In Re Flood Litigation: When It Rains, the Lawsuits Pour: Considering Social, Public and Economic Policy When Determining Duty in West Virginia

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IN RE FLOOD LITIGATION: WHEN IT RAINS, THE LAWSUITS POUR: CONSIDERING SOCIAL, PUBLIC AND ECONOMIC POLICY WHEN DETERMINING DUTY IN WEST VIRGINIA

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I. INTRODUCTION

In July of 2001, a storm system drenched southern West Virginia with heavy rain and caused flash flooding in many counties.\(^1\) The flooding devastated many communities, forcing citizens either to relocate or rebuild, and estimated damages are approximately $500 million.\(^2\) As a result, roughly 3,500 people sued various coal, timber, railroad and other landholding companies for damages sustained during that flood.\(^3\)

The plaintiffs alleged that the companies altered the landscape, increasing the water runoff and worsening the flood damage.\(^4\) However, unlike other surface water alteration cases, the scale of damages and large number of plaintiffs (some not living adjacent to any defendant’s property) make this lawsuit unique.\(^5\) As a result, these cases will force West Virginia courts to analyze new surface water issues, such as what theories of recovery are available to plaintiffs and what extent the defendants owe a duty of care to non-adjacent landowners. Additionally, the complexity of this litigation will force courts to confront many surface water alteration issues more explicitly than they have in the past.

The implications of this lawsuit will not be limited to the July 8, 2001 floods. Actually, more than 600 plaintiffs have already filed lawsuits against many of the same companies for damages sustained during floods on May 2, 2002.\(^6\) Also, lawyers involved in those cases expect to see lawsuits from 2003 and 2004 flooding as well.\(^7\) Holding coal, oil, gas, timber, and other landholding companies liable for damages every time it floods could be financially ruinous for many of the defendants and it could worsen the economic conditions in an already depressed part of West Virginia.\(^8\)

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3. Id.
4. Id.
5. Generally, West Virginia surface alteration cases involved only adjacent landowners. See, e.g., Morris Assocs., Inc. v. Priddy, 383 S.E.2d 770 (W. Va. 1989). “Generally, under the 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 . . . .” Id. at 773 (emphasis added).
8. For instance, due primarily to the economic effects of deindustrialization, McDowell and Wyoming counties alone, both of which were severely affected by the July 8, 2001 floods, have lost more than 70% of their population during the last 50 years. PLANNING, July 2004, Vol. 70, Issue 4, p.62. In addition, loss of jobs is primarily blamed for the fact that bankruptcy filings
This Note will analyze the West Virginia Supreme Court of Appeals’s decision in In re Flood Litigation. Specifically, it will discuss four issues in depth: (1) the two theories of recovery discussed in In re Flood Litigation, the nuisance theory and the reasonable use rule, and the relationship between them; (2) the factors that courts may use to define reasonable use; (3) the problems regarding causal apportionment and the divisibility of damages; and (4) how courts will define the duty of care element. This Note will primarily argue that when a court determines whether the defendants owed a duty of care to the plaintiffs, it should factor social, public and economic policy into its analysis. Particularly, when determining duty, courts should balance the plaintiffs’ needs to recover for their property damage against the economic implications of holding the defendants liable, the general populations’ need for the resources that the defendants produce, the jobs that the defendants provide in an economically depressed part of West Virginia, and the impact that holding the defendants liable would have on utility prices.

Part II of this Note discusses the three predominant surface water doctrines in the United States, as well as the history of the surface water doctrine in West Virginia. Several key issues raised in In re Flood Litigation are discussed in Part III. Specifically, Part III will discuss those factors that the court indicated should be considered in the reasonable use test; the Court’s insinuation that the plaintiffs have a cause of action under the theory of private nuisance; and finally, the distinction between causation and the apportionment of damages that is raised in the opinion. Part IV then argues that West Virginia courts should consider social, public and economic policy when determining duty, and that among these considerations should be the economic consequences that expanding the defendants’ duty would have on defendant companies and to the general public. Finally, Part V summarizes this author’s proposed solution to

soared to a record 6,326 in Southern West Virginia for the fiscal year ending June 30, 2003, breaking the previous record of 6,162. State Bankruptcies Soar, CHARLESTON GAZETTE, Aug. 21, 2003, at C2.

However, the natural resources industry continues to be a vital economic industry in West Virginia, particularly in the southern part of the state. In 2003, 8,923 people were directly employed by coal companies alone in the southern counties of Boone, Kanawha, Mingo, Logan, Wyoming, McDowell, and Raleigh, and coal producers in those same counties contributed over $7,450,000 to the state in severance tax for that same year. See WEST VIRGINIA COAL ASSOCIATION, COAL FACTS 7-16 (2004), http://www.wvcoal.com/resources/pdfs/coalfacts2004.pdf. In addition, Oil and Gas producers paid over $2,276,240 in severance taxes to the state of West Virginia.


Coleman, supra note 2, at C1. Justice Maynard noted during oral arguments that the court would have to form rules that would allow juries to weigh the flood losses against the “economic activity” created by the defendant companies. Id.
accommodate meritorious claims while protecting the defendants from limitless liability.

II. HISTORY OF SURFACE WATER DOCTRINES IN THE COMMON LAW

A. Three Predominant Surface Water Doctrines: The Common Law Rule, Civil Law Rule, and Reasonable Use Rule

In order to deal with the problems caused by the alteration of surface water, American jurisdictions initially adopted two doctrines that were almost diametrically opposed: the common law or common enemy rule [hereinafter the common law rule], and the civil law rule.\(^\text{11}\) Under the common law rule, "each landowner was entitled to take what steps he pleased, on his own land, to dispose of surface water without liability for any adverse consequences to his neighbors."\(^\text{12}\) Conversely, under the civil law rule, neither landowner could alter the natural flow of surface water over his or her respective properties.\(^\text{13}\) The common law rule had the advantage, particularly in undeveloped areas, of promoting improvements on the land, while the obvious negative effect of the rule was the potential unjust consequences to injured neighbors.\(^\text{14}\) On the other hand, the civil law rule, although avoiding inequitable results, had the tendency to preclude development of property.\(^\text{15}\) Thus, in an effort to avoid the rigidity of the common law and promote the development of land, a hybrid approach developed focusing on the reasonableness of the development when determining liability.\(^\text{16}\) Under this hybrid approach, which became known as the reasonable

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\(^\text{12}\) Id. The common enemy doctrine or common law rule "provides that surface water is an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others." Halverson v. Skagit County, 983 P.2d 643, 651 (Wash. 1999) (internal quotations omitted).

\(^\text{13}\) See Fairchild, supra note 11, at 1216. Under the civil law rule, adjoining landowners are entitled to have the normal course of natural drainage maintained, with the lower owner bound under a servitude to accept and dispose of the water which naturally came to his land from above, but, reciprocally, he was not entitled to have the normal drainage artificially changed or increased.

\(^\text{14}\) See id.

\(^\text{15}\) See id.

\(^\text{16}\) See id. at 1197-1199.

The erosion incident to attempts to apply the extreme doctrines to constantly arising 'hard cases' soon led to the adoption of exceptions to both rules, which tended to draw them both toward a more flexible middle position and to give the courts considerable leeway in adjusting the rights of the parties in the light of particular circumstances.
use rule, the value of improvements to the property benefited by the diversion of surface waters are weighed against the harm the water diversion caused other property. New Hampshire first interpreted the rule in 1862 in the case of Basset v. Salisbury Manufacturing Company. There, the Supreme Judicial Court of New Hampshire rejected the common law approach's rigidity, and it rejected the civil law rule for its tendency to prevent improvement of the land. Instead, the court fashioned a rule stating that one property owner could reasonably use his or her own land provided that he or she did not interfere with the property rights of others. Under Basset, any landowner who altered the surface water on his or her land in such a way that injured another was liable for such damage unless, under all the circumstances, the landowner's use was reasonable. Despite the equitable balancing approach under this rule and the First Restatement of Torts' strong promotion of the rule, Minnesota was the only other state to formally adopt the reasonable use rule until midway through the twentieth century. Instead, most states, much like West Virginia, adopted exceptions to their respective surface water doctrines causing them to approach an intermediate rule actually resembling the reasonable use rule.

