

## **After Me, the Flood: Liability and Damages for Water Run-off**

**By: Jeffrey A. Clayman<sup>1</sup>**

***Sic utere tuo, ut alienum non lædas—***

**So use your own property as not to injure your neighbors.**

### **I. Water Rights In General**

As a general proposition, a property owner is obliged to utilize his property in a manner that will not harm others in the use of their property.<sup>2</sup> With regard to water, if one takes no steps to alter the natural flow of water from his property, he is not liable for damage which results to an adjoining owner's property from such flow.<sup>3</sup>

### **II. Terminology**

To fully appreciate the issues of liability and damages in water run-off claims, it is useful to have an understanding of the legal terminology associated with "water rights," specifically rights involving "surface waters" (e.g., rainfall or seepage), as opposed to rights pertaining to "watercourses" (e.g., streams, rivers and lakes) and "ground" or "percolating water" (e.g., water pumped or drawn from wells).

"Surface waters" generally refers to diffused waters that have no channel but pass over the surface of the land. Courts have variously described "surface waters" as follows:

- "[T]hose casual waters which accumulate from natural sources and which have not yet evaporated, been absorbed into the earth, or found their way

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<sup>2</sup> See, e.g., *Hughes v. Anderson*, 68 Ala. 280, 1880 WL 1426, \*2 (Ala. 1880) ("So, as a rule, every one must so enjoy his own property, as not to offend his neighbor's equal right to enjoy his own unmolested.")

<sup>3</sup> *Id.*

into a stream or lake. The term does not comprehend waters impounded in artificial ponds, tanks or water mains.”<sup>4</sup>

- “Water diffused over the surface of land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs, is known as ‘surface water.’ It is thus distinguishable from water flowing in a fixed channel, so as to constitute a watercourse, or water collected in an identifiable body, such as a river or lake.”<sup>5</sup>

Perhaps the most amusing definition comes from an old West Virginia decision, which, quoting *The American & English Encyclopedia of Law*, anthropomorphically defined “surface waters” as “waters of a casual and vagrant character, which ooze through the soil, or squander themselves over the surface, following no definite course.”<sup>6</sup> This case also made the important point that, when “surface waters reach, and become part of, a natural water course, they lose their character as surface water, and come under the rules governing water courses.”<sup>7</sup>

For purposes of coverage under a standard flood insurance policy issued pursuant to the National Flood Insurance Act, a federal appellate court recently rejected an insured’s argument that “the phrase ‘surface waters’ is ambiguous as to whether it includes rainwater which ran from the elevated deck into the lobby.”<sup>8</sup> The court found that the term “surface waters” is not ambiguous because it has a “generally accepted meaning,” citing several legal treatises.<sup>9</sup>

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<sup>4</sup> *Taylor v. Conti*, 177 A.2d 670, 672 (Conn. 1962) (internal quotation marks and citations omitted).

<sup>5</sup> *Keys v. Romley*, 412 P.2d 529, 531 (Cal. 1966).

<sup>6</sup> *Neal v. Ohio River R. Co.*, 34 S.E. 914, 915 (W.Va. 1899).

<sup>7</sup> *Id.*

<sup>8</sup> *Flamingo South Beach I Condominium Ass’n, Inc. v. Selective Ins. Co. of Southeast*, 492 Fed.Appx. 16, 20 (11<sup>th</sup> Cir. 2012).

<sup>9</sup> *Id.*

Courts often speak of water rights between adjoining landowners in terms of the “upper” or “dominant” estate and “lower” or “servient” estate. The “upper” or “dominant” estate is generally defined as “an estate that benefits from an easement.”<sup>10</sup> The “lower” or “servient” estate is generally defined as “an estate burdened by an easement.”<sup>11</sup> Without defining an easement or discussing how an easement might arise, for purposes of this discussion, it is safe to say that issues typically arise when the owner of an upper estate alters or diverts surface waters onto the lower estate or when the owner of a lower estate obstructs or restricts the flow of surface water that naturally crosses his land from the upper estate.

### **III. Theories of Liability**

There are three theories of liability which are applied to surface waters: (1) the “natural flow” theory or civil law rule; (2) the “reasonable use” theory or common law rule; and the “common enemy” theory.<sup>12</sup> The applicable theory varies by jurisdiction.

