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2021 Edition

Surface Water in Connecticut

A Guide to Resources in the Law Library

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References to online legal research databases refer to in-library use of these databases. Remote access is not available.

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Introduction

- **Surface waters**: "those casual waters which accumulate from natural sources and which have not yet evaporated, been absorbed into the earth, or found their way into a stream or lake. The term does not comprehend waters impounded in artificial ponds, tanks or water mains." Taylor v. Conti, 149 Conn. 174, 178, 177 A.2d 670 (1962).

- "'**Surface water**' is a term which has been defined or used variously. A few of the definitions embody statements which would imply that it is a term appropriate to be applied to all fresh water upon the surface of the earth, not ponded, which is not that of a watercourse. Other authorities while giving a definition which affords no logical foundation for such a broad use of the term, act upon the assumption that all non-ponded fresh water is either surface or stream water. The better and more generally stated definitions, and those which permit a consistent application productive of just results, confine surface water within more definite limits." Thompson v. New Haven Water Co., 86 Conn. 597, 603, 86 A. 585 (1913).

Section 1: Between Private Landowners

A Guide to Resources in the Law Library

SCOPE:

- Bibliographic resources relating to actions against private property owners who alter flow of surface water causing injury to owners of adjacent property.

DEFINITIONS:

- **Common enemy doctrine**: "briefly stated, is that the owner of land may repel or divert surface water from its land on to that of another." Page Motor Co. v. Baker, 182 Conn. 484, 487, 438 A.2d 739 (1980).

- **Rule of reasonable use**: "the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility." Page Motor Co. v. Baker, 182 Conn. 484, 488-489, 438 A.2d 739 (1980).

FORMS:

- 1 *Library of Connecticut Civil Complaints for Business Litigation*, Connecticut Law Tribune, 2010.
  Form 3-005 State Court Complaint – Diversion of Surface Waters

- 2 Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  Form 104.6. Injunction against interference with flow of surface water. See Figure 1.

- 1A *Am Jur Pleading & Practice Forms* Injunctions, Thomson West, 2014 (also available on Westlaw).
  § 154. Complaint, petition, or declaration - Storm water discharged onto plaintiff's land - House damaged

- 24C *Am Jur Pleading & Practice Forms* Injunctions, Thomson West, 2018 (also available on Westlaw).
  § 248. Complaint, petition, or declaration—Concentration and injurious discharge of surface water—By adjoining landowner—Negligent maintenance of inoperative drainage system
  § 269. Motion—By landowner—For temporary restraining order—To enjoin adjacent landowner from discharging water onto property

- 48 *COA 2d* 397, Cause of Action for Damage Caused by Diversion of or Change in Flow of Surface Water by Eric M. Larsson, J.D. (2011). Also available on Westlaw.
  - § 50. Sample complaint
  - § 51. Sample complaint for damages and injunctive relief due to obstruction and diversion of stream by levee

- 87 *Am Jur Trials* 423 Proof of Landowner's Unreasonable Interference with Surface Water Drainage (2003). Also available on Westlaw.
  - § 29. Complaint by lower landowner seeking relief for upper owner's acceleration and increase in volume of surface waters discharged onto lower land
  - § 30. Complaint by upper landowner seeking relief from lower landowner's obstruction of natural drainage by erection of earthen embankment

- 2 *A Practical Guide to Disputes between Adjoining Landowners—Easements*, by James H. Backman, Matthew Bender, 1989, with 2020 supplement (also available on Lexis).
  - Chapter 13. Water-Related Property Rights
    - § 13.09 Practice Aids
      - [2] Forms
        - [b] Complaint for Flooding by Diversion of Uncontrolled Surface Waters

JURY INSTRUCTIONS:

- 87 *Am Jur Trials* 423 Proof of Landowner's Unreasonable Interference with Surface Water Drainage (2003). Also available on Westlaw.
  - Model Jury Instructions
  - § 46. Rule of reasonable use
  - § 47. Liability for unreasonable alteration of surface water drainage—Augmenting natural drainage
  - § 48. Determination of "unreasonableness" of Defendant's conduct as question of fact

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

- JMS Newberry, LLC v. Kaman Aerospace Corporation, 149 Conn. App. 630, 90 A.3d 249 (2014). "The record supported the trial court's finding that the plaintiff failed to present any evidence that would establish that the defendants were maintaining an alteration that diverted surface water off their property; although the complaint attributed the increased flow of water across the plaintiff's property to the unnatural grading of the defendants' property, there was no evidence in the record that the defendants' property had been altered so as to discharge water off of their property in a different course than its natural flow, the evidence submitted by the defendants conclusively established that neither they nor their predecessor had altered the property, and

affidavits of the plaintiff's expert fell short of establishing material issues of fact concerning whether the defendants were maintaining an unnatural grade on their property or diverting surface water off of their property."

- Hurlburt v. DeRosa, 137 Conn. App. 463, 49 A.3d 249 (2012). "The court concluded that the plaintiff failed to present sufficient evidence to establish his right to enforce the drainage easement because he failed to present evidence that a natural watercourse was on the defendants' property or had ever been on the defendants' property. Our careful review of the record supports the court's determination."

