

4.1.2.3 Common Enemy Doctrine

The common enemy doctrine permits each landowner to fend off surface waters as he sees fit, which is the complete opposite of the civil law rule. Under the strict form of this theory, surface waters are regarded as a common enemy which each landowner may fight as he deems best, regardless of the harm he may cause to others. The common enemy doctrine, in its stated form, is clearly a harsh one and, therefore, was bound to be modified. In most jurisdictions, it has been made subject to a limitation that one must use his land so as not to unreasonably or unnecessarily damage the property of others.

4.1.2.4 Application of the Common Enemy Doctrine

1. Damming back water. Under the common enemy doctrine in unmodified form, there is no liability for casting surface waters on the land of an upper owner by the construction of a fill so as to form a dam. This situation is generally avoided in highway construction by the installation of adequate drainage facilities. The right to dam against surface waters has been substantially limited by various modifications of the doctrine. It has been held that the casting back or damming of waters must be reasonable and with due regard for the rights of others.
2. Augmenting natural drainage. Under the common enemy doctrine, even as modified, there seems to be little doubt that an owner of upper land, acting in the reasonable use of his property and without negligence, may augment the flow of surface water to the land below, either by increasing the volume or by changing the mode of flow.
3. Collecting and discharging water. The common enemy and civil law rules appear to be most alike in this area. A number of jurisdictions with the common enemy doctrine or modifications thereof have held that it is unlawful to collect, concentrate, and discharge surface waters on a lower owner to his damage or injury. (It should be noted that courts in States throughout the Union have had difficulty in determining the parameters or the definition of the words collection, concentration, and discharge.)

4.1.2.5 Reasonable Use Rule

The problems created by the early attempts at specific rules have led to the application, in some States, of the reasonable use rule. Under this rule, the possessor of land incurs liability only when his harmful interference with the flow of surface waters is unreasonable. One court, in applying this rule, stated it as follows:

“In effecting a reasonable use of land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which otherwise would never have gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if (a) there is a

reasonable necessity for such a drainage; (b) reasonable care be taken to avoid unnecessary injury to the land receiving the burden; and (c) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d), if where practicable it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.”

(Enderson v Kelehan, 226 Minn. 163, 32 N.W. 2d 286 (1948))

4.1.2.6 Application of the Reasonable Use Rule

Under the reasonable use rule, a possessor of land 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. The possessor of land incurs liability, however, when his harmful interference with the flow of surface waters is unreasonable. The issue of reasonableness or unreasonableness is a question of fact to be determined in each case upon consideration of all relevant circumstances. In determining the question of reasonableness under the reasonable use rule, it is proper to take into consideration 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 other relevant matters such as whether the ability of the possessor's use of his land outweighs the gravity of the harm which results to his neighbor from alteration of the flow of the surface waters.

4.1.3 Stream Water Rules

Much of the law regarding stream waters is founded on a common law maxim that states “water runs and ought to run as it is by natural law accustomed to run.” Thus, as a general rule, any interference with the flow of a natural watercourse to the damage of another will result in liability. This may involve augmentation, obstruction and detention, or diversion of a stream. However, there are qualifications.

Where natural watercourses are unquestioned in fact and in permanence and stability, there is little difficulty in application of the rule. Highways cross channels on bridges or culverts, usually with some constriction of the width of the channel and obstruction by substructure within the channel, both causing back-water upstream and acceleration of flow downstream. The changes in regime must be so small as to be tolerable by adjoining owners, or there may be liability for any damages suffered.

Surface waters from highways are often discharged into the most convenient watercourse. The right is unquestioned if those waters were naturally tributary to the watercourse and unchallenged if the watercourse has adequate capacity. However, if all or part of the surface waters have been diverted from another watershed to a small watercourse, any lower owner may complain and recover for ensuing damage.