5-1-1989

Weaver v. Bishop and Negligence: A Path Toward Clearing the Muddy Water

John H. Abbott

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law of the Sea Commons

Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol26/iss3/8

This Note is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
Weaver v. Bishop and Negligence: A Path Toward Clearing the Muddy Water

I. INTRODUCTION

Oliver Wendell Holmes once stated, “[t]he life of the law has not been logic: it has been experience.” However, the law governing the obstruction or diversion of waters in California has drawn its life from neither logic nor experience. Indeed, Judge Anderson, after stating the facts in Weaver v. Bishop, began the court’s analysis by asserting that “[t]he liability of a landowner for causing harm to another by diverting or obstructing water presents one of the most confusing areas of California law.” After years of development, the law is riddled with a combination of common law, property law, and modern tort doctrines, each applied in varying degrees according to the classification of the water involved.

Weaver indicates that California courts have finally begun to apply a consistent legal doctrine to damages claims resulting from

2. For the purposes of this Casenote, the water law to be applied will relate solely to circumstances of the diversion or obstruction of water which results in damage to another property owner. This Casenote will not address water “rights.” Nor will this Casenote address actions for inverse condemnation, based on article 1, section 19 of the California Constitution, resulting from damage to a landowner due to state action. For a recent case addressing the plaintiff’s burden in inverse condemnation, see Belair v. Riverside County Flood Control Dist., 47 Cal. 3d 550, 764 P.2d 1070, 253 Cal. Rptr. 693 (1988).
4. Id. at 1351, 254 Cal. Rptr. at 426.
5. The general classification of water falls into three groups. The legal doctrine, and hence liability, has traditionally been dependent on the water classification. The three categories of water are surface waters, flood waters, and natural watercourses. Id. at 1354, 254 Cal. Rptr. at 426; see also infra notes 29-32 and accompanying text.
water obstruction or diversion. The trend is to apply negligence law principles to determine the liability issue. Accordingly, a negligence (reasonable use) standard has been applied to cases involving surface waters, flood waters, and natural watercourses.

Nevertheless, the progress toward applying negligence principles is hampered by the lingering effects of the traditional water classifications and accompanying legal doctrines; these traditional doctrines have outgrown their usefulness. The time is now right for the California Supreme Court or the California Legislature to abolish these outdated rules and replace them with a single legal doctrine to be applied in all circumstances. Negligence law, or the "reasonable use" doctrine, should be the sole legal principle applied in the California courts.

The use of negligence principles in this area of water law would be extremely advantageous. First, equal application of the law will replace the inconsistent treatment provided under the old rules which depended on the water classification. Second, use of negligence principles will allow for a varying degree of reasonableness depending on the facts of the case and the balancing of interests involved. Third, a negligence principle will provide for greater clarity of decision, al-

6. See Weaver, 206 Cal. App. 3d at 1355-56, 254 Cal. Rptr. at 427-28. The court applied the rule of reasonable use announced in Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). However, the court in Keys held the civil law rule applicable to certain situations involving the diversion of "surface waters." See infra note 12 and accompanying text.

7. Weaver, 206 Cal. App. 3d at 1357, 254 Cal. Rptr. at 428 (reasonableness standard applies to natural watercourse); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (reasonable standard is to apply to diversion of surface waters; however, if both parties are reasonable, the civil law rule will apply); Linvill v. Perillo, 189 Cal. App. 3d 195, 234 Cal. Rptr. 392 (1987) (reasonable standard applies to the diversion of flood waters).

8. As this Casenote will show, the development of the "reasonable use" doctrine in California case law, in circumstances involving the obstruction or diversion of water, has shifted toward a negligence standard. See infra notes 56, 57 and accompanying text. Although differences in the doctrines exist in some circumstances, the Casenote will use the terms interchangeably.


11. Weaver, 206 Cal. App. 3d at 1358, 254 Cal. Rptr. at 430.

12. A prime example of how the traditional rules have continued to hamper the movement toward the complete application of negligence principles is evidenced by Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). The Keys court only qualified the traditional civil law rule when the court adopted the rule of "reasonable use." Id. at 409, 412 P.2d at 537, 50 Cal. Rptr. at 281. Thus, in circumstances where both landowners' conduct was found to be reasonable, the civil law rule would place liability on the landowner creating the change in the water conditions. Id.