- Walton v. New Hartford, 223 Conn. 155, 162, 612 A.2d 1153 (1992). "In their appeal, the Parsons claim that the trial court improperly concluded that the plaintiffs had granted to the Parsons a license, rather than an easement, to use the plaintiffs' property. We disagree."

- Ferri v. Pyramid Construction Company, 186 Conn. 682, 686, 443 A.2d 478 (1982). "In *Page Motor*, this court substituted the reasonable use doctrine for the first branch of the rule of *Tide Water Oil*. We announced that a repelling landowner would no longer enjoy immunity in dealing with surface water. Instead, we held (pp. 488-89) that, in dealing with surface water, the landowner would be 'entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility.' In increasing the possible liability of a landowner repelling surface waters, we did not address, and certainly did not diminish, the existing liability of a landowner diverting surface water under the second branch of the rule of *Tide Water Oil*."

- Berin v. Olson, 183 Conn. 337, 439 A.2d 357 (1981). "The fact that the court awarded damages does not preclude the plaintiff from receiving injunctive relief. See Taylor v. Conti, supra (award of both damages and injunctive relief); 42 Am.Jur.2d, Injunctions 40, p. 780; 5 Clark, Waters and Water Rights 458. "For over one hundred years in this state, we have recognized the general power of equity to afford relief by injunction and damages for injury caused by a nuisance created by the unreasonable conduct on one's own property of an otherwise lawful activity. [Citations omitted.]" Nair v. Thaw, 156 Conn. 445, 451-52, 242 A.2d 757 (1968) (award of money damages and injunction restraining certain activity of the defendant)."

- Page Motor Co. v. Baker, 182 Conn. 484, 488, 438 A.2d 739 (1980). "We now feel that the inflexibility of the old

rule [common enemy doctrine], as correctly reported by the trial referee, should be modified so as to allow some reasonable latitude. By way of dictum, we are now inclined to adopt what some jurisdictions have termed the reasonableness of use rule."

- Falco v. James Peter Associates, Inc., 165 Conn. 442, 446, 335 A.2d 301 (1973). "Moreover, one who maintains such an alteration in his land [causing an increase in volume of surface water which flows onto the land of others], though it was created by his predecessor in title, may, after a request to remove it, be held liable for the continuing injury."

- Taylor v. Conti, 149 Conn. 174, 177, 177 A.2d 670 (1962). "A landowner cannot use or improve his land so as to increase the volume of the surface waters which flow from it onto the land of others, nor can he discharge surface waters from his land onto the land of others in a different course from their natural flow, if by so doing he causes substantial damage."

Unreported Decisions:

- Chase v. Tusia, Superior Court, Judicial District of Windham at Putnam, No. CV04-4000354-S (May 8, 2007) (43 Conn. L. Rptr. 688). "'Surface water cases first abandoned the law of property in favor of the law of torts in *Basset v. Salisbury Mfg. Company*, 43 N.H. 569 (1862)... While under the law of property, water dripping from an overhanging eve was actionable, the law of torts, which governs surface water, requires the water to do damage before a right of action accrues.' *Street v. Woodgate Condominium Assoc.*, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV 01-096955 (January 13, 2004, Gordon, J.)."

- Agnello v. Urbano, Superior Court, Judicial District of New Haven at New Haven, No. CV00-0273689-S (Oct. 24, 2002) (2002 WL 31501032). "The court finds that the defendants' actions violated the second branch of the *Tide Water* test. The defendants improved their land and caused the water to impermissibly flow upon the plaintiffs' property."

- Gentile v. Reed, Superior Court, Judicial District of Stamford - Norwalk at Stamford, No. CV91-0115805-S (July 22, 1997) (1997 WL 435842). "'The plaintiffs rely primarily on *Falco v. James Peter Associates, Inc.*, 165 Conn. 442, 446, 335 A.2d 301 (1973), for the proposition that a successor in title can be held liable for the actions of his predecessor in title in that one who maintains such an alteration in his land, though it was

created by his predecessor in title, may, after a request to remove it, be held liable for the continuing injury.' The referee, however, distinguished this case by noting that the water diverted by the defendants' predecessors in title in Falco drains towards the workshop and house cellar and subject them 'to substantial continuing water seepage.' *Id*., 444. In this case the referee said that the filling on the subject property fell 'far short of . . . continuing harm.' Therefore, the conclusion that the defendants are not responsible for the maintenance of a nuisance is legally and logically consistent with the facts found by the referee. *Romano v. Derby, supra*. 42 Conn. App. 628."

