



Inverse Condemnation After *Oroville*: New Opportunities to Limit Liability

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I. Introduction

2019 brought the first victory in decades for government in the California Supreme Court in a physical taking inverse condemnation case— *City of Oroville v. Superior Court of Butte County* (2019) 7 Cal.5th 1091 (*Oroville*). It is the first California Supreme Court decision involving liability requirements for physical takings in many years. It marks an end to a generations-long view that inverse condemnation liability is tantamount to strict liability and ends the encouragement of government liability in the interests of protecting private property owners; the push for governments to internalize the risks inherent in the design, construction and maintenance of public works; and the desire to socialize the costs of public improvements.

Oroville refines the “substantial cause” element of an inverse plaintiff’s case — a duty to show that his injury was substantially caused by the defendant agency’s public work. In this case, the plaintiff dentists’ failure to comply with a requirement of the Uniform Plumbing Code to install and maintain a backwater valve that would have prevented the sewer backup that damaged them — and the City’s reasonable design assumption of such compliance — together prevented the plaintiffs from establishing that their damage was “substantially caused” by the deliberate design, construction and plan of maintenance of the City’s sewer system. (*Oroville, supra*, 7 Cal.5th at p. 1108.)

This important new decision affects inverse condemnation litigation, of course, but also the advice public lawyers must give their clients about risk management, and project design, construction and maintenance. *Oroville* also provides a welcome rule that cities can expect property owners to follow the law, as the *Oroville* opinion states: “the City did not act unreasonably in expecting private property owners to comply with the law.” (*Id.* at p. 1111.)

II. Oroville’s Facts and Procedural History

Oroville’s facts are taken from the Supreme Court decision and, in summary, are as follows. *Oroville* arose from a sanitary sewer overflow into a suite of dentists’ offices, causing far more expensive damage than occurs in a typical sewer backup case. The property lay below the elevation of the nearest protective manhole cover (designed to divert sewage away from improved property and into a street where it can be contained and abated). Accordingly, the City of Oroville’s building code, based on the Uniform Plumbing Code, required the structure to be protected by a backwater valve, effectively a flap gate like one sees in storm channels, which allows water to flow downstream, but not upstream. For reasons not in evidence, that valve was omitted from the initial construction plans and this omission was not caught by the City’s building inspector. The

project plan submitted to the City did not indicate the elevation of the site or disclose that it lay below the elevation of the nearest protective manhole cover.

As built, plumbing fixtures in the dentists' suite were about 2.5 feet lower in elevation than the nearest manhole — an accident waiting to happen. The City's sewer main became partially blocked by roots, and sewage backed up into the dental offices. Helpful evidence for the City included that there had been no earlier problems with this sewer main, and the City had serviced it just two months before the spill.

The dentists sued for inverse and nuisance. Their insurers paid out the policy limit of \$1 million and then the City's risk pool acquired that insurer's claim against the City in a partial settlement. Liability for inverse was determined on the property owners' motion for determination of legal issues under Code of Civil Procedure 1260.040. [Such a pretrial motion is now limited to eminent domain, and no longer available in inverse condemnation. (*Weiss v. People ex rel. Department of Transportation* (2020) 9 Cal.5th 840, 852 (*Weiss*).)] The trial court found the City liable for inverse, set a jury trial on inverse damages and on the remaining nuisance claim. It found no evidence of a deliberately deficient maintenance plan and there was no challenge to the design and construction of the sewer main.

The City petitioned for an appellate writ to overturn the trial court's inverse liability determination. The Court of Appeal allowed briefing and argument of the writ, but the affirmed liability ruling, citing *California State Auto Ass'n Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 (CSAA); disapproved by *Oroville, supra*, 7 Cal.5th at p. 1109, fn. 3. The City and its risk pool obtained Supreme Court review.

III. A Brief Overview of Inverse Condemnation

The starting point for understanding the law of inverse condemnation is the just compensation clause of the federal and state constitutions. The 5th Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." In California, inverse condemnation is governed by article I, section 19, subdivision (a) of the California Constitution: "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

The law of inverse condemnation spans two major areas — physical takings, when private property is taken or damaged by a public project, and regulatory takings, which deprive the property owner's use of their property. "If a regulation goes too far, it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) This

paper focuses on the new standard of causation the California Supreme Court articulated in *Oroville* for physical takings cases.

IV. Elements of Inverse Liability

Plaintiffs must prove four elements to establish liability for inverse condemnation in physical takings cases:

- The plaintiff has an interest in real or personal property;
- The defendant agency substantially participated in the planning, approval, construction, or operation of a public project;
- The plaintiff's property was damaged; and
- The public project, act, or omission was a substantial cause of the plaintiff's damage.

