City Trees and Urban Forests: Understanding Inverse Condemnation Liability

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I. INTRODUCTION

Last year, in *Mercury Casualty Company v. City of Pasadena*, 14 Cal.App.5th 917 (2017), *reh'g denied* (Sept. 15, 2017), *review denied* (Nov. 15, 2017) ("*Mercury Casualty*") the California Court of Appeal decided whether a tree was a "work of public improvement" for purposes of inverse condemnation liability. Although two prior California appellate decisions touched on that issue, *Mercury Casualty* was the first California appellate decision to examine that question in detail.

In *Mercury Casualty*, the Court considered a trial court ruling which held that the City of Pasadena ("Pasadena" or "City") was liable for damage that a City-owned tree caused when it fell in a windstorm in which winds reached 101 mph. The trial court held that Pasadena was liable for damage simply because its tree was close enough to strike the adjacent house, and that the City was liable regardless of the reason it fell.

The trial court further found that Pasadena's Ordinance creating an urban forest was a "design" that satisfied the inverse condemnation requirement that damage be caused by a work of public improvement "as deliberately designed and constructed." In essence, the trial court found that Pasadena's urban forest was one large work of public improvement, and that (presumably) every tree in that forest could give rise to an inverse condemnation claim. Thus, according to the trial court, if a branch fell from one of the approximately 60,000 trees in its urban forest, the City would be liable *regardless of the cause*. Based on the trial court's ruling, if a drunk driver ran into a tree and caused a branch to fall on a parked car, Pasadena would be liable in inverse condemnation. Similarly, if the largest recorded earthquake in the history of the world struck California, with Pasadena at its epicenter, the City would be strictly liable for damage from every falling tree.

The City appealed. In *Mercury Casualty*, the Court was presented with novel questions regarding the scope of inverse condemnation liability under Article 1, Section 19 of the California Constitution. These questions included:

1. Whether a city tree in a public right of way is a work of public improvement even though there was no record of who planted it;
2. Whether, in analyzing causation, a regulatory ordinance creating an urban forest is a "design of a public project";
3. Whether negligent maintenance can give rise to a claim for inverse condemnation; and
4. Whether inverse condemnation liability can be imposed where there is no evidence that damage was substantially caused by a tree "as deliberately designed or constructed".

The Court in *Mercury Casualty*, answered three of these questions in a manner favorable to public entities, and deferred ruling on the fourth. It found:

1. In order for a tree to be a work of public improvement, it must be "deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose, such as to enhance the appearance of a public road." *Mercury Casualty*, *supra*, 15 Cal.App.5th at p. 928.
2. Pasadena's ordinance creating an urban forest "does not constitute a design for a public project or improvement, nor does it covert [the tree that fell] into a work of public improvement, that subjects the City to inverse condemnation liability." (*Id*. at p. 930.)

3. "To establish an inverse condemnation claim based on a government entity's maintenance of one of its improvements, the property owner must show that the plan of maintenance was deficient in light of a known risk inherent in the improvement." (*Id*. at pp. 930-931.)

Because the *Mercury Casualty* Court found no work of public improvement, no design, and no negligent plan of maintenance, it did not decide the fourth question concerning whether the damage caused by the falling tree was a result of its "deliberate design and construction." It is possible that this issue may be decided in the future, and this paper will discuss how best to address it if it arises.

II. RELEVANT FACTS OF *MERCURY CASUALTY*

The Court in *Mercury Casualty* devoted several pages of its decision to discussing the evidence from trial. In order to understand the scope of the decision, and its impact on public entities, a brief discussion of the facts is in order.

Mercury Casualty involved an extreme and unprecedented weather event that occurred on November 30, 2011 and December 1, 2011, with winds greatly exceeding hurricane force (the "2011 Windstorm"). Between midnight and 1:00 a.m. on December 1, wind gusts in Pasadena peaked at 101 mph – which is double hurricane force. The 2011 Windstorm destroyed more than 2,200 of the 57,000 trees in Pasadena's urban forest and caused extensive damage to both private and public property in Pasadena, including damage to 5,000 other City trees.

The 2011 Windstorm damaged a residence (the "Property") owned by Sarah and Christopher Dusseault (the "Dusseaults"). Between midnight and

1:00 a.m. on December 1, at the peak of the 2011 Windstorm, a City tree fell onto the Property.