WEST KEY NUMBERS:

- *Water Law*
  - V. Diffuse Surface Waters
    - (A) In General
      - #1160. In general
      - #1161. What are surface waters
      - #1162. Rights, duties, and liabilities in general
      - #1163. Rights to capture, own, or use surface water
      - #1164. Rule of reasonableness in general
      - #1165. Obstruction or repulsion of flow in general
      - #1166. Common enemy doctrine; right to avoid surface waters
      - #1167. Right to have natural drainage maintained
      - #1168-1173. Drainage or discharge
      - #1174. Persons liable
      - #1175-1182. Easement of drainage
      - #1183-1187. Transfer of easement or other right of drainage
      - #1188. Abandonment, forfeiture, or other loss of right or privilege of drainage
      - #1189. Pollution
      - #1190. Rain water and eaves drip
    - (B) Actions or Other Proceedings to Determine, Establish, and Protect Rights
      - #1195. In general
      - #1196. Rights of action and defenses in general
      - #1197. Economic loss as grounds
      - #1198. Nuisance
      - #1199. Preliminary injunction
      - #1200-1211. Proceedings and relief
      - #1212. Review
      - #1213. Costs and attorney fees

DIGESTS:

- West's Connecticut Digest
  - Water Law
    - V. Diffuse Surface Waters
      - A. In general
        - §§ 1160-1190
      - B. Actions or Other Proceedings to Determine, Establish, and Protect Rights

§§ 1195-1213

- Dowling's Digest: *Waters*
  § 5. Surface water

- West's ALR Digest
  Water Law
  V. Diffuse Surface Waters
  A. In general
  §§ 1161-1190
  B. Actions or Other Proceedings to Determine, Establish, and Protect Rights
  §§ 1198-1212

ENCYCLOPEDIAS:

- 1 *Am. Jur. 2d* Adjoining Landowners (2016). Also available on Westlaw.
  § 35 Water, Snow or Ice Precipitating onto Adjoining Premises

- 78 *Am. Jur. 2d* Waters (2013). Also available on Westlaw.
  III. Particular Types of Waters or Water Bodies
  D. Surface Waters
  §§ 189-190 In general
  §§ 191-199 Drainage; Interference with natural flow
  § 191 Common-enemy doctrine
  § 192 Civil law rule
  §§ 200-210 Application of general rules; circumstances affecting rights and liabilities
  §§ 211-216 Remedies and actions
  VI. Liability for Water-related Injury or Damage
  Property Damage In General
  § 395 Generally
  § 396 Overflow resulting from obstruction by debris or waste
  § 397 Overflow from wells
  § 398 Injury resulting from defect in artificial underground drain, conduit, or pipe
  § 399 Matters affecting liability; defenses
  § 400 −Act of God as causative factor

- 93 *CJS* Injunctions (2013). Also available on Westlaw.
  V. Surface water
  §§ 247-251. In general
  §§ 252-256. Rights, duties, and liabilities
  §§ 257-265. Natural flow or drainage and obstruction thereof
  §§ 266-274. Artificial drainage and obstruction thereof
  §§ 275-279. Creation and transfer of easement or right of drainage
  §§ 280-291. Actions for damages
  §§ 292-296. Injunction

- 87 *Am Jur Trials* 423, *Proof of Landowner's Unreasonable Interference with Surface Water Drainage* (2003). Also available on Westlaw.
  - I. Legal background
  - II. Rules governing interference with surface water drainage
  - III. Application of rules to particular forms of interference
  - IV. Defenses
  - V. Damages and other relief
  - VI. Elements of proof
  - VII. Model pleadings
  - VIII. Proof of upper landowner's unreasonable change in surface water drainage
  - IX. Model jury instructions

- 109 *POF 3d* 403, *Unreasonable Alteration of Surface Drainage* (2009). Also available on Westlaw.

- 48 *COA 2d* 397, *Cause of Action for Damage Caused by Diversion of or Change in Flow of Surface Water,* by Eric M. Larsson, J.D. (2011). Also available on Westlaw.

- 88 *ALR 4th* 891, Annotation, *Liability for Diversion of Surface Water By Raising Surface Level of Land*, by Martin J. McMahon, J.D. (1991). Also available on Westlaw.

- 42 *ALR* 4th 462, Annotation*, Extinguishment by Prescription of Natural Servitude For Drainage Of Surface Waters*, by Francis M. Dougherty, J.D. (1985). Also available on Westlaw.

- 93 *ALR 3d* 1193, Annotation, *Modern Status Of Rules Governing Interference With Drainage Of Surface Waters*, by Janet Fairchild, J.D. (1979). Also available on Westlaw.

TREATISES:

You can contact us or visit our catalog to determine which of our law libraries own the treatises cited.

References to online databases refer to in-library use of these databases.

- 2 Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw)
  Authors' Comments following Form 104.6

- *Connecticut Law of Torts*, 4th ed., by Douglass B. Wright et al., Atlantic Law Book Co., 2018, with 2020 supplement.
  § 18. Connecticut decisions on trespass
  See §18b.

- *Connecticut Torts: The Law and Practice*, 2d ed., by Frederic S. Ury et al., LexisNexis, 2020.
  Chap. 14 Recovery for Injury to Property

- 2 *A Practical Guide to Disputes between Adjoining Landowners—Easements*, by James H. Backman, Matthew Bender, 1989, with 2020 supplement (also available on Lexis).
  § 13.04. Neighboring landowner disputes arising from uncontrolled surface waters on private property

- *The Law of Easements and Licenses in Land* by Jon W. Bruce and James W. Ely, Jr, Thomson West, 2001, with 2020 supplement (also available on Westlaw).
  § 5:37. Special-purpose prescriptive easements

- *Law of Water Rights and Resources*, by A. Dan Tarlock, Thomson West, 2015, with 2020 supplement (also available on Westlaw).
  § 3:11. Waters subject to riparian rights
  § 3:12 —Surface waters
  § 3:13. — Diffused surface waters
  § 3:14. — — Ownership of diffused surface waters

- *Water Law in a Nutshell*, 4th ed., by David H. Getches, Thomson West, 2009.
  Chapter 7. Diffused surface waters

- *Neighbor Law*, 9th ed., by Cora Jordan and Emily Doskow, Nolo, 2017.
  Chapter 15. Water

- *Waters and Water Rights*, 3rd ed., by Robert E. Beck and Amy K. Kelley, LexisNexis, 2009.

