degree of unavoidable risk and magnitude of probable harm to private property, thus constitutes the criterion for estimating the reasonableness of the decision to proceed. A change in the location of a highway, for example, may add only slightly to length and total construction costs, yet may reduce substantially the frequency or the extent of property damage reasonably to be anticipated from interference by the highway with storm water runoff. Alternatively, the change might make it possible to include more adequate drainage features in the project plans without exceeding budgetary limits. On the other hand, the erection of a massive water storage tank at a particular location may entail a relatively low risk of landslide under foreseeable conditions, yet be justified by emergency considerations (e.g., impending failure of other facilities), the need for adequate hydrostatic pressure peculiarly available by storage at that location, or the costs that pumping equipment, together with longer distribution lines and access roads, would entail if a less suitable location were selected. The calculated risk implicit in such governmental decisions appears capable of rational judicial review, particularly if aided by statutory standards relevant to compensation policy. The factual elements deserving consideration, for example, do not appear unlike those specified in present statutory rules governing the liability in tort of public entities for dangerous conditions of public property.

Although the preceding discussion has centered chiefly upon the concept of fault as a basis of inverse liability, it seems evident that the risk analysis here advanced also could be applied fruitfully in cases, like Albers, in which inverse liability obtains notwithstanding unforeseeability of injury and absence of fault. Albers may simply embody an implicit hypothesis that practically every governmental decision to construct a public improvement involves, however remotely, at least some unforeseeable risks that physical damage to property may result. In the presumably rare instance where substantial damage does in fact eventuate “directly” from the project, and is

286 See note 279 supra. It is clear, however, that the conditional “plan or design” immunity, Cal. Gov’t Code § 830.6, withholds tort liability in precisely the same situations in which well settled rules of inverse condemnation law impose liability. Compare Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967) (tort liability withheld) with Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (inverse liability affirmed).

287 Even though the risk may be deemed remote or even unforeseeable, the damage that eventuates is actionable if it results “directly” from the improvement. See Albers v. Los Angeles County, 62 Cal. 2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965); text accompanying notes 27-35 supra. See also House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 957 (1945) (Traynor, J.) (concurring opinion): “It is of no avail to defendant that the invasion of plaintiff’s property in the manner in which it hap-
capable of more equitable absorption by the beneficiaries of the project (ordinarily either taxpayers or consumers of service paid for by fees or charges) than by the injured owner. Absence of fault may have been not foreseeable. . . . The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote.”

The conclusion in Albers that the County of Los Angeles was a better loss distributor than the plaintiff property owners (the losses in question were presumably not of a kind ordinarily covered by insurance) is unexceptional. But many public entities have very limited fiscal resources. See Van Alstyne, Governmental Tort Liability: A Public Policy Prospectus, 10 U.C.L.A. Rev. 463, 465 n.7 (1963), where “the tremendous disparities in size, population and fiscal capacity” of local public entities are pointed out. It is evidenced by the fact that some counties, cities, and special districts “function on annual fiscal budgets of less than $50,000, while other cities, counties and districts have budgets averaging more than that sum per day.” See generally [1965-1966] CAL. CONTROLLER ANN. REP., FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA; J. Vieg, CALIFORNIA LOCAL FINANCE (1960). The total liability of the defendant in Albers exceeded $5,000,000. Reliance upon loss distribution capacity as a significant criterion of inverse liability would thus, upon occasion, result in inequitable and discriminatory treatment of equally deserving property owners, depending upon the differing fiscal capacities of the defendant public entities.

This difficulty, of course, could be minimized by development of adequate means for funding of inverse liabilities by even the smallest of public entities. Even if it is assumed that commercial insurance against such risks is obtainable at reasonable premiums, it is not entirely clear that adequate statutory authority exists for public entities to insure against all inverse liabilities. See Cal. Gov't Code §§ 989-991.2, 11007.4 (authorizing insurance against “any injury”). But see id. § 810.8 (defining “injury” to mean losses that would be actionable if inflicted by a private person). Since inverse liability may obtain where private tort liability does not, Albers v. Los Angeles County, 62 Cal. 2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965), comprehensive tort liability insurance may still be regarded as inapplicable to some inverse claims. Existing statutory authority to fund judgment liabilities with bond issues, Cal. Gov't Code §§ 975-78.8, is, however, clearly broad enough to include inverse liability judgments. A. Van Alstyne, CALIFORNIA GOVERNMENTAL TORT LIABILITY § 9.16 (Cal. Cont. Educ. Bar ed. 1964). And although authority for payment of judgments by installments, Cal. Gov't Code § 970.8, is, in terms, limited to “tort” judgments, A. Van Alstyne, supra, § 9.15, inverse liabilities may possibly be a form of “tort” for this purpose. See generally Douglass v. Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935).

In principle, the existing devices for funding tort liabilities appear to provide ample flexibility for administering inverse liabilities of the great majority of public entities. The statutes should, however, be clarified to avoid any doubt as to their applicability to inverse situations. In addition, the “catastrophe” liability problem should be given appropriate legislative attention. See Van Alstyne, A STUDY RELATING TO SOVEREIGN IMMUNITY, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 308-11 (1963) (similar proposal geared to local “fiscal effort”); Borchard, STATE AND
be treated as simply an insufficient justification for shifting the unforeseeable loss from the project that caused it to be the equally innocent owners. Absence of foreseeability, like the other factual elements in the balancing process, is, in effect, merely a mitigating but not necessarily exonerating circumstance.

The risk analysis here advanced, it is submitted, reconciles most of the seemingly inconsistent judicial pronouncements as to the need for fault as a basis of inverse liability. Consistent with the intent of the framers of the just compensation clause to protect property interests against even the best intentioned exercises of public power, it avoids as well a fruitless search for the somewhat artificial moral elements inherent in the tort concepts of negligence and intentional wrongs. It assumes that in the generality of cases, the governmental entity with its superior resources is in a better position to evaluate the nature and extent of the risks of public improvements than are potentially affected property owners, and ordinarily is the more capable locus of responsibility for striking the best bargain between efficiency and cost (including inverse liability costs) in the planning of such improvements. Reduction in total social costs of public improvements may also be promoted by this approach, since political pressure generated by concern for inverse liability costs imposed upon taxpayers may be expected to produce both a reduction in the number of risk-prone projects undertaken and an increase in the use of injury-preventing plans and techniques.

It may be objected, of course, that the risk analysis approach assumes the competence of judges and juries to sit in review upon basic governmental policy decisions involving a high degree of discretion and judgment—a competence explicitly denied by prevailing legislation dealing with governmental liability in tort. However meri-

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289 See Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 STAN. L. REV. 727, 771–76 (1967), for a review of the constitutional convention proceedings which led to adoption of the “or damaged” clause in section 14 of article I of the California Constitution.