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18 43 N.H. 569 (1862). See also Fairchild, supra note 11, at 1216.
19 See Bassett, 43 N.H. at 573-577. Discussing the civil law rule, the court stated, No land-owner has an absolute and unqualified right to the unaltered natural drainage or percolation [of water] to or from his neighbor's land. In general it would be impossible for a land-owner to avoid disturbing the natural percolation or drainage, without a practical abandonment of all improvement or beneficial enjoyment of his land.

20 Id. at 577. The court stated in Salisbury that whenever landowners disrupt the natural flow of surface water on their property, "they are liable, unless the obstruction was caused by the reasonable use of their own land or privilege; and the reasonableness of the use would depend upon the circumstances of the case." Id. at 577.

21 Id.

22 Stanley V. Kinyon & Robert C. McClure, Interference With Surface Waters, 24 MINN. L. REV. 891, 908 (1940); see also Sheehan v. Flynn, 61 N.W. 462, 465 (1894) (Minnesota adopted the reasonable use rule).

23 Fairchild, supra note 11, at 1198.
B. Surface Water Doctrine in West Virginia


Early case law in West Virginia regarding the alteration of surface water is "not a model of clarity." In two of its earliest decisions, the West Virginia Supreme Court of Appeals seemed to have adopted the civil law rule. In *Gillison v. Trustee,* the court held that a city had a duty in making street improvements to not change the course of surface water in a way that damaged the adjoining property. Then, in *Henry v. Ohio River Railroad Co.,* the court held that a railroad company was liable for constructing an embankment that caused water to collect on the plaintiff's property. However, in *Jordan v. City of Brenwood,* the court adopted the common law rule despite its earlier decisions. The facts in *Jordan* were similar to those in *Gillison.* The plaintiff sued a municipality for raising the street level grade and causing water that would have gone elsewhere to flow onto her property. After analyzing both the common law and civil law rules, the court adopted the common law rule and held that the city was not liable for increasing the surface water that flowed onto the

25 *Id.* at 772.
26 16 W. Va. 282 (1880).
27 *Id.* at 304. In *Gillison,* the plaintiff claimed that the city of Charleston damaged her property when it installed surface water drains near her yard. *Id.* at 284. The plaintiff claimed that the surface water drains prevented surface water from draining from her property. *Id.* The court held that "where a city in grading its streets by cutting ditches and drains collects surface-water, and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural water-course, the proprietor sustains a legal injury and may have his action therefore." *Id.* at 304.

In *Gillison,* the court discussed in length several opinions dealing with the diversion of surface water, and it appeared to reject the common law rule.

A number of authorities . . . recognize the principle that individuals and municipal corporations have the right to dispose of surface-water in any manner they please, to prevent its flow from adjoining lands upon their premises, although the result may be to flood the adjoining land, or to expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics as well as law, that a man may use his own property in any manner he pleases: *Provided,* he does not thereby interfere with the rights of his neighbor.

28 21 S.E. 863 (W. Va. 1895).
29 *Id.* at 867.
31 *Id.* at 268. The court stated that *Gillison* "recognized the general [common law] rule inferentially," but it never stated that *Gillison* seemed to have rejected the common law rule. See *id.* at 267.
32 *Id.* at 266.
plaintiff's lot. However, recognizing the potential harshness of this rule, the court created an exception to the common law rule which said that a landowner could be liable if he or she caused surface water to flow onto another's property by channeling it through drains, ditches, or culverts.

After Jordan, the court continued to expand the exception to the common law rule in an effort to soften the rule. The court held that water that collected in holes before spilling onto neighboring lands fit into the common law rule exception announced in Jordan, that an embankment constituted a drain or channel, and that Jordan did not apply when a city altered the street grade and caused water from connecting streets to flow onto the plaintiff's property. In at least one case, the court's holding resembled the civil law rule and ignored the common law rule altogether.

In Tierney v. Earl, the court held that the defendant was liable for raising the grade on his property in a manner that altered the flow of water onto the plaintiff's property, which was contradictory to the holding in Jordan. In fact, Tierney caused West Virginia to be classified as a civil rule state by at least one legal commentator. As a result, after Jordan, in its effort to create equitable results without abandoning a rigid rule, the court instead created unpredictable and often contradictory case law.


In 1989, in Morris Associates, Inc. v. Priddy, the West Virginia Supreme Court of Appeals overturned Jordan v. City of Brenwood and the common law rule for surface water liability and adopted the reasonable use rule. In Morris, the defendant installed a series of culverts on his property over which

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33 Id. at 268
34 Id.
37 See Mason v. City of Bluefield, 141 S.E. 782 (W. Va. 1928).
40 Id. at 560.
41 See generally Jordan v. City of Brenwood, 26 S.E. 266 (W. Va. 1896).
42 See Fairchild, supra note 11, at 1209 (stating that West Virginia recognized the civil law rule in Tierney v. Earl).
43 See Morris Assocs., Inc. v. Priddy, 383 S.E.2d 770, 772 (W.Va. 1989) ("Admittedly, our law with regard to a landowner's liability for altering the surface of his land to change the course or amount of surface water . . . is not a model of clarity.").
45 See id. at 774.
he constructed a parking lot. After a hard rainstorm, the culverts proved inadequate, and the plaintiff’s adjacent parcel of land flooded. The court thoroughly analyzed surface water law in West Virginia and concluded that the law lacked clarity and was too inflexible to meet the demands of a modern society. The court adopted the reasonable use standard, which states that when dealing with surface water, a landowner 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.” Additionally, the determination of reasonableness is a question of fact for the jury.

Cases after Morris expand little on what constitutes “reasonable use.” In Whorton v. Malone, several defendants developed their respective properties, which entailed clearing land, building roads, and constructing ditches and culverts to deal with the surface water. The defendants’ land bordered the plaintiff’s, and after several rainstorms, the plaintiff experienced flooding on her property which she claimed was exacerbated by the defendants’ development. The defendants argued that they were not liable because the surface water did not originate on their property and that their actions were reasonable as their intent was to solve their own water problems, not to injure their neighbors’ property. The court held though, that a defendant would not be shielded from liability merely because the surface water originated elsewhere. In addition, the court reasoned that unless there was a valid waiver of liability, landowners could not claim that actions taken in altering the natural flow of water from their land were reasonable just because they intended to protect their property and not to harm any other property. However, because reasonable use is a fact specific inquiry, the court refused to say whether the defendants’ actions were a reasonable use of their property, and it remanded the case to the lower court. One other important factor in Whorton is the court’s statement that under the reason-

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46 Id. at 770-771.
47 Id.
48 Id. at 772-773.
49 Id. at 773.
50 Id.
51 Id.
52 549 S.E.2d 57 (W. Va. 2001).
53 Id. at 62. It is important to note too that the court made it a point to state that such development can “significantly change the amount of water the land can absorb during a storm, and the amount of water that will run off.” Id.
54 Id.
55 Id. at 62-63.
56 Id. at 63.
57 Id. at 64.
58 Id.
able use standard, the principles of negligence would still control. This means that the defendants must owe a duty of care to the plaintiffs in order to be held liable for the alteration of surface water.

In McCormick v. Wal-Mart Stores, Inc., Wal-Mart constructed a Supercenter between the plaintiff's land and another piece of property where the town of Lewisburg had previously constructed storm water drains. Following the construction, the town's drainage system became inadequate, and the plaintiff's land began to flood after heavy rainstorms. The town of Lewisburg argued that no cause of action existed under the reasonable use test against non-adjacent landowners, and because Wal-Mart was an intervening property, the town should not be held liable. However, the court rejected this argument and held that a landowner was not immunized from liability merely because the water passed over an intervening property before causing the injury. Rather than base this conclusion under the traditional tort principles of duty or foreseeability of the harm, the court instead relied on Whorton's holding that the origination of water was irrelevant when determining liability in surface water alteration cases.

The issue in McCormick was not the origination of the surface water, but by phrasing the issue in this manner, McCormick might create an additional duty for some landowners. In Whorton, the defendants constructed an inadequate culvert that increased the water runoff onto their neighbor's land, and then argued that they should not be liable because the surface water did not originate on their property. The Court correctly rejected this argument, recognizing that if that were the law, no one would be liable for unreasonable surface alteration because "[i]t is an inescapable fact of nature that, surface water originates elsewhere." On the other hand, in McCormick, the town constructed a drainage system that was adequate until Wal-Mart built a store between the plaintiff's

59 Id. at 61.
60 See Aikens v. Debow, 541 S.E.2d 576, 580 (W. Va. 2000). "In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Id.
62 Id. at 578.
63 Id.
64 Id. at 579.
65 Id. But see Justice Maynard's dissenting opinion criticizing this aspect of the holding. Id. at 581 (Maynard, J., dissenting). Justice Maynard stated that landowners should only be held liable for surface water run-off that damages an adjoining landowner. Id. at 582.
66 Id. at 579-80.
68 See id. at 62. Surface water either "falls from the sky, comes up from a spring, or flows from a higher grade to a lower one." Id.
property and the drainage system. In Whorton, the actual construction was unreasonable, but in McCormick, it was not the construction itself that was unreasonable, but the town’s failure to upgrade its culvert after another party’s land use caused the culvert to become inadequate. So, McCormick might create the additional duty for some landowners to intervene and preemptively alleviate water problems caused by a third party’s subsequent development of his or her property.

