

Testimony of Gary Livaich

Little Hoover Commission Hearing

9 a.m.

Thursday, October 27, 2005

BACKGROUND

Thank you for the opportunity to present my thoughts concerning the critical factors that influenced the court decision in *Paterno v. State of California* and the implication of that decision for the State in future floods.

I was the lead trial counsel in *Paterno v. State of California* for the plaintiffs. *Paterno* arose out of the flood of February 20, 1986, in which the left bank of the Yuba River failed and flooded the communities of Linda and Olivehurst. The levee failure occurred while the river channel was at approximately 53% capacity. The failure occurred at approximately 6:10 p.m. And while, miraculously, there was no loss of life, there was enormous property damage. Over 3,000 homes were damaged and 150 businesses were destroyed. Although this component of the Sacramento River Flood Control Project failed and caused the damage mentioned above, the rest of the project held and \$13 billion in damages were avoided.

The liability in *Paterno* is based on inverse condemnation. Plaintiffs alleged and proved a violation of their constitutional rights. Our case lasted over nineteen and one-half years. During that time, the law of inverse condemnation, as it relates to liability for the failure of flood control works, was “clarified” by the California Supreme Court.

Shortly after we filed our complaint, the court decided *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550. In *Belair*, the court made it clear that the test for liability for a failure of a public flood control project does not rely on traditional notions of fault, but must be determined by use of a constitutional balancing test.

Paterno was tried for the first time in 1991, and resulted in a judgment in favor of plaintiffs and against the State under the theory of inverse condemnation. During the pendency of the State’s appeal of that judgment, the California Supreme Court decided *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327 and *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432. The court in *Locklin* and *Bunch* specified factors that must be considered by a court in weighing the evidence and in applying the constitutional balancing test.

In 1999, the Third District Court of Appeal overturned the *Paterno* trial court’s judgment on inverse

condemnation and sent the case back to the trial court to be retried in light of the decisions of *Locklin* and *Bunch*.

On February 20, 2001, the 16th anniversary of the flood, the second trial began. After over four months of testimony, the trial court found in favor of the State and plaintiffs appealed. The Third District Court of Appeal in *Paterno v. State of California* (2003) 113 Cal.App.4th 998, reversed the judgment and entered judgment in favor of plaintiffs against the State. The court found liability based on inverse condemnation.

The court of appeal was impressed by the findings of the trial court and, after application of the *Locklin* factors, concluded that plaintiffs' damages *were* caused by an unreasonable project or plan which resulted in the failure of the Linda levee. The court's decision, in large part, was due to the fact that the system benefitted all of California and saved billions of dollars in damages, and to require plaintiffs to bear the cost of a partial failure of that system would violate the underlying policies of the law of inverse condemnation.

INVERSE CONDEMNATION

Liability in *Paterno* and the requirement for payment of just compensation for the damages caused by the failure of a public project within its design capacity rests on the legal theory of recovery of inverse condemnation. This constitutional protection is afforded by Article I, Section 19 of our State Constitution (Cal. Const., art I, § 19), which provides:

Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into the court for, the owner.

The Constitution requires the payment of just compensation where actual physical damages are proximately caused by public works deliberately planned and carried out by a public agency. The constitutional goal is to distribute throughout the community the loss inflicted upon the individual. It makes no difference whether the taking is intentional, unintentional or negligent. Moral and tort concepts of fault are not involved in determining liability in inverse condemnation.

An inverse condemnation action is an eminent domain proceeding that is initiated by the property owner rather than the government. The principles which affect the parties' rights in an inverse condemnation are the same as those in an eminent domain action where the constitutional guarantee of just compensation extends to both types of cases and “. . . not merely where the taking is cheap or easy; indeed the need for compensation is greatest where the loss is greatest.” (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43.)

Inverse condemnation decisions, in general, establish a rule of compensability founded on constitutional

policy. This policy is best described as follows:

The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. In other words, the underlying purpose of our constitutional provision in inverse – as well as ordinary condemnation – is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements [citation] to socialize the burden . . . – to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society. [Citation] (*Locklin, supra*, 7 Cal.4th 365, citing *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 642.)

In other words, the policy underlying the constitutional guarantee of just compensation is designed to prevent the government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole. This broad, cost-spreading principle or purpose is the fundamental policy basis of the constitutional requirement of just compensation. (*Belair, supra*, 47 Cal.3d at 558.)

Liability in inverse condemnation was traditionally strict liability. There was no requirement to prove fault. Inverse condemnation liability would be found where any actual physical injury to real property was caused by a public improvement as deliberately designed and constructed. The only limits to the claim were that (1) the injuries must be physical injuries to property, and (2) the injuries must have been proximately caused by the public improvement as deliberately constructed and planned. (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 394.)