- **Natural Flow Theory / Civil Law Rule:** The owner of the lower or servient estate must accept surface water from the upper or dominant estate in its natural flow, and the owner of the dominant estate may not require the owner of the servient estate to accept a greater runoff by increasing or concentrating the flow. In short, under this theory, one cannot alter the natural flow of surface waters where such action would injure the adjoining estate.<sup>13</sup>
- **Reasonable Use Theory / Common Law Rule:** Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but

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<sup>10</sup> Black’s Law Dictionary (9<sup>th</sup> ed. 2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Alburger v. Philadelphia Elec. Co.*, 535 A.2d 729, 736-37 (Pa. Commw. Ct. 1988). For a brief history of these concepts, see *Heins Implement Co. v. Mo. Highway & Transp. Comm’n*, 859 S.W.2d 681 (Mo. 1993).

<sup>13</sup> See, e.g., *Schmidt v. Eger*, 289 N.W.2d 851, 856 (Mich. Ct. App. 1980).

incurs liability when his harmful interference with the flow of surface waters is unreasonable. Reasonableness is a question of fact, to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct. Liability arises when the defendant's conduct is either (1) intentional and unreasonable; or (2) negligent, reckless, or in the course of an abnormally dangerous activity.<sup>14</sup> This is becoming the predominate theory in American jurisdictions.

- Common Enemy Theory: A landowner can protect himself from surface water by any means, without liability for the harm that he may inflict on other landowners. This is based on the principle that surface water is a “common enemy” and a property owner has an unlimited right to use his land as he pleases. Adherents of this rule believe it promotes the development and improvement of real estate.<sup>15</sup>

In 1993, the Missouri Supreme Court surveyed American jurisdictions and found:

- The following jurisdictions apply the Natural Flow Theory / Civil Law Rule: Alabama, Kansas, South Dakota, and Vermont.
- The following jurisdictions have imposed a reasonableness requirement upon the Natural Flow Theory / Civil Law Rule: California, Illinois, Idaho, and Iowa.
- The following jurisdictions apply the Reasonable Use Theory / Common Law Rule: Alaska, Connecticut, Delaware, Florida, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, Utah, West Virginia, and Wisconsin.

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<sup>14</sup> *Heins Implement Co.*, 859 S.W.2d at 689-90 (internal quotations and citations omitted).

<sup>15</sup> *Gus Machado Buick, Inc. v. Westland Skating Center, Inc.*, 523 So.2d 596, 599 (Fla. Ct. App. 3 Dist. 1987).

- The following jurisdictions apply the Common Enemy Theory: Arizona, District of Columbia, Indiana, Montana, and New York.
- The following jurisdictions have imposed a reasonableness requirement upon the Common Enemy Theory: Arkansas, Oklahoma, South Carolina, and Virginia.
- The following jurisdictions observe more than one rule:
  - Nebraska applies the Common Enemy Theory to diffuse surface water, but switches to the civil law rule once the water has reached a drain way.
  - Pennsylvania applies the Natural Flow Theory / Civil Law Rule in rural areas and the reasonable use rule where artificial uses of land exist.
  - In Texas, the Natural Flow Theory / Civil Law Rule governs the conduct of landowners whose title derives from Spain and Mexico, whereas the Common Enemy Theory applies to landowners whose title derives from the Republic or the State of Texas. The conduct of non-owners, however, is subject to the Natural Flow Theory / Civil Law Rule by statutory mandate.<sup>16</sup>

#### **IV. Actions for Damages**

The basis for an action for damages arising from surface waters is aptly summarized as follows:

Improperly draining surface water on the land of another, or obstructing its flow off the land of another, is an injury for which an action may be

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<sup>16</sup> *Heins Implement Co.*, 859 S.W.2d at 690.

maintained by a party having title to, or possession of, the property affected at the time the injury was occasioned, and without proof of actual damage. One seeking to prohibit the diversion of water, however, must show some damage or injury resulting from it. There is authority to the effect that a landowner is not entitled to damages caused by the discharge of water where he or she did not object to such discharge until after the damage was done.<sup>17</sup>

#### **a. Parties**

“As a general rule, any person having a vested interest in property injured by water may maintain an action for redress of such injury, and the right of action belongs, ordinarily, to the property owner of the property at the time of the infliction or accrual of the injury.”<sup>18</sup> As alluded to above, however, there is precedent for the proposition that one may maintain an action for damages even if he or she is not the record title holder, as long as he or she has a right to use the affected property.<sup>19</sup> There is also authority for the proposition that one need not be the record title holder to the affected land at the time the flow of water was initially diverted or obstructed, provided that damages continue to occur after the complainant takes title.<sup>20</sup>

#### **b. Accrual of Action**

An issue which may arise when litigating an action for damages caused by surface waters is when did the action for damages accrue? Does the action arise when

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<sup>17</sup> 93 C.J.S. *Waters* § 282 (2013).