So, in decisions post-Morris, the court has held that the origination of the surface water and intent are not determinative of liability and that the reasonable use test is not limited to adjacent landowners. Beyond that there is little analysis of what factors constitute a reasonable use of one’s property.

C. Reasonable Use Rule in Foreign Jurisdictions

Although a fact specific inquiry, four basic factors have emerged in jurisdictions applying the reasonable use doctrine: (1) whether it was reasonably necessary to alter the surface water flow; (2) whether reasonable care was taken to avoid unnecessary harm; (3) whether the benefit resulting from the alteration outweighed the gravity of the harm; (4) and whether any viable alternative existed for the course of action taken. Other courts have also considered to what extent the natural flow of water was altered, the cost of any alternative means of disposing of surface water, and whether or not the upper landowner acted in good faith. One court has held that no matter how beneficial a diversion of surface water may be, the defendant may still be required to pay damages if the cost of bearing the harm is greater than the injured party should be required to

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69 See McCormick, 600 S.E.2d at 577.
70 See Whorton, 549 S.E.2d at 63.
71 See McCormick, 600 S.E.2d at 577.
72 See id. at 582 (Maynard, J., dissenting).
73 Lockhart, supra note 17 §3.
74 See Rodrigues v. State, 472 P.2d 509, 516 n.5 (Haw. 1970). “The circumstances which may be considered [under the reasonable use rule] include: the nature and importance of improvements made, the reasonable foreseeability of the injury, the extent of interference with the water, the amount of injury done to other landowners compared to the value of the improvements.” Id.
75 See Hall v. Wood, 443 So. 2d 834, 840 (Miss. 1983). “Where two methods of disposing of excess waters are available to an upper landowner, one of which will damage to lower lands of his neighbors and the other of which will not, the upper landowner, absent prohibitive expense, must use the latter alternative.” Id.
76 See Quist v. Kroening, 410 N.W.2d 5, 6 (Minn. App. 1987). In Quist, the defendants intentionally built their house on lower ground to avoid building steps that could have posed difficulties for their handicapped son. Id. at 7. Ten years after they built their house, the defendants raised one portion of their lot three to four inches in order to better drain that part of their yard. Id. However, after the defendants raised that corner of their lot, the plaintiff’s lot began collecting water. Id. The court indicated that the defendants acted in good faith, and that this was a reasonable use of the defendants’ land. Id.

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bear without compensation. As the current flood litigation proceeds in West Virginia, these cases could be probative as to what factors the courts will consider when determining whether the defendants' use of their land was reasonable under the circumstances.

D. Restatement (Second) of Torts' Approach to Surface Water Alteration

The Restatement (Second) of Torts defines the "reasonable use rule" as a rule of tort law applying the law of nuisance rather than the law of property. Under the Restatement’s approach, the "invasion of one's interest in the use and enjoyment of land resulting from another's interference with the flow of surface water may constitute a nuisance." A nuisance can be either private or public; "[a] public nuisance is an unreasonable interference with a right common to the general public", and "[a] private nuisance is a nontrespassory invasion of an-

77 See Pendergast v. Aiken, 236 S.E.2d 787, 797 (1977).

[E]ven should alteration of the water flow by the defendant be 'reasonable' in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance 'if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation. . . . The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant.

Id. (internal citations omitted).

78 Restatement (Second) of Torts § 833 cmt. c (1979).

79 Id. A nuisance cause of action references the interest invaded and not the type of conduct that subjects the actor to liability. Id. § 822 cmt. b. Failure to differentiate the two has led to confusion as courts have attempted to distinguish between private nuisance and negligence. Id. Thus, it is the land interest invaded that makes it a private nuisance cause of action, and it is the actor's negligent conduct that subjects the actor to liability. Id. A private nuisance is not itself a form of liability forming conduct. Id. at cmt. c.

80 Id. § 821A.

81 Id. § 821B. In order to recover for a public nuisance, one must have suffered a unique harm that the general public did not suffer. Id. at § 821C. It is not enough that the plaintiff suffered the same harm but to a more extreme degree than the general public. See id. at cmt. b. In other words, if a public highway is obstructed and everyone who drives on the highway has to detour a mile, there is no distinction between the person who has to drive on the highway and take the detour every day and the person who drives on the highway only once a month. See id. Neither can bring a public nuisance cause of action. See id. Therefore, it is unlikely that anyone in the pending flood litigation would be able to bring a public nuisance cause of action because even though some suffered more flood damage than others, everyone suffered at least some flood damage.
other’s interest in the private use and enjoyment of land.”

In addition, to constitute a private nuisance, the plaintiff must suffer "significant harm." Most surface water disputes arise under a private nuisance theory since they usually involve damage to private property. Under the Restatement:

[o]ne is liable for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligence or reckless conduct, or for abnormally dangerous conditions or activities.

Intentionality is found when the actor “acts for the purpose of causing [the invasion]”, or if the actor “knows that [the invasion] is resulting or knows [the invasion] is substantially certain to result from his [or her] conduct.” Thus, under the Restatement, if Party A intentionally alters the flow of surface water onto Party B’s property causing B damage, then the question becomes whether A’s use of his or her land was reasonable. In determining whether conduct was unreasonable, a court weighs the gravity of the harm against the benefits of the intentional invasion. If Party A unintentionally alters the flow of surface water causing harm to Party B’s property, then A may still be held

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82 Id. § 821D.
83 Id. § 821F. Significant harm means more than a "slight inconvenience or petty annoyance." The plaintiff must have suffered a "real and appreciable invasion of [his] interests before he can have an action for either a public or a private nuisance." Id. at cmt. b.
84 Id. § 822.
85 Id. § 825. Examples of intentional conduct would be a person who builds a bonfire next door to her neighbor’s house when she knows that the smoke will blow into her neighbor’s house, or when a person dumps materials into a stream on her property which flows through her neighbor’s property and prevents the neighbor from utilizing the water. See id. at cmt. d., illus. 1-2.
86 See id. § 822.
87 Id. § 826. The Restatement (Second) of Torts lists the following factors as important when determining the gravity of harm from an intentional invasion of another’s use of land:

(a) The extent of the harm involved; (b) the character of the harm involved; (c) the social value that the law attaches to the type of use or enjoyment invaded; (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and (e) the burden on the person harmed of avoiding the harm.

Id. § 827. In determining the utility of the conduct, the Restatement lists these factors as important: “(a) the social value that the law attaches to the primary purpose of the conduct; (b) the suitability of the conduct to the character of the locality; and (c) the impracticability of preventing or avoiding the invasion.” Id. § 828.
liable if his conduct was nonetheless negligent, reckless, or included an abnormally dangerous activity. 88

III. IN RE FLOOD LITIGATION: ANALYZING THE COURT’S OPINION

After the severe flooding that occurred in July 2001, roughly 3,500 plaintiffs sued various coal, railroad, timber, natural gas and other landholding companies for negligently altering the surface water on their properties. 89 The West Virginia Supreme Court of Appeals issued an administrative order that consolidated the estimated 3,500 cases into a massive lawsuit before a three-judge mass litigation panel ["Flood Litigation Panel"]. 90 The Flood Litigation Panel’s duties were to develop and implement case management and trial methodologies that would facilitate an efficient and timely trial (or trials) for the mass litigation. 91 The Flood Litigation Panel decided that the watersheds and plaintiffs involved had different factual patterns, but all of the cases had similar questions of law. 92 The Panel then certified nine questions of law to the West Virginia Supreme Court of Appeals. 93 The Court reformulated several of the certified questions and provided answers and analysis for each of the questions of law. 94 Upon remand, the Flood Litigation Panel will decide the most appro-

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88 Id. § 822. An example of an unintentional invasion of land would be a landowner who dumps waste material onto her land and unbeknownst to her, the waste material seeps into her neighbor’s groundwater and contaminates it. Id. § 825 cmt. d, illus. 3. However, if the landowner subsequently learns that her waste material is contaminating her neighbor’s property and she continues to dump the material, the invasion becomes intentional. Id. at illus. 4.