13. Negligence and "reasonable use" are similar doctrines and can really be said to be the same in application. See Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); see also Linvill v. Perillo, 189 Cal. App. 3d 195, 234 Cal. Rptr. 392 (1987); Ektelon v. City of San Diego, 200 Cal. App. 3d 804, 246 Cal. Rptr. 483 (1988).
lowing for the development of clear precedent. The end result will be an understandable legal doctrine which can be applied without resorting to ancient classifications and legal theories.

This Casenote will probe the law affecting the diversion and obstruction of water and demonstrate the need for the uniform application of a single legal principle to control this area of law. Part I examines the facts and legal analysis of *Weaver v. Bishop*. Part II analyzes the desirability of the adoption of negligence principles. Finally, Part III proposes a clarification of the law which would then provide for the consistent application of water law principles.

It is the opinion of this author that a definitive statement by either the California Supreme Court or the California Legislature, applying negligence principles to actions involving the diversion or obstruction of water, will untangle the courts' current confusion and clarify an area of law begging for definition.

II. *Weaver v. Bishop*—Facts and Legal Analysis

A. The Facts

Donald and Virginia Weaver (plaintiffs) brought this action against Richard and Wanda Bishop, seeking to recover damages for the erosion of their property.\(^{14}\) National American Insurance Company of California (NAIC) intervened as subrogee of the plaintiffs.\(^{15}\) The complaint in intervention alleged that the defendants, upstream owners, diverted the Sulphur Springs Creek causing damage to the plaintiffs' downstream property, which NAIC was forced to repair.\(^{16}\)

Evidence introduced at the jury trial established that the defendants had built a riprap (wall of boulders) along the banks of the creek in order to stop the erosion of their own property.\(^{17}\) Expert testimony indicated that the riprap caused the subsequent erosion of the plaintiffs' land.\(^{18}\)

NAIC sought to have the jurors instructed that if they found that the plaintiffs' property damage resulted from the defendants' obstruction or diversion of the natural flow of the creek, the defendants were to be held strictly liable.\(^{19}\) Additionally, NAIC sought to have

---

15. *Id.* at 1353, 254 Cal. Rptr. at 425.
16. *Id.*
17. *Id.* at 1353, 254 Cal. Rptr. at 426. Evidently, Donald Weaver had suggested that the defendants build the riprap. *Id.*
18. *Id.*
19. *Id.*
the jury instructed that the defendants' action was the proximate cause of plaintiffs' injury. The court rejected both requests. Instead, it instructed the jury that liability was dependent on the reasonableness of the parties' actions, and that the jury was to determine proximate cause.

The jury, by special verdict, found the defendants' conduct reasonable. In addition, the jury found the plaintiffs' conduct unreasonable, and that the plaintiffs were the proximate cause of the damages. NAIC appealed, challenging the use of the reasonableness standard and the trial court's decision to leave the causation issue in the hands of the jury.

B. Legal Analysis

The court's analysis in Weaver illustrates two important aspects of this area of water law. First, the court effectively demonstrated its warning regarding the confusing nature of this area of California law. The court accomplished this through a long and confusing analysis of the various prerequisites, under the traditional rules, for liability and the exceptions to the traditional categories. Conceivably, the court might have included this portion of the analysis in order to illustrate the warning in its opening statement.

Second, the court affirmed the trial court's adoption of the "reasonable use" doctrine previously applied in Keys v. Romley. The court's analysis in this portion of the opinion pointed out the absurdity, confusion, and inconsistency which resulted from the application of the traditional classifications. Further, the court indicated that the trend in similar water cases is to apply tort principles to the issue of liability.

20. Id.
21. Id.
22. Id. The court did not indicate the facts from which the jury could have found that the plaintiffs' conduct was the proximate cause of the injury to their property. It could be inferred that the record of the lower court was not very clear. See id. at 1354 n.1, 254 Cal. Rptr. at 427 n.1.
23. Id. at 1353, 254 Cal. Rptr. at 426.
24. Id. The court stated "the liability of a landowner for causing harm to another by diverting or obstructing water presents one of the most confusing areas of California law. The cases have always reflected considerable confusion as to the doctrinal basis and factual prerequisites for liability." Id.
25. A self-fulfilling prophecy? However, a better idea may be that the use of a confusing analysis of the traditional rules makes the adoption of a negligence principle seem that much more reasonable.
26. Weaver, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428 (adopting Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966)).
27. Id. at 1357, 254 Cal. Rptr. at 429.
28. Id. at 1358, 254 Cal. Rptr. at 429.
1. Engendering Confusion: The Traditional Concepts and Their Progeny

In Weaver, Judge Anderson started down this winding road of analysis by stating that "[t]he usual formula made liability dependent on the nature of the water causing the harm." The court described the three traditional general water classifications and their rules of liability as follows:

First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. Second, one has the right to protect himself against flood waters and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. Third, one may not obstruct or divert the flow of a natural watercourse.

