Legal Panel
Flood Liability: Trends and Standards

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"I might not understand what the politicians are doing, but I know who's going to pay for it."
Let's Start with Federal Liability

In 1928 "Congress enacted an immunity provision which stated that '[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.' 33 U.S.C. §702c. At issue in this case is the meaning of the words 'floods or flood waters.' The narrow question presented is whether those words encompass all the water that flows through a federal facility that was designed and is operated, at least in part, for flood control purposes."

*Central Green Co. v. United States, 531 U.S. 425 (2001)*
1. The Anderson Plaintiffs
   • Damaged by failed levees and dredged canals.
   • Levees and canals were specifically flood-control activities.
   • The Court held that “because the waters that damaged the Anderson plaintiffs property were allegedly released by negligence in flood-control activity, the Corps is immune under Section 702c.”
2. The Miss. River Gulf Outlet Plaintiffs
   • MRGO was a navigation facility that eroded and widened over time, creating wave and fetch which caused levees to fail.
   • These plaintiffs were not stymied by section 702 because this was not a “flood-control activity.”
   • But. . . .
2. The Miss. River Gulf Outlet Plaintiffs

- The discretionary-function exception to the Federal Tort Claims Act:
  - The conduct must involve an “element of judgment or choice” and
  - Protects government actions and decisions based on considerations of public policy.
- Thus, the plaintiffs were precluded from bringing a suit.
Public Agencies in California

Historically, public liability for flood was parallel to that of private players.

Based upon the "Common Enemy Doctrine"

The last 30 years of cases has been about the court eliminating or refining that exception in the context of public entities.
The Constitutional Basis

Article I, section 19 (formerly 14) provides that "private property may be taken or damaged for public use only when just compensation . . . has first been paid."
liability will result where the owner of damaged property, if uncompensated, would contribute more than his or her proper share to the public undertaking.
The Basic Rules

Belair, Locklin, & Bunch

In the case of an unintended breach of a flood control improvement in which the water was kept in a natural waterway, plaintiffs are not entitled to recover absent proof of unreasonable conduct by the defendant public entity.
When alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume and/or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage, a public entity, as a property owner, may be liable for that damage. The test is whether, under all the circumstances, the upper landowner's conduct was reasonable.
When a flood control project diverts and rechannels water through a flood control system of dikes and levees that fails in a severe rainstorm and causes flood damage, the issue is whether the system's design, construction, and maintenance were reasonable. If the public entity's conduct was unreasonable and was a substantial cause of damage, the entity is liable only for the proportionate amount of damage caused by its actions.
6 factors from *Bunch*

- Overall public purpose served by the improvement project
- Degree to which plaintiff's loss is offset by reciprocal benefit
- Availability to the public entity of feasible alternatives with lower risks
- Severity of the plaintiff's damage in relation to risk-bearing capabilities
- Extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership
- Degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff
4 Factors from \textit{Belair}

- Historic responsibility of riparian owners to protect their property from damage caused by the stream flow AND to anticipate upstream development that may increase the flow
- Whether efforts of the public entity to prevent downstream damage were not reasonable in light of the potential for damage caused by the entity's conduct
- Cost to public entity of reasonable measures to avoid downstream damage
- Availability of AND cost to the downstream owner of means of protecting that property from damage
5 Factors from Locklin

- The damage, if reasonably foreseeable, would have entitled the property owners to compensation.
- The likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote.
- Whether the property owners suffered direct physical damage to property as a result of the work deliberately planned or carried out.
- Whether the cost of such damage can better be absorbed, and with less hardship, by the taxpayers as a whole than by the individual property owners.
- Whether the owner, if uncompensated, would contribute more than his proper share of the public undertaking.
“Reasonableness” is the key. But of what? Conduct? A Plan?
And now it gets interesting: Akins, Paterno, and Arreola

The reasonableness test for inverse condemnation liability does not apply if governmental flood control works cause flooding by intentionally diverting water to upstream private property which was not historically subject to flooding, in order to protect lower lying land.

= Strict Liability!
Public entities cannot be held liable under inverse condemnation for the bad acts of the entities' employees. Rather, there must be a deliberate plan of the entity that resulted in the taking.

A State decision to not address fundamental design problems with levees accepted by the State constituted an unreasonable plan.
“it is enough to show that the entity was aware of the risk posed by its public improvements and deliberately chose a course of action – or inaction – in the face of known risk.”
So, how do you make policy decisions that avoid liability?
Let's Look At Other State’s Rules

As a general matter in the states:

• Whether or not to protect an area does not create liability.

• Selection of a level of protection is discretionary and doesn't create liability, unless:
  • A statute sets a particular standard, or
  • The project increases the naturally occurring hazard
Let's Look At Other State's Rules (cont)

• Adequacy of the design can create liability as an operational issue. The court usually looks at the "reasonableness" of the actions.
• High hazard activities, like dam construction, are often considered strict liability activities.
• The Courts have split on maintenance, some finding it to be discretionary, and others finding it to be ministerial.
"I get 20 percent off my flood insurance for having the oars installed."
“Gentlemen, it’s time we gave some serious thought to the effects of global warming.”
QUESTIONS?
Thank You

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