The tree that fell was "planted in the late 1940s or early 1950s by an unknown party." (*Mercury Casualty, supra*, at p. 923.) The tree was in a 20-foot-wide dirt parkway owned by the City. (*Id*. at p. 922.) However, the Dusseaults landscaped Pasadena's parkway and installed a sprinkler system which "may have caused [the trees in the parkway] to grow 40 to 50 feet taller than they would have grown with only natural irrigation." (*Id*. at p. 923.) When they landscaped in 2011 (a few months before the 2011 windstorm), a neighbor testified that they removed a root from the tree that fell that "was about two feet long and the width of a human fist." (*Ibid*.)

Mercury Casualty Company ("Mercury") insured the Property and paid the Dusseaults for their property damage. Mercury then sued the City seeking to recoup that money. On July 23, 2012, Mercury filed a complaint against the City that alleged three causes of action: inverse condemnation, dangerous condition of public property, and nuisance. On February 26, 2015, Mercury dismissed all causes of action except inverse condemnation. The City viewed the dismissal of the dangerous condition cause of action as an admission that Mercury had no evidence to support it dangerous condition claim; Pasadena had an exemplary tree maintenance program. It pruned the tree that fell in April 2007 and inspected the trees in front of the residence at the Dusseaults' request in 2006 and 2008.[1] So there was no evidence that the City acted or omitted to act in a manner that caused damage to Mercury's insured.

[1] The Court of Appeal stated that "the City's five-year cycle for inspecting and caring for City trees was not only adequate, the undisputed evidence established that it exceeded the standards used in most other cities." *Mercury Casualty*, *supra*, 14 Cal.App.5th at p. 931.

Inverse condemnation liability was bifurcated and tried to the court. The trial court found in favor of Mercury. The Court found that the "'tree that fell was a work of public improvement'" and that "'[t]he City's maintenance of a 110-foot-tall Canary Island pine tree only 60 feet away from the insured's residence exposed the property owner to a peril from the falling tree, **caused by whatever event**, to which she would not otherwise have been exposed.'" (*Id*. at p. 924.) (Emphasis added.) The Court entered judgment in favor of Mercury for $800,000 plus $329,170 in costs (including attorneys' fees. (*Id*. at p. 925.)

Pasadena appealed.

III. OVERVIEW OF INVERSE CONDEMNATION LAW

Article 1, section 19 of the California Constitution allows a property owner to recover "just compensation" from a public entity for private property that is "taken or damaged for a public use." *Locklin v. City of Lafayette*, 7 Cal.4th 327, 362 (1994). "When there is incidental damage to private property caused by governmental action, but the governmental entity has not reimbursed the owner, a suit in 'inverse condemnation' may be brought to recover monetary damages for any 'special injury,' i.e., one not shared in common by the general public." (Ibid.)

In inverse condemnation, a property owner may recover from a public entity for "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed ... whether foreseeable or not." *Albers v. County of Los Angeles*, 62 Cal.2d 250, 263–264 (1965) ("*Albers"*). Thus, a public entity generally is strictly liable for any damage to private property caused by a public improvement as that improvement was deliberately designed, constructed, or maintained. *Pacific*

Bell v. City of San Diego, 81 Cal.App.4th 596, 610 (2000) ("*Pacific Bell*"). Typically, these involve storm drains, sewers, water mains, powerlines, and other quintessential infrastructure. If shown to be *publicly* owned and constructed, these are unquestionably works of public improvement so the threshold element is assumed without discussion in most physical damage inverse decisions.

The fundamental policy "underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community." *Pacific Bell*, *supra*, 81 Cal.App.4th at p. 602. Thus, as the California Supreme Court explained in *Albers*, the primary consideration in an inverse condemnation action is "'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.'" *Albers*, supra, 62 Cal.2d at p. 262. In other words, "[i]nverse condemnation liability ultimately rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement." *Belair v. Riverside County Flood Control Dist*., 47 Cal.3d 550, 566 (1988).

Notably, trees differ from classic public works in a few significant respects, and lawyers representing public entities should keep these differences in mind in cases in which a tree is claimed to be a work of public improvement. First, unlike classic works of public improvement, the property owner adjacent to a City tree derives the most benefit from it, including shade and increased property values; this is contrary to the stated basis for inverse condemnation liability, where a property owner bears a burden for the benefit of the community. Second, property owners often water adjacent trees (as the Dusseaults did) which impacts the trees'

characteristics; in contrast, homeowners do not generally maintain other classic works of public improvement. Third, there is a specific public policy to encourage public entities to plant trees and develop urban forests. (California Urban Forestry Act of 1978 (CUFA), Public Resources Code (PRC) §§ 4799.06 et seq.)