<sup>18</sup> 78 Am. Jur. 2d *Waters* § 390 (2013).

<sup>19</sup> *Dravis v. Sawyer*, 254 N.W. 920 (Iowa 1934).

<sup>20</sup> *Carriger v. East Tenn. V. & G.R. Co.*, 75 Tenn. 388, 1881 WL 4360 (Tenn. 1881) (it is immaterial that owner did not own property at the time the offending road was built but purchased it later because each overflow constituted an independent wrong, the subsequent purchaser did not release the defendant from liability nor did he acquiesce or submit to the wrong). *But see, Ceramic Tile Intern., Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App. 2004) (“A subsequent purchaser cannot recover for an injury committed before his purchase absent an express provision in the deed, or as here an assignment, granting him that power.”)

a water-diverting structure is erected?<sup>21</sup> When damage is first sustained? When the landowner knew or should have known of the damage? What if the damaging conduct is continuous? When the damaging conduct abates?<sup>22</sup>

The commencement of the limitations period may also depend upon a determination as to whether the damage is permanent or temporary.<sup>23</sup>

### **c. Causes of Action**

In addition to negligence, an action for damages caused by surface waters may be in the form of a suit for trespass or nuisance.<sup>24</sup> This is significant because an action premised upon a continuing trespass or nuisance may allow the claimant to seek injunctive relief, as well as damages. The nature of the action is also significant in terms of properly instructing the jury.

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<sup>21</sup> See, e.g., *Dobbs v. Missouri Pac. R. Co.*, 416 F.Supp. 5, 8 (E.D. Okla. 1975) (“[W]here a trespass is the natural result of, or obviously consequential from, the construction of a permanent improvement, the cause of action arising from a resulting trespass accrues upon the construction of the improvement, and in an action for that trespass an aggrieved landowner must recover for all damages which he has or will thereby sustain.”)

<sup>22</sup> See, e.g., *Lyman v. Town of Sunset*, 500 So.2d 390, 391-92 (La. 1987) (“When the damage is to immovable property, time begins to run once the landowner becomes aware of the damage. However, when the damaging conduct is continuous, prescription does not begin until the tortious conduct is abated.”)

<sup>23</sup> 78 Am. Jur. 2d *Waters* § 388 (2013); *Reichert v. City of Mobile*, 776 So.2d 761, 764-65 (Ala. 2000) (“[F]or an injury by a permanent and unabatable condition the damages are estimated on the hypothesis of an indefinite continuance of the nuisance, and thus affecting the permanent value of the property. In such event, one may not recover in successive suits, but his damages are awarded in solido in one action.”) (quoting *Harris v. Town of Tarrant City*, 130 So. 83, 84 (Ala. 1930)).

<sup>24</sup> *Pleasant Hill Cemetery Ass’n v. Morefield*, \_\_ N.E.2d, 2013 WL 1456461, \*5 (Ill. App. 4 Dist. 2013) (“Damaging someone’s land by unreasonably altering the flow of surface water is a nuisance, and a nuisance is a tort.”) (internal citations omitted); *Bailey v. Annistown Road Baptist Church, Inc.*, 689 S.E.2d 62, 76 (Ga. Ct. App. 2009) (“[A] continuing trespass and a continuing nuisance are one and the same thing in a surface-water invasion case.”) (quoting *Brand v. Montega Corp.*, 209 S.E.2d 581 (Ga. 1974)); *Angeles v. Larson*, 249 S.W.3d 278, 283 (Mo. Ct. App. E.D. 2008) (“The court has clearly stated interference with the flow of surface water is to be analyzed under nuisance.”) (citing *Heins Implement Co.*, 859 S.W.2d at 689).