- *Waters and Water Rights*, by Robert E. Beck, Michie, 1991.
  § 4.05(b). Diffused surface waters
  § 6.02. Categories of surface water

- *Restatement of the Law Second*, Torts, 1979, with 2021 supplement (also available on Westlaw).
  §§ 833. Interference with the flow of surface waters

LAW REVIEWS:

Public access to law review databases is available on-site at each of our law libraries.

- Patricia A. Ayars, Comments, *The Flow of Surface Water Law in Connecticut*, 14 Connecticut Law Review 601 (1982).

- B Clifford Davis, *The Law Of Diffused Surface Water In Eastern Riparian States*, 6 Connecticut Law Review 227 (1973-74).

Section 2: From Public Roads or Ways

A Guide to Resources in the Law Library

SCOPE:

- Bibliographic resources relating to actions against the State or municipalities for damage caused by drainage of surface waters

DEFINITIONS:

- "The common-law rule provides that a person cannot gather surface water on his or her own land in an artificial volume and turn it onto a neighbor's land in an increased volume to the neighbor's injury. This rule also applies to governmental agencies engaged in highway maintenance. [General Statutes of Connecticut] Section 13a-138 (a) limits the liability for such water diversion only where the party charged with maintaining the highway complies with the statute by draining the water in a manner that causes the least damage to the affected land." Hutchinson v. Town of Andover, 49 Conn. App. 781, 786, 715 A.2d 831 (1998).

- **Ministerial**: "'A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment [or discretion] upon the propriety of the act being done. (Internal quotation marks omitted.) *Blake* v. *Mason,* 82 Conn. 324, 327, 73 A. 782 (1909)'." Northrup v. Witkowski, 332 Conn. 158, 169, 210 A.3d 29 (2019).

- **Discretionary**: "In contrast, when an official has a general duty to perform a certain act, but there is no 'city charter provision, ordinance, regulation, rule, policy, or any other directive [requiring the government official to act in a] prescribed manner,' the duty is deemed discretionary. *Violano* v. *Fernandez*, supra, 280 Conn. 323." Northrup v. Witkowski, 332 Conn. 158, 169, 210 A.3d 29 (2019).

- **Ministerial vs. Discretionary Acts**: "Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts. . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature." Northrup v. Witkowski, 332 Conn. 158, 167, 210 A.3d 29 (2019).

STATUTES:

- Conn. Gen. Stat. (2021)
  Chapter 97. Municipalities: General Provisions.
  § 7-147. Regulation of obstructions in waterways

You can visit your local law library or search the most recent statutes and public acts on the Connecticut General Assembly website to confirm that you are using the most up-to-date statutes.

Chapter 98. Municipal Powers
§ 7-148 Scope of municipal powers
Chapter 238. Highway construction and maintenance
§ 13a-138. Highways may be drained into private lands
§ 13a-138a. Limitation on actions for drainage damage
Chapter 439. Department of Energy & Environmental Protection. State Policy.
§ 22a-6u. Notification requirements re discovery of contamination of soil or water. Exceptions. Content of notice. Acknowledgement of receipt. Posting of notice. Civil penalty. Forwarding of notice.
Chapter 925. Statutory Rights of Action and Defenses
§ Sec. 52-557n. Liability of political subdivision and its employees, officers and agents. Liability of members of local boards and commissions.

FORMS:

- 2 Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw).
  Form 104.6. Injunction against interference with flow of surface water. See Figure 1.

- 1A *Am Jur Pleading & Practice Forms Adjoining Landowners,* Thomson West, 2014 (also available on Westlaw).
  § 157. Overflow from municipal drains and fills on defendants' lands - House damaged

  § 159. Municipal dam on stream running through plaintiff's land – Land flooded and rendered unproductive

- 24C *Am Jur Pleading & Practice Forms* Waters*,* Thomson West, 2018 (also available on Westlaw).

  § 246. Complaint, petition, or declaration—Concentration and injurious discharge of surface water—By state agency
  § 249. — By county highway
  § 250. — By highway drainage ditch
  § 251. — By street drain

LEGISLATIVE:

Office of Legislative Research reports summarize and analyze the law in effect on the date of each report's publication. Current law may be different from what is discussed in the reports.

- *Drainage from State Highways*, Paul Frisman, Connecticut General Assembly. Office of Legislative Research, Report No. 2002-R-0609. (July 1, 2002).
  "You asked who is responsible for correcting flooding problems when the discharge of water from a state highway culvert flows onto private property in a wetlands area. You specifically asked about the responsibility, if any, of the Department of Transportation (DOT) in a particular instance."