IV. IN ORDER TO ESTABLISH THAT A PUBLIC ENTITY IS LIABLE IN INVERSE CONDEMNATION FOR DAMAGE CAUSED BY A TREE, A PLAINTIFF MUST ESTABLISH THAT THE TREE WAS PLANTED BY OR AT THE DIRECTION OF THE GOVERNMENT ENTITY AS PART OF A PLANNED PROJECT OR DESIGN SERVING A PUBLIC PURPOSE.

Until *Mercury Casualty*, no California appellate decision had directly addressed whether a tree is a work of public improvement. Two previous appellate decision touched on that question: *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal.4th 507 (2006) ("*Regency*") and *City of Pasadena v. Superior Court*, 228 Cal.App.4th 1228 (2014) ("*City of Pasadena*"). The *Mercury Casualty* Court discussed both decisions at length, and both are discussed immediately below.

In *Regency*, a billboard company (Regency) sued Los Angeles in inverse condemnation claiming that trees planted along Century Boulevard near LAX for a city roadway beautification project made Regency's billboards less visible from the road, diminishing their value. (*Regency*, *supra*, 39 Cal.4th at 512.) Affirming the lower courts, the Court held this did not give rise to inverse condemnation because Regency's sole claim was impaired visibility of its billboards. It thus failed to surmount the liability hurdle. (*Id*. at 520.)

Regency was decided on a narrow issue: impaired views, without more, do not satisfy the liability hurdle. Liability did not depend on whether the object blocking the billboard was a tree, freeway overpass, city billboard, or weather balloon. *Regency* did not discuss whether the trees were a work of public improvement under inverse condemnation law. However, "[a]s part of its analysis, the court assumed that the planting of trees along a city-owned street as part of a highway beautification project constituted a public improvement for purposes of an inverse condemnation claim." *Mercury Casualty*, *supra*, 14 Cal. App. 5th at 922. (Citation omitted.)

Notably, *Regency* involved palm trees that Los Angeles *deliberately* planted on City-owned property as *part of a highway improvement project*. *Id.* at 512. Thus, the palm trees were part of the "deliberate design and construction" of that project. Thus, *Regency* is easily distinguishable when used in most cases involving street trees owned by public entities.

The *Mercury Casualty* Court also discussed *City of Pasadena*. That decision involved a different inverse liability claim brought by Mercury against Pasadena.[2] In *City of Pasadena*, the appellate court reviewed an order denying the City's motion for summary adjudication of Mercury's claim for inverse condemnation arising out of residential damage caused by a different City-owned tree that fell during the 2011 Windstorm. In that case, the City argued that a tree is not a work of public improvement for purposes of an inverse condemnation action. Ultimately, the court denied the City's writ petition because a triable issue of fact existed as to whether the City's tree that damaged the insured's home was a work of public improvement. (*Id*. at

[2] Both *Mercury Casualty* and *City of Pasadena* were decided by the same court – Second Appellate District, Division 3. However, the panel of judges differed.

pp. 1235–1236.) Specifically, the court relied on *Regency*, and determined that the City failed to present any evidence demonstrating that the tree was *not* part of the construction of a public project. (*Id*. at p. 1235.) Put simply, the City argued that a street tree was not a work of public improvement as a matter of law; the Court of Appeal held that the City would have to present facts concerning whether the tree was planted as part of a construction project, as in *Regency*.

Unlike *City of Pasadena*, *Mercury Casualty* was decided by the Court of Appeal following a trial, so there was ample evidence in the record concerning the tree that fell. Both the trial court and the Court of Appeal found that the trees in front of the Dusseaults' residence "were planted in the late 1940s or early 1950s by an unknown party." *Mercury Casualty*, *supra*, 14 Cal.App.5th at p. 923. It also noted that the tree that planted was not the species that was designated as the official street tree for that particular street. (*Id*. at 929.)

After considering these decisions, the *Mercury Casualty* Court articulated a holding that is consistent not only with both *Regency* and *City of Pasadena*, but also with *Albers* which required that damage must be caused by an improvement as "deliberately designed and constructed." *Albers*, *supra*, 62 Cal.2d at p. 263.

