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Surface Waters in California: Adoption of Reasonable Use Rule: Keyes v. Romley (Cal. 1965) Case Notes

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> such injury is not synonymous with the phrase "arising out of and in the course of the employment" as used in section 3600 to describe a compensable injury. . . .[20]

Thus the *McIvor* court distinguished "scope of his employment" from "arising out of and in the course of the employment," declaring that the former implied a strict, more employer-oriented sort of activity than did the latter. The First District Court of Appeals which heard the *Saala* case disagreed with the Fourth District's interpretation of a co-employee's liability. The First District Court asserted that "There is no reason to assume . . . that the Legislature intended the area of immunization to be less than the area of compensation."[21] Subsequently, the Supreme Court's judgment in *Saala* decided the issue in favor of the Fourth District's view.

Conclusion

Recognizing the potential for double recovery, the California Supreme Court nevertheless holds a negligent employee responsible for his actions in this overlapping area in which workmen's compensation is applicable but the co-employee is not immune from suit. For an employee to be free from liability for his negligence, he must be working strictly within the scope of his employment in the respondeat superior sense of that phrase, while the injured employee's ability to recover workmen's compensation benefits extends to broader situations arising from his employment, including parking lot accidents following a work shift.

Kent Frewing

SURFACE WATERS IN CALIFORNIA: ADOPTION OF REASONABLE USE RULE: *KEYES V. ROMLEY* (CAL. 1965)

A landowner, whose property is higher than that of his neighbor, has certain rights and duties concerning the surface water that flows from his property onto the property of the other. As a corollary to this, the owner of the lower or servient tenement has other rights and duties concerning the flow of the water onto his land. Thus stated, the surface water problem has been clearly identified in all

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[20] *Id.* at 139-40, 33 Cal. Rptr. at 747.
[21] Saala v. McFarland, 231 A.C.A. 22, 28, 41 Cal. Rptr. 530, 535 (1964).

the jurisdictions of the United States.[1] Nevertheless, the applicable rule of law has varied according to each jurisdiction.[2]

PRIOR LAW IN CALIFORNIA

Traditionally, California has followed the civil law rule.[3] That rule can be stated as follows:

> . . . [A]s between the owners of higher and lower ground, the upper proprietor has an easement to have surface water flow naturally from his land onto the land of the lower proprietor, and that lower proprietor has not the right to obstruct its flow and cast the water back on the land above.[4]

The California courts were quick, however, to apply an exception to this rule if the real property in question was located in an urban area. By way of dictum, the California Supreme Court said that the civil law rule was not generally followed, "in so far as it applies to town or city lots."[5]

Succeeding cases in this state have re-emphasized this general distinction. In *Los Angeles Cemetery Ass'n v. City of Los Angeles*[6] and *Voight v. Southern Pac. Co.*,[7] the court recognized the need for a modification of the civil law rule in view of the changing character of the community. The court in the *Voight* case distinguished the rule set forth in *LeBrun v. Richards*[7a] by stating:

> We would point out, however, in that case [*LeBrun*] plaintiff and defendant were both still engaged in agriculture. . . . In that case neither plaintiff nor defendant was a party to the urbanization of the neighborhood.[8]

Nevertheless, the *Voight* case continued to treat its ruling as an exception to the civil law doctrine. It was for the District Court of Appeal, in *Keyes v. Romley*,[9] to assert that the rule in California had changed to the reasonable use doctrine.

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1 Surface waters have been defined as ". . . waters that are precipitated by rains and snows on the land. . . . The chief characteristic is inability to maintain their identity and existence as a body or stream of water. They flow vagrantly over the land but are not divested of their character as surface waters by reason of flowing onto lower land in obedience to the law of gravity. . . ." 52 Cal. Jur. 2d *Waters* § 724 (1959).

2 There are generally three views on surface waters. For discussion see 93 C.J.S. *Waters* § 114(a)(1) (1956).

3 LeBrun v. Richards, 210 Cal. 308, 291 Pac. 825, 72 A.L.R. 336 (1930).

4 93 C.J.S., *supra* note 2, at 803.

5 Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213 (1873).

6 103 Cal. 461, 37 Pac. 375 (1894).

7 194 Cal. App. 2d 907, 15 Cal. Rptr. 59 (App. Dep't Super. Ct. 1961).

7a 210 Cal. 308, 291 Pac. 825 (1930).

8 *Id.* at 915, 15 Cal. Rptr. at 64.

9 233 A.C.A. 681, 43 Cal. Rptr. 683 (1965).

THE KEYES CASE AND A NEW RULE

In the *Keyes* case, the plaintiffs, Keyes, and the defendants, Lusebrinks, were adjoining landowners in the town of Walnut Creek. In 1956, the defendants leased their property, as yet unimproved, to the defendant Romley. The plaintiffs, in the meantime, built an appliance shop on their premises during the same year. In the process of building, they piled excavated dirt in the rear of their property, which was adjacent to the boundary line of the defendants' property. Later in 1957, the defendant lessee constructed a building which housed an ice rink. He constructed an asphalt pavement around the building. The defendant also installed four downspouts on the side of the building nearest to the plaintiffs' land. Excavation and further improvements by both parties changed the contour of the land so that the property of the plaintiffs was lower than that of the defendants. Water from the defendants' land flowed onto the Keyes property. Keyes tried to divert the water away by constructing a ditch. After that failed, he used railroad ties in an attempt to curtail the flooding. Flooding occurred from 1959 to 1961. The problem was finally remedied in 1962, but the plaintiffs brought this action to recover damages which were sustained during the preceeding three years.