(CSAA, *supra*, at p. 480, disapproved on other grounds by *Oroville*, *supra*, 7 Cal.5th at p. 1109, fn. 3.)

Additionally, in cases involving drainage and flooding, a plaintiff must also prove the upstream property owner (typically the public entity) acted unreasonably and that the downstream property owners (typically the plaintiff) acted reasonably. (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1268, 1272–1280 (*Redding*); *Locklin v. City of Lafayette* (1994) 7 Cal. 4th 327, 361 (*Locklin*)). A property owner has the burden to prove a public entity has, in fact, taken or damaged his or her property and that a substantial causal connection exists between the public improvement and the damage. (*Dina v. People ex rel. Dep't of Transportation* (2007) 151 Cal.App.4th 1029, 1048–1049, disapproved on other grounds by *Weiss*, *supra*, 9 Cal.5th at p. 859, fn. 5.)

As *Oroville* focuses on causation, we start with a brief review of the development of inverse condemnation law on causation. Although *Oroville* disapproved CSAA, the CSAA case demonstrates the typical factual scenario present in sewer overflow cases and helpfully reviews the historical development of causation analysis in inverse condemnation. (CSAA, *supra*, 138 Cal.App.4th at pp. 476–478.) *Oroville* corrected its muddled causation analysis.

V. Pre-Oroville Cases

Inverse condemnation is largely derived from eminent domain principles, which are heavily statutory in origin and application. The California Eminent Domain Law was reorganized in 1976 and is found at Code of Civil Procedure sections 1230.010 through 1273.050. Inverse condemnation, on the other hand, is governed by the ordinary rules of civil procedure, with substantive rules developed by case law.

Certain aspects of eminent domain law and procedure are codified in the Code of Civil Procedure. These provisions—among them section 1260.040 — make up the Eminent Domain Law. (§ 1230.010.) By contrast, the Legislature generally has left inverse condemnation law “ ‘for determination by judicial development.’ ” (*Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 530, 46 Cal.Rptr.3d 742, 139 P.3d 119 (*Regency Outdoor Advertising*)). And the special procedures of the Eminent Domain Law do not apply to inverse condemnation actions.

(*Weiss, supra*, 9 Cal.5th at p. 852).

A. Albers’ Causation Standard as Refined by Belair

Albers v. County of Los Angeles (1965) 62 Cal.2d 250, 263–264 first articulated the causation standard in inverse condemnation as:

A property owner may recover just compensation 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.

(*CSAA, supra*, 138 Cal.App.4th at p. 479, citing *Albers, supra*, 62 Cal.2d at pp. 263–264.) That standard is distinct from that for tort liability and the rule remains that “damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered.” (*Id.* at p. 479, citing *Barham v. Southern California Edison Co.* (1999) 74 Cal.App.4th 744.)

Albers’ causation standard — “damage being proximately caused by the public improvement as deliberately designed and constructed” — proved problematic in combining the tort concept of proximate cause while eliminating foreseeability as an element of an inverse claim. Thus, in *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550 (*Belair*), discussed more fully below, the California Supreme Court adopted the recommendation of Professor Van Alstyne in his seminal article *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 435–438. This test eschewed proximate cause language, and re-defined the inverse causation standard as “a

substantial' cause and effect relationship [which] exclud[es] the probability that other forces **alone** produced the injury." (*Belair, supra*, 47 Cal.3d at pp. 558–559, emphasis added.)

Belair was a flood-control case and recognizes that forces other than government conduct — like heavy rainfall — frequently contribute to damage in such cases. Accordingly, the California Supreme Court revised the necessary showing of a causal connection between a public flood control improvement and the plaintiff's damages as:

Where independently generated forces not induced by the public flood control improvement — such as a rainstorm — contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, i.e., where the injury occurred in substantial part because the **improvement failed to function as it was intended**. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity. In conventional terminology, such an extraordinary storm would constitute an intervening cause which supersedes the public improvement in the chain of causation.

(*Belair, supra*, 47 Cal.3d at pp. 559–560, emphasis added.)