89 Coleman, supra note 2, at C1.


91 The Mass Litigation Panel is a panel of senior status circuit judges who are appointed by the Chief Justice of the West Virginia Supreme Court of Appeals. See W. VA. TRIAL CT. R. 26.01(a) (2005). The Panel’s responsibilities consist of “developing and implementing case management and trial methodologies for mass litigation”, and to “make recommendations . . . on the transfer of actions from one jurisdiction to another in order to facilitate any case management or trial methodologies developed by the panel . . . .” Id. at 26.01(b)(1), (3). “‘Mass litigation’ [is] defined as two or more civil actions pending in one or more circuit courts . . . involving common questions of law or fact in ‘property damage mass torts’.” W. VA. TRIAL CT. R. at 26.01(c).

92 In Re Flood Litig., 607 S.E.2d 863, 869 (W. Va. 2004).

93 See id. For purposes of the proposed questions of law, the Panel assumed that the defendants’ activities caused an increase in peak water flow and thus caused the plaintiffs damage. See id. at n.4.

94 The reformulated certified questions and answers are:


2. Whether the plaintiffs have a cognizable cause of action upon the allegation
appropriate trial method for the mass litigation given that the fact patterns are different, but the reformulated questions of law will be controlling in all of the roughly 3,500 cases.\textsuperscript{95} This Note, however, will focus on only those questions pertaining to the reasonable use rule, the nuisance theory, the issues of causation and the apportionment of damages, and the issue of duty.

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that the defendants were negligent in the use of their land and therefore answerable under the classic theory of negligence.
Answer: Yes.

3. Whether the plaintiffs have a cognizable cause of action upon the allegation that the operation of extracting and removing natural resources is an abnormally dangerous activity or that such activity produces ancillary conditions that create an unreasonably high risk of flash flooding so that the defendants are strictly liable to the plaintiffs for any damages caused by these activities.
Answer: No.

4. Do those plaintiffs herein who are riparian owners, by virtue of the fact that they own property adjacent to a stream or through which a stream flows, have a cognizable cause of action for interference with riparian rights based on the fact that the stream's natural flow was increased by a flood or the water of the stream overflowed and stood upon the riparian owner's land?
Answer: Yes.

5. In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with federal law and with permits issued by appropriate federal agencies, is any state court action preempted for damages caused by surface waters accumulating and migrating on residential property?
Answer: No.

6. Is compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent?
Answer: Yes.

7. Where a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way fairly attributable to the defendant's conduct, then is the defendant liable only for the damages that are fairly attributable to the defendant's conduct?
Answer: Yes.

\textit{Id.} at 879-80.

\textsuperscript{95} See W. VA. TRIAL CT. R. 26.01.
A. West Virginia Begins to Outline What Factors Will be Considered in the Reasonable Use Test

In *In re Flood Litigation*, the West Virginia Supreme Court of Appeals expanded on what factors could be important in the reasonable use rule's balancing test. The court unequivocally stated that the foreseeability of the harm is one such factor.\(^96\) The defendants argued that only adjacent landowners had a cause of action under the reasonable use rule in *Morris*.\(^97\) The court rejected this argument and held that one factor to be determined under the reasonableness rule was the foreseeability of the harm.\(^98\) The court reasoned that it would be unjust to adopt an inflexible rule that a defendant could not be held liable to a non-adjacent landowner, particularly in situations where the topography of the land made the harm foreseeable.\(^99\) In addition, the Flood Litigation Panel certified two sub-parts of question one which asked whether the balancing test in the reasonable use standard included such intangibles as the right to peaceful enjoyment of the land, and whether the social utility of the defendants' activities included the general population's need for electricity and heat.\(^100\) Again, like in *Whorton*, the court stated that because of the fact-specific nature of the inquiry, it would not try to state with specificity all of the factors to be considered when determining reasonableness.\(^101\) Instead, the court held that juries should consider "all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of [the] landowner making [the] alteration in the flow of surface waters, and the purpose or motive with which the landowner acted, etc."\(^102\) This was certainly intended as a non-exhaustive list, and since the court emphasized that all relevant factors should be considered, the opinion suggests that the societal benefits from the defendants' operations and the plaintiffs' right to peaceful enjoyment of their property are relevant factors that need to be weighed against each other when determining reasonableness.

B. Has West Virginia Created a Separate Cause of Action For Surface Water Alteration?

The second certified question was whether, in addition to the reasonable use standard in *Morris*, the plaintiffs have an additional cause of action upon

\(^96\) *In Re Flood Litig.*, 607 S.E.2d at 871.

\(^97\) *See id.* at 870.

\(^98\) *Id.* at 871.

\(^99\) *Id.* at 870.

\(^100\) *Id.* at 871.

\(^101\) *Id.*. In *Whorton*, the court also refused to state what factors constituted a reasonable use of one's property because of the fact-specific nature of the inquiry. *See Whorton v. Malone*, 549 S.E.2d 57, 64 (W. Va. 2001).

\(^102\) *Id.*
allegations that the defendants’ use of the land is a private nuisance and therefore actionable under the standards set forth in *Hendricks v. Stalnaker*.

The court refused to answer the question on the grounds that it did not have a sufficient factual record before it, but the court did not preclude a cause of action for a private nuisance, and it stated that nothing in West Virginia case law excluded a cause of action in nuisance for surface water diversion.

Because the court insinuated that the plaintiffs have a cause of action under a private nuisance theory, a discussion of *Hendricks* is relevant. In *Hendricks*, the defendant drilled a water well near the border of his property - the only feasible place on his property to drill a well. The plaintiff wanted to develop a septic tank, but the only part of his land that was suitable was an area that was within 100 feet of the defendant’s water well and state regulations prevented a septic tank from being developed within 100 feet of a well. The plaintiff sued under the theory that the defendant’s water well was a private nuisance. The court adopted the Restatement (Second) of Torts’ definition of nuisance, holding that the plaintiff’s inability to operate a septic system on his land due to the defendant’s water well was a substantial interference with the plaintiff’s use and enjoyment of his land. In addition, the court held that the interference was intentional because the defendant did not drill the water well until after he learned that the plaintiff intended to develop a septic system. Therefore, he knew or should have known that this would have prevented the plaintiff from developing the septic system. Nonetheless, the court held that drilling a water well was not an unreasonable use of one’s land, so the defendant was not liable. In determining whether the conduct was unreasonable, the court adopted the Restatement’s balancing approach and weighed the gravity of the harm against the social value of the activity alleged to cause the harm. The court noted that both the plaintiff’s septic system and the water well were necessary for both parties to develop the land and that neither party had a practical and inexpensive alternative. However, in a nuisance cause of action, the plaintiff has the burden of proving that the gravity of harm outweighs the social value of the activity alleged to have caused the harm.

105 *Hendricks*, 380 S.E.2d at 199.
106 *Id.* at 200.
107 *Id.*
108 *Id.* at 202.
109 *Id.*
110 *Id.*
111 *Id.* at 203.
112 *Id.* at 202.
113 *Id.*
114 *Id.*
interests were equal, and since the plaintiff failed to prove that the benefits gained from his septic system outweighed the defendant’s benefits from drilling his water well, the plaintiff did not show that the water well was an unreasonable use of the defendant’s land.\(^{115}\)

Despite the inference that the plaintiffs have one cause of action under the theory of private nuisance and a separate cause of action under \textit{Morris}’s reasonable use rule, the two approaches are actually the same cause of action. The surface water doctrine of reasonable use derives from the nuisance area of tort law.\(^{116}\) In a nuisance cause of action, courts must weigh the benefits of the land use versus the harm caused by diverted surface water.\(^{117}\) This balancing approach avoids the rigidity of the common law and civil law rules and it allows courts to recognize the right to peaceably enjoy one’s land as well as the need to develop property.\(^{118}\) In surface water alteration cases, this balancing approach became known as the reasonable use rule.\(^{119}\) However, the Court in \textit{In re Flood Litigation} suggests that a private nuisance cause of action is somehow separate from a cause of action for the unreasonable use of one’s land.\(^{120}\) Although it is

\(^{115}\) \textit{Id.} at 203.