292 See CAL. GOV'T CODE §§ 820.2, 830.6; A. VAN ALSTYNE, CALIFORNIA
tious the objection may be in considering statutory tort policy, it fails in the face of settled constitutional policy regarding eminent domain. The cases are legion that approve inverse condemnation liabilities grounded precisely upon determinations of judges or juries that the consequences of carefully considered discretionary decisions of public officials, including decisions relating to the plan or design of public improvements, amounted to a "taking" or a "damaging" of private property for public use. To deny adjudicability in such cases would effectively remove from the purview of the just compensation clause those very situations in which compensation was clearly intended to be available for the protection of property owners. In any event, the risk analysis approach does not interfere directly with official power or discretion to plan or undertake public projects; it merely determines when resulting private losses must be absorbed as part of the cost of such projects.

Certainty and predictability also would be improved significantly by the enactment of general legislative standards for the determination of inverse liability. The "risk theory" of inverse liability, here suggested, provides a possible approach to uniform guidelines that would eliminate arbitrary distinctions based on fault, absence of fault, and varieties of fault. Moreover, since it seems likely that the practical impact of the Albers decision will be more frequent imposition of inverse liability without fault, it is noteworthy that the American


Cases in other states are discussed in Mandelker, Inverse Condemnation: The Constitutional Limits of Public Responsibility, 1966 Wis. L. REV. 3. Imposition of inverse liability upon public entities for defectively designed public structures is consistent with the trend in private tort law toward imposition of liability upon architects and engineers for defective plans. See Comment, Architect Tort Liability in Preparation of Plans and Specifications, 55 CALIF. L. REV. 1361 (1967).


296 See text accompanying notes 9-35 supra. Despite the implications of the Albers decision, however, subsequent inverse litigation has continued to revolve principally around the concept of fault. See, e.g., Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (flooding caused by highway improvement and related flood control works).
Law Institute has under consideration a proposal to restate the law of strict tort liability for abnormally dangerous activities by reference to factors not unlike those suggested as appropriate to the "risk theory." Determination whether an activity is "abnormally dangerous," for example, would be determined as a matter of law (i.e., not as a jury question) by considering such factors as the degree of risk, gravity of potential harm, availability of methods for avoiding the risk, extent of common participation in the activity, appropriateness to the locality, and social and economic importance to the community of the activity.\textsuperscript{297} Limitations upon strict liability in tort have been recommended also where the damage was caused by the intervention of an unforeseeable force of nature (i.e., "act of God"),\textsuperscript{298} where the plaintiff assumed the risk,\textsuperscript{299} and where the injury was due to the abnormally sensitive nature of the plaintiff's activities.\textsuperscript{300}

A somewhat similar approach is suggested as well by the prevailing interpretation of those Massachusetts statutes authorizing compensation for "injury . . . caused to . . . real estate" by state highway work.\textsuperscript{301} Proceeding from the premise that statutory authority for construction of highways contemplates the use of reasonable care, the Massachusetts courts have concluded that statutory compensation is available only when the claimed damage was a "necessary" or "inevitable" result of the work when performed in a reasonably proper manner.\textsuperscript{302} To recover, the claimant must show that the damage was

\footnotesize{\textsuperscript{297} \textit{RESTATEMENT (SECOND) OF TORTS} § 520, at 56 (Tent. Draft No. 10, 1964): "In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others; (b) whether the gravity of the harm which may result from it is likely to be great; (c) whether the risk cannot be eliminated by the exercise of reasonable care; (d) whether the activity is not a matter of common usage; (e) whether the activity is inappropriate to the place where it is carried on; and (f) the value of the activity of the community." \textit{See also} id. § 521, stating that there should be no strict liability for abnormally dangerous activities required or authorized by law; liability should be governed by the standard of reasonable care appropriate to such activity.}

\footnotesize{\textsuperscript{298} Id. § 522(a), at 82 (minority proposal by Reporter, W. Prosser, and three Advisors).}

\footnotesize{\textsuperscript{299} Id. § 523, at 86. \textit{See also} id. § 524, at 91 (contributory negligence).}

\footnotesize{\textsuperscript{300} Id. § 524A, at 93.}

\footnotesize{\textsuperscript{301} \textit{MASS. GEN. LAWS ANN.} ch. 81, § 7 (1964). \textit{See, e.g.}, United States Gypsum Co. v. Mystic River Bridge Auth., 329 Mass. 130, 106 N.E.2d 677 (1952). Although Massachusetts is a "taking" state, it has enacted an extensive pattern of legislation providing for payment of compensation for damage inflicted by governmental programs. For citations of Massachusetts cases, see \textit{generally} 2 P. NICHOLLS, \textit{EMINENT DOMAIN} § 6.42–43, at 464–86 (rev. 3d ed. 1965).}

\footnotesize{\textsuperscript{302} The development of the Massachusetts doctrine is reviewed fully in Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir.
either (a) unavoidable by exercise of due care, or (b) economically impracticable to avoid in fact even if technically avoidable. This dual approach thus imposes inverse (statutory) liability where the plan, design, or method of construction of the public improvement incorporates a deliberately accepted risk of private property injury, but relegates to tort litigation any injuries caused by mere negligence in carrying out the public entity’s program.

B. De-emphasis of Private Law Analogies

The existing judicial gloss on the just compensation clause is, to a considerable degree, a reflection of legal concepts derived from the private law of property and torts. The analogues, however, are unevenly drawn, sometimes disregarded, and occasionally confused. There is no compelling reason why rules of law designed to adjust jural relationships between private persons necessarily should control the rights and duties prevailing between government and its citizenry. Indeed, the definition of the constitutional term “property”

1959). This case is factually similar to Reardon v. San Francisco, 66 Cal. 429, 6 P. 317 (1885).

303 Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir. 1959); Murray Realty, Inc. v. Berke Moore Co., 342 Mass. 689, 175 N.E.2d 366 (1961). See also Webster Thomas Co. v. Commonwealth, 336 Mass. 130, 143 N.E.2d 216 (1957). Economic considerations are deemed relevant to a determination of the practicability of damage avoidance. “In determining whether the damage was inevitable, the test is not whether the method was absolutely necessary, but whether in choosing another method so as to avoid damage the expense would be so disproportionate to the end to be reached as to make [the other method] from a business and common sense point of view impracticable.” Murray Realty, Inc. v. Berke Moore Co., supra at 692, 175 N.E.2d at 368. In this case, the use of explosives for demolition work had been disapproved by the state as too risky, and the “pin and feather” method (drilling a series of holes and driving wedges to break paving) as too expensive and time-consuming. Adoption of the steel-ball-and-crane technique was found to be a reasonable decision and, absent negligence in the actual use of this technique, was thus a basis for statutory liability for “necessary” damage that resulted. In Boston Edison Co. v. Campanella & Cardi Constr. Co., supra, the twisting of the plaintiff’s foundation as a result of dumping heavy fill on unstable soil on an adjoining public improvement site was held to be foreseeable, but the evidence failed to support a finding that avoidance techniques were practicable.