B. Proper Analytical Focus Is the Cause of the Damage

The Court of Appeal in *Oroville* erred in part because it focused its analysis of the sewer-backup claim there on the cause of the sewer line blockage, rather than of the damage to the plaintiffs' property. In *CSAA*, the parties argued extensively about the import of the evidence regarding the cause of the sewer blockage there. (*CSAA, supra*, 138 Cal.App.4th at pp. 481–483.) However, "[h]ow or why the blockage occurred is irrelevant." (*Id.* at p. 483.) The relevant causation inquiry was whether the blockage in the City's sewer main caused the sewage to back up into the plaintiff's home. (*Ibid.*)

But our Constitution does not require that [a plaintiff show the how and why of a blockage]. It only requires proof of a substantial cause of the damage, indeed as was said by our Supreme Court in *Belair*, "a substantial cause-and-effect relationship which excludes the probability that other forces **alone** produced the injury.'" (*Belair, supra*, 47 Cal.3d at p. 559.) In [*CSAA*], there was a substantial cause and effect relationship between factors entirely within the City's control

(*CSAA, supra*, 138 Cal.App.4th at p. 484, emphasis by *CSAA* court, internal quotations omitted.)

CSAA found Palo Alto liable because it could not show that other forces alone damaged the plaintiff's home. CSAA concluded the homeowner "had the duty to demonstrate the actual cause of the damage to him," and [h]e did that." (CSAA, *supra*, 138 Cal.App.4th at p. 484.) Indeed, CSAA found:

CSAA did everything in its power to address the McKenna's plumbing issue, even going so far as to replace the entire lateral pipe from McKenna's home to the City's sewer main, including the portion owned and operated by the City. There was nothing more CSAA could do to protect the homeowners from sewage backup. CSAA paid the costs to repair the portion of the lateral that was under the control of the homeowner, and did not claim that such costs were attributable to the City. CSAA should not also be required to pay the costs of damages as a result of a blockage in the City main over which CSAA had no control.

(*Ibid.*)

The lower courts in *Oroville* erred in that they did precisely what CSAA prohibited — they focused on the cause of blockage in the City's sewer main, rather than the causes of the plaintiff dentists' damages. The Court of Appeal based its ruling on whether the dentists' failure to install a legally required backwater valve caused the blockage. However, it failed to evaluate whether the failure to install that valve caused the damage to the dentists' property: "In our case, the property owner's failure to install a backup valve did not cause blockage in the City's sewer main." (*City of Oroville v. Superior Court*, 2017 WL 2554447 (3rd DCA, filed June 13, 2017) at p. *7 (*Oroville v. Superior Court*)). However, the cause of the blockage is neither the test nor the proper inquiry — rather, the cause of a plaintiff's damage is.

A blockage in a sewer main does not alone trigger inverse condemnation liability. Resulting damage to property is required and, had the *Oroville* plaintiffs installed the backwater valve the Uniform Plumbing Code required, they would have experienced no damage — instead, the backup would have flowed upstream in the City's sewer main to the nearest protective manhole and flowed into a city street. As the trial court found in *Oroville*, the City's evidence "tend[ed] to show that the plaintiffs violated the City Code in failing to install an appropriate and required backflow valve, **which probably would have prevented the sewage back up that occurred.**" (*Oroville v. Superior Court, supra*, 2020 WL 2554447 at p. *3, emphasis added.)

This finding distinguishes *Oroville* from *CSAA*. The missing backwater valve is a logical and probable "other force" which alone could have and did produce the injury.

The trial court's finding that a properly installed and maintained backwater valve "probably would have prevented the sewage backup that occurred" precludes a finding the blocked sewer main's relationship to plaintiffs' injury was "a substantial" cause-and-effect relationship which excludes the probability that other forces alone produced the injury." ((*Oroville v. Superior Court, supra*, 2020 WL 2554447 at p. *3.) The trial court's finding compelled the opposite conclusion.

VI. The Reasonableness Standard in Flooding and Drainage Cases

A. *Belair's* Reasonableness Rule

In the development of inverse condemnation law, a reasonableness rule has developed to protect public entities from disabling liability that might discourage needed flood control projects. *Belair* first articulated the rule, and it has steadily evolved in both flood control and water damage cases.

Belair's "failed to function as intended" test developed in flood control cases. While CSAA cited that standard as the basis for its causation analysis, it did not expressly employ *Belair's* accompanying reasonableness test. CSAA did discuss the actions of the plaintiffs' insurer and concluded it did everything in its power to address a recurrent plumbing issue and there was "nothing more CSAA [the homeowners' insurer] could do to protect the homeowners from sewage backup." CSAA, *supra*, 138 Cal.App.4th at p. 484.) However, by not expressly referencing *Belair's* reasonableness analysis, CSAA caused confusion for trial courts. Some read it as a rule of strict liability — if a sewer spill follows a main blockage, the agency bears liability, without respect to whether the agency had taken every reasonable step to avoid spills and whether the property owner had behaved reasonably.