After indicating the various types of water, the court attacked the
plaintiffs' claim that strict liability should be applied. In doing so, the court failed to expressly indicate exactly what type of water was at issue in this case. However, the court did appear to acquiesce to NAIC's claim that the water was a natural watercourse. This acquiescence would traditionally lead to the conclusion that the obstruction or diversion of a watercourse results in liability of the upstream landowner. Nevertheless, the court indicated that the traditional rule is not always followed, and a number of cases were cited for this proposition. However, because the court failed to expressly articulate which type of water was in issue, the reader is left wondering how some of these exceptions apply, since not all involve natural watercourses. In other words, by refusing to take the first necessary step in the analysis, that of identifying the water in issue,

33. See Weaver, 206 Cal. App. 3d at 1354, 254 Cal. Rptr. at 426. It seems evident that the trial court also failed to determine the type of water at issue. The appellate court noted "it is unclear whether defendants were protecting themselves solely against floodwaters, or whether some of the washing away was caused by the natural flow of the creek." Id. at 1354 n.1, 254 Cal. Rptr. at 427 n.1. Of course, when a court is to apply a strict negligence principle to the issue of the reasonableness of the defendant's action, the traditional classifications would not be determined since their only relevance would be in the determination of reasonableness.

34. See id. at 1354, 254 Cal. Rptr. at 426. The court should have made a more definitive finding on the type of water involved. Since NAIC was claiming that liability should be based on a strict liability theory, it is obvious that their claim would (under the traditional rules) involve a natural watercourse. The court, in failing to articulate the type of water at issue, left open the possibility that the water may be a natural watercourse, as alleged by NAIC, or that it may be flood waters. Since the legal theories applicable to these two types of water are diametrically opposed (a landowner is not liable for protection against flood waters, but a landowner is liable for diverting or obstructing a natural watercourse), the court's further analysis may have been made much easier by classifying the water at issue.

35. See supra note 32 and accompanying text. It certainly can be argued that automatically holding the landowner who diverts or obstructs a natural watercourse liable for damage to property is a form of strict liability.

36. See Weaver, 206 Cal. App. 3d at 1354, 254 Cal. Rptr. at 426. The court stated: "Disputes of the present type were traditionally subject to several rules." Id.

An exception to the traditional rule is created when a landowner makes improvements in the watercourse, such as widening, deepening, or straightening, and these improvements result in an increased velocity to the stream which harms downstream land. See People v. Weaver, 147 Cal. App. 3d Supp. 23, 197 Cal. Rptr. 521 (1983); Bauer v. County of Ventura, 45 Cal. 2d 276, 289 P.2d 1 (1955); Archer v. City of Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941). Another cited exception provides that an upstream owner may drain surface waters into a natural watercourse provided the watercourse is the surface water's natural watershed. San Gabriel Valley County Club v. Los Angeles, 182 Cal. 392, 188 P. 554 (1920). The San Gabriel court also indicated it is "the owner's right under the 'common enemy' doctrine to build levees, bulkheads, dikes, or similar structures along the banks of the stream to confine or repel floodwater. . . ." Id. at 400, 188 P. at 557. (This holding just seems to restate the general rule with regard to flood waters.) The Weaver court stressed that this rule applies to actions taken to prevent the banks from washing away. Weaver, 206 Cal. App. 3d at 1354, 254 Cal. Rptr. at 427. However, this rule applies to flood waters, and since the court did not determine that the water in question was a flood water (and even seemed to acquiesce to NAIC's claim that the water was a natural watercourse), it seems irrelevant to this case.

37. See supra note 29. Weaver itself expressly mentions that the first step is to
the court created confusion by continuing on in its analysis as if the water was defined.

The court continued its assault on NAIC's claim by positing that "a question remains whether the traditional rules truly imposed strict liability, or whether they required some showing that the defendant's conduct was unreasonable or otherwise wrongful." Additionally, the court stated that NAIC had failed to cite any cases on point, nor could the court find any.