Belair noted that there were two exceptions in which the urgency or particular importance of the governmental conduct inveighed against a rule of strict liability. Those exceptions were the common enemy doctrine and police power. *Belair* marked the demise of the common enemy doctrine and recognized that the police power exception is severely limited in its application.

Belair also recognized the dilemma of competing public and private interests. “On the one hand, a public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection. On the other hand, the damage potential of a defective flood control project is clearly enormous.” (*Belair, supra*, 47 Cal.3d at 565.) The court held that where a public flood control improvement fails to function as intended, and properties historically subject to flooding are damaged as a proximate result thereof, plaintiffs’ recovery in inverse condemnation requires proof that the failure was attributable to some unreasonable conduct on the part of defendant public entities.

So, while the court in *Belair* laid down a rule of reasonableness (that is – if the project as planned, constructed and maintained, exposes plaintiff to an unreasonable risk of harm, then compensation is

required), it did not tell us how the test is applied and what factors should be considered. The court answered these questions in *Locklin v. City of Lafayette* and *Bunch v. Coachella Water District*.

The constitutional balancing test is founded upon the analysis of Professor Arvo Van Alstyne, found in his law review article, entitled *Inverse Condemnation: Unintended Physical Damage* (Jan. 1969) 20 *Hastings L.J.* 431. Professor Van Alstyne proposed a discriminating appraisal of all the relevant facts, balanced by enumerated factors and considered by the court, to determine whether the damaged property owner is being required to bear more than his or her fair share of the cost of the public undertaking. These factors are:

1. The overall public purpose being served by the improvement project;
2. The degree to which plaintiff's loss is offset by reciprocal benefits;
3. The availability to the public entity of feasible alternatives with lower risks;
4. The severity of the plaintiff's damages in relation to the risk bearing capabilities;
5. The extent to which damage of the kind plaintiff sustained is generally considered as a normal risk of land ownership; and
6. The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to plaintiff.

(*Locklin v. City of Lafayette, supra*, 7 Cal.4th 368-69.)

NECESSARY ELEMENTS OF INVERSE CONDEMNATION

- **Substantial Participation**

While the decision in *Paterno* has generated a lot of attention, there is one thing that must be kept in mind: *Paterno* is *not* new law. All the court did in *Paterno* was apply the constitutional balancing test as required by the Supreme Court in *Belair*, *Locklin* and *Bunch* to the facts of the February 20, 1986 Linda levee break, and then conclude that compensation was required.

A necessary element of a cause of action in inverse condemnation is that the entity must be engaged in a public project. The first question that the court is faced with is whether or not the project is that of the defendant entity. If the defendant entity owns, operates or controls the levee or the project, it can be found liable for damages caused by its failure. In the same breath, you should also know that ownership of the project is not always determinative of this issue. If the plaintiff shows that the defendant public entity substantially participated in the planning, approval, construction and/or operation of the public project, it can be liable for the payment of just compensation. (*Stoney Creek Orchards v. State of California* (1970) 12 Cal.App.3d 903, 907-908.)

The defendant public entity is subject to liability for damages caused by the failure of a flood control project even if the project was built by others. Acceptance of the project's works, which is part of

substantial participation, mandates that approval and/or acceptance of the public works project subjects the accepting governmental entity to liability to persons whose property is later damaged or destroyed by the public work. Approval and acceptance by the governmental entity may be implied by official acts of dominion and control of the property and by continued use of the improvement by the entity.

In *Paterno*, the Linda levee was a “project levee”; that is, a joint project carried out by the federal government and the State of California. In 1953, the completed works of the Sacramento River Flood Control Project were transferred to the State for operation and maintenance. The State reaffirmed its obligation to operate and maintain the completed works through a Memorandum of Understanding, as well as its obligation to hold the federal government harmless of any potential liability to pay damages caused by the project. The State in turn, delegated the day-to-day maintenance over to the local reclamation districts, but retained supervisory power and took responsibility for all policy making functions concerning the Sacramento River Flood Control Project.

There are different types of levees and sometimes the characterization of the levee will be determinative of who is liable for damage caused by its failure. Project levees must be contrasted with those involved in *Galli v. State of California* (1979) 98 Cal.App.3d 662. *Galli* involved the break of the levee in the Sacramento-San Joaquin Delta that protected the town of Isleton and surrounding farmland. It was a non-project levee. The court held that the State was not liable for the damages caused by the Isleton levee break because (1) the local district was not a state agency and (2) the State did not substantially participate in the work of public improvement. The court noted that there are three general categories of levees:

- » Project levees
- » Direct agreement levees
- » Non-project levees

Project levees are levees within a flood control project that has been authorized by the Legislature alone or in conjunction with the federal government. Direct agreement levees are levees maintained to federal standards by local interests in direct agreement with the United States Corps of Engineers. An example of which are the levees along the Stockton deep water channel. All other levees are non-project levees.