CASES:

Once you have identified useful cases, it is important to update the cases before you rely on them. Updating case law means checking to see if the cases are still good law. You can contact your local law librarian to learn about the tools available to you to update cases.

- Northrup v. Witkowski, 332 Conn. 158, 160, 210 A.3d 29 (2019). "This certified appeal requires us to consider the continued vitality of this court's decision in *Spitzer* v. *Waterbury*, 113 Conn. 84, 88, 154 A. 157 (1931), which held that '[t]he work of constructing drains and sewers, as well as that of keeping them in repair, is ministerial, and the municipality is responsible for negligence in its performance.' The plaintiffs…brought this action against the defendants, the borough of Naugatuck (town) and several town officials, claiming, inter alia, that the defendants' negligence in maintaining and repairing the town's storm drains and drainage pipes had caused the repeated flooding of the plaintiffs' residence. The plaintiffs now appeal, upon our granting of their petition for certification, from the judgment of the Appellate Court affirming the trial court's granting of the defendant's motion for summary judgment on the ground that the negligence claims were barred because, under more recent cases refining and clarifying Spitzer, the maintenance of storm drains and drainage systems is a discretionary function subject to governmental immunity, rather than a ministerial function, the negligent performance of which can subject a municipality to liability. *Northrup* v. *Witkowski*, 175 Conn. App. 223, 250, 167 A.3d 443 (2017). We disagree with the plaintiffs' claim that the Appellate Court improperly failed to follow Spitzer because we conclude that decision must be overruled in light of modern case law governing the distinction between ministerial and discretionary duties. Accordingly, we affirm the judgment of the Appellate Court."

- Northrup v. Witkowski, 175 Conn. App. 223, 225, 167 A.3d 443 (2017). "The plaintiffs claim on appeal that the court improperly determined that (1) the defendants were entitled to governmental immunity on all counts as a matter of law because the acts or omissions of which they complained were discretionary rather than ministerial in nature, (2) the identifiable person-imminent harm exception to governmental

immunity did not apply to the flooding at issue because the plaintiffs were not subject to imminent harm, and (3) the allegations of recklessness directed against the individual defendants could not be sustained as a matter of law. We disagree with the plaintiffs and, for the reasons that follow, affirm the judgment of the trial court."

- Silberstein v. 54 Hillcrest Park Associates, LLC, 135 Conn. App. 262, 269 (2012). "On the basis of this evidence, we conclude that the defendants voluntarily undertook to construct and maintain the roads, drains and storm sewers in Hillcrest Park. The defendants therefore had a duty to maintain and repair the storm drains and sewers in the Hillcrest Park neighborhood.

II

The plaintiffs argue that the defendants' maintenance of the roads, storm drains and sewers in Hillcrest Park is a ministerial function. We disagree and conclude, under the circumstances of this case, that the defendants' maintenance of the roads, storm drains and sewers was discretionary in nature."

- Herasimovich v. Town of Wallingford, 128 Conn. App. 413, 421, 17 A.3d 502 (2011). "Specifically, the plaintiffs claim that the court improperly concluded that the parties intended the term 'surface water' to include both precipitation falling on Highland Avenue and water that naturally flows off of property adjacent to Highland Avenue. The plaintiffs argue that the parties intended the meaning of the term 'surface water' to be limited solely to precipitation falling on Highland Avenue."

- Boyne v. Town of Glastonbury, 110 Conn. App. 591, 598, 955 A.2d 645 (2008). "In the present case, even if we assume that § 13a-138a does not limit expressly a cause of action under § 13a-138(b), the most suitable limitation period is the fifteen year period provided by § 13a-138a. Section 13a-138, in general, authorizes municipalities to drain water from public highways into or through the land of another under certain circumstances. A cause of action for a violation of § 13a-138 does not change significantly by pleading circumstances that violate subsection (b) rather than circumstances that violate subsection (a)."

- Johnson v. Town of North Branford, 64 Conn. App. 643, 650, 781 A.2d 346 (2001). "Section 13a-138a serves as a limitation on actions for drainage damages brought pursuant to § 13a-138. Section 13a-138a provides in relevant part that '[n]o action shall be brought by the owner of land adjoining a public

highway ... for recovery of damage of such property ... by reason of any draining of water into or through such land by any town, city, borough or other political subdivision of the state pursuant to subsection (a) of section 13a-138, but within fifteen years next after the first occurrence of such drainage, except that if such drainage first occurred prior to October 1, 1981, no such action shall be brought after October 1, 1986.'"

- Hutchinson v. Town of Andover, 49 Conn. App. 781, 785, 715 A.2d 831 (1998). "Our Supreme Court has said that the statute 'permits drains to be built only when *necessary*, and if there is a reasonable alternative course open, that course must be taken.' (Emphasis added.) *Postemski v. Watrous*, 151 Conn. 183, 188, 195 A.2d 425 (1963). Here, there is no dispute that it is necessary for the town to divert some water onto the plaintiffs' land and the only issue is which system will cause the least damage to the land."