—a term that merely connotes the aggregate of legal interests to
which courts will accord protection
often is different, when dam-
age has resulted from governmental conduct, from its definition when comparable private action caused the injury. For example, the "police power" may immunize government from liability where private per-
sons would be held responsible; conversely, public entities may be
required to pay compensation for harms which private persons may
inflict with impunity. Yet, in other situations (notably the water
damage cases) private law principles are invoked without hesitation as
suitable resolving formulae for inverse liability claims.

The present uneasy marriage between private law and inverse
condemnation has none of the indicia of a comprehensively planned or
carefully developed program of legal cohabitation. Its current status
may perhaps best be understood as the product of an episodic judicial
process that often regards factual similarity as more important than
doctrinal consistency. In this process, the doctrinal treatment invoked
in flooding cases tends to beget like handling of other flooding cases,
in seepage cases of other seepage cases, and in pollution cases of other
pollution cases; cross-breeding between these genealogical lines is rel-
atively rare. The interchangeability of private and public precedents
has, of course, some superficially deceptive virtues, including con-
sistency and predictability. These apparent advantages, however,
are obtained at the risk that significant differences between the in-
terests represented by governmental functions and like private func-
tions may be overlooked and the application of legal rules conse-
quently distorted.

The water damage cases provide a useful illustration of the point.
The "common enemy" rule, which California decisions invoke to ab-
solve riparian owners from liability for damage caused by reasonable
flood protection improvements, may arguably possess merit as ap-
plied to individual proprietors. In the interest of promoting useful
land development through individual initiative, the law should not
discourage private efforts to take protective action against the emer-
gency of menacing flood waters even though other owners who act

was held liable for flooding due to the obstruction of surface waters even
though, under private water law rules, a private person would not be liable;
inverse liability for the "taking" of private property was held to be unfettered
by rules of common law.

306 See 2 P. NICHOLS, EMINENT DOMAIN § 5.1, at 4-8 (rev. 3d ed. 1963).
307 See text accompanying notes 59-78 supra. See also Van Alstyne,
Statutory Modification of Inverse Condemnation: Deliberately Inflicted In-
jury or Destruction, 20 STAN. L. REV. 617 (1968).
308 See text accompanying notes 9-35 supra.
(stream water diversion); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 866
(1968) (surface water diversion).
less diligently or are unable to command the resources to protect themselves may sustain losses as a result.\footnote{310} Indeed, during the early development of the State, prior to the proliferation of governmental agencies explicitly charged with flood control duties, the owner's privilege to construct protective works was perhaps indispensable to the safeguarding of valuable agricultural lands from destruction.\footnote{311} Moreover, potential damage resulting from the undertakings of individuals in this regard is not likely to be extensive or severe.

The rationale of the "common enemy" rule, however, is of dubious validity when considered in the context of governmentally administered flood control projects developed for the collective protection of entire regions. The aggregation of resources involved in most flood control district developments, as well as the comprehensive nature of such schemes, imports a quantum jump in damage potential. For example, a major project may well entail massive outlays of public funds over an extended period of years for the construction of an area-wide network of interrelated check dams, catch basins, stream bed improvements, drainage channels, levees, and storm sewers, all programmed for completion in a logical order dictated primarily by engineering considerations. The realities of public finance may, at the same time, require the cost to be distributed over a substantial

\footnote{310} See note 114-18 supra.

\footnote{311} See San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). The first comprehensive legislative approach to regional flood control involved the creation of the Sacramento & San Joaquin Drainage District as a state agency to implement, in cooperation with the federal government, the flood control plans formulated by the California Debris Commission. Cal. Stats. 1913, ch. 170, at 252; see Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). Local flood control organizations, until recent years, consisted principally of relatively small drainage, levee, or flood control districts created pursuant to general enabling statutes. E.g., Cal. Water Code App. §§ 6-1 to -29 (1968) (corresponds to Protection District Act of 1895, Cal. Stats. 1895, ch. 201, §§ 1-29); Cal. Water Code App. §§ 9-1 to -25 (1968) (corresponds to Levee District Act of 1905, Cal. Stats. 1905, ch. 310, §§ 1-16). A few flood control districts of more sweeping geographical scope had been established by special legislation before 1939. Cal. Water Code App. §§ 28-1 to -23 (1968) (Los Angeles County); Cal. Water Code App. §§ 36-1 to -23 (1968) (Orange County); Cal. Water Code App. §§ 37-1 to -31 (1968) (American River Basin). However, the modern trend to establishment of such districts in a majority of the counties of California by carefully tailored special laws began in 1939 with the creation of the San Bernardino County Flood Control Act. Cal. Water Code App. §§ 43-1 to -28 (1968) (corresponds to Cal. Stats. 1939, ch. 73, §§ 1-28). In the 30 years since then, some 35 major flood control districts have been created by special act. See Cal. Water Code App. §§ 46-106 (1968). The validity of such specially created districts, despite the constitutional prohibition against local and special legislation, has been affirmed repeatedly. See American River Flood Control Dist. v. Sweet, 214 Cal. 778, 7 P.2d 1030 (1932).
time span, either in the form of accumulations of proceeds from periodic tax levies for capital outlay purposes or through one or more bond issues.

Piecemeal construction, often an inescapable feature of such major flood control projects, creates the possibility of interim damage to some lands left exposed to flood waters while others are within the protection of newly erected works. Indeed, the partially completed works, by preventing escape of waters that previously were uncontrolled, actually may increase the volume and velocity of flooding with its attendant damage to the unprotected lands, often to such a degree that private action to repel the onslaught is completely impracticable. The prevailing private law doctrine embodied in the "common enemy" rule, however, imposes no duty upon the public entity to provide complete protection against flood waters; like private riparians, the entity is its own judge of how extensively it will proceed with its improvements. Increased or even ruinous damage incurred by the temporarily unprotected owners, due to the inability of the improvements to provide adequate protection to all, therefore, is not a basis of inverse liability. The constitutional promise of just compensation for property damage for public use thus yields to the overriding supremacy of an anomalous rule of private law.