\(^{116}\) \textit{See RESTATEMENT (SECOND) OF TORTS} § 833 reporter’s note, app. at 536 (1979).

Beginning with \textit{Basset v. Salisbury Mfg. Company} . . . and going through \textit{Sheehan v. Flynn}, . . . there developed the reasonable use rule, strongly promoted by the first Restatement . . . . The ‘reasonable use rule’ is a rule of tort law applying the law of nuisance rather than the law of property. The balancing process stated in §§ 822-831 [of the Restatement (Second) of Torts] provided the legal concepts for attaining a fair adjustment of the conflicting rights of the parties.

\(^{117}\) \textit{See id.}

\(^{118}\) \textit{Fairchild, supra} note 11, at 1216.

\(^{119}\) \textit{See id.} Many courts began adding reasonableness criteria to their respective surface water doctrines, which led some courts to formally adopt a reasonable use rule that applied the tort principles of reasonable use and negligence. \textit{See id.}

\(^{120}\) \textit{See In re Flood Litig.}, 607 S.E.2d 863, 869-72 (W. Va. 2004). The court also attempts to distinguish a reasonable use cause of action from an ordinary negligence cause of action. \textit{See id.} at 872. However, as the Restatement notes, the attempt to distinguish a private nuisance cause of action from a negligence cause of action has led to confusion. \textit{See RESTATEMENT (SECOND) OF TORTS} § 822 cmt. b. (1979). What such attempts fail to realize is that private nuisance merely references the interest invaded and negligence references the type of conduct that subjects the actor to liability for the invasion. \textit{Id.} In order to have a private nuisance cause of action, there has to be some sort of tortious activity. \textit{Id.} at cmt. c. Many began to think of a private nuisance as a type of liability forming conduct and contrasted it with negligence. \textit{Id.} However, in a private nuisance cause of action, it is the invasion in the interest in another person’s use and enjoyment of his or her land that makes it a private nuisance cause of action. \textit{Id.} But to be actionable, there still has to be negligent conduct on the part of the person that caused the invasion. \textit{Id.} In cases where the invasion is intentional, i.e. Party A intentionally digs a ditch on her land that causes water to flow onto Party B’s land, courts utilize a balancing approach to determine if Party A’s conduct is negligent. \textit{See id.} However, it is the fact that increased water flow onto Party B’s land prevents her from the \textit{use and enjoyment} of her land that makes it a private nuisance cause of action. \textit{See id.} Therefore, in a private nuisance cause of action, where the invasion is intentional, the balan-
uncertain that differing results would be reached under a private nuisance action as opposed to a reasonable use action, such an approach could potentially lead to more confusing case law as attorneys and judges would struggle to identify separate elements for what is essentially the same cause of action.\textsuperscript{121} To avoid this result, the court should recognize that the reasonable use tests in \textit{Hendricks} and \textit{Morris} are the same and should formally adopt the Restatement (Second) of Torts' approach to surface water alteration. This is not a drastic change in West Virginia case law, but merely a recognition that the reasonable use rule adopted in \textit{Morris} is rooted in the legal theory of nuisance.\textsuperscript{122} The net result would be that if the defendant intentionally altered the flow of surface water and damaged the plaintiff's property, the plaintiff would have to show that the defendant's conduct was unreasonable under \textit{Morris}'s reasonable use test.\textsuperscript{123} If the invasion was unintentional, the plaintiff would have to show that the defendant's conduct was nonetheless negligent, reckless, or that the conduct involved an abnormally dangerous activity.\textsuperscript{124}

In addition to doctrinal clarity, such an approach could also be useful in future surface water litigation because the balancing approach in West Virginia nuisance law is better defined and could help guide parties and courts as to what factors should be considered when determining reasonableness.\textsuperscript{125}

C. \textit{Distinguishing the Court's Treatment of Causation, Joint and Several Liability, and the Apportionment of Damages in In re Flood Litigation}

The other important issue addressed in \textit{In re Flood Litigation} is causation. The plaintiffs appeared to make a joint and several liability argument when they argued that the defendants should be liable for all damages if they contributed at all to the flooding.\textsuperscript{126} The defendants argued that the potential

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\textsuperscript{121} See \textit{Morris}, 383 S.E.2d 770, 772 (W. Va. 1989) ("Admittedly, our law with regard to a landowner's liability for altering the surface of his land to change the course or amount of surface water . . . is not a model of clarity.").

\textsuperscript{122} See \textit{RESTATEMENT (SECOND) OF TORTS} § 833 (1979) (reporter's note). \textit{See also} Pendergrast v. Aiken, 236 S.E.2d 787, 796 (N.C. 1977) (recognizing that a cause of action under the reasonable use rule is a private nuisance cause of action).

\textsuperscript{123} \textit{See id.} cmt. b.

\textsuperscript{124} \textit{See id.} However, in \textit{In re Flood Litigation}, the Court held that the defendants' operations were not abnormally dangerous activities. \textit{In re Flood Litig.}, 607 S.E.2d at 879.

\textsuperscript{125} For instance, the court adopted the Restatement (Second) of Torts' definition of what factors would be important when determining "the gravity of harm and the social value of the activity alleged to have caused the harm." \textit{Hendricks} v. Stalnaker, 380 Se. 2d 198, 202 (W. Va. 1989). \textit{See RESTATEMENT (SECOND) OF TORTS} § 826 (1979). \textit{See also} Duff v. Morgantown Energy Associates, 421 S.E.2d 253 (W. Va. 1992); Carter v. Monsanto Co., 575 S.E.2d 342 (W. Va. 2002).

\textsuperscript{126} \textit{See In re Flood Litig.}, 607 S.E.2d at 879. \textit{See also} Supplemental Brief of Plaintiffs at 1, \textit{In re Flood Litig.}, No. 02-C-797 (W. Va. Aug. 3, 2004), http://www.state.wv.us/wvsca/clerk/cases/
harshness of this result is evident because the defendant companies could not collect from the other tortfeasor, "mother nature." The court recognized the defendants' argument, but it also noted that if a heavy burden is placed on the plaintiffs to show the portion of the damages that is unforeseeable and fairly attributable to the defendants, then the defendants might unfairly escape liability. In an effort to strike a compromise between these competing interests, the court held that

[W]here a rainfall event of an unusual and unforeseeable nature combines with a defendant's actionable conduct to cause flood damage, and where it is shown that a discrete portion of the damage complained of was unforeseeable and solely the result of such event and in no way attributable to the defendant's conduct, the defendant is liable only for the damages that are fairly attributable to the defendant's conduct.

However, the court held that the defendants have the burden of proving by clear and convincing evidence the damages that are not the defendants' responsibility, and if they cannot do so, then they are liable for all of the damages.

The plaintiffs' argument that the defendants should be liable for the entirety of the damages if they contributed at all misconstrues the principles of joint and several liability. In order to hold multiple defendants joint and severally liable, all of the defendants' negligence must have been a legal cause of an indivisible injury. The primary test for factual cause is the "but for" analysis, which requires that the negligence must be that which produced the wrong complained of, and without which, the wrong would not have occurred. In this case, there are arguably two alleged causes - mother nature and the alteration of land surfaces. Obviously, but for mother nature, the floods and ensuing damage would not have occurred. However, since it is undeniable that a large amount of flooding would have occurred absent the defendants' activities, it...
follows that the defendants’ activities are not a but-for cause of the entire amount of harm, so joint and several liability would not apply. The court correctly rejected this particular argument and recognized that the defendants should only be held liable for those damages that they negligently caused. The defendants have the burden of proving that the damages are capable of being apportioned, and if they fail to prove that the damages can be divided, then they are liable for the entirety of the harm.