- Walton v. New Hartford, 223 Conn. 155, 168, 612 A.2d 1153 (1992). "The trial court concluded that 'the plaintiffs have sustained their burden of proof that the Town of New Hartford has failed to properly maintain "the enclosed catchbasin and the discharge system...."' The court then ordered that, pursuant to the easement, 'the plaintiffs are entitled to an order directing the town to periodically, as necessary, clear the catchbasin on the plaintiffs' property as well as that located on Lair Road which feeds into the easement pipes.'"

- Hillman v. Greenwich, 217 Conn. 520, 521-522, 587 A.2d 99 (1991). "The plaintiff, Howard B. Hillman, brought an action for damages and injunctive relief against the defendant, the town of Greenwich, alleging that unlawful and unreasonable drainage of surface storm water by the defendant had damaged the plaintiff's property."

- Spitzer vs. City of Waterbury, 113 Conn. 84, 154 A. 157 (1931). Overruled *to the extent it concluded that municipal duties with respect to the maintenance and repair of drains and sewers are ministerial in nature.* Northrup v. Witkowski, 332 Conn. 158, 161, 210 A.3d 29 (2019).

Unreported Decisions:

- Pyskaty v. City of Meriden, Superior Court, Judicial District of New Haven at New Haven, CV126005514S (August 3, 2015) (2015 WL 5236948) (2015 Conn. Super. LEXIS 2035). "Similar to *Great Food Corp.*, there are allegations in the present case that Meriden

failed to remove debris that clogged the detention basin and made a deliberate choice to cut trees and leave them in the vicinity of the detention basin whereby the tree logs could float into and block the egress pipe, causing the stream to flood onto the property. In addition, unlike Pluhowsky, it is unclear how the logs, branches, tree trunks, and/or debris made their way to the egress pipe in the Frary detention basin. Therefore, on the basis of the evidence submitted by the plaintiffs, there is a genuine issue of material fact as to whether Meriden participated in the creation of a nuisance by way of its positive act in cutting down trees in the Frary detention basin and leaving the cut tree trunks, logs, branches, and debris to float in the basin, block and/or clog a pipe, which resulted in the stream overflowing and flooding the property."

- DeMarco v. City of Middletown, Superior Court, Judicial District of Middlesex, No. MMXCV116006185S (April 3, 2014) (58 Conn. L. Rptr. 4) (2014 WL 1721935). "The defendant attempts to argue that the holding in *Spitzer* does not extend to the type of sewage system involved here by citing to *Rouleau v. Suffield,* Superior Court, judicial district of Hartford, Docket No. CV−06−5007179−S (January 16, 2013, Sheriden, J.) [55 Conn. L. Rptr. 372]. The factual situation in *Rouleau* involved flooding resulting from rising water levels in Stony Brook on the upstream side of a concrete structure because the culvert openings were blocked by water-borne debris. The plaintiffs alleged negligence in the design, construction and maintenance of a structure intended to span and provide passage by vehicles and pedestrians over an existing stream or watercourse. As seen from the facts of *Rouleau,* the court did not face the issue of governmental immunity in the context of the type of sewage system that is involved here in this present matter." (Footnote 2.)

  "The defendant also argues that because of one particular allegation in the plaintiff's complaint, the acts are discretionary. The defendant argues that 'the actions of the City in inspecting, fixing, and advising the plaintiffs about the sewage system were discretionary acts for which, pursuant to § 52−557n(a)(2)(B), governmental immunity applies.' In support, the defendant cites to cases that have set forth the broad principle that the exercise of duties involving inspection are generally considered discretionary acts entitled to governmental immunity. Although true, it is worth noting, however, that these cases are not in the context of sewer systems, and the principle to which the defendant alludes is a principle of

general applicability and does not necessarily control the issue at hand. Furthermore, given that the entirety of the plaintiffs' complaint is based on the construction, repair, and maintenance of the sewer system, the plaintiff's sole allegation pertaining to 'inspection,' an allegation that is generally considered discretionary, is not sufficient enough to impose governmental immunity. See *Barankowsky v. Waterbury, supra,* Superior Court, Docket No. CV−96−133416 (court found that although allegation pertaining to 'design' of sewer system is usually discretionary, because the complaint contained other allegations regarding the construction and repair, governmental immunity did not apply); *Librandi v. Stamford, supra,* Superior Court, Docket No. CV−90−0111346−S (court found governmental immunity did not apply even though complaint contained allegation that city failed to exercise due care and proper inspection of sewage system)." (Footnote 3.)

- Rouleau v. Town of Suffield, Superior Court, Judicial District of Hartford, No. HHD-CV065007179-S. (Jan. 16, 2013) (55 Conn. L. Rptr. 372) (2013 WL 593874). "A close examination of the Spitzer facts and the Spitzer holding lead this court to believe that its logic and its holding should be limited and should not be expanded to apply to the factual situation presented in this case. As previously noted, the Spitzer court reasoned that in order to carry out its statutory duty to maintain the highways within its limits, the municipality was required to collect and dispose of the 'surface water falling upon them.' Creating and maintaining a 'system' to complete that 'required' operation was held to be a ministerial function, incidental to a statutorily prescribed duty, allowing for no exercise of judgment or discretion.