312 See, e.g., Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).
313 See Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); Comment, California Flood Control Projects and the Common Enemy Doctrine, 3 Stan. L. Rev. 361 (1951). A collateral problem, to which little or no attention has been given in the case law, is the question of notice. The physical activity of one farmer in putting up protective levees might well give adequate notice to his immediate neighbors of the need for similar self-help to repel the "common enemy"; but it seems unrealistic to expect that lower landowners will necessarily realize that upstream flood control improvements being installed by a large public district, possibly many miles distant, will augment the volume, velocity, and intensity of downstream flow to a degree that warrants additional protective barriers. To the extent that the "common enemy" rule assumes that the resulting downstream flood damage is the result of the injured owner's failure to take self-protective measures, despite absence of notice of the need to do so, it tends to function as a rule of strict liability operating in reverse. Cf. Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). The analogous problem of allocating responsibility for protection against loss of lateral support due to normal excavations for improvement purposes has been resolved by statutory provision for the giving of "reasonable notice" by the improver as a condition of non-liability. Cal. Civ. Code § 832; see note supra.
Assimilation of private concepts into inverse condemnation law also may produce governmental liability in circumstances of dubious justification. This result, in part, can be explained by the blurred definitional lines which distinguish the various categories of factual circumstances (e.g., "surface water," "stream water," flood water) to which disparate legal treatment is accorded under private law rules. But it is also a consequence of the failure of the private law rules to accord appropriate weight to the special interests that attend the activities of governmental agencies. For example, it is arguable that strict liability for damage resulting from the diversion of water flowing in a natural watercourse may be reasonably sensible as applied to adjoining riparian owners; a contrary view would expose settled reliance interests to the threat of repeated and diverse private interferences that could discourage natural resource development. Stream diversions, however, may be integral features of coordinated flood control, water conservation, land reclamation, or agricultural irrigation projects undertaken on a large scale by public entities organized for that very purpose. Where this is so, the community may suffer more by general fiscal deterrents resulting from indiscriminately imposed strict liabilities than by specifically limited liabilities determined by the reasonableness of the risk assumptions underlying each diversion.

Liability in water damage cases, it is submitted, should not be reached by mechanical application of private law formulas. Instead, it should be based upon a conscientious appraisal of the overall public purposes being served, the degree to which the loss is offset by reciprocal benefits, the availability to the public entity of feasible preventive measures or of adequate alternatives with lower risk potential, the severity of damage in relation to risk-bearing capabilities, the extent to which damage of the kind sustained is generally regarded as a normal risk of land ownership, the degree to which like damage is distributed at large over the beneficiaries of the project or is peculiar to the claimant, and other factors which in particular cases may be relevant to a rational comparison of interests.

315 See text accompanying notes 125-30, 149-50, 155-56 supra.
316 See, e.g., Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897).
UNINTENDED PHYSICAL DAMAGE

Recent California Supreme Court decisions indicate that a balancing approach along these lines henceforth will be taken in cases involving loss of stream water supply and claims of damage resulting from interference with surface water. But it is far from certain whether, absent legislative standards, the balancing process in such cases would take into account all the peculiar factors appropriate to governmental, but irrelevant to private, nonliability. Similarly, it is arguable that prevailing private law rules governing liability for damage due to concussion and explosion may be unrealistically severe as applied in an inverse condemnation context.

Conversely, growing national concern over problems of environmental pollution necessarily is focused on the continuing expansion of governmental functions capable of contributing to pollution problems (e.g., sewage collection and treatment, garbage and rubbish collection). Accordingly, a statutory rule of strict inverse liability arguably may be regarded as a desirable incentive to the development of intragovernmental anti-pollution programs supported by widespread cost distribution. This certainly would be preferable to an unfounded adherence to somewhat ambiguous legal concepts developed in comparable private litigation.

distribution deemed relevant to compensability for loss of riparian rights due to seasonal overflowing of agricultural lands); United States v. Willow River Power Co., 324 U.S. 499 (1945) (appraisal of competing private and public interests deemed relevant to compensability for loss of head due to increase in water level).


319 See text accompanying notes 297-300 supra.


322 See text accompanying notes 206-23 supra. But see N.J. Rev. Stat. § 40:68-129 (1967): "The owner of any land adjacent to any plant, works or station for the treatment, disposal or rendering of sewage . . . who shall sustain any direct injury by reason of the negligence or lack of reasonable care of the contracting municipalities . . . in the establishment and maintenance of any such plant, works, or station, may maintain an action at law . . . for
The law of inverse condemnation liability for loss of soil stability and deprivation of lateral support, as already noted, is also in need of clarification by legislation. Here again, because of the vast volume of construction work undertaken by governmental agencies with potential damage-producing characteristics, a rational approach—already adopted, for example, in several states, including Connecticut, Massachusetts, Pennsylvania, and Wisconsin—might well substitute a statutory rule of strict inverse liability in place of rules developed for private controversies and predicated upon fault. In connection with damage claims arising from drifting chemical sprays used in governmental pest abatement work, where current statutory provisions appear to impose a large measure of strict liability, legislation again would be helpful to clarify applicability of the relevant provisions to public entities.

Note 210 and accompanying text supra.

The recovery of all damages sustained by him by reason of such injury." (Emphasis added). Since the concept of "nuisance" appears to be the principal doctrinal basis for tort liability (and possibly for inverse liability) in pollution cases, there is a need for legislative clarification of the extent of governmental tort liability for nuisance under the Tort Claims Act of 1963.

Note 210 and accompanying text supra.

To some extent, of course, a form of strict inverse liability is already required in some cases by the decision in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). The full implications of this decision, however, remain to be worked out. Cf. Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (dictum) (opinion quotes extensively from pre-Albers opinions).

For example, the legislature in Cal. Agric. Code §§ 14063, 14093, has explicitly authorized governmental agencies to use certain dangerous chemicals in pest control operations, while the use of 2,4-D and other injurious herbicides in accordance with administrative regulations is authorized (apparently, but not explicitly, applicable to public entities) by a different section. Id. § 14033. Use of these chemicals may, of course, result in damage to private property. See Comment, Crop Dusting: Two Theories of Liability?, 19 Hastings L.J. 476 (1968). Legislative recognition of this risk is implicit in provisions declaring that authorized and lawful use of pesticides will not relieve "any person" from liability for damage to others caused by such use. Cal. Agric. Code §§ 14003, 14034. Furthermore, in the interest of preventing improper and harmful methods from being employed, the legislature has delegated extensive authority to the director of agriculture to promulgate regulations, including a permit procedure, to govern the actual use of injurious agricultural chemicals. Id. §§ 14005-11, 14033. All users are under a mandatory duty to prevent substantial drift of economic poisons employed in the course of pest control operations and to conform to applicable regulations. Id. §§ 12972, 14011, 14032, 14063.

323 See text accompanying notes 173-84 supra.


325 MASS. GEN. LAWS ch. 81, § 7 (1964).


327 WIS. STAT. § 80.47 (1957).

328 To some extent, of course, a form of strict inverse liability is already required in some cases by the decision in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). The full implications of this decision, however, remain to be worked out. Cf. Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (dictum) (opinion quotes extensively from pre-Albers opinions).

