

**2011 Edition**

# Surface Water in Connecticut

*A Guide to Resources in the Law Library*

- **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 nonponded 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).
- “**Surface water** has been defined as ‘natural water that has not penetrated much below the surface of the ground’; Webster’s Third New International Dictionary 2300 (2002); and ‘[w]ater lying on the surface of the earth but not forming part of a watercourse or lake.’ Black’s Law Dictionary 1729 (9th Ed. 2009). ‘Water such as rainfall runoff is ordinarily in this category until it either seeps into the ground or runs into a confined water body. . . . Surface diffuse water is said to run in watersheds or drainage basins.’ 9 R. Powell, Powell on Real Property (M. Wolf ed. 2011) § 65.02 [2] [c] [iii], p. 65-26.

## Table of Contents

<b>SURFACE WATER IN CONNECTICUT</b> .....	<b>1</b>
<b>SECTION 1: BETWEEN PRIVATE LANDOWNERS</b> .....	<b>3</b>
<b>SECTION 2: FROM PUBLIC ROADS OR WAYS</b> .....	<b>7</b>
TABLE 1: CAUSE OF ACTION .....	11
FIGURE 1: FORM 104.6 .....	13

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# Section 1: Between Private Landowners

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*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:

- 2 [CONN. PRACTICE BOOK](#) (1997).  
Form 104.6. Injunction against interference with flow of surface water. See [Figure 1](#)
- 1A [AM JUR PLEADING AND PRACTICE FORMS](#) *Adjoining Landowners* (2003).  
§ 132. Complaint, petition, or declaration - Storm water discharged onto plaintiff's land - House damaged
- 24B [AM JUR PLEADING AND PRACTICE FORMS](#) *Waters* (2011).  
§ 228. Complaint, petition, or declaration—Concentration and injurious discharge of surface water—By adjoining landowner—Negligent maintenance of inoperative drainage system  
§ 248. Motion—By landowner—For temporary restraining order—To enjoin adjacent landowner from discharging water onto property
- *Cause Of Action For Damage Caused By Change In Flow Of Surface Water*, 16 COA 675 (1988)  
§ 37. Sample complaint  
§ 38. Sample complaint for damages and injunctive relief due to obstruction and diversion of stream by levee
- *Proof Of Landowner's Unreasonable Interference With Surface Water Drainage*, 87 [AM JUR TRIALS](#) 423 (2003).  
§ 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

**JURY**  
**INSTRUCTIONS:**

- *Proof Of Landowner's Unreasonable Interference With Surface Water Drainage*, 87 [AM JUR TRIALS](#) 423 (2003).  
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:**

- *Chase v. Tusia*, , Superior Court, Judicial District of Windham at Putnam, No. CV 04-4000354-S (May 1, 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 eave 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. CV 00-0273689-S (Oct 22, 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.”
- [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*.”
- [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.”

**WEST KEY NUMBERS:**

- *Waters & Water Courses*  
Surface Waters
  - #115. What are surface waters
  - #116. Rights and liabilities in general
  - #117. Rights to surface water
  - #118. Obstructions or repulsion of flow
  - #119. Drainage or discharge
  - #120. Pollution
  - #121. Rain water and eavesdrip
  - #122. Actions
  - #123. \_\_\_\_\_. Rights of action and defenses
  - #124. \_\_\_\_\_. Injunction
  - #125. \_\_\_\_\_. Damages
  - #126. \_\_\_\_\_. Proceedings and review