  In the present case, the plaintiffs allege negligence in the design, construction and maintenance of a structure intended to span and provide passage by vehicles and pedestrians over an existing stream or watercourse. Of necessity, a naturally occurring watercourse flows under and through the structure, but neither the structure nor the watercourse is part of a 'system' built to carry out a required function which is 'incidental' to a statutorily prescribed duty. The logical structure of Spitzer is, in fact, fairly limited in its application. It does not extend to every case where government channels or conveys a liquid, and the plaintiffs have failed to provide facts or law to suggest that it should apply in this case."

- Great Foods Corp. v. Town of New Canaan, Superior Court, Judicial District of Fairfield at Bridgeport, No. CV095026011S (August 22, 2011) (2011 WL 4089770). "The first count of the revised complaint claims that because of the defendant's violation of §13a-138, the plaintiff has suffered and continues to suffer damages. In count two, a nuisance claim, the plaintiff incorporates paragraphs one through eleven of count one and further alleges that the runoff from the surface water was due to an affirmative act by the defendant in designing, grading, constructing and maintaining its property. Count two further alleges that this water has a natural tendency to create and inflict damage to private property in close proximity to its property, and that the danger is continuous and interferes with the right of adjacent landowners and occupiers to enjoy their property, including the plaintiff. In count three, a negligence claim, the plaintiff incorporates paragraphs one through eleven of count one and further alleges that the defendant has a duty to maintain its property in such a manner as to prevent excess runoff of surface water onto adjoining property.

  On March 15, 2011, the defendant filed a motion for summary judgment on the grounds that as to count one, the plaintiff cannot establish a cause of action under §13a-138, and, as to counts two and three, the defendant is entitled to governmental immunity under General Statutes §52-557n(a)(2)(B) as the plaintiff cannot establish that the imminent harm exception applies to it."

WEST KEY NUMBERS:

- *Highways*
  VII. Construction, Improvement, and Repair
  #120. Drainage
  (.5). In general
  (1). Power and duty as to drainage
  (2). Rights and remedies of abutting owners in general
  (3). Injunction
  (4). Damages and actions therefor
  (5). Drainage districts

- *Municipal Corporations*
  XII. Torts.
  (D). Defects or obstructions in sewers, drains, and water courses
  #835. Obstruction or diversion of flow of surface water
  # 845. Actions for injuries

DIGESTS:

- West's Connecticut Digest
  Water Law
  V. Diffuse Surface Waters
  A. In general
  §§ 1160-1190
  B. Actions or Other Proceedings to Determine, Establish, and Protect Rights
  §§ 1195-1213

- Dowling's Digest: *Waters*
  § 5. Surface water

- West's ALR Digest
  Water Law
  V. Diffuse Surface Waters
  A. In general
  §§ 1161-1190
  B. Actions or Other Proceedings to Determine, Establish, and Protect Rights
  §§ 1198-1212

ENCYCLOPEDIAS:

- 39 *Am Jur 2d* Highways, Streets and Bridges (2019). Also available on Westlaw.

  § 123. Interference with surface waters
  § 124. Preventing flow from adjoining land
  § 125. Discharge of collected surface water

- 93 *CJS* Injunctions (2013). Also available on Westlaw.
  V. Surface water
  §§ 247-251. In general
  §§ 252-256. Rights, duties, and liabilities
  §§ 257-265. Natural flow or drainage and obstruction thereof
  §§ 266-274. Artificial drainage and obstruction thereof
  §§ 275-279. Creation and transfer of easement or right of drainage
  §§ 280-291. Actions for damages
  §§ 292-296. Injunction

- 87 *Am Jur Trials* 423, *Proof of Landowner's Unreasonable Interference With Surface Water Drainage* (2003). Also available on Westlaw.

- 65 *POF* 3d 311*, Governmental Liability for Injury to Landowner's Property from Road Construction Activities on Neighboring Land* (2002). Also available on Westlaw.

- 48 *POF* 3d 419, *Recovery under Property Insurance for Loss Due To Surface Water, Sewer Backup and Flood* (1998). Also available on Westlaw.

- 109 *POF 3d* 403, *Unreasonable Alteration of Surface Drainage* (2009). Also available on Westlaw.

- 54 ALR 6th 201, *Municipal Liability for Damage Resulting from Obstruction or Clogging of Drain or Sewer*, by Michael A. Rosenhouse, J.D. (2010). Also available on Westlaw.

TREATISES:

Each of our law libraries own the Connecticut treatises cited. You can contact us or visit our catalog to determine which of our law libraries own the other treatises cited or to search for more treatises.

References to online databases refer to in-library use of these databases. Remote access is not available.

- 2 Connecticut Practice Series, *Connecticut Civil Practice Forms*, 4th ed., by Joel M. Kaye et al., Thomson West, 2004, with 2020-2021 supplement (also available on Westlaw)
  Authors' Comments following Form 104.6

- 18A *The Law of Municipal Corporations*, 3d ed. rev., by Eugene McQuillin, Thomson West, 2012, with 2020 supplement (also available on Westlaw).
  Chapter 53. Municipal liability for torts
  § 53.170. Surface water. In general
  § 53.171. Surface water; definitions
  § 53.172. Liability for public improvements; "common enemy" rule
  § 53.174. Statutory provisions affecting recovery
  § 53.175. Casting surface water on private land

- *Water Law in a Nutshell*, 4th ed., by David H. Getches, Thomson West, 2009.
  Chapter 7. Diffused surface waters
  § III B. State control of use of diffused surface waters

- *Restatement of the Law Second*, Torts, 1979, with 2021 supplement. Also available on Westlaw.
  §§ 841-848. Interference with the use of water ("Riparian rights")

LAW REVIEWS:

Public access to law review databases is available on-site at each of our law libraries.