329 See note 248 supra.
Legislative development of uniform inverse liability guidelines which avoid reliance upon established private legal rules would improve predictability and rationality of decision-making. Statutory criteria also would tend to clarify the factors of risk exposure to be considered by responsible public officials, and might well produce systematic improvements in preventive procedures associated with the planning and engineering of public improvements.

A collateral advantage might be the identification of situations, elucidated in the process of formulating appropriate criteria of public liability, in which reciprocal private liabilities may also appear worthy of legislative treatment. For example, a review of water damage problems in Wisconsin led in 1963 to an abrogation of formerly inflexible rules and the substitution of a new statutory duty, imposed comparatively upon both public entities and private persons, requiring the

It seems probable that the courts would hold governmental agencies subject to the cited statutory provisions. Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (general statutory language held applicable to public entities absent legislative intent to contrary). However, this conclusion is open to some doubt. Express reference to public agencies in certain code sections, Cal. Agric. Code §§ 14063, 14093, suggests the intended non-applicability of others in which no such reference is included. On the other hand, the code expressly makes the sections dealing with “Injurious Materials,” id. §§ 14001-98, inapplicable to public entities while engaged in research projects. Id. § 14002. This impliedly indicates that it does apply in non-research situations. Legislation clarifying applicability would, it is submitted, be helpful.

Assuming applicability of the code provisions, the scope of governmental tort liability resulting from violations is not entirely clear. In some instances, such violations, for example, the use of a method of chemical pest control which caused substantial drift in violation of section 12972 would presumably constitute a basis for entity liability for breach of a mandatory duty. Cal. Gov't Code § 815.6. In some instances, however, it may be questionable whether such property damage resulted from actionable negligence in applying the chemicals or from the immune discretionary determination to apply them under circumstances in which drift, and resultant damage, was inevitable. Cal. Gov't Code §§ 820.2, 855.4; A. Van Alstyne, California Governmental Tort Liability 639 & n.4 (Cal. Cont. Educ. Bar ed. 1964). If no negligence is found or the discretionary tort immunity obtains, the question remains whether liability could be predicated upon inverse condemnation or nuisance theories. See Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959) (nuisance theory). On the need for legislative treatment of the scope of nuisance liability of public entities, in conjunction with inverse condemnation, see notes 168, 208-223 and accompanying text supra. Finally, it is not clear whether the special “report of loss” procedures, which may affect the injured party's ability to establish the extent of his damages from chemical drift, Cal. Agric. Code §§ 11761-65, are applicable to governmental operations or are limited to private commercial pest control activities. Clarification of these doubtful areas by legislation would also be helpful.
use of "sound engineering practices" in the construction of improvements so that "unreasonable" impediments to flow of surface water and stream water would be eliminated. California statutes, however, have taken precisely the opposite stance: private landowners are denied the full benefit of private law rules according upper owners a privilege to discharge surface waters upon lower lying lands, as well as the "common enemy" privilege to repel flood waters, where damage to or flooding of state or county highways results. As standards are developed for the inverse liability of governmental entities injuring private property, consideration also should be given to the possible justification if any, for retention of inconsistent stand-

331 WIS. STAT. § 88.87 (Supp. 1967). In this measure, the Wisconsin legislature explicitly recognizes that some diversions and changes in both volume and direction of flow of surface and stream waters are the inevitable consequences of the improvement of property by public and private proprietors. Accordingly, in the interest of eliminating discouragements to the physical development of land, and to promote responsible drainage engineering to reduce unnecessary water damage, a statutory test of "reasonableness" was substituted for the less flexible and more mechanical criteria recognized under prior law. See Note, Highways—Flood Damage—Proposed Modification of Common Enemy Doctrine, 1963 WIS. L. REV. 649. Other states have taken varying approaches. In North Dakota highway construction is required to be "so designed as to permit the waters . . . to drain into coulees, rivers, and lakes according to the surface and terrain . . . in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands." N.D. CENT. CODE § 24-03-06 (1960). Also when a highway has been constructed over a watercourse into which surface waters from farmlands flow and discharge, the state conservation commission, on petition, "shall determine as nearly as practicable the maximum quantity of water, in terms of second feet, which such watercourse or draw may be required to carry," after which the responsible authority is required to install a culvert or bridge of sufficient capacity to permit "such maximum quantity of water to flow freely and unimpeded through the culvert or under such bridge." Id. § 24-03-08 (1960). In Ohio, an administrative procedure exists for adjusting claims for private damage resulting from the overflow or leakage of a public reservoir, canal or dam, or the insufficiency of a public culvert. An appointed board of commissioners is required to award "such damages as they may deem just" upon a finding that the injury resulted from "defective construction of any part of the public work which might have been avoided by the use of ordinary skill or care, or resulted from the want of proper care on the part of the officers or agents of the state in maintaining or repairing" the improvement. OHIO REV. CODE ANN. §§ 123.39-42 (Page 1953).

ards such as these governing the liability of private persons for damage to public property.

Complete displacement of existing private rules may not be essential to an effective legislative program; indeed, in certain respects those rules may be worthy of retention. Improvement also could take the form of statutory presumptions tied to existing liability criteria. This is essentially the approach now taken in private litigation involving interferences with surface water drainage. Where both parties are shown to have acted reasonably in disposing of and protecting against surface waters, liability ordinarily falls upon the upper owner who altered the drainage pattern unless he can establish that the social and economic utility of his conduct outweighs the detriment sustained as a result. A comparable legislative approach, for example, might provide that property damage newly caused by a public improvement is presumptively compensable in inverse condemnation if private tort liability would follow on like facts, but is subject to a defense by the public entity grounded upon the existence of overriding justification. Conversely, property damage which public improvements (e.g., flood control works) were intended, but failed, to prevent could be declared presumptively non-recoverable if that same result would obtain under private law. The result would be contrary, however, if the claimant could bring forth persuasive evidence that the inadequacy of the improvement was attributable to the unreasonable taking of a calculated risk by the entity that such damage would not result.

Constitutional protections for property rights, it should be noted,

333 For example, present statutory provisions relating to liability for escaping fire, note 247 supra, and for damage to drifting of injurious chemicals used in past abatement work, note 248 supra, may be reasonably appropriate for retention as part of the tort-inverse liability framework. Modification of the existing statutes in the interest of clarification may, however, be necessary. See the suggestions relating to the chemical drift problem in note 330 supra.