Belair addressed whether an inverse plaintiff could recover damages when a flood control levee failed to retain waters within its design capacity. The Supreme Court concluded an unintended breach of a flood control improvement, plaintiffs were not entitled to recover absent proof the flood control agency had acted unreasonably. (*Belair, supra*, 47 Cal.3d at p. 554.) In crafting this reasonableness test, the California Supreme Court sought to harmonize inverse condemnation causation rules with common law rules governing upstream and downstream property owners in managing water. *Belair* established a reasonableness rule applicable when a flood control improvement failed to function within its design capacity. (*Belair, supra*, 47 Cal.3d at p. 562.) *Belair* held:

when 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 the defendant public entities.

(*Id.*, at p. 567.) Thus, flooding liability required a plaintiff to show both that the flood control project had failed to contain a flood within its design limits and that the defendant agency had acted unreasonably.

In articulating its test, *Belair* rejected the notion that absolute liability results by merely establishing a levee failed to contain a flood within its design capacity and that such a failure constituted a substantial concurring cause of plaintiff's damage. Instead, a plaintiff must also show his damage resulted from an unreasonable act or omission attributable to the defendant. (*Belair, supra*, 47 Cal.3d at p. 562.) "The reasonableness of the public agency's conduct must be determined on the facts of each individual case, taking into consideration the public benefit and the private damages in each instance." (*Id.* at p. 566 (citing *People v. Ramirez* (1966) 64 Cal.2d 396, 409–410.) Inverse liability ultimately rests on the idea that a private individual should not be required to bear a disproportionate share of the costs of a public improvement. (*Id.*, citing *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 (*Holtz*).

B. Locklin's Refined Reasonableness Analysis

The reasonableness rule was later expanded in *Locklin, supra*, 7 Cal. 4th 327. *Locklin's* reasonableness analysis derives from *Keys v. Romley* (1966) 64 Cal.2d 396, 409. There, the Supreme Court articulated rules governing the relationship between upstream and downstream property owners with respect to water management. Abandoning an older, common law, "common enemy rule" which allowed any landowner to fend off flooding by any means, the Court wrote: "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." (*Ibid.*)

It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.

(*Sheffet v. City of Los Angeles* (1970) 3 Cal. App. 3d 720, 727–28.)

The *Keys* analysis examines the reasonableness of the parties' conduct as a separate element of the inverse liability analysis. While the downstream owner does not

necessarily have to take affirmative steps to alter the flow of water, he or she must act reasonably:

The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter.

(*Locklin, supra*, 7 Cal.4th at p. 359.)

Reasonable conduct may or may not require the downstream owner to act to protect his property from inundation, depending upon the circumstances. The social utility of the upstream owner's conduct in altering (or failing to alter) natural flows must be weighed against the burden imposed on the downstream owner. More often than not, the downstream owner's unreasonable conduct will consist, not of his failure to take steps to protect his property, but of affirmative conduct increasing the danger to that property. However, the law remains that the "downstream owner must take reasonable measures to protect his property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so." (*Locklin, supra*, 7 Cal.4th at p. 338.) In *Keys*, for example, the plaintiff removed a dirt wall from his property, allowing his land to be flooded. The Court required this act to be weighed against the defendant's acts to determine reasonableness. (*Keys, supra*, 64 Cal.2d at pp. 409–410.)

This rule of reasonableness has been subsequently applied to flooding, storm drainage, and other water damage cases. *Locklin* noted the breadth of the application of the reasonableness rule, extending it to the discharge of surface waters, whether onto adjoining private land or into a natural water course. (7 Cal.4th at p. 357.) It identified the factors to be considered in evaluating the reasonableness of parties to an inverse condemnation claim of water damage:

- (1) The overall public purpose being served by the public project;
- (2) The degree to which the loss to other property is offset by reciprocal benefits;
- (3) The availability to the public entity of feasible alternatives with lower risks;
- (4) The severity of the damage relative to risk-bearing capabilities;
- (5) The extent to which the type of damage sustained is generally considered to be a normal risk of land ownership; and
- (6) The degree to which similar damage is distributed among the other beneficiaries of the project or is peculiar to the individual property owner.

(*Id.* at pp. 368–369.) A plaintiff property owner must also prove “that the efforts of the public entity to prevent downstream damage were not reasonable in light of the potential for damage posed by the entity’s conduct, the cost to the public entity of reasonable measures to avoid downstream damage, and the availability of and cost to the downstream owner of means of protecting that property from damage. (*Id.* at p. 369.)