Actually, West Virginia follows a similar approach in “crashworthiness” cases. Crashworthiness cases are those in which the plaintiff is involved in an automobile accident caused by one tortfeasor and suffers enhanced injury due to a product defect in the car which made it “uncrashworthy.” Typically, the plaintiff would have suffered some injury absent the alleged defect, but the plaintiff alleges that the product defect enhanced the injury suffered. In such cases, defendant auto manufacturers can limit their liability by showing that the damages are capable of being apportioned. If the defendant can successfully show that the damages are divisible, then basic causation principles limit the defendant’s portion of the damages to the increased harm caused by the defect. However, if the auto manufacturer is unable to prove that the damages are capable of being apportioned, then it is liable for all of the plaintiff’s harm. In West Virginia crashworthiness cases, whether a harm is divisible is a question of law for the judge. This suggests that whether the de-

135 See Re STATEMENT (SECOND) OF TORTS § 879.
136 See In Re Flood Litig., 607 S.E.2d at 879. See also Re STATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. a (2000). The policy underlying division by causation is that no person should be held liable for a harm that he or she did not cause. Id.
137 See In Re Flood Litig., 607 S.E.2d at 879. This position is also consistent with the Restatement (Third) of Torts’ approach to apportionment of causation. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h. (2000) (“A party alleging that damages are divisible has the burden to prove that they are divisible.”).
138 See generally Johnson v. Gen. Motors Corp., 438 S.E.2d 28, 32 (W. Va. 1993). In Tracy v. Cottrell, 524 S.E.2d 879 (W. Va. 1999), the plaintiff was killed in a car crash, and his heirs alleged that his death was caused by the collision and a defective seatbelt. The court held that in order to find the manufacturer liable, the plaintiff only needed to prove that the defective seatbelt was a factor in causing the defendant’s death. Id. at 894. Once the plaintiff made this prima facie showing, the defendant could limit its liability by showing that the damages were capable of being apportioned. Id.
140 See Restatement (Third) of TORTS: PRODUCT LIABILITY § 16 (1998).
141 See id.
142 See id.
143 See id.
fendants can prove that the flood damages are divisible might be a question of law for the judge in the flood litigation cases as well. However, given the heavy rain, the topography of the land, and the scope of damages, proving by clear and convincing evidence what flood damages are capable of being appor-
tioned could be difficult.

In summary, after In re Flood Litigation, non-adjacent landowners are not precluded from bringing a cause of action against a defendant under the rea-
sonable use rule, and the Court stated that foreseeability of the harm was one of
the factors in the reasonable use test. Additionally, the Court suggested that
the plaintiffs may be able to bring a cause of action under the private nuisance
theory as well. This Note argues that the reasonable use rule actually derived
from the nuisance theory of tort law and that the two causes of action are one
and the same. Although more of a practical matter, suggesting that the reason-
able use rule and the private nuisance theory are different could cause attorneys
and judges to attempt to formulate separate tests for what is essentially the same
cause of action. In addition, the Court correctly held that the defendants would
only be held liable for the portion of the damages which they caused. However,
the Court held that the defendants must prove by clear and convincing
evidence those damages that they did not cause or else bear the entire lia-

IV. WEST VIRGINIA SHOULD WEIGH PUBLIC AND SOCIAL CONSIDERATIONS,
INCLUDING ECONOMIC IMPLICATIONS, WHEN DETERMINING WHETHER
DEFENDANTS OWE A DUTY OF CARE TO THE PLAINTIFFS IN FLOOD LITIGATION
CASES

One aspect in the pending flood litigation that distinguishes these cases
from other surface water alteration cases is the scope of the damage and the
large number of claimants. In fact, West Virginia cases as well as surface water
alteration cases in other jurisdictions generally contemplate damages to only
neighboring lands. However, many claimants in the pending litigation are

146 See id. at 872.
147 See id. at 879.
148 See id.
149 See Jordan v. City of Brenwood, 26 S.E. 266, 268 (W. Va. 1896) ("If a city, in changing
grade, causes water collecting on its streets . . . to go on adjoining land, it is not liable for dam-
ages.") (emphasis added). See also Mason v. City of Bluefield, 141 S.E. 782, 782 (W. Va. 1928)
("A city is liable . . . to a property owner in collecting surface water and casting it in a mass . . . on
his land by raising the grade of an adjoining street.") (emphasis added); see also Morris Associ-
ates, Inc. v. Piddy, 383 S.E.2d 770, 770 (W. Va. 1989) ("landowner . . . is entitled to take only
such steps as are reasonable . . . to the adjoining landowners" (emphasis added); Zollinger v.
Carter, 837 S.W.2d 613, 615 (Tenn. 1992) ("a wrongful interference with the natural drainage of
surface water causing injury to an adjoining landowner constitutes an actionable nuisance.") (em-
phasis added).
non-adjacent landowners. As mentioned above, the Court held that the reasonable use rule did not preclude non-adjacent landowners from bringing a cause of action because one of the factors in the reasonable use balancing test was the foreseeability of the harm. In certain circumstances, the Court stated, the specific topography of the land could have made flood damage to those non-adjacent claimants foreseeable. The Court stated that another element of the cause of action, the defendants' duty of care to the plaintiffs, would also be predicated upon foreseeability of the harm.

Duty is an essential element in any tort action, and West Virginia recognizes that duty must be proven in surface water alteration cases, as well as in nuisance cases. Yet duty is an element that has confounded courts and commentators alike. Generally, legal duty is defined by the relationship be-

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150 See In re Flood Litig., 607 S.E.2d at 870 (arguing whether a cause of action existed for non-adjacent landowners under the reasonable use theory).

151 See id.

152 See id.

153 Id. at 867 ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man [or woman] in the defendant's position, knowing what he [or she] knew or should have known, anticipate that harm of the general nature that suffered was likely to result."). Actually, the Court addressed duty in a separate certified question that asked whether the plaintiffs had a common law negligence cause of action against the defendants in addition to the reasonable use rule and the private nuisance causes of action. Id. However, liability under both the reasonable use rule and a private nuisance cause of action (which this Note argues are the same cause of action) depend upon the presence of some type of tortious conduct. See RESTATEMENT (SECOND) OF TORTS § 822 cmt. c. (1979). Therefore, a duty is required no matter under what theory of liability a cause of action is brought. See Whorton v. Malone, 549 S.E.2d 57, 64 (W. Va. 2001). See also Carter v. Monsanto Co., 575 S.E.2d 342, 347 (W. Va. 2002). It is plausible that duty will be based on foreseeability of the harm for all causes of action in the flood litigation.

154 57A AM. JUR. 2D Negligence § 73 (2001) ("The existence of such a duty is imperative to a negligence cause of action, essential to a finding of negligence, and a prerequisite to any negligence action. Thus, the threshold question in a negligence action is whether the defendant owed a legal duty to the plaintiff.").


156 See Carter, 575 S.E.2d at 347. Despite the court's insinuation that a separate cause of action exists in nuisance, the law of surface water alteration in West Virginia is grounded in nuisance law. See discussion supra Part III.A.

157 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, (West Publishing Co.5th ed. 1984). Historically, in early English law there was little consideration of duty, and defendants were exposed to almost limitless liability without any regard for their culpability. See id. However, beginning in the Industrial Revolution, English courts began to develop the idea of duty, which they described as a sort of relationship between the parties, and without such relationship, there could be no duty. Id. It is quite plausible that courts developed the concept of duty in an effort to limit the liability that the growing industries faced. Id. The first English case to address duty, Heaven v. Pender, held that a duty arises whenever a person is placed in a situation where he or she "would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person." Id. (quoting Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883)). This is an oft quoted phrase in case law,
tween individuals;158 "it is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff."159 Courts impose upon individuals a duty to conduct themselves or exercise their own rights in a manner that does not injure others or prevent others from enjoying their own rights.160 Conversely, there are certain situations when the defendant is under no obligation to a particular person, and even though the defendant’s conduct falls short of the required level of care and injures the other person, the law imposes no duty on the defendant and he or she is not liable for that person’s injuries.161

Also, apart from the other elements of negligence - breach, causation, and damages - duty is always a question of law for a judge.162

Arguably, there are three ways in which courts could define duty in the pending flood litigation. Under one approach, courts could develop a bright line rule that was somewhat less restrictive than "only adjoining landowners." For instance, courts could say that the defendant companies only owed a duty to landowners within a half mile of their properties.163 Such a rule would have the advantage of promoting judicial efficiency and would address crushing liability concerns raised by the defendants, although it could potentially exclude some even though ten years after Heaven, the judge that authored the opinion had to constrict his definition of duty because it was too broad. Id. Courts struggled with defining the contours of duty in 1883 and continue to struggle with defining duty today. See John W. Wade, Prosser, Wade and Schwartz’s Cases and Materials on Torts 386 (The Foundation Press 9th Ed. 1994) (1951); See also Charles O. Gregory, Gratuities Undertakings and the Duty of Care, 1 Dep. L. Rev. 30 (1951).


159 Keeton, supra note 157. "The statement that there is or is not a duty [of care] begs the essential question-whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct." Id. "It is a shorthand statement of a conclusion, rather than an aid to analysis in itself." Id. Duty is an expression of “the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” Id.