The court continued with a discussion of cases which apply a negligence (reasonable use) theory to liability, instead of the strict traditional rule. This line of analysis is quite confusing for two reasons. First, the court seems to be caught up in the inconsistent precedential development which has been generated under the old rules. Based on the precedents, the Weaver court could realistically find cases which strongly support strict liability, modified strict liability, no liability, and negligence. The second problem presented by this

identify the water in issue. Weaver, 206 Cal. App. 3d at 1353, 254 Cal. Rptr. at 426. What makes this analysis even more confusing is the fact that the Weaver court applied the reasonable use doctrine to the liability issue. Id. at 1356, 254 Cal. Rptr. at 428. Arguably, under the reasonable use or negligence doctrines, the determination of the water in issue is but one factor in the overall decision as to whether the defendant's conduct was reasonable in any given circumstance.

38. Id. at 1355, 254 Cal. Rptr. at 427. It seems odd that the definitive rule cited by the court as regards natural watercourses is now, besides being fraught with exceptions, subject to the reasonableness of the landowner. Isn't "reasonable use" the new rule applied by the court?

39. Id. The court did cite Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 96 P. 292 (1908), which held a mine strictly liable for diverting a stream with a large amount of debris. Id. at 554, 96 P. at 295. However, the court stated that this case was hardly analogous to the present facts. Weaver, 206 Cal. App. 3d at 1355, 254 Cal. Rptr. at 427.

40. Weaver, 206 Cal. App. 3d at 1355, 254 Cal. Rptr. at 427. The cases cited by the court include the following cases which involve flood waters: The Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25 (1921) (a reasonableness criterion was applied to ameliorate the harsh effects of the common enemy doctrine); Jones v. California Dev. Co., 173 Cal. 565, 160 P. 823 (1916) (landowner may use every reasonable precaution to protect his property in dealing with extraordinary water conditions; reasonableness is to be determined from the then-existing facts, not the consequences); Tahan v. Thomas, 7 Cal. App. 3d 78, 86 Cal. Rptr. 440 (1970) (holding that the defendant's actions in building a levy across a public road to protect his land from flood waters was not reasonable; reasonableness is to be determined from the existing facts); Williams v. Pacific Coast Aggregates, Inc., 128 Cal. App. 2d 777, 276 P.2d 28 (1954) (landowner not liable for the unforeseen results to a neighboring landowner resulting from the construction of a levy; landowner must act as a reasonable person in avoiding foreseeable injury to another).

A case involving surface waters is also cited. San Gabriel Valley County Club v. Los Angeles, 182 Cal. 392, 188 P. 554 (1920) (a cause of action does not necessarily accrue to a downstream landowner due to improvements made to a watercourse which increased its flow, thereby causing property damage).
line of analysis is that the cited cases mainly concern flood waters or surface waters, and are thus not directly applicable to the facts of Weaver.\textsuperscript{41}

Finally, the court analogized the instant facts to a situation in which the "common enemy"\textsuperscript{42} doctrine would apply.\textsuperscript{43} Generally, the common enemy doctrine states that a landowner has an unqualified right to do with the water as she wishes without legal liability for subsequent injury to others.\textsuperscript{44} This portion of the analysis is particularly confusing for two reasons. First, the court had just stated its intention to adopt the "reasonable use" approach of Keys v. Romley.\textsuperscript{45} Once the reasonable use rationale of Keys is adopted, analogy to the common enemy doctrine is irrelevant.\textsuperscript{46} Since the basis for liability under reasonable use is the landowner's conduct, the absolute bar to liability that the common enemy doctrine provides must be discarded. Second, the court's failure to indicate the type of water at issue may make its discussion of the common enemy doctrine irrelevant.\textsuperscript{47} Indeed, the common enemy doctrine has traditionally been applied only to flood waters.\textsuperscript{48} And, as the court indi-

\textsuperscript{41} See supra notes 40, 34 and accompanying text. The court's failure to squarely address the issue of the type of water illustrates another confusion that the traditional rules place on the courts. Based on the court's analysis, one must first determine the type of water, then the traditional rule of liability, then whether any exceptions apply, then whether another rule of liability applies due to the exceptions. As the court illustrates so well, great confusion is the result if just one step is left out, in this case the type of water at issue.

\textsuperscript{42} As the court in Weaver indicated, the common enemy doctrine has been applied to flood waters in California. Weaver, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428. The court noted that the California Supreme Court adopted the common enemy doctrine as it applies to flood waters in Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887). Weaver, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428.

In Keys v. Romley, the court defined the common enemy doctrine as follows:

Stated in its extreme form, the common enemy doctrine holds that as an incident to the use of his own property, each landowner has an unqualified right, by operations on his own land, to fend off surface waters as he sees fit without being required to take into account the consequences to other landowners, who have the right to protect themselves as best they can.