These *Locklin* factors now govern flooding and other water damage cases. They require a detailed factual analysis, and, as a result, such cases are often difficult to resolve before trial.

The reasonableness test and *Locklin*’s factors have since been applied “to all cases involving unintentional water runoff, whether they involved facilities designed to keep water within its natural course or designed to divert water safely away from a potentially dangerous natural flow.” (*Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 439.) *Bunch* applied the reasonableness test broadly, holding that *Belair* and *Locklin* should be likewise. (*Id.* at p. 448.)

More recently, *Biron v. City of Redding* (2014) 225 Cal.App.4th 1264 applied the reasonableness test and *Locklin* factors to storm water intrusions caused by a City’s storm drain system, which did not discharge surface waters into a natural watercourse, and to a public project, which was not a project to protect lands historically subject to flooding. (*Id.* at pp. 1272, 1276.) *Biron* provides a good discussion of the evidence and analytical inquiry required for avoiding inverse liability.

Applying *Locklin*’s analysis in sewer overflow situations, if the upper owner (usually the public entity) acts reasonably and the lower owner (usually a plaintiff property owner) has not taken reasonable steps to protect her property, the conclusion should be that plaintiff must accept the risk of damage. On *Oroville*’s facts, this meant the plaintiff dentists bore the risk created by their and their predecessors in title’s failures to install and maintain a backwater valve required by the Uniform Plumbing Code. That risk, arising from a Code violation, should not be socialized through sewer fees burdening all the public or by the City’s taxpayers or general fund. The damage in this situation could and should have been most easily avoided at a very low cost by plaintiffs themselves and their building contractors, who were in a position to manage the risk and prevent their injury. However, rather than expressly expand the *Locklin* analysis to specifically apply to sewer claims, *Oroville* focused on the substantial causation rule and the inherent risks of a public project.

VII. Oroville's Holdings

Oroville is the first California Supreme Court decision involving inverse condemnation liability since *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432. And it ends a line of cases beginning with *Albers* that could be read to impose a strict liability standard in inverse.

At the Supreme Court, the City and its risk pool offered the Court a range of arguments to reverse the dentists' lower court victories, including:

- Expanding the application of the multi-factor rule of reason of *Locklin* derived from flooding cases;
- Imposing on the plaintiff a duty to mitigate damages, not just as a measure of damages, but as an element of its duty to prove the design, construction and maintenance of a public work was a "substantial cause" of injury;
- Accept as a reasonable element of the City's design and construction of its sewer system, its assumption that property owners would comply with the Uniform Plumbing Code by installing and maintaining back water valves to protect properties downhill from the nearest protective manhole.

The Court's opinion did not embrace the first idea, but it accepted the other two, restating them as an update to the earlier understandings of inverse condemnation's "substantial causation" inquiry.

A. *Locklin's* Factors Are Limited to Flooding Cases

Oroville repeatedly emphasizes that flood control cases provide a distinct line of reasoning not to be extended to inverse condemnation cases generally. Such cases involve the great social value of flood control projects, the impossibility of designing and constructing such projects to prevent any damage at all, and the need to give government incentive to design them well to avoid needless damage. (E.g., *Belair, supra*, 47 Cal.3d at p. 562.) Justice Cuéllar's opinion for a unanimous court references "the distinctive realm of flood control improvements" (*Oroville, supra*, 7 Cal.5th at p. 1103) and "the unique problems of flood control litigation — arising in a distinctive context that bears only a limited relationship to our analysis of public improvements in other contexts." (*Id.* at pp. 1108–1109.) Those cases developed a "failed to function as intended" test to assign liability to a flood control agency when a project fails to contain the storm for which it is designed, but not when it fails to contain larger events. (*Ibid.*, citing *Belair, supra*, 47 Cal.3d at pp. 555–557.)

That test is worded in a confusingly similar way to the test for most inverse claims that liability can arise only when a project **does** “function as intended” — i.e., that damage arises from something inherent in the deliberate design, construction and plan of maintenance of a public improvement. *Oroville* refused to extend the flooding standards to other contexts. (7 Cal.5th at pp. 1108–1109.) It also disapproved CSAA, on which the lower courts in *Oroville* had relied to rule for the dentists, specifically due to its uncritical importation of the “failed to function as intended” test from flooding cases into the sewer overflow context. (*Oroville, supra*, 7 Cal.5th at p. 1109, fn. 3.)