160 See 65 C.J.S. Negligence § 40 (2000). See also Keeton, supra note 157. ("Duty is imposed upon individuals to conform to the legal standard of reasonable conduct in the light of the apparent risk.")

161 See Wade, supra note 157, at 385. For example, courts often limit duty in cases where the defendant is accused of causing a bystander emotional distress as a result of having witnessed an accident. See, e.g., Thing v. La Chusa, 771 P.2d 814 (Cal. 1989). In emotional distress cases such as Thing, the defendant’s negligence injured someone and an innocent bystander suffered emotional trauma from witnessing the accident. There is no question that the defendant’s negligence "injured" the bystander by causing him or her to view the accident, but courts have often held that in such circumstances, there is not a sufficient relationship between the defendant and the innocent bystander to create a duty of care. See id. at 877-78.


meritorious claims.\textsuperscript{164} Although the Court did not preclude this rule, such a bright-line rule seems contrary to the spirit of In re Flood Litigation.\textsuperscript{165} Alternatively, courts could say that duty is dependent on foreseeability of the harm, which the Court suggested is the primary factor in determining whether the defendants owed a duty of care to the plaintiffs.\textsuperscript{166} However, this Note will argue that predicated duty solely on foreseeability of the harm could lead to almost limitless exposure to liability.\textsuperscript{167} A third approach, and one advocated in this Note, would be to include foreseeability of harm in a duty analysis, but to also include social, public, and economic policy concerns when determining whether the defendants owed a duty of care to the plaintiffs.

\textbf{A. Other Courts Have Considered Social, Public, and Economic Policy When Determining Duty}

When determining whether the defendant is under a legal duty to the plaintiff, courts have addressed concepts of morality and logic, as well as considered the social consequences of imposing a duty.\textsuperscript{168} Early in the twentieth century, Justice Cardozo recognized that one of the important public policy concerns in a duty analysis should be the economic implications of expanding duty to a large class of plaintiffs.\textsuperscript{169} In a famous New York case, H.R. Moch Co., Inc. v. Rensselaer Water Co.,\textsuperscript{170} Justice Cardozo advocated limiting duty in order to prevent the defendant from being subjected to enormous liability.\textsuperscript{171} In Moch, the defendant entered into a contract with the city of Rensselaer to supply water to the city, including supplying the water supply at the city’s fire hydrants.\textsuperscript{172} However, when the plaintiff’s warehouse caught fire, insufficient water pressure at the hydrant caused the warehouse to burn.\textsuperscript{173} Justice Cardozo denied recov-

\textsuperscript{164} The New York fire rule was adopted to deal with the crushing liability concerns of holding someone liable for all fire damage negligently caused that were present in the late nineteenth and early twentieth centuries. See Rabin, supra note 163, at 1530. Because of the prevalence of wooden buildings and coal stoves during that time period, fire spread rapidly. See Id. Holding someone liable for all fire damage negligently caused could thus have been economically ruinous for someone. Thus, New York created an aberrational rule that limited liability to only the first building damaged in a fire. See Logan, supra note 163.

\textsuperscript{165} The Court said that an inflexible rule that prevented non-adjacent landowners from suing would be inequitable, and although it did not specifically rule out a “more generous” bright-line rule, it stands to reason that courts would nonetheless reject such a rule for the same policy reasons. See generally In re Flood Litig., 607 S.E.2d 863, 870 (W. Va. 2004).

\textsuperscript{166} Id. at 873.

\textsuperscript{167} See discussion infra Part IV.B.1.


\textsuperscript{169} See H.R. Moch Co., Inc. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928).

\textsuperscript{170} Id. at 896-97.
ery on the basis that there was no privity of contract between the water company and the individual residents of the city.\textsuperscript{174} However, Cardozo also held that the plaintiff did not have a common law negligence claim against the defendant either because the defendant owed no duty to the plaintiff.\textsuperscript{175} Cardozo held that to extend the zone of duty to every citizen who might have benefited from the supply of water exposed the defendant to an unfair amount of liability.\textsuperscript{176} In rendering his opinion, Justice Cardozo also considered the broader economic consequences of expanding duty.\textsuperscript{177} Expanding duty, Cardozo thought, would mean that everyone making a contract would assume a duty not only to the contractee, but also to an indefinite number of potential beneficiaries of the contract.\textsuperscript{178} Such a result would “unduly and indefinitely” extend liability, and policy considerations justly limiting the defendant’s duty.\textsuperscript{179}

Since \textit{Moch}, New York has extended this theme of balancing competing public policy concerns when determining whether a duty existed.\textsuperscript{180} In one notable case, \textit{Strauss v. Belle Realty Company},\textsuperscript{181} an electric utility company’s gross negligence caused a twenty-five hour blackout in New York City.\textsuperscript{182} During the blackout, an elderly tenant lost his water due to the power outage and suffered injuries while walking through a dark part of his apartment building to

\begin{flushright}
\textit{Id. at 897.}\textsuperscript{174}
\textit{See id. at 898.}\textsuperscript{175}
\textit{See id. at 899.}\textsuperscript{176}
\textit{Justice Cardozo stated:}\textsuperscript{177}
\begin{quote}
The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacturer of goods, who enters upon the performance of his contract, must answer . . . not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply.
\end{quote}
\textit{Id.}\textsuperscript{178}
\textit{Id.}\textsuperscript{179}
\textit{See id.}\textsuperscript{180}
\begin{quote}
\textit{See, e.g., Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 556 N.E.2d 1093, 1096 (N.Y. 1990) (determining that the defendant owed no duty to the plaintiff, in part because imposing a duty on the defendant would expose it to limitless liability and cause it to pass along its increased costs to the general public); Palka v. Servicemaster Mgt. Servs. Corp., 634 N.E.2d 189, 192 (N.Y. 1994) (when determining duty, courts need to look at “logic, science, weighty competing socio-economic policies and sometimes contractual assumptions of responsibility. These sources contribute to pinpointing and apportioning of societal risks and to an allocation of burdens of loss and reparation on a fair, prudent basis”). See generally Espinal v. Melville Snow Contractors, Inc., 773 N.E.2d 485 (N.Y. 2002). In these three cases, the defendants had entered into contracts with the plaintiffs, and the court in each case held that there was no privity of contract to find a duty of care existed. However, each case also discusses other policy considerations, such as economic implications, when determining whether a duty of care exists. But see Warren A. Seavey, The Waterworks Cases and Stare Decisis, 66 Harv. L. Rev. 84 (1952).}\textsuperscript{181}
\end{quote}
\end{flushright}

\textit{482 N.E.2d 34 (N.Y. 1985).}\textsuperscript{181}
\textit{Id. at 35.}\textsuperscript{182}
obtain water.\textsuperscript{183} Again, the court held that the harm was foreseeable, but it was the court's obligation when determining duty to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability.\textsuperscript{184} When "fixing the bounds of that duty, not only logic and science, but policy considerations play an important role."\textsuperscript{185} If the court held that the electric company had a duty to every customer for every harm suffered during the blackout, then its potential liability would be incalculable.\textsuperscript{186} The court also considered in its analysis the general population's need for electric service.\textsuperscript{187} Exposing the company to such a large liability might inhibit its ability to supply that service, and the benefit of curtailing the company's exposure outweighed any benefit gained from finding the company liable to every customer whom it might have harmed through its negligence.\textsuperscript{188}

Other jurisdictions besides New York have considered the economic implications of expanding duty. For example, Louisiana held that it is important to look at the economic impact on employers when deciding whether store owners have a duty to provide security for their patrons.\textsuperscript{189} The issue probably surfaces most frequently, though, when the defendant is a public utility company.\textsuperscript{190} In Florida, a court held that an electric company did not owe a duty to a bicyclist who was killed by a motorist who could not see him because the electric company's negligence caused a street light to be inoperative.\textsuperscript{191} California has also held that electric companies owe no duty to motorists in automobile accidents caused by inoperative street lights, even when the electric company is under a contractual obligation to maintain the light.\textsuperscript{192} In Mississippi, a court held that an electric company owed no duty to an employee of a manufacturing