**DIGESTS:**

- DOWLING’S DIGEST: *Waters*  
§ 5. Surface water

**ENCYCLOPEDIAS:**

- 1 [AM. JUR. 2D](#) *Adjoining Landowners* (2005).
  - § 35. Water, Snow or Ice Precipitating Onto Adjoining Premises
  - § 36. –Prescriptive Right
- 93 [C.J.S.](#) *Waters* (2001).  
Surface waters
  - §§ 254-258. In general
    - § 254. What are surface waters
    - § 255. Rights, duties and liabilities in general
    - § 257. Rainwater and eavesdrip
    - § 258. Liability for drainage
  - §§ 259-267. Natural flow or drainage and obstructions thereof
    - § 259. Easement for surface water to flow naturally
    - § 260. Urban property
    - § 261. Obstruction of natural drainways or depressions
  - §§ 268-276. Artificial drainage and obstruction thereof
  - §§ 277-281. Creation and transfer of easement or right of drain
  - §§ 282-296. Action for damages
- *Proof Of Landowner's Unreasonable Interference With Surface Water Drainage*, 87 [AM JUR TRIALS](#) 423 (2003).
  - 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 relieves

- VI. Elements of proof
- VII. Model pleadings
- VIII. Proof of upper landowner's unreasonable change in surface water drainage
- IX. Model jury instructions

- *Unreasonable Alteration Of Surface Drainage*, 109 POF 3d 403 (2009).
- *Cause Of Action For Damage Caused By Change In Flow Of Surface Water*, 16 COA 675 (1988).
- Martin J. McMahon, J.D., Annotation, *Liability for diversion of surface water by raising surface level of land*, 88 ALR 4<sup>th</sup> 891
- Francis M. Dougherty, Annotation, *Extinguishment By Prescription Of Natural Servitude For Drainage Of Surface Waters*, 42 ALR 4<sup>th</sup> 462 (1985).
- Janet Fairchild, Annotation, *Modern Status Of Rules Governing Interference With Drainage Of Surface Waters*, 93 ALR 3d 1193 (1979).

**TEXTS & TREATISES:**

- 2 JOEL M. KAYE ET AL., [CONNECTICUT PRACTICE BOOK ANNOTATED](#) (4<sup>th</sup> ed. 2004).  
Authors' Comments following Form 104.6
- DOUGLASS B. WRIGHT ET AL., [CONNECTICUT LAW OF TORTS](#) (3rd ed. 1991).  
§ 17. Connecticut decisions on trespass
- 2 JAMES H. BACKMAN AND DAVID A. THOMAS, [A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS – EASEMENTS](#) (2001).  
§ 13.04. Neighboring landowner disputes arising from uncontrolled surface water on private property
- JON W. BRUCE AND JAMES W. ELY, JR., [THE LAW OF EASEMENTS AND LICENSES IN LAND](#) (2010).  
§ 5:37. Special purpose prescriptive easements—Water rights
- DAN TARLOCK, [LAW OF WATER RIGHTS AND RESOURCES](#) (2010).  
§ 3:12. Waters subject to riparian rights—Surface waters  
§ 3:13. —Diffused surface waters  
§ 3:14. — — Ownership of diffused surface waters

**LAW REVIEWS:**

- 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).

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# 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).

## **STATUTES:**

- CONN. GEN. STAT. (2011).  
Chapter [98](#). Municipal Powers  
§ [7-148\(c\)\(6\)\(B\)\(ii, iv\)](#) 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

## **FORMS:**

- 2 [CONN. PRACTICE BOOK](#) (1997).  
Form 104.6. Injunction against interference with flow of surface water. See [Figure 1](#)
- 24B [AM JUR PLEADING AND PRACTICE FORMS](#) *Waters* (2011).  
§ 226. Complaint, petition, or declaration—Concentration and injurious discharge of surface water—By state agency  
§ 229. —By county highway  
§ 230. —By highway drainage ditch  
§ 231. —By street drain

## **LEGISLATIVE:**

- Paul Frisman, Drainage from State Highways, 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:**

- [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.”
- [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 plaintiffs property.”