Keys v. Romley, 64 Cal. 2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); see also Comment, California's Surface Waters, 39 S. Cal. L. Rev. 128 (1966). Note that the above definition refers to surface waters. As Keys later stated, the common enemy doctrine does not apply to surface waters under California law. Keys, 64 Cal. 2d at 405, 412 P.2d at 534, 50 Cal. Rptr. at 278 (stating that the civil law rule applies to surface waters in California).

\textsuperscript{43} Weaver, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428. "The present case, if not squarely within the traditional 'common enemy' doctrine, presents a substantially identical situation." Id.

\textsuperscript{44} See supra note 40.

\textsuperscript{45} Weaver, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428.

\textsuperscript{46} Indeed, the Keys court, in adopting a reasonable use doctrine, did so by tempering the "civil law" rule which had previously been applied to cases involving surface waters. Keys, 64 Cal. 2d at 408-09, 412 P.2d at 536-37, 50 Cal. Rptr. at 280-81.

\textsuperscript{47} See supra note 33 and accompanying text.

\textsuperscript{48} See supra note 42 and accompanying text (defining common enemy doctrine).
cated, a negligence principle has recently been applied in *Ektelon v. City of San Diego* and *Linvill v. Perillo* cases dealing with flood waters; thus, the court's analogy and analysis are seriously flawed. Inasmuch as the courts in *Ektelon* and *Linvill* refused to follow the common enemy doctrine, it seems clear that the common enemy principles no longer have any practical application under California law. Consequently, the common enemy principles have no logical relevance to the facts in *Weaver*.

Thus, in discussing portions of the water law history, the court perpetuated the very confusion that it recognized as being created by this law. This confusion provides a compelling reason for the adoption of the much simpler and fairer negligence principles.

2. The Application of "Reasonable Use"

The *Weaver* court upheld the lower court's application of the "reasonable use" principles outlined in *Keys v. Romley*. The court held:

We believe the trial court properly concluded that the "reasonable use" doctrine of *Keys v. Romley* applies where one landowner seeks damages for the loss of land along a stream, claiming that the loss was caused by another owner's installation of measures to protect his or her bank from being washed away.

---

55. *Weaver*, 206 Cal. App. 3d at 1356, 254 Cal. Rptr. at 428.
The court did not go into in-depth analysis of its reasons for applying the *Keys* rule. However, the court did indicate that the general trend in water law cases is away from property law rules and toward the law of tort.\textsuperscript{56} Further, the court stated that the almost universal trend is toward “fact-based determinations of reasonableness in the particular circumstances of each case.”\textsuperscript{57} To support this proposition, the court cited the recent California appellate court cases of *Ektelon v. City of San Diego*\textsuperscript{58} and *Linvill v. Perillo*.\textsuperscript{59} Both *Ektelon* and *Linvill* applied negligence principles to neighboring property damage caused by landowners’ protection of their property from flood waters.\textsuperscript{60}

Far more compelling was the court’s reasoning that application of traditional classification rules was not rational.\textsuperscript{61} The court correctly pointed out that the traditional rules can produce absurd, harsh, and inconsistent results.\textsuperscript{62} The court noted that liability under the old rules differed according to the classification of the water and that the classifications were sometimes arbitrary.\textsuperscript{63} Thus, the traditional

\textsuperscript{56} Id. at 1358, 254 Cal. Rptr. at 429 (“More broadly, as *Keys* acknowledges and illustrates, the general trend in water-damage cases is to replace the rigidities of property law with the more flexible, conduct-oriented principles of tort.”). The court also cites the *Second Restatement of Torts* for the proposition that “defendants’ liability would depend on a balancing of reasonableness, either by analogy to the rules concerning interference with water use, or under the rules of nuisance and trespass.” Id. (citing *RESTATEMENT (SECOND) OF TORTS* §§ 849, 850, 821D, 822, 165 (1986)).

\textsuperscript{57} Id.

\textsuperscript{58} 200 Cal. App. 3d 804, 246 Cal. Rptr. 483 (1988).


\textsuperscript{60} *Ektelon*, 200 Cal. App. 3d at 810, 246 Cal. Rptr. at 487. The court in *Ektelon* held: “An upstream landowner has no absolute right to protect his land from floodwaters by constructing structures which increase the downstream flow of water into its natural watercourse, but is instead governed by the ordinary principles of negligence.” Id.

The *Linvill* court held that the diversion of floodwaters was governed by negligence principles. *Linvill*, 189 Cal. App. 3d at 198-99, 234 Cal. Rptr. at 394.