The trial court found that the defendant Romley had gathered surface waters onto the lower lands of the plaintiffs in a greater volume than had been discharged prior to the construction of the ice rink and the asphalt pavement. Accordingly, judgment was given in favor of the plaintiffs.

On appeal, the District Court reversed the judgment in favor of the defendants. In doing so, the court unequivocally asserted a new doctrine concerning surface water rights in California.

The reasonable use rule, sometimes referred to as the Minnesota rule, differs considerably from the civil law and common enemy[10] rules. Under it, a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make reasonable use of his land, even though the flow of the surface waters is altered and causes some harm to others. The owner of the dominant

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[10] Under the common enemy rule, surface water is " . . . regarded as a common enemy which every proprietor may fight as he deems best, regardless of its effect on other proprietors; and under this rule the lower proprietor may take any measures necessary for the protection or improvement of his property, although the result is to throw the water back on the land of an adjoining proprietor. . . ." 93 C.J.S. *Waters* § 114(a)(2) (1956).

tenement incurs liability only when his harmful interference is unreasonable.[11]

The court concluded in *Keyes* that to establish reasonable use: (1) there should be a reasonable necessity for the drainage; (2) reasonable care must be taken to avoid unnecessary injury to the land receiving the burden; (3) the utility or benefit accruing to the land drained should reasonably outweigh the gravity of the harm resulting to the land receiving the burden; (4) when practicable, the drainage should be accomplished by improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or in the absence of a natural drain, a reasonable and feasible artificial drainage system should be provided.[12]

Instead of distinguishing between urban and rural property, as the courts in previous cases had done, this court adopted a different tack. Reasonableness is to be the determining factor. Other jurisdictions which have adopted the reasonable use rule are New Hampshire,[13] Minnesota,[14] New Jersey,[15] and most recently, Alaska.[16]

Conclusion

The abandonment of the civil law rule has been long in coming. In the main, California courts have recognized that the civil law rule, which defined surface waters in terms of natural flow, is no longer adequate in a growing, highly urbanized and industrial state. In so far as the reasonable use rule has been adopted, there are several questions which remain to be answered.

The first point of inquiry is, does the reasonable use rule apply only to urban lands? The court in the *Keyes* case arrived at its decision by observing:

> In view of the rapid growth and development of urban communities in this state, we believe that the time has come for the adoption in this state of a rule with respect to surface waters *in cities and towns* which attends the application of the rule of reason and will thereby balance the competing interests in the light of social progress and common wellbeing.[17]

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11 See generally Kinyon & McClure, *Interferences with Surface Waters*, 24 Minn. L. Rev. 891, 904 (1940).

12 233 A.C.A. 681, 690-91, 43 Cal. Rptr. 683, 690 (1965).

13 City of Franklin v. Durgee, 71 N.H. 186, 51 Atl. 911 (1902).

14 Sheehan v. Flynn, 59 Minn. 163, 32 N.W. 462 (1894).

15 Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

16 Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450 (Alaska 1963). Also, for general comments on reasonable use rule see 59 A.L.R.2d 435.

17 233 A.C.A. 681, 689-90, 43 Cal. Rptr. 683, 690 (1965). [Emphasis added.]

If the court meant to apply the rule of reason only to the urban areas of the state, the problem of surface waters in the rural parts of the state has no applicable rule of law, unless the civil law rule is to be applied. The language of the District Court of Appeal seems to consider only the urban lands of California. Certainly, if the court meant to have a bifurcated surface water doctrine, it left itself open to further problems of determining what constitutes an urban area. In all probability, the courts will apply the reasonable use doctrine to rural lands as well as to urban lands in order to avoid this dilemma.

The second question is, does the adoption of the reasonable use rule mean that the court is tending to look at the surface water problem in terms of tort liability, rather than in terms of property law? Traditionally, the surface water problem was an area of property law. With the application of the rule of reason, the implication seems to be that the legal relations of the parties are defined more in terms of legal obligations rather than by the rigid rules found in property law. It has been observed that:

> Such words as "right," "servitude" and "easement" seem to connote something fixed and definite to most courts, and it is difficult for them to use those terms in describing flexible legal relations dependent on varying circumstances. The terms have acquired a certain rigidity and absoluteness from their long association of the Land Law.[18]

The same writers seemed to feel that the reasonable use rule tended to define surface water in terms of tort law.[19] They went on to say that the use of tort law in this area would bring out a clearer and more penetrating analysis of the fundamental considerations involved.[20]

The practical importance of this problem is apparent. Certainly, the theory which one uses to plead his surface water action may well determine the outcome of his case.

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[18] Kinyon & McClure, *supra* note 11, at 937-38.
[19] *Id.* at 939.
[20] *Ibid.*