> "Based on Regency and City of Pasadena, we hold that a tree constitutes a work of public improvement for purposes of inverse condemnation liability if the tree is **deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose** or use, such as to enhance the appearance of a public road. Our holding comports with the requirement for inverse condemnation claims that the complained-of damage must be caused by an improvement that was "deliberately designed and constructed." (See *Albers*, supra, 62 Cal.2d at p. 263.) Indeed,

> in virtually every case affirming inverse condemnation liability, the responsible public entity, or its predecessor, **deliberately constructed** the improvement that caused damage to private property. (See, e.g., id. at pp. 254–255 [a county's construction of roads caused a landslide]; *Pacific Bell*, *supra*, 81 Cal.App.4th at pp. 599–601, 607–610 [water main pipes constructed and maintained by a city burst and flooded private property]; *Cal. State Automobile Assn.*, supra, 138 Cal.App.4th at pp. 476–484 [sewage pipes constructed and maintained by a city backed up and flooded private property]; *Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 269–271 [drainage structure constructed and maintained by a public entity flooded private property*]; Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 872–874 [power lines constructed and maintained by public entity sparked and caused a fire that damaged private property].)" *Mercury Casualty*, *supra*, 14 Cal. App. 5th at p. 928–29 (unofficial citations omitted).

The Court stated that its holding was "consistent with a fundamental justification for inverse liability: the public entity, acting in furtherance of a public objective, took a calculated risk that damage to private property may occur. (Citations omitted.)" (*Id*. at p. 929.) The Court found there was no evidence "to suggest that the City planted the tree as part of a planned project or design to beautify its roads, or to serve some other public purpose." (*Ibid*.) So there was no "construction."

Additionally, the *Mercury Casualty* Court found no evidence of a design. The Court of Appeal specifically rejected Mercury's "argument that the City's adoption of the [Tree] Ordinance converted Tree F-2 into a work of public improvement because the Ordinance promotes the public's interest in maintaining trees." (*Ibid*.) The Court agreed with Pasadena's argument that its Tree Ordinance was not a "design".

> "[A]lthough one of the Ordinance's general goals is to preserve and grow the City's canopy cover, it does not establish specific design standards or parameters for the planting or removal of street trees, nor does it include any maintenance or pruning

> schedules for street trees like Tree F-2. … Quite simply, **the Ordinance does not constitute a design for a public project or improvement, nor does it convert Tree F-2 into a work of public improveme**nt, that subjects the City to inverse condemnation liability." *(Id.* at pp. 929–30.)

In conclusion, if a tree is planted as part of a large-scale construction project as in *Regency*, it may be a work of public improvement giving rise to inverse liability. If it is a street tree, planted by an unknown person, it is not. Future litigation will address the numerous other factual scenarios which can arise in the context of urban forests.

However, even if a tree is found to be a work of public improvement, it will be very difficult to overcome the next hurdle – which is to tie the "deliberate design and construction" of the tree to the damage caused.

V. INVERSE CONDEMNATION WILL BE DIFFICULT TO PROVE IN MOST CASES INVOLVING PROPERTY DAMAGE CAUSED BY FALLING TREES.

Even if a tree is a work of public improvement, i.e. it was deliberately planted by a public entity as part of a construction project, it will be difficult for most plaintiffs to satisfy the causation element to hold a public entity liable in inverse condemnation. This is because most trees fail because of either inadequate maintenance or conditions beyond the control of the public entity (like the 2011 Windstorm), not because of the deliberate design of the tree.

More than 50 years ago, the California Supreme Court established a general rule of inverse condemnation that "any actual physical injury to real property proximately *caused by the improvement as deliberately designed and constructed* is compensable under article I, section [19] of our Constitution whether foreseeable or not." *Albers,* 62 Cal.2d at 263-264

(italics added). To prevail, a plaintiff in an inverse condemnation action must demonstrate a causal link between the "deliberate design and construction" of the public work and the resulting damage.

Inverse condemnation liability for unintentional physical damage caused by a public improvement (assuming there is one) requires a detailed analysis of the evidence to determine whether a causal relationship exists between the deliberate design and construction and the resulting damage. The causal link between design and damage is examined below in connection with appellate decisions involving a road, a power line, and a sewer line.