\textsuperscript{61} *Weaver*, 206 Cal. App. 3d at 1357, 254 Cal. Rptr. at 429. This line of reasoning is especially compelling considering the court’s confusing discussion of the traditional concepts and their exceptions.

\textsuperscript{62} See id. The court pertinently states:

[T]his movement away from the traditional categorical rules seems inevitable given the seeming absence of any overarching rationale for those rules and the confusion they engendered on many crucial issues. It may also be supposed that they often produced harsh results, depriving one owner or the other of valuable property rights based on some arcane if not arbitrary classification of the facts. Nor could they be easily defended as possessing the virtues of certainty, predictability, simplicity, or uniformity.

\textit{Id.}

\textsuperscript{63} Indeed, the water in issue does not always neatly fit into one of the general categories. Thus, the liability of a landowner will hinge on the court’s interpretation of the water. For example, it is not clear whether a stream which does not flow all year is a natural watercourse, or surface waters. In San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554 (1920), the court indicated that a natural watercourse may not have to flow year-round. However, an intermittently flowing stream seems to also fit into the definition of surface waters. \textit{See supra} note 30 and accompanying text.
rules, applied in varying degrees and creating inconsistent results, were a strong reason behind the Weaver court's adoption of a single standard of reasonable use.

3. The Impact of Weaver

The importance of the opinion in Weaver v. Bishop lies not only in its adoption of the "reasonable use" doctrine set forth in Keys v. Romley, but also in the court's analysis which highlighted the conflict between the old and the new. The first portion of the court's opinion, dealing with the confusing traditional rules and their exceptions, points out the absurdity and irrationality of these rules. The second half, upholding the trial court's adoption of reasonable use, applies the absurdity of the old rules to forge a modern rule for similar water cases.

Future courts, although persuaded by the trend toward negligence, may remain perplexed by the court's reluctance to totally disregard the old rules. Thus, future litigation may still revolve around parties' attempts to apply rules of liability based on old classifications. The result: birth of yet another generation of muddied water law.

III. Analysis: The Application of Negligence Principles

As this Casenote has shown, the traditional rules of liability regarding the obstruction or diversion of water are riddled with exceptions which result in confusion among the courts. As one result, decisions have slowly begun a shift away from reliance on traditional classifications toward the application of negligence principles. These courts have come to realize that a liability principle built on conduct is superior to the rigid and confusing historical concepts, which were based on the type of water involved.

This movement toward negligence principles is soundly based in

---


65. See supra notes 38-51 and accompanying text.


67. See Keys, 64 Cal. 2d at 408-09, 412 P.2d at 536-37, 50 Cal. Rptr. at 280-81.
policy and reason. First, a rule of law based on human conduct rather than on traditional classifications provides more consistent application of the law. Second, a negligence standard allows flexibility due to the varying degree of reasonableness according to the facts and circumstances of each case. Third, the application of negligence allows for a clear line of precedent, based on a single rule of liability, to develop.

A. The Negligence Principle

Negligence law, finding its basis in conduct, provides a foundation for the clarification of water law. The tort objective standard of conduct, imposed on the behavior of a landowner, is an external one having no bearing on the "individual[']s] sense of right and wrong." However, before the landowner's conduct in obstructing or diverting water can be judged by this standard, a duty of due care must be placed upon the landowner's actions. In California, the duty of due care exists for landowners through an extension of the reasoning of the landmark case Rowland v. Christian, which applied principles derived from California Civil Code section 1714. The reasoning of Rowland has been applied in the water law context by California courts of appeal in Linvill and Ektelon.

The California Supreme Court's analysis in Rowland was based on principles enumerated in California Civil Code section 1714, providing a general duty of due care to all persons. According to the Rowland court, the principles stated in California Civil Code section 1714 are to be applied without exception, "unless clearly supported by public policy." It can hardly be argued that public policy supports rules of law which in their original context ignore conduct in favor of the type of water at issue. The Rowland court outlined several factors which should be considered before departing from the principles of California Civil Code section 1714. The California

70. CAL. CIV. CODE § 1714 (West 1985).
71. Linvill, 189 Cal. App. 3d at 198-99, 234 Cal. Rptr. at 393-94.
72. Ektelon, 200 Cal. App. 3d at 809-10, 246 Cal. Rptr. at 486-87.
73. Rowland, 69 Cal. 2d at 111-12, 443 P.2d at 564, 70 Cal. Rptr. at 100. California Civil Code section 1714 states:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. . . ."