- Patricia A. Ayars, Comments, *The Flow of Surface Water Law in Connecticut*, 14 Connecticut Law Review 601 (1982).

- Clifford Davis, *The Law of Diffused Surface Water In Eastern Riparian States*, 6 Connecticut Law Review 227 (1973-74).

Table 1: Cause of Action

Cause of action for damage caused by diversion of or change in flow of surface water 48 COA 2d 397 (2011)	
PRIMA FACIE CASE	
§ 12	Elements
§ 13	—Negligence
§ 14	—Nuisance
§ 15	—Trespass
§ 16	Duty to control flow of surface water
§ 17	Breach of duty
§ 18	—Proof
§ 19	Harm to plaintiff or plaintiff's property
§ 20	Proximate causation
DEFENSES	
§ 21	Absence of duty
§ 22	Absence of duty by drainage easement, license, or servitude
§ 23	Absence of breach
§ 24	—Compliance with statute or governmental directive
§ 25	Intervening cause of harm
§ 26	—Plaintiff's failure to take precautions to prevent harm
§ 27	—Act of God or other natural occurrence
§ 28	Sovereign immunity
§ 29	Absence of privity of contract
§ 30	Statute of limitations
§ 31	Laches
§ 32	Misleading representations; equitable estoppel
§ 33	Collateral estoppel or res judicata
PARTIES	
§ 34	Parties who may bring action
§ 35	Persons potentially liable
Practice and Procedure	
PROCEDURAL MATTERS	
§ 36	Single or multiple cause of action
§ 37	Jurisdiction
§ 38	Limitations; time for bringing action
§ 39	Pleadings

PROOF	
§ 40	Plaintiff's proof
§ 41	—Proof of harm
§ 42	Defendant's proof
REMEDIES AND RECOVERY	
§ 43	Equitable relief
§ 44	—Type and scope of equitable relief
§ 45	Compensatory damages
§ 46	—Measure of damages
§ 47	Punitive damages

Figure 1: Form 104.6

FORM 104.6

Injunction Against Interference with Flow of Surface Waters

COMPLAINT

1. The plaintiff is the owner of a certain piece or parcel of land, with the appurtenances thereto, situated in the city of _____, and bounded and described as follows: *[here insert description]*. On the premises he has a large garage in which he stores and repairs automobiles.

2. The defendants are the owners of a contiguous piece of land which abuts the above mentioned property of the plaintiff on the south, which premises are described as follows: *[here insert description]*.

3. Abutting the above described premises of both parties to the east is and for a long time has been a railroad right of way on which are constructed tracks upon an embankment higher than the lands of the parties.

4. The natural slope of land across the premises of both parties is from the northwest to the southeast.

5. Prior to the construction of the railroad a small stream or watercourse ran across the land of the plaintiff and away to the east over the land now occupied by the railroad but by reason of the building of the embankment it was deflected to the west and has ever since run in a definitely defined and marked course across the land of the defendant.

6. The change was made more than fifteen years before the occurrences hereafter stated and ever since the plaintiff has enjoyed and asserted the right to have the water in this watercourse pass off over the defendant's land, and the use of the watercourse over the defendant's land for that purpose has been open, continuous, uninterrupted, with the knowledge and acquiescence of the defendant and his predecessors in title and adversely to him and them.

7. Beginning on or about *[date]* the defendant has filled in the land on his premises for the entire distance it abuts upon the land of the plaintiff until it is higher than the land of the plaintiff, and has filled in the channel of the watercourse and wholly obstructed it.

8. As a further result of the filling in of his premises by the defendant, he has caused the surface water which falls upon it, instead of flowing away to the south as it normally would, to flow northerly upon the land of the plaintiff, and thereby has greatly increased the volume of surface water coming upon the plaintiff's premises, and has

so filled his land as to cause the surface water coming upon the plaintiff's premises to flow thereon not in a natural diffused manner but in several well defined channels, which bring upon the plaintiff's premises dirt and silt and wash channels through it.

9. As a result of the filling of his land by the defendant the waters coming to the plaintiff's premises from the north and surface water falling thereon and on the defendant's premises accumulate upon the plaintiff's premises and remain standing thereon to a considerable depth and create a nuisance and a condition dangerous to the maintenance of the plaintiff's structures now on the premises, and these conditions and the deposits of dirt and the channels on the plaintiff's land caused by defendant's acts seriously impair the plaintiff's beneficial use of his premises.

The plaintiff claims

1. An injunction requiring the defendant to reopen the channel of the watercourse and against placing obstructions therein.

2. That the defendant be enjoined from interfering with the natural flow of the surface waters coming onto the plaintiff's land.

3. Damages.

Notes

(P.B.1963, Form 349; P.B.1978, Form 104.6.)