For example, *Albers* involved road construction and design that "included the making of extensive cuts and the deposition of substantial quantities of fill material" caused a landslide. 62 Cal.2d at 264. In affirming judgment against the county in inverse condemnation, the California Supreme Court found the damage was "the proximate result of the construction of a public work deliberately planned and carried out" by the county. *Id.* at 262. *See, also*, *Holtz v. Superior Court*, 3 Cal.3d 296 (1970) (extensive excavation under city street to build a subway system results in land subsidence); *Blau v. City of Los Angeles*, 32 Cal.App.3d 77 (1973) (city's excavation and brush removal for construction of a public road caused a landslide). Put simply, there was a direct link between the cuts and fills as deliberately designed and constructed, and the damage caused.

Aetna Life & Casualty Co. v. City of Los Angeles, 170 Cal.App.3d 865 (1985), demonstrates the type of analysis needed to tie the design of a public work to a particular damage. In *Aetna*, the court found a power line as "deliberately designed and constructed" caused property damage. Power lines created sparks that caused a fire. The court thoroughly examined the

design and found that the deliberate design and construction of the power lines caused the fire. The Court explained:

> "[T]he evidence established that the power lines in question were designed to sag 22 inches between polls. As deliberately spaced 26 inches apart on the cross-arms, two of the wires sagging 22 inches could be blown into contact with each other by winds blowing at about 42 miles per hour. Clearly, by defendants' own design standards, the construction of the power lines carried some risk of arcing in strong winds. Moreover, the sag of the power lines in question exceeded the defendants' 22-inch design guideline by approximately 30 inches. The risk that these lines, sagging 51 inches or more, could come into contact with each other in moderate to high winds is much greater than if they had been tightened to a sag of only 22 inches. The evidence showed that the lines were deliberately constructed at a greater sag and remained that way through routine semi-annual maintenance inspections. Thus, the design, construction and maintenance of the sagging high voltage cables permitted intercable contact during windy conditions which resulted in a disastrous fire." (*Id.* at 874.)

Put simply, there was a direct link between the spacing of the power lines as deliberately designed and constructed, and the damage caused.

Similarly, in *California State Automobile Assn. v. City of Palo Alto*, 138 Cal.App.4th 474 (2006), the court found a sewer line as "deliberately designed and constructed" caused a sewer back up and resulting property damage. Plaintiff presented evidence of three possible causes of the backup, all of which related to the *deliberate* design and construction of the line: "(1) the existence of tree roots invading the porous clay pipe of the sewer main… (2) the .455 percent slope of the [City's] main …; and (3) the existence of standing water filling one half of the main…." *Id.* at 478. The Court found there was "a substantial cause and effect relationship between factors entirely within the city's control, namely, tree roots, slope and standing water in the main that contributed to the backups…" *Id*. at 484. Put simply, there was a

direct link between the material used for the pipe, and the slope of the pipe, as deliberately designed and constructed, and the damage caused.

Each of these decisions demonstrate that the causation element in inverse condemnation requires detailed analysis of *why* the public work failed. In contrast, in the overwhelming majority of cases involving damage caused by falling trees, the issue of why the tree failed will usually be a maintenance issue which, in almost all cases, is not the proper subject of an inverse condemnation action.

At trial in *Mercury Casualty*, Mercury argued that the fact that the tree was tall enough to strike the adjacent house satisfied causation. However, lawyers representing public entities that encounter a similar argument in the future should distinguish between the cause of damage (a tree), and the cause of the failure (e.g. a windstorm). In every case involving damage caused by a work of public improvement, it is axiomatic that whatever was damaged by the public work was close enough to it to be damaged. The relevant inquiry is, instead, what caused the failure. Under existing law, there must be a link between the design and the tree failing.

A helpful case for lawyers representing public entities on this point is *Ingram v. City of Redondo Beach*, 45 Cal.App.3d 628 (1975). In *Ingram*, "the earthen wall of [a] sump collapsed, [and] water came from the sump, across a park adjacent to it and onto plaintiffs' properties and into their homes. [¶] The sump was not designed for all rains. An overflow pipe was installed in the sump by the city. There was some evidence that the pipe had been blocked by a sandbag or piece of burlap." *Id* at 631. The trial court found for the city. The Court of Appeal reversed and remanded because it did "not know the basis for the trial court's finding that no damages occurred

to plaintiffs as a proximate result of a deliberately designed and constructed public work." *Id*. at 633.