334 Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968). Care should be taken, of course, to appraise the validity of the suggested approach in varying kinds of situations. For example, the problem of flooding of adjoining property as the result of inadequate drainage of public streets is marked, in the California cases, by excessive confusion and uncertainty. See text accompanying notes 106-08 supra. Consideration should be given to the question whether, in this type of case, damages should be administered under a rule of strict liability. See, e.g., S.C. Code Ann. § 59-224 (1962), by which municipalities are under a mandatory duty to provide "sufficient drainage" for surface water collected in streets, after demand by property owners, and are liable for failure or refusal to do so. Hall v. Greenville, 227 S.C. 375, 88 S.E.2d (1955). On the other hand, in this type of case, consideration should be given to the question whether there is need for a rule of reasonableness geared to standard engineering expertise. See note 331 supra.
do not preclude the fashioning of reasonable inverse liability rules which differ from the rules of liability applied between private property owners. Over half a century ago, the California Supreme Court declared the existence of legislative power to alter the rules of private property law to the extent necessary to carry out the beneficent public purpose of government.\(^\text{335}\) Moreover, the United States Supreme Court has indicated that the basic content of the "property" rights protected by the just compensation clause is governed by state law,\(^\text{336}\) and that "no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit."\(^\text{337}\) Significant changes in settled rules of law, of course, have repeatedly been given effect by the courts in actions against public entities, both in inverse condemnation\(^\text{338}\) and in tort actions.\(^\text{339}\)

C. Statutory Dissolution of Inconsistencies Caused by the Overlap of Tort and Inverse Condemnation Law

It is widely recognized that inverse condemnation liabilities developed, in part, as limited exceptions to the governmental immunity doctrine.\(^\text{340}\) The abrogation of that doctrine in California, and its replacement by a statutory regime of governmental tort liability and immunity has produced inconsistencies between tort and inverse liabilities of governmental entities which are a source of confusion, and occasional injustice.\(^\text{341}\)

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\(^\text{335}\) Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 653, 163 P. 1024, 1037 (1917).


\(^\text{337}\) Chicago & Alton R.R. v. Tranbarger, 238 U.S. 68, 76 (1915), where a statute which imposed a duty on railroads to construct culverts for drainage of surface water across a right-of-way, contrary to state common law rules of property law, was held not a compensable "taking" of a property right.

\(^\text{338}\) See, e.g., Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967), discussing the historical changes in California law relating to riparian water rights.

\(^\text{339}\) There are many cases sustaining the retroactive application of statutory provisions destroying previously accrued tort causes of action against governmental agencies. E.g., Los Angeles County v. Superior Court, 62 Cal. 2d 839, 402 P.2d 868, 44 Cal. Rptr. 796 (1965); Flournoy v. State, 230 Cal. App. 2d 520, 41 Cal. Rptr. 190 (1964).


\(^\text{341}\) See, e.g., Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (mandamus granted to compel trial court to sustain demurrer to complaint for interference with surface water drainage so that plaintiff would be required to set out tort and inverse theories of liability in separate counts). See also text accompanying notes 46–58 supra.
The precise status of nuisance as a source of inverse liability, notwithstanding its omission from the purview of statutory tort liabilities recognized by the California Tort Claims Act, is a prime example of law in need of legislative clarification. In addition, the frequent interchangeability of tort and inverse condemnation theories, where property damage has resulted from a dangerous condition of public property, may result in inverse liability notwithstanding a clearly applicable statutory tort immunity. Lack of conceptual symmetry also is seen in the fact that damages for personal injuries or death often are wholly unrecoverable (due to a tort immunity) even though full recovery for property losses is assured by inverse condemnation law upon precisely the same facts.

The overlap of trespass and inverse condemnation is reflected presently in section 1242.5 of the California Code of Civil Procedure, under which public entities with power to condemn land for reservoirs, on petition and deposit of security for damages, may obtain a court order authorizing reservoir site investigations upon private land. Ordinarily, official entries upon private land are a privileged exercise

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342 See notes 168, 208-23 and accompanying text supra.

343 See, e.g., Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (defective plan of culvert design held actionable for inverse condemnation purposes; court does not, however, discuss possible application of immunity provision of CAL. GOV'T CODE § 830.6). Cf. Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (newly created defenses to "dangerous property condition" liability, as provided in CAL. GOV'T CODE § 835.4, held retroactively applicable; such defenses, however, impliedly deemed not a limitation upon inverse condemnation). The need for legislative reconsideration of the present tort immunity for public improvements which are dangerous because of their plan or design, CAL. GOV'T CODE § 830.6, is underscored by the Supreme Court's position that the reasonableness of the plan must be judged solely as of its origin, without regard for latent dangers inherent therein which became apparent in the course of use and experience. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476, (1967); Note, Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6, 19 HASTINGS L.J. 584 (1968). Inverse liability thus serves as a "loophole" to the tort immunity conferred for initial bad planning; but neither tort nor inverse remedies are available for governmental failure to correct known dangers that later develop. Any incentive for accident prevention or for upgrading public facilities for safety purposes is not conspicuous here.

344 Although inverse condemnation liability is not limited to real property but extends also to personalty, see Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968), it has never been deemed applicable to personal injuries or death claims. Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941); note 270 supra. However, if the factual basis for inverse liability also constitutes a nuisance, damages for personal injuries are recoverable. See Murphy v. Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962); cf. Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 355 P.2d 527 (1959).
of governmental authority. Section 1242.5 was designed to meet the special problem of substantial property damage likely to occur from the kinds of technical operations, including soil tests, trenching, and drilling operations, often necessitated by reservoir investigations. It appears, however, that section 1242.5 is both too broad and too narrow. By requiring a preliminary court proceeding in all cases, without regard for the degree of improbability that substantial damage will result from the entity’s proposed investigatory methods, it imposes a requirement that often is unduly burdensome, time-consuming, and constitutionally unnecessary. At the same time, since other kinds of privileged entries also may result in substantial property damage, section 1242.5 is more restricted in scope than its policy rationale warrants.