**WEST KEY NUMBERS:**

- *Highways*
  - #120. Drainage
    - (.5). In general
    - (1). Power and duty as to drainage
    - (2). Rights and remedies of abutting owners in general
    - (3). Injunctions
    - (4). Damages and actions thereof
- *Municipal Corporations*
  - Torts. Defects or obstructions in sewers, drains, and water courses
  - # 845. Actions for injuries

**ENCYCLOPEDIAS:**

- 39 [AM. JUR. 2D](#) *Highways, streets and bridges* (2008).
  - § 123. Interference with surface waters
  - § 124. Preventing flow from adjoining land
  - § 125. Discharge of collected surface water
- 93 [C.J.S.](#) *Waters* (2001).
  - Surface waters
  - § 265. Construction and maintenance of railroads. Generally
  - § 266. Crossing a gully, ravine, or natural depression
  - § 267. Effect of grant of right-of-way and condemnation
  - § 275. Artificial drainage and obstruction thereof. By railroad companies
- *Proof Of Landowner's Unreasonable Interference With Surface Water Drainage*, 87 AM JUR TRIALS 423 (2003).
- *Governmental Liability For Injury To Landowner's Property From Road Construction Activities On Neighboring Land*, 65 POF 3d 311 (2002).
- *Recovery Under Property Insurance For Loss Due To Surface Water, Sewer Backup And Flood*, 48 POF 3d 419 (1998).
- *Unreasonable Alteration Of Surface Drainage*, 109 POF 3d 403 (2009).
- *Cause of Action For Damage Caused By Change In Flow Of Surface Water*, 16 COA 675 (1988).
  - § 2. Drainage rights and liabilities, generally —Public works
  - § 5. Obstruction of drainage
- Janet Fairchild, Annotation, *Modern Status Of Rules Governing Interference With Drainage Of Surface Waters*, 93 ALR 3d 1193 (1979).

**TEXTS & TREATISES:**

- 2 JOEL M. KAYE ET AL., [CONNECTICUT PRACTICE BOOK ANNOTATED](#) (4<sup>th</sup> ed. 2004).
  - Authors' Comments* following Form 104.6
- 18A EUGENE MCQUILLIN, [THE LAW OF MUNICIPAL CORPORATIONS](#) (2002).
  - Chapter 53. Municipal liability for torts
  - § 53.140. Surface water. In general
  - § 53.141. Injuries from public improvements
  - § 53.143. Statutory provisions affecting recovery
  - § 53.144. Casting surface water in body on private land

**LAW REVIEWS:**

- 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).

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**Table 1: Cause of Action**

<b>Cause of action for damage caused by change in flow of surface water 16 COA 675 (1988)</b>	
<b>Prima Facie Case</b>	
§ 5	Elements, generally
§ 6	—Under particular theories of liability
§ 7	Duty to control flow of surface water
§ 8	Breach of duty
§ 9	—Particular circumstances
§ 10	Harm to plaintiff or plaintiff's property
§ 11	Proximate cause
<b>DEFENSES</b>	
§ 12	Absence of duty
§ 13	—Drainage easement, license, or servitude
§ 14	Absence of breach
§ 15	—Compliance with statute or governmental directive
§ 16	Intervening cause of harm
§ 17	—Plaintiff's failure to take precautions to prevent harm
§ 18	—Act of God or other natural occurrence
§ 19	Failure to seek timely relief
§ 20	Prior adjudication
§ 21	Other defenses
<b>PARTIES</b>	
§ 22	Parties who may bring action
§ 23	Persons potentially liable
<b>Practice and Procedure</b>	
§ 24	Single or multiple cause of action
§ 25	Jurisdiction
§ 26	Time for bringing action
§ 27	Pleadings
<b>PROOF</b>	
§ 28	Plaintiff's proof
§ 29	—Type and scope of equitable relief
§ 30	Defendant's proof

<b>Remedies and recovery</b>	
§ 31	Equitable relief
§ 32	—Type and scope of equitable relief
§ 33	Compensatory damages
§ 34	—Measure of damages
§ 35	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.

(P.B. 1963, Form 349.)