> "There is no finding that this rain storm was the sole cause of the damages, or, to adopt Professor Van Alstyne's language, that it 'alone' produced the injury. Nor is there any finding concerning the role played by a sandbag or piece of burlap allegedly blocking the overflow pipe. We do not hold that either such a blockage, if it existed, or the storm, are enough, singly or in combination, to have constituted the sole cause of the flooding. That is a question for the trial court's determination. On remand, that court may proceed as it deems best, by amending its findings and conclusions after hearing, or by retrying the matter in full." *Id*. at 634.

Applying this language to the *Mercury Casualty* case, the City did not dispute that a City tree failed in the 2011 Windstorm and Mercury's insureds' real property suffered damage. Similarly, it was undisputed in *Ingram* that the city's sump wall failed in a rainstorm and plaintiffs' real property suffered damage. If the law were as Mercury contended, the *Ingram* court should have ended its inquiry and instructed the trial court to rule for plaintiff.

Unfortunately (or perhaps fortunately), the trial court did not need to reach the issue of causation, because it ruled Mercury could not demonstrate the tree was a work of public improvement. This issue may be decided in future litigation.

VI. A PUBLIC ENTITY CANNOT BE LIABLE IN INVERSE CONDEMNATION FOR INADEQUATE MAINTENANCE UNLESS THERE IS AN INADEQUATE *PLAN* OF TREE MAINTENANCE

Courts have extended the *Albers* rule in certain very limited circumstances to allow inverse condemnation liability if physical damage is caused, not by the *design or construction* of a public improvement but rather,

by inadequate *maintenance* of a public improvement. See, e.g., *Pacific Bell supra*, 81 Cal.App.4th at p. 609. Specifically, if a public entity has an inadequate *plan* of maintenance, which the evidence shows is the substantial cause of damage, liability may lie. In contrast, if damage is caused by "negligent acts committed during the routine day-to-day operation of the public improvement having *no relation to the functioning of the project as conceived* does not create a claim in inverse condemnation." *Id.* at 608-609 (italics added).

Thus, appellate courts have imposed inverse condemnation liability for an inadequate plan of maintenance where public entities adopted a "wait until it breaks" maintenance program to avoid costs. In *Pacific Bell, supra*, a severely corroded cast-iron water pipe burst when a fire hydrant connected to the pipe was struck, damaging plaintiff's property. Plaintiff sought inverse condemnation damages, alleging that because the city of San Diego had no preventive maintenance plan to monitor the corrosion of its cast-iron pipes, the damage to plaintiff's property was an "inevitable consequence of City's water delivery system as designed, constructed and maintained." 81 Cal.App.4th at 599. The Court concluded that San Diego's "wait until it breaks" program of pipe maintenance gave rise to inverse condemnation liability. *Id.* at 608. San Diego's "knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers* ..." *Id.* at 609 (citation omitted.)

The *Pacific Bell* court found dispositive an earlier decision, *McMahan's v. City of Santa Monica*, 146 Cal.App.3d 683 (1983). In *McMahan's*, Santa Monica decided it would be more cost efficient to repair water lines when they failed than replacing them throughout the city. The

city knew its water lines would fail but did not know when or where they would fail. A pipe ruptured and damaged plaintiff's property and plaintiff sued in inverse condemnation.

Santa Monica argued that "the rupture of the pipe was caused by negligent maintenance and daily operations and not by a deliberate plan of construction, and that negligent maintenance is not a deliberate act that constitutes a taking." *Id*. at 609. The *McMahan's* court rejected this argument, reasoning that "damage *resulting from a maintenance program* that involves 'a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole' satisfies the 'deliberately designed and constructed' requirement." *Id.* (italics added).

Thus, *Pacific Bell* and the earlier decisions upon which it relied squarely address the "deliberate act" of adopting a *defective* plan of maintenance of a public improvement. Each of these decisions arose in the context of water lines, which are recognized public improvements. That was not the case in *Mercury Casualty*.

Based on these decisions, if a tree falls due to alleged poor maintenance, that may subject the public entity to liability for dangerous condition of public property, but it will not give rise to an inverse condemnation claim. Indeed, most tree maintenance decision are made by employees in the field based on conditions unique to a particular tree. As such, they are maintenance decisions, not design decisions.

VII. CONCLUSION

Mercury Casualty is a favorable decision for public entities. However, the next important decision in this area will involve the issue of causation, and we expect that decision will also favor public entities.