At the time of *Galli*, it was estimated that in the Sacramento-San Joaquin Delta, approximately 15% of the levees were project levees, 10% were direct agreement levees, and 75% were non-project levees.

Non-project levees are neither inspected by the State nor required to be maintained to state and federal standards. The State did not substantially participate in their planning, construction, operation or maintenance.

The court in *Galli* reasoned as follows:

Non-project levees, while in a sense part of the state-wide water control system, are not subject to the same direct control of the state as project levees and are maintained on a local basis. Being a part of a complex system of levees for both flood control and other purposes does not of itself determine liability for damages for failure of a given portion of a levee. The levee in question was not under the general control of the state insofar as maintenance was concerned.

In reaction to the 1972 Isleton flood, the Legislature passed the “Way Bill” (Wat. Code, § 12983) and directed the Department of Water Resources to develop and submit to the Reclamation Board criteria for maintenance and improvement of non-project levees in the Delta. Local agencies may become eligible for reimbursement of part of their levee maintenance and rehabilitation costs after submission to and approval by the Reclamation Board of plans for the maintenance and improvement of non-project levees in conformance with the adopted criteria. Annual levee inspections by DWR are also required to participate in this subvention program.

The program authorized by the “Way Bill” purports to preserve the characterization of these levees as non-project levees and insulates the State from being a substantial participant. Water Code section 12983 provides in part, “[t]he purpose of the state’s approval of plans and inspection of works, which duties are set forth in this part, is to ensure that subvention funds are properly expended and that delta levees are effectively rehabilitated and maintained, and the state does not thereby assume any responsibility for the safety of any delta levee against failure.”

I am not aware of any case that has successfully argued that this attempt by the Legislature to assert some control over maintenance and rehabilitation of the Delta levees equals substantial participation in the public works.

- **Causation**

After the court determined that the State was engaged in the project that included the Linda levee, it turned its attention to the issue of causation. Causation in inverse condemnation requires that any physical injury to property caused by the public improvement, as deliberately designed and constructed, is compensable under Article I, Section 19, of the Constitution. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 304.) This means that where the public improvement failed to function as intended, causation will be found. In this regard, the appellate court was impressed that the Linda levee was designed to safely carry 120,000 cubic feet per second and that it failed at approximately 53% of its design capacity. This was borne out further by the uncontroverted evidence that the levee was constructed from porous hydraulic mining debris on a foundation of that same material. The court was impressed that the material used to construct the levee was not compacted during construction and was, therefore, highly susceptible to seepage.

The trial court found that the Linda levee on the day of failure existed as designed and constructed, by the participants of the project. It was a high risk levee that did not meet the engineering standards that existed during any time of its life. The court was impressed that even though its construction was abysmal, feasible technology existed during the life of the levee (including during the '30s and '40s when the levee was rehabilitated) which, if implemented, would have brought the levee within engineering standards and would have averted the failure. In my view, the existence of feasible alternatives was critical in the appellate court's determination that the State was liable for the damages caused by its failure.

APPLICATION OF THE *LOCKLIN* FACTORS

A taking or damaging of private property for public use must be compensated. Damages caused by defective projects are considered deferred costs of the project, and it is proper to require the public to bear those costs when realized.

The rule of liability in failure of flood control projects is found in *Bunch* at page 450.

. . . When a public flood control system fails to protect land from historic periodic flooding, the only way to determine whether a damaged private landowner has thereby been forced to contribute a compensable "disproportionate" share of the public undertaking is to determine whether the system, as designed, constructed, operated, and maintained, exposed him to an "unreasonable" risk of harm, either individually or in relation to other landowners.

As stated above, this is done through a discriminating appraisal of relevant facts and weighing of those facts by consideration of the *Locklin* factors.

In *Paterno*, these factors were weighed as follows:

1. **The overall public purpose being served by the improvement project:** The court was impressed by the magnitude of the project. The SRFCP protected billions of dollars and millions of lives during the storms of 1986. It largely accomplished its mission.
2. **The degree to which the plaintiff's loss is offset by reciprocal benefits:** The court noted that plaintiffs paid for flood protection and did not receive it. Plaintiffs received benefits in prior years, as did all other protected by the project, but the operation of a defective system does not promote any reciprocal benefits. (See also, *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.)
3. **The availability to the public entity of feasible alternatives with lower risks:** The court found that viable alternatives existed that would have prevented the failure. These alternatives

included cut off walls, filter blankets and pressure relief walls. These alternatives were found to be fiscally feasible.