This can work to the advantage of non-flood control defendants in inverse condemnation cases because the seven-factor *Locklin* test, built around a notion of relative reasonableness, does not lend itself to resolution other than by trial. The many sewer spill, tree root intrusion, and other routine claims arising from government property are better addressed by a standard which can, in appropriate cases, be resolved on the pleadings or motions for summary judgment or summary adjudication.

B. Oroville’s Restated “Substantial Cause” Test

While not expressly applying the *Locklin* factors as a method of determining liability, *Oroville* instead adapted the City’s and its risk pool’s other arguments into a restatement of the elements of an inverse condemnation claim, accounting for the reasonableness of a plaintiff’s behavior. The essential judicial task in determining causation in an inverse case is to determine “whether the inherent risks associated with the [public project] as deliberately designed, constructed, or maintained — were the substantial cause of the damage to the private property.” (*Oroville, supra*, 7 Cal.5th at p. 1098.)

To succeed on an inverse condemnation action, a plaintiff must ordinarily show — assuming the public entity made reasonable assumptions about the public improvement in question — that the damage to private property was **substantially caused by inherent risks** associated with the design, construction, or maintenance of the public improvement.

(*Ibid.*, emphasis added.) The Court rejected the notion that liability attaches “whenever a public improvement is a concurrent cause of damage to private property, regardless of whether private property owners acted to defeat the deliberate design or construction of the improvement.” (*Id* at p. 1109.) “A causal connection between the public improvement and the property damage alone is insufficient to sustain a finding of inverse condemnation liability.” (*Ibid.*)

Much of *Oroville* is devoted to elaborating on the emphasized terms — “substantial causation” and “inherent risk.” The “inherent risk” concept requires a plaintiff’s harm be of a type that necessarily follows from the conscious design, construction or plan of maintenance of a public improvement. Since *Albers*, foreseeability has not applied in inverse condemnation, as it does in tort, with exceptions for cases involving government response to an emergency (*Oroville, supra*, 7 Cal.5th at p.1104, fn. 2., citing *Holtz, supra*, 3 Cal.3d at pp. 304–305) and “the unique context of water law.” (*Ibid.*, citing *Bunch, supra* 15 Cal.4th at p. 441.) To determine that harm flows from an “inherent risk” of a defendant’s public improvement, a court asks, “did inherent dangers in the project as designed, constructed or maintained materialize and cause the harm?” (*Oroville, supra*, 7 Cal.5th at p. 1106.)

The design of public improvements is presumed to be reasonable, but a defendant agency bears the risk of design decisions to accept risks to private property and of a “fix it when it breaks” policy of non-maintenance. (*Oroville, supra*, 7 Cal.5th at p. 1107.) Also, part of the reasonableness inquiry is the notion that public entities can expect that property owners will follow the rules. *Oroville* specifically noted “the City did not act unreasonably in expecting private property owners to comply with the law.” (*Id.* at p. 1111.)

As to the “substantial causation” requirement for an inverse claim, Justice Cuéllar writes: “Liability depends on whether some element of physical, but-for causation is present to link the public improvement and the damage.” (*Oroville, supra*, 7 Cal.5th at p. 1108.) He cites one of a series of law review articles the late Professor Arvo Van Alstyne wrote in the late 1960s in the wake of *Albers*, at the request of the Law Revision Commission, to recommend a comprehensive structure for inverse condemnation law. (*Ibid.*) Those articles remain a valuable resource for inverse condemnation litigation two generations later. These phrases define the “substantial causation” inquiry as damage which is:

- A “necessary or probable result” of the infrastructure’s design, construction and plan of maintenance;
- the “immediate, direct, and necessary effect” of those choices; and
- “predominantly produced by the improvement” or an “inescapable or unavoidable consequence of the public improvement as planned and constructed.”

(*Ibid.*)

The City and its risk pool prevailed under these standards because the plaintiffs' failure to comply with the backwater valve requirement of the Uniform Plumbing Code and the City's reasonable design assumption of such compliance together prevented the plaintiffs from establishing the sewer backup was "substantially caused" by the deliberate design, construction and plan of maintenance of the sewer system. (*Oroville, supra*, 7 Cal.5th at p. 1108.)

VIII. Other Arguments Made in the California Supreme Court

The City and its risk pool argued alternative theories in *Oroville*, encouraging the developments in inverse condemnation law to limit governmental liability. The Court did not accept many of them, but some remain viable theories for further litigation.