CAL. CIV. CODE § 1714 (West 1985).
74. See CAL. CIV. CODE § 1714 (West 1985).
75. Rowland, 69 Cal. 2d at 111, 443 P.2d at 564, 70 Cal. Rptr. at 100.
76. The oft-stated factors are as follows:
court of appeal in Linvill v. Perillo applied the Rowland factors in a
case involving flood waters. Likewise, relying on the analysis of
Linvill, the court of appeal in Ektelon v. City of San Diego applied a
negligence standard. It is evident that the Rowland decision has
clear application to this area of water law. Therefore, the rationale

[T]he foreseeability of the harm to the plaintiff, the degree of certainty that
the plaintiff suffered injury, the closeness of connection between the defend-
ant's conduct and the injury suffered, the moral blame attached to the defend-
ant's conduct, the policy of preventing future harm, the extent of the burden to
the defendant and consequences to the community of imposing a duty to exer-
cise due care with resulting liability for breach, and the availability, cost, and
prevalence of insurance for the risk involved.

Id. at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100. Even though the court in Rowland
indicated that these factors were to be applied to create exceptions to the general rule of
California Civil Code section 1714, it seems that in large measure these factors have
been applied to extend a duty, not to take one away.

77. The court stated:

We find that a departure from the principle of tort law as codified in Civil
Code section 1714, and an adoption of the respondent's narrow view of the
requirements of reasonableness is not warranted. Whether the landowner has
acted reasonably is a question of fact to be determined in each case upon a
consideration of all circumstances, including such factors as the amount of
harm caused, the foreseeability of harm which results, the purpose or motive
with which the landowner acted, and all other relevant matter.

Linvill, 189 Cal.App. 3d at 199, 234 Cal. Rptr. at 394. The court also relies on the
language of Keys v. Romley in applying the negligence standard. Id; see also Keys v.

78. Ektelon, 200 Cal. App. 3d at 810, 246 Cal. Rptr. at 487. The Ektelon
court held as follows: "We agree with the analysis in Linvill. An upstream landowner has no
absolute right to protect his land from floodwaters by constructing structures which in-
crease the downstream flow of water into its natural watercourse, but is instead governed
by the ordinary principles of negligence." Id.; see also Keys, 64 Cal. 2d at 410, 412 P.2d
at 537, 50 Cal. Rptr. at 281.

79. Even though Rowland applied to artificial conditions in a land case, as the
court in Linvill noted, the California Supreme Court in Sprecher v. Adamson Cos., 30
Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981), held that the same (Rowland)
principles apply in the case of a natural condition. Linvill, 189 Cal. App. 3d at 198-99,
Rptr. 97 (1968). Justice Bird, for the Sprecher court stated:

The trend in the law is in the direction of imposing a duty of reasonable care
upon the possession of land with regard to natural conditions of land. The ero-
sion of the doctrinal underpinning is evident even from a cursory review of the
case law. Also evident is the lack of congruence between the old common law
rule of nonliability and the relevant factors which should determine whether a
duty exists. All this leads to but one conclusion. The distinction between artificial
and natural conditions should be rejected.

Sprecher, 39 Cal. 3d at 371, 636 P.2d at 1128, 178 Cal. Rptr. at 790. In destroying the
distinction between artificial and natural conditions, the Sprecher court relied in good
part on the reasoning of Rowland and California Civil Code section 1714. Id. at 363,
368, 371-72, 636 P.2d at 1123, 1126, 1128, 178 Cal. Rptr. at 785, 788, 790.

The analogy between the application of negligence in Rowland and the application of
negligence in water cases is a strong one. In both instances, strict traditional formulas for
of Rowland, as analyzed in Linvill and Ektelon, should be the basis for a negligence law applied to water cases.

B. One Rule of Law

The application of a negligence principle mandates a single rule of law be applied in every case. No longer will the arbitrary classification of water be the basis for confusing and contradictory decisions. With a single rule of law, arbitrariness will be reduced, if not eliminated. The resulting law will be free of the confusion over the rule of law to be applied.

C. A Flexible Standard

By its very nature, negligence is a flexible standard. A duty of due care based on conduct does not mean the same thing to all landowners. This inherent flexibility will allow for a sliding scale of liability based on the facts of each case. Flexibility equates to fairness for all landowners. In contrast to the old system in which the landowner may lose her case based on an unclear determination of the type of water in issue, or may win or lose based on the “luck of the draw” as to whether the water at issue just happens to be of one type or another, the new system will be based solely on the conduct of the landowner. Of course, the nature of the water will be considered under a negligence formulation, but it will not be determinative.