4. **The severity of the plaintiff's damage in relation to risk-bearing capabilities:** The court stated that the risk of loss can better be absorbed by the State and with far less hardship to the taxpayers. The court also noted that the State usurped the field in determining how the protection against a flood is afforded, so that there was nothing plaintiffs could have done to avoid the risk.
5. **The extent to which damage of the kind the plaintiff sustained is generally considered a normal risk of landownership:** The purpose of the project was to reclaim the Valley and encourage people to settle here. The court was impressed that the project itself induced plaintiffs to make improvements to their real property in reliance on the project. There was no perception of lack of safety. A loss of this magnitude was not considered a normal risk of landownership.
6. **The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff:** The court noted that the damage was to the community of Linda and Olivehurst, and did not impact the vast area protected by the SRFCP. This was not a catastrophic failure of the project. The project for the most part provided significant benefits in 1986, the exception being Linda/Olivehurst.

The court in *Paterno* also said that additional factors laid out in *Albers* should also be considered, but these factors are just a variation on the same theme. The evidence considered in light of the *Locklin* factors weighed heavily in favor of compensation or socializing the loss.

The purpose of this constitutional balancing test is to determine whether a disproportionate burden has been inflicted on the individual by the public project. The factors are not elements of a cause of action for an inverse condemnation, but, when balanced, indicate whether the owner, if uncompensated, would contribute more than his proper share of the public undertaking. *Paterno* weighed the evidence in light of the foregoing factors, and concluded that the uncompensated would contribute more than their proper share of the public undertaking.

The dilemma of the competing public and private interests is met head on by the *Paterno* ruling. As succinctly stated in the *Bunch* decision:

This balancing of interest serves both the private sector and public improvement efforts by addressing the cost spreading objective of the just compensation clause while protecting the public entities from unlimited, undeserved liability that could well inhibit further construction of public works. (*Bunch, supra*, 15 Cal.4th at 451.)

The post-*Paterno* reaction has been positive. More attention is being paid to the SRFCP and action is being taken to ensure the design levels of protection are achieved.

Contrary to the views of the critics, the ruling in *Paterno* does not reduce the State to an insurer of all flood damages. It does not require upgrades in the levels of flood protection. It does not interfere with the State's prerogative to choose where and how to build levees. All *Paterno* does is implement the California Constitution's command that the State must pay for damaging property when carefully considered, discretionary decisions, including decisions relating to the plan or design of public improvements, amount to a taking. In other words, the balancing test, as applied by the court in *Paterno*, does not interfere directly with the power or discretion to plan or undertake public projects; it merely determines when resulting private losses must be absorbed as a part of the cost of such project. This test is consistent with the intent of the framers of the just compensation clause to protect private property interest against even the best intention exercised as a public power.

The test also assumes that the government is in the best position with its superior resources to evaluate the nature and extent of the risks of the public improvement and, ordinarily, is the more capable party for the striking of the best bargain between efficiency and cost (including inverse liability) in planning such improvements.

STATE LIABILITY AND FUTURE FLOODS

For my part in the *Paterno* case, I studied the inception and evolution of the SRFCP. History shows that the Valley was, at times, a vast inland sea preventing the beneficial use and development of hundred of thousands of acres of land. There were men of foresight and insight that recognized the problem and worked tirelessly to resolve it. The result is what we see today – the development of major communities, farmland, airports, and thousands of homes and businesses.

History also shows that the men of insight and foresight vanished. During the years prior to 1986, those operating the project and those responsible for development of policy concerning the project became complacent and reactionary. A prime example was a study done in reaction to the Yuba City levee failure and flood of 1955. A State of California Resources Agency task force prepared a report on flood damage and liability in connection with flood control programs. The purpose of the study was to look into whether or not there were effective ways to reduce the potential liability of the State for future flood control damages and whether the State would be better off by delegating its responsibilities for the project to the local reclamation districts. The report contained a memorandum attached as "Appendix F" from the State Reclamation Board and authored by its then-General Manager, A.E. McCollam, who took a contrary and refreshing view. Mr. McCollam recognized that the discussion concerning liability in the task force report revolved around the concept of "ducking the liability by one means or another." Mr. McCollam recognized that such a course of action would be contrary to the State's assured interest in flood control matters, and would actually slow the progress on flood control works. The Reclamation Board, through Mr. McCollam, recommended:

A far better course is for the State to recognize the liability and take positive action to accept the liability and to further insure that the projects will be designed and constructed in accordance with the highest standards and with the highest possible degree of protection that can be afforded and that once constructed, the works will be maintained to the highest standards.

If the State does not continue to have a primary interest in flood control problems and attempts to avoid its responsibilities, substandard projects can and will be constructed by local interests to the detriment of the present and future welfare of the State.

(State of California Resources Agency Report of Task Force on Flood Damage Liability and Flood Control Programs (Sept. 1966) pp. 90-91.)

In my opinion this course of action is the only way for the State to mitigate its exposure to liability and protect lives and property.

Thank you for your time and attention.