A. Applying the *Locklin* Factors to Sewer Cases

Belair explains that inverse 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. (*Id.*, citing *Holtz, supra*, 3 Cal.3d at p. 303.) As *Biron* further explained, "[i]n considering inverse condemnation liability, courts must balance the interests of property owners who should not be required to contribute more than their fair share to the public undertaking, with the 'possibility that imposing open-ended liability on public entities charged with creating and maintaining flood control improvements will discourage the development of needed public works.'" (*Biron, supra*, 225 Cal.App.4th at p. 1276.)

The reasonableness standard which has steadily evolved from *Belair* to *Biron*, could be extended to the sewer context, which would allow for an additional examination of the conduct of the parties in each case. In arguing the *Locklin* factors, one could argue that a plaintiff could easily have installed and maintained the statutorily required backwater valve, avoiding the not only risks, but the damage entirely. Plaintiffs who are legally obligated to do so but never did, should not be allowed to recover. Indeed, *Biron* concluded the plaintiffs there could have taken steps to mitigate the risk of flooding, i.e., purchasing flood insurance and installing floodgates. (*Biron, supra*, 225 Cal.App.4th at p. 1278.)

Second, the installation of a backwater valve is required by law. [Note: this only applies to new construction or to some other condition or construction that would trigger the installation of the backwater valve. Broad, retroactive application of the Plumbing Code's backwater valve requirements is not required.] Installing and maintaining the backwater valve is a legal and normal obligation of land ownership. Violating the law exposes plaintiffs to normal risks of do so (i.e., code enforcement). Plaintiffs and their

licensed contractors were legally responsible for determining that a backwater valve was needed and for installing and maintaining it, and only plaintiffs and their contracting representatives failed to do so.

Third, the argument could be made that the public entity had feasible alternatives with lower risks than requiring adjoining landowners to comply with Building and Plumbing Code requirements, so that adjoining properties interface with City's gravity-flow sewer system as designed and constructed. If true, you may be able to argue the plaintiff never challenged the design or construction of City's sewer main — nor could they — because there is nothing wrong with it.

The key to the expansion of the *Locklin* argument is that, when analyzing a case with respect to the applicable *Locklin* factors, you must be able to show that the public entity acted reasonably towards plaintiffs in operating and maintaining its sewer system at all times.

B. Mitigation as an Element of a Plaintiff's Case in Chief

Another potential argument for future litigation is that mitigation of damages by the plaintiff is an element of proof in the liability phase. Since the 1960s the law of inverse condemnation has required a plaintiff to mitigate his or her damages, absolving the defendant agency of liability for damages the plaintiff needlessly allowed. However, modern practice has tended to treat the issue of mitigation of damages as merely a justification for a plaintiff to recover the cost of reasonable efforts or as a method to reduce the dollar amount of an adverse damages award. *Oroville* did not restate the rule requiring a plaintiff to mitigate damages to have a claim at all, but did not reject it either.

Failure to install and maintain a legally required backwater valve on a claimant's real property acts as the substantial cause of any damage claims brought by a property owner, thereby defeating any inverse condemnation claim. A claimant's failure to prevent and mitigate damages by installing and maintaining a backwater valve should be an absolute affirmative defense to liability for an inverse claim, since the existence of damage itself is a specific element of such a claim.

Typically, "[t]he doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of ... a breach of contract ... has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.'" (*Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691.) Under the doctrine, "[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion." (*Ibid.*) However, "[t]he duty to mitigate damages does not

require an injured party to do what is unreasonable or impracticable.” (*Ibid.*; *Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.)

The doctrine of mitigation of damages has application in the realm of inverse condemnation, but its use has been recently arisen only as to offsetting damage that has already occurred. As commonly employed in inverse cases, mitigation of damages typically arises through the efforts of property owners to decrease the damage to property after it has already occurred. The general rule is that an owner whose property is being taken or damaged by a public entity is under a duty to take all reasonable steps available to minimize his loss. (*Albers, supra*, 62 Cal.2d at p. 269.)

To date, the development of the mitigation of damages doctrine has been limited to whether a property owner’s reasonable costs for good faith mitigation efforts expended to minimize the actual damage are compensable if a governmental entity is found liable. (*CUNA Mutual Life Insurance Co. v. Los Angeles County Metropolitan Transportation District* (2003) 108 Cal.App.4th 382, 393 (citing *Albers, supra*, 62 Cal.2d at p. 272.) As articulated in *Albers*, the rule that good faith and reasonable mitigation costs are compensable best serves public interest because “the owner ... is ordinarily in the best position to learn of and guard against danger to his property” and is thereby encouraged to attempt to minimize the loss inflicted on him by the condemnation, “rather than to sit idly by and watch otherwise avoidable damage accumulate.” (*Albers, supra*, 62 Cal.2d at p. 272.)