What is required are general statutory criteria based upon section 1242.5, but limited to those cases in which its safeguards are required most urgently. It would be desirable, for instance, to make the procedure mandatory only when the owner’s consent is not obtainable through negotiations and the planned survey (regardless of purpose) includes the digging of excavations, drilling of test holes or borings, extensive cutting of trees, clearing of land areas, moving of large quantities of earth, use of explosives, or employment of vehicles or mechanized equipment. Bypassing the formal statutory procedure by voluntary agreement with the owner could be promoted by a statutory requirement that, in any event, the entity at its sole expense must repair and restore the property, so far as possible, after the survey is concluded. In addition, the entity could be required to com-

346 See Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923); text accompanying note 257 supra.
348 See note 260 supra.
349 The petition and deposit procedure need be employed only “in the event . . . [the public] agency is unable by negotiations to obtain the consent of the owner.” CAL. CODE CIV. PROC. § 1242.5.
350 Precedent for imposition of a duty to restore the previous condition of the premises is found in numerous statutes providing, in connection with authorization for the construction of public improvements in or across streets, rivers, railroad lines, and the like, that the public entity “shall restore” the intersection, street, or other location to its former state. See, e.g., CAL.
pensate the owner for his damages if for any reason the entity is unable fully to restore the premises to their previous condition.\textsuperscript{351} Other minor defects in section 1242.5, while not discussed in this article, should also be abrogated.\textsuperscript{352}

\begin{footnotesize}
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  \item Statutes of other states, which authorize official entries upon private property for survey and investigational purposes, typically require the entity to reimburse the owner for "any actual damage" resulting therefrom. Kansas allows entry by the turnpike authority to make authorized "surveys, soundings, drillings and examinations." The authority is required to make reimbursement for "any actual damages." Kans. Stat. Ann. § 68-2005 (1984). Massachusetts permits entry by the highway department for authorized "surveys, soundings, drillings or examination." The department is required to restore lands to previous condition, and to reimburse owner for "any injury or actual damage . . . ." Mass. Gen. Laws Ann. ch. 81, § 7F (1964). Ohio authorizes the condemning public agencies, prior to instituting eminent domain proceedings, to enter to make "surveys, soundings, drillings, appraisals, and examinations" after notice to the property owner. The agency is required to "make restitution or reimbursement for any actual damage resulting" to the premises or improvements and personal property located thereon. Ohio Rev. Code Ann. § 163.03 (Supp. 1986). Oklahoma also allows entry by the department of highways to make "surveys, soundings and drillings, and examinations" with the department required to make reimbursement for "any actual damages resulting" to the premises. Okla. Stat. tit. 69, § 46.1-.2 (Supp. 1986). In Pennsylvania the condemning agencies are authorized to enter property, prior to filing a declaration of taking, to make "studies, surveys, tests, soundings and appraisals." Agencies are required to pay "any actual damages sustained" by the owner. Pa. Stat. Ann. tit. 26, § 1-409 (Supp. 1966).

The courts have generally construed statutes of this type as limited to reimbursement for substantial physical damages only. See e.g., Onorato Bros. v. Massachusetts Turnpike Auth., 336 Mass. 54, 142 N.E.2d 389 (1957), where recovery was denied for "trivial" damage caused by the setting of surveyors' stakes, and for temporary loss of marketability due to apprehension by prospective buyers that the property being surveyed would be condemned in the near future; cf. Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962). Since the owner may fear that some injuries will occur despite the entity's assurances to the contrary, authority for the entity to pay the owner a reasonable amount within stated limits as compensation for prospective apprehension and annoyancé (in addition to assurance of payment of actual damages) could also usefully assist in promoting owner cooperation through negotiation.

\textsuperscript{352} Defects deserving consideration include:

1) It is not entirely clear under section 1242.5 whether the court proceedings preliminary to the order for the survey are \textit{ex parte} or on notice to the owner. See Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962) (on appeal from order for reservoir survey made under section 1242.5 in which report fails to indicate whether owner received notice and hearing; interlocutory order held nonappealable). Since no elements of
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D. Expansion of Statutory Remedies

Procedural disparities also deserve legislative treatment. The remedy in inverse condemnation generally contemplates the recovery of monetary damages, though in special circumstances the courts

emergency justify summary entries for survey and testing purposes, it is doubtful that ex parte proceedings would meet the requirement of procedural due process. Cf. People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (notice and hearing required before narcotics forfeiture of vehicle effective); Thain v. Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962) (notice and hearing required, absent emergency, before weed abatement action taken on private property). Assurance of a fully informed decision with respect to the amount of security to be required would be promoted by a noticed hearing with opportunity for presentation of evidence by the owner. If in the course of the survey, the deposit becomes inadequate because of unforeseen injuries inflicted, the court should also be authorized to require deposit of additional security and the statute should indicate the procedures open to the owner to obtain such an order.

(2) Section 1242.5 is silent on the scope of the court's authority to inquire into the techniques of exploration and survey that are contemplated, and as to the extent of its power to impose limitations and restrictions upon their use in the interest of reducing the prospective damages or of requiring utilization of the least detrimental techniques where alternatives are technologically feasible. See Los Angeles v. Schweitzer, supra (appeal from trial court order imposing specific limitations upon investigatory methods, under section 1242.5, dismissed without consideration of merits).

(3) Section 1242.5 fails to provide for remedies available to the owner when a public entity fails to invoke the statutory procedure, whether inadvertently or by design.

(4) Although section 1242.5 expressly authorizes the landowner to recover, out of the deposited security, compensation for the damages caused by the survey, plus court costs and a reasonable attorney fee “incurred in the proceedings before the court,” it is not clear what “proceeding” is referred to—the initial proceeding leading to the order permitting the survey, or the subsequent proceeding to obtain compensation for the damages incurred, or both.

353 Legislative clarification of the rules of damages applicable in inverse condemnation proceedings would be appropriate, since present statutory provisions governing eminent domain awards are geared solely to affirmative condemnation proceedings. See Cal. CODE Civ. Proc. §§ 1248-55b. Consideration should be given to the following aspects of inverse damages rules:

(a) Should a “before-and-after” test, as a measure of loss of value, be established by statute as the basic rule of damages, in accordance with the decisional law? See Rose v. State, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942). It is clear that loss of value is not the only constitutionally permissible measure of just compensation. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Citizens Util. Co. v. Superior Court, 59 Cal. 2d 805, 382 P.2d 365, 31 Cal. Rptr. 316 (1963). If this standard is adopted, however, it should be recognized that exceptions may be needed to deal equitably with situations in which damage to improvements may not be reflected in diminished land value. See, e.g., Kane v. Chicago, 392 Ill. 172, 64 N.E.2d 506 (1946) (no inverse damage recognized where, after destruction of building, land was more
sometimes have developed a "physical solution" where successive fu-

valuable than before); Evans v. Wheeler, 209 Tenn. 40, 348 S.W.2d 500 (1951)
(detriment to operation of riding academy, caused by diversion of river, held
noncompensable since no loss was established when property values were
judged by "before-and-after" method in light of fact that highest and best
use was for residential subdivision); Note, Compensation For a Partial Taking
Furthermore, the method of computing loss of value should exclude increased
values attributable to general inflationary trends, especially where the damage
was inflicted over an extended period of time. See Steiger v. San Diego,

(b) Should "special" benefits be set off against inverse damages, in
accordance with the case law? See Dunbar v. Humboldt Bay Mun. Water
Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967). In affirmative eminent
domain proceedings, special benefits may only be set off against severance
damages, not against the value of what is taken. CAL. CODE CIV. PROC. § 1248;
see Gleaves, Special Benefits: Phantom of the Opera, 40 CALIF. ST. B.J. 245
(1965); Comment, The Offset of Benefits Against Losses in Eminent Domain
litigation, however, ordinarily does not involve issues of severance damages;
hence, to allow a complete offset against inverse damages might, in some cases,
reduce the plaintiff's recovery to zero. Cf. United States ex rel. TVA v.
Land in Hamilton County, 259 F. Supp. 377 (E.D. Tenn. 1966), even though,
had the identical facts been the subject of an affirmative condemnation suit,
offset would have been permissible. But see CAL. CODE CIV. PROC. §§ 534,
1248. Section 1248 provides for an offset of specifically defined benefits
against damages for appropriation of water. This section is incorporated
by reference in section 534 which provides for an inverse damage award as al-
ternative relief in a suit to enjoin appropriation of water.