#### **d. Defenses**

While the plaintiff's own fault may be pleaded as a defense, a defendant must be cautious—several courts have held that it is no defense to an action for damages caused by surface waters that the plaintiff purchased his or her land with knowledge of an embankment diverting surface water to the land, or knowing that there is a possibility that his or her land may be overflowed through the negligent act of another already committed.<sup>25</sup>

A defendant's right to discharge surface water on the plaintiff's land may be raised as an affirmative defense.

The Act of God defense may be a good defense; however, a defendant must ordinarily show that the flooding was extraordinary and that plaintiff's damage would have occurred regardless of the defendant's alleged negligence. As one state's supreme court held, "In order for [defendant] prevail on the act-of-God defense, he had the burden of establishing by a preponderance of the evidence that the rainfall, runoff, and flooding (1) were unprecedented and extraordinary; (2) could not have been reasonably anticipated; (3) could not have been reasonably provided against; and (4) were the *sole* proximate cause of the damage to the plaintiffs' property."<sup>26</sup>

#### **e. Damages**

Elements of damages may include compensatory damages in the form diminution of value;<sup>27</sup> restoration and repair costs;<sup>28</sup> the value of structures, crops

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<sup>25</sup> 93 C.J.S. *Waters* § 290 (2013) (citing *Walshe v. Dwight Mfg. Co.*, 59 So. 630 (Ala. 1912); 78 Am. Jur. 2d *Waters* § 384 (2013) (citing *Capital Candy Co. v. City of Montpelier*, 249 A.2d 644, 646 (Vt. 1968) ("The mere fact that there was a possibility, or even a probability, that the plaintiff's premises could be overflowed by the defendant's neglect, does not preclude the plaintiff from using the land as it saw fit. It had the right to improve and use its leasehold, notwithstanding the possibility of overflow from the defendant's negligent draining of the land above."))

<sup>26</sup> *Lang v. Wonnenberg*, 455 N.W.2d 832, 836 (N.D. 1990) (emphasis in original).

<sup>27</sup> *Ingles Markets, Inc. v. Kempler*, 730 S.E.2d 444, 449 (Ga. Ct. App. 2012).

<sup>28</sup> *Id.*



and/or other property; and rental value.<sup>29</sup> Costs and attorneys fees may be awarded. A plaintiff may also recover punitive damages in cases of gross negligence, malice or wanton conduct.<sup>30</sup> Also, as noted above, injunctive relief is often available to restrain the offensive conduct.<sup>31</sup> An affirmative or mandatory injunction may also be ordered to compel a defendant to take some action, for instance to grade land or dig ditches.<sup>32</sup>

#### **f. Proof**

As in other actions for damages, in an action for damages caused by surface waters, the plaintiff will bear the burden of proving the essential elements of his or her claim by a preponderance of the evidence. Similarly, the defendant must offer adequate proof of his or her affirmative defenses.<sup>33</sup> As in other civil actions, evidence must be relevant to be admissible.<sup>34</sup>

### **IV. Conclusion**

One should glean from the above discussion of actions for damages resulting from surface water run-off, that a water run-off claim is incredibly fact-intensive and will vary considerably by jurisdiction, depending upon theories of liability and damages.

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<sup>29</sup> *West v. National Mines Corp.*, 336 S.E.2d 190, 197 (W.Va. 1985) (quoting 58 Am. Jur. 2d, *Nuisances* § 123 (1971)).

<sup>30</sup> *Mississippi Gulf Properties, LLC v. Eagle Mechanical, Inc.*, 98 So.3d 1097, 1109 (Miss. Ct. App. 2012).

<sup>31</sup> *Swigert v. Gillespie*, 976 N.E.2d 1176 (Ill. App. 4 Dist. 2012).

<sup>32</sup> *Romshek v. Osantowski*, 466 N.W.2d 482, 496 (Neb. 1991).

<sup>33</sup> *Bailey*, 689 S.E.2d at 68 (Evidence that owner failed to build or rebuild French drains after receiving \$40,000 in county's condemnation of a portion of her property for road widening project, or later when flooding of her property began, was relevant to contributory negligence, avoidable consequences, and mitigation of damages in action against county and church to recover for water intrusion on owner's property.)

<sup>34</sup> *Id.*