D. Clear Precedential Development

Under the traditional classifications, the development of precedent was hampered by the confusing and often contradictory application of the law. Thus, precedential development included cases applying the traditional rules, cases applying a modified version of the traditional rules, and cases involving the application of a “reasonable liability had been developed. Over time, these strict rules were relaxed and exceptions developed. This doctrinal development resulted in contradictory and confusing decisions. As the exceptions and qualifications ate up the rule, the rationale behind the traditional rules dissolved until a new, more workable doctrine now must be adopted. Such is the case with artificial conditions on the land (Rowland) and the obstruction and diversion of water (Weaver, Ektelon, Linvill).

80. The only relevance that the type of water would have in the determination of liability would be in the finder of fact’s determination of reasonableness in each case. This determination would not, of course, be based on the three classifications, but on a fact specific determination. The fact specific determination of the reasonableness of the landowner will allow for the development of flexibility.

81. See supra notes 30-53 and accompanying text.

82. See Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950) (applying the traditional common enemy doctrine to flood waters).

83. See Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) (landowner may make improvements to a watercourse and not be liable for damage caused by increased
use" standard backed up with a traditional rule.\textsuperscript{84} Compared with
the stair-stepped development under the traditional rules, the current
development of precedent under negligence principles is far clearer.\textsuperscript{85}
Admittedly, the negligence formula with its fact-specific determination
may cause some variation in decision due to the factfinder's in-
clinations. However, the important precedential value will be in the
single negligence principle applied by the courts, unlike the tradi-
tional methods with the three classifications, exceptions to these clas-
sifications, and exceptions to these exceptions. The development of a
single coherent liability formula will thus create a clear line of case
law based on negligence.

IV. ABOLISHING THE TRADITIONAL RULES: A SUPREME IDEA

It seems quite odd that the \textit{Weaver} court, after describing how
confusing California law was regarding the obstructing or diverting
of water,\textsuperscript{86} and after subsequently adopting a reasonable use rule,
failed to make a bold statement to the effect that the old rules no
longer apply.\textsuperscript{87}

However, all is not lost; the California Supreme Court or the Cali-
ifornia Legislature can abolish the traditional rules and adopt a negli-
gence standard. Because the old rules are so confusing and because
the rationale for applying negligence principles is so compelling, the
court or legislature should act now to clarify and define the rights
and duties of a landowner who diverts and obstructs water.

In adopting a rule of negligence, the court or legislature must not
equivocate. The old ways must be expressly abolished, not merely
qualified as they were in \textit{Keys v. Romley}.\textsuperscript{88} Without the muddied
discussion of the old classifications, the courts' opinions will become

\textsuperscript{84} Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966)
(applying reasonable use and qualifying the civil law rule).
\textsuperscript{85} See Ektelon v. City of San Diego. 200 Cal App. 3d 804, 246 Cal. Rptr. 483
\textsuperscript{86} See supra note 24 and accompanying text.
\textsuperscript{87} It is illogical to apply any of the traditional classifications or their legal theo-
ries of liability when negligence principles have been adopted. The traditional per se
formulas have no place where the court will be weighing the conduct of the landowner.
Thus, the court in \textit{Weaver}, after aptly pointing out how inadequate these old rules are,
could have easily made an express statement abolishing them. Instead, the court failed to
complete its thought by not taking this last step.
\textsuperscript{88} The California Supreme Court in \textit{Keys} failed to abolish the civil law rule as it
applies to surface waters. Instead, the court qualified the rule to only apply if it was
found that both party's actions were reasonable. Keys, 64 Cal. 2d 396 at 408, 412 P.2d
at 537, 50 Cal. Rptr. at 281.
clear as well.

V. CONCLUSION

Under the traditional concepts of liability, the law regarding the obstruction or diversion of water has mutated into one of contradiction and confusion. As Weaver v. Bishop demonstrates, this traditional confusion continues to linger. However, courts have increasingly applied the negligence or "reasonable use" theory of liability.

The desirability of adopting a negligence rule of law becomes compelling when compared to the confusing nature of the traditional rules. The adoption of a negligence rule is supported by strong policy considerations. These policy considerations include the adoption of a single rule of law, the inherent flexibility of the negligence standard, and the development of clear precedent.

It is up to the California Supreme Court or the California Legislature to abolish the old rules and apply a negligence standard. The time has come to clear the muddy water.

JOHN H. ABBOTT