(c) To what extent should expenses incurred in an
effort to mitigate inverse damages be recoverable? Such mitigation expenses
are presently recoverable under the decisional law, when incurred in good
faith and in reasonable amount, even though the mitigation efforts were
unsuccessful. Albers v. Los Angeles County, 62 Cal. 2d 250, 269-72, 386 P.2d
129, 140-42, 42 Cal. Rptr. 99, 100-02 (1965). Such mitigation expenses are
recoverable in addition to loss of market value. Id. See also Game & Fish
Comm’n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967); Kane v. Chicago,
392 Ill. 172, 64 N.E.2d 506 (1945).

(d) When "cost-to-cure" is less than loss of market value, should this
measure of damages be authorized or required in lieu of loss-of-value? See
Rptr. 358 (1967) (cost of remedial measures held relevant to damage issues);
Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958) (cost of con-
structing adequate drainage to alleviate erosion held relevant to loss of value);
Bernard v. State, 127 So. 2d 774 (La. 1961) (cost of construction of
new bridge to restore access destroyed by enlargement of drainage canal);
wall to control erosion caused by lowering of street grade). Should the cost
of available remedial measures limit inverse damages where the owner, by
unreasonably failing to take such measures in mitigation of damages, in-
creased the physical injuries and loss of value sustained? See United States
v. Dickinson, 331 U.S. 745, 751 (1947) (fair to measure erosion damage by
ture damaging to an uncertain or speculative degree is anticipated. Ordinarily, however, injunctive or other equitable relief is not available in an inverse condemnation action where a public use of the property has attached. Accordingly, equitable powers to mold de-
cost of reasonable protective measures which plaintiffs could have undertaken). See generally Note, Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain, 72 YALE L.J. 392 (1962).


(f) Should attorney fees and expert witness fees be recoverable in inverse condemnation proceedings? Ordinarily, such losses are not presently recoverable in inverse suits. See Frustuck v. Fairfax, 230 Cal. App. 2d 412, 41 Cal. Rptr. 56 (1964), in which the abandonment of the project causing inverse damages was held not a basis for a statutory award of attorneys fees and expert witness fees under CAL. CODE CIV. PROC. § 1255a. But see id. § 532 (attorneys fees authorized in water appropriation suit where defendant posts bond on obtaining modification of injunction).

See Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949) (allocation of water rights in underground basin); Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1938) (replacement of public school water supply depleted by municipal exportation). Unconditional mandatory orders for physical correction of a cause of recurrent damaging have sometimes been approved. See, e.g., Union Pac. R.R. v. Irrigation Dist., 253 F. Supp. 251 (D. Ore. 1966) (mandatory correction of seepage from irrigation canal); Weiss-hand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918) (mandatory installation of culvert); Colella v. King County, — Wash. 2d — , 433 P.2d 154 (1967) (mandatory injunction to county to provide drainage for plaintiff’s lands). It is submitted, however, that the public entity preferably should be given a choice, in the form of a conditional judgment, whether to undertake physical correction of the difficulty or to pay just compensation and thereby acquire the right to continuation of the injurious condition in the future. See, e.g., Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938) (city could not be compelled to erect expensive sewage treatment plant in lieu of just compensation for pollution damage); Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of drainage facilities or payment of damages); cf. Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 534, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned upon city’s failure to pay damages). The latter view would reduce the danger of judicial interference with the discretionary determinations of elected public officials in matters relating to fiscal and budget policy, scope of improvement projects, and arrangement of priorities in allocation of public resources.

Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Frustuck v. Fairfax, 212 Cal. App. 2d 348, 28 Cal. Rptr. 357 (1963). However, there are cases to the contrary. Note 354 supra. Injunctive relief has been recognized
crees to fit the practical situations presented in inverse litigation seldom have been exploited in California inverse condemnation litigation, perhaps on the assumption that "just compensation" contemplates pecuniary relief only.\textsuperscript{356} If, by statute, inverse condemnation actions were treated as tort actions, greater flexibility of remedial resources could become available to adjust the relations between the parties in an equitable fashion.\textsuperscript{357} Moreover, alternative ways to redress the property owner's grievance could be provided, perhaps subject to the public entity's option. In water damage cases, for example, a Wisconsin statute permits the entity to choose whether to pay damages, correct the deficiency, or condemn the rights necessary to allow a continuation of the damage.\textsuperscript{358} Qualified judgments, under which a reduction in the amount of the inverse damage award is conditioned upon correction of the cause of the damage, also might be authorized.\textsuperscript{359}

It appears reasonably probable that much of the artificiality of inverse condemnation law, derived largely from its use as a device to evade sovereign immunity, can be eliminated by the codification of statutory standards. Moreover, in cases where unintended physical property damage is the basis of the claim, it is now both possible (due to the demise of sovereign immunity) and desirable (in the interest of greater certainty and predictability,) to develop a single legislative

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\textsuperscript{357} See, e.g., Enos v. Harmon, 157 Cal. App. 2d 746, 321 P.2d 810 (1958) (mandatory injunction, plus damages, awarded in private tort suit to compel removal of obstruction to flow of irrigation water). See also CAL. CODE CIV. PROC. § 1251 (authorization for condemning agency to elect to build fences, in lieu of paying damages, when property is taken for highway purposes).

\textsuperscript{358} WIS. STAT. § 88.87, -89 (Supp. 1967).

\textsuperscript{359} See note 354 \textit{supra}. In appropriate cases, the court could be authorized to award just compensation for damages accrued in the past, plus a mandatory order to undertake corrective measures to prevent damage in the future, unless the defendant public entity formally asserts its desire to acquire title to a permanent easement or servitude and pay compensation therefor. See Game & Fish Comm'n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967) (stream pollution); Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960) (stream diversion and erosion).
remedy with adequate scope and flexibility to supplant the uncertain and inconsistent inverse condemnation action developed by the courts. The prospect is a worthy challenge for modern law reform.