However, when the means to prevent any damage is wholly within the control of the property owner, and he fails to employ it, mitigation of damages should be a complete defense to liability. In this situation, where damage itself is a necessary element of the inverse condemnation claim and where the property owner is in the position to completely prevent any damage, courts should recognize the property owner’s failure to mitigate damages the legal cause of his injury. In this circumstance, it should not be relegated to merely an argument used to reduce recoverable damages. *Albers* and other cases early in the development of inverse condemnation law support the point.

IX. Oroville’s Implications for Risk Management

Oroville creates new opportunities for California’s governments to manage the risk of inverse condemnation liability.

First, just as the Uniform Plumbing Code requires owners of properly lying lower than the nearest protective manhole to install and maintain backwater valves, a host of other safety and design standards appear in the uniform codes and other local, state and federal law. Standards exist for the design of potable water systems to prevent backflow

of water from private systems into public mains, to prevent cross-connection of potable and non-potable supplies, to manage the risk of water hammer which can damage pipes, etc. Elaborate standards exist for the design, construction, and maintenance of electrical system to prevent similar harms — solar systems must be installed so as not to energize a public utility's lines during a power outage, for example. Detailed fire safety standards appear in both building and fire codes. All of these are now a basis to defend claims of public liability — if a plaintiff failed to comply with one or more of these property maintenance standards in a way that allowed, or worsened, his or her damage, *Oroville* suggests a defense.

Further, agencies can establish new safety standards using their regulatory and police powers. If there are recurring areas of municipal liability, your client might consider standards to shift maintenance responsibility and risk management to adjacent property owners or potential claimants. This might include sidewalk trip and falls (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320); fire safety requirements, such as landscape irrigation and weed abatement (*Clary v. City of Crescent City* (2017) 11 Cal.App.5th 274), management of drainage channels (*Contra Costa County v. Pinole Point Properties, LLC* (2015) 235 Cal.App.4th 914); or driveway design standards to prevent poor sightlines or other risks of traffic accidents where private roads intersect public streets. (*Laabs v. City of Victorville* (2016) 163 Cal.App.4th 1242.)

Second, when defending inverse condemnation cases, consider developing an argument — through discovery or otherwise — that the plaintiff failed to mitigate damages or otherwise to prevent or contain damage to his or her property. While this has long been an aspect of inverse condemnation case law, *Oroville* newly revitalizes it as a defense to liability and not just a means for plaintiffs to recover costs they incur to mitigate damages.

Third, the *Locklin* factors remain essential to defense of flooding cases, but likely cannot currently be extended to other settings — like the coming deluge of inverse cases arising from recent catastrophic wildfires.

Fourth, defense of an inverse condemnation claim continues to require the defendant agency to prove it acted reasonably in designing and constructing its public works and that it has a reasonable plan of maintenance — something beyond “fix it when it breaks.” This is both a substantive duty to act reasonably, and a record-keeping challenge to prove — sometimes decades later — that it did so. Records useful to argue design immunity are relevant. (E.g., *Grenier v. Irwindale* (1997) 57 Cal.App.4th 931.) This amounts to documenting that a public work was actually constructed consistently with a

plan or design, that the plan or design was reasonable, and that any subsequent alternation or maintenance did not defeat that plan or design. In the inverse condemnation context, it will be also be useful to demonstrate the reasonableness of that design, as by showing some or all of these:

- it was drawn by a qualified professional,
- reflects industry or national standards, and
- alternative designs were rejected for prudent reasons, such as:
 - having risks of their own,
 - being needlessly costly, or
 - unlikely to achieve greater protection of private property.

Fifth, when defending inverse condemnation cases, it is worth re-reading Professor Van Alstyne’s articles from the 1970s. Dry, dense, and challenging though they are, they are persuasive authority routinely relied upon by appellate courts, and they draw an analytical roadmap through a great many of the issues you may encounter.

X. Conclusion

Oroville is a welcome turning point in inverse condemnation law. After a generation of case law ever expanding government liability, it represents an understanding that there is a counter-balancing principle — that too much liability, much less the strict liability the dentists argued for — will discourage government from providing needed services and facilities. *Oroville* suggests new strategies to manage risk and to defend litigation. It is worthy of celebration and a careful reading with each new inverse case that reaches your desk.