\textsuperscript{183} Id.
\textsuperscript{184} Id. at 36.
\textsuperscript{185} Id. (quoting De Angelis v. Lutheran Medical Center, 58 N.Y.2d 1053, 1055 (1983)).
\textsuperscript{186} See id. at 37.
\textsuperscript{187} Id.
\textsuperscript{188} See id. at 38.
\textsuperscript{189} See Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999). See also San Benito Bank & Trust Co. v. Landiar Travels, 31 S.W.3d 312, 321 (Tex. 2000) (holding that when determining whether a new common law duty should be created, among other considerations, courts should consider the social, economic, and political implications of placing the burden on the defendant).
\textsuperscript{191} Levy v. Fla. Power & Light Company, 798 So. 2d 778, 780 (Fla. 2001). See also Arenado v. Fla. Power & Light Co., 523 So. 2d 628, 629 (Fla. 1998). In Levy, an electric company's negligence caused a traffic light not to work properly. Levy, 798 So. 2d at 780. The plaintiff was killed crossing the street by a motorist who could not see him due to the malfunctioning street lights. Id. The court held that the electric company owed no duty to the pedestrian. Id.
plant when the utility’s negligence disrupted the electricity causing an employee to stumble in the darkness and fatally fall into a vat of acid.\footnote{Mullican v. Meridian Light and Ry. Co., 83 So. 816, 819 (Miss. 1920).}

In many of these cases, the courts noted that the injuries were arguably foreseeable consequences of the defendants’ negligence, but that policy reasons nonetheless justified limiting the defendants’ duty and shielding them from excessive liability.\footnote{See, e.g., Strauss v. Belle Realty Co., 482 N.E.2d 34, 36 (N.Y. 1985) (foreseeability is not dispositive of duty). See also White, 25 Cal. App. 4th at 450 (“we must take into consideration not only the foreseeability of the harm but also the burdens to be imposed against a defendant”).} Important here, especially in the utility cases, is that the courts not only looked at the economic consequences to the defendant companies, but they also looked at the economic effect that expanding duty might have on the general public, such as possibly causing higher utility rates.\footnote{See White, 25 Cal. App. 4th at 450-51 (looking at the existing public utility rate structure as a factor in imposing a duty. See also Keeton, supra note 157, at § 4 (the capacity to bear or distribute loss is a factor to consider in allocating the risk).}

In addition, the courts seemed to limit duty to events that the defendants were able to control.\footnote{See, e.g., Strauss, 482 N.E.2d at 36 (courts have the duty in fixing the orbit of duty to “limit the legal consequences of wrongs to a controllable degree”).} In \textit{White v. Southern California Edison Co.},\footnote{25 Cal. App. 4th 442 (Cal. 1994).} a California court listed examples of when an electric company could be held liable, such as when it places a utility pole too close to a road or when it negligently allows high voltage power lines to fall, but distinguished negligently caused power outages from these situations.\footnote{Id. at 448-51.} The court in \textit{White} stated that when making this distinction, it “must consider the cost of imposing this liability on public utilities, the current public utility rate structures, the large numbers of streetlights, [and] the likelihood that streetlights will become periodically inoperable.”\footnote{Id. at 451.} \textit{White} suggests that an electric company would be held liable for placing a light pole too close to the road and injuring a motorist, but that it would not be held liable if its negligence resulted in a power outage that caused the motorist to wreck due to the lack of operable street lights.\footnote{See \textit{id}. \textit{See generally} Strauss, 482 N.E.2d at 34.} In the first example, the company could control where it placed the light pole, but it arguably could not control what accidents occurred during inevitable power outages.\footnote{For example, coal accounts for fifty percent of the electricity produced nationwide, and it accounts for almost ninety percent of the nation’s fossil energy reserves. See \textit{West Virginia}}

Many of the policy arguments for limiting utility companies’ exposure to liability could also apply to the defendant companies in the flood litigation. Several defendant companies in the pending flood litigation provide the natural resources for which utility companies rely.\footnote{Disseminated by The Research Repository @ WVU, 2005} Therefore, expanding the defen-
dants’ duty and exposing them to such a large liability could cause their losses to eventually be shifted to the general public in the form of utility rate increases.\textsuperscript{203} Exposing the defendant companies to large liability could also curtail their ability to extract resources, which could then affect society’s need for the resources that the defendant companies produce.\textsuperscript{204} The defendant companies’ operations sometimes necessarily cover large areas, so their potential liability for flooding that occurs during a heavy rainstorm could be quite massive.\textsuperscript{205} Additionally, for the defendant companies to operate - for coal mines to mine coal, for natural gas companies to extract gas, for logging companies to timber land - it is necessary to alter the landscape. Also, heavy rains, and thus flooding, are inevitable, and the extent to which the defendants could control the amount of damages that occurred during the flooding could be a factor in determining whether the defendants owed a duty to certain plaintiffs.

B. Duty Analysis in West Virginia: Social, Public, and Economic Policy Considerations Should Factor into the Court’s Analysis

1. The Duty Analysis in Aikens v. Debow\textsuperscript{206}

The idea of protecting defendants from random and unpredictable liability by limiting duty is not a new idea in West Virginia.\textsuperscript{207} In Aikens v. Debow, the court held that social and public policy considerations, particularly the need

\textsuperscript{203} See Keeton, supra note 157 § 93. Relieving the electric company of liability may leave the loss on the shoulders of the individual plaintiff, who may be ruined by it . . . “[b]ut the imposition of tort liability on those who must render continuous service of this kind to all who apply for it under all kinds of circumstances could [also] be ruinous and the expense of litigation and settling claims over the issue of whether or not there was negligence could be a greater burden to the rate payer than can be socially justified.” Id.

\textsuperscript{204} See Strauss v. Belle Realty Co., 482 N.E.2d 34, 38 (N.Y. 1985) (discussing how exposing an electric company to a large liability might curtail its ability to provide electricity, which would adversely affect the general population).

\textsuperscript{205} For example, the largest underground mine in West Virginia, the McElroy Mine, encompasses some 6,791,716 acres. West Virginia Coal Association, Coal Facts, supra note 202, at 2.

\textsuperscript{206} 541 S.E.2d 576 (W. Va. 2000).

to restrict the limitless expansion of duty, necessitated limiting the defendant’s duty to the plaintiff when he suffered only economic damages. In Aikens, the defendant was a truck driver who wrecked his truck on a bridge overpass, causing it to close for nineteen days. The plaintiff, who owned a motel near the overpass, lost business during the time it took to repair the bridge and sued the defendant for lost income. In determining whether the defendant owed a duty to the plaintiff, the court stated that “the ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised.” Yet the court stated that in addition to foreseeability, the existence of duty also involves policy considerations such as the “likelihood of the injury, the magnitude of the burden of guarding against it, and the consequences of placing the burden on the defendant.” In Aikens, the plaintiff suffered only economic damages, and although the damages were caused by the defendant’s negligence, public policy considerations justified restricting duty in such situations, particularly in the absence of physical damages or a special relationship between the parties.

In reaching its decision, the court in Aikens noted that predating duty solely on foreseeability was insufficient because legal liability does not necessarily extend to all foreseeable consequences of an accident. The court warned that to only look at foreseeability could transform duty analysis into a logical connection test that would eventually involve nothing more than a watered down maxim that if a party is injured by the conduct of another, then there must have been a duty to avoid such conduct. Rather, courts must draw a line be-

208 Aikens, 541 S.E.2d at 590-91.
209 Id. at 579.
210 Id.
211 Id. at 581.
212 Id.
213 Id. at 589-90.
214 Id. at 581-83. See also Harris v. Martin, Inc., 513 S.E.2d 170, 176 (W. Va. 1998) (Maynard, J., dissenting) (criticizing the majority for placing too much emphasis on foreseeability when analyzing the duty element). Other courts have also warned that solely focusing on foreseeability when defining duty could expose defendants to almost limitless liability. See, e.g., Thing v. La Chusa, 771 P.2d 814, 821 (Cal. 1989). See also Newton v. Kaiser Foundation Hosp., 228 Cal. Rptr. 890, 893 (Cal. Dist. Ct. App. 1986) (overruled on other grounds) (“the quest for foreseeability is endless because foreseeability, like light, travels endlessly in a vacuum”).

The courts’ uncertainty about what to do with duty is displayed in their uneven use of the concept of foreseeability. Sometimes foreseeability is deemed part of the issue of breach and thus left to the jury. Other times it is deemed the essence of duty and kept for the courts. Still other times it is left for the jury under the heading of proximate cause. What one court finds unforeseeable as a matter of law, another court will find foreseeable as a matter of law. Foreseeability is sometimes a necessary condition of liability, sometimes a sufficient condition, and sometimes merely a factor. Far from cleaning up duty-
tween the competing policy considerations of providing a remedy to everyone who is injured and preventing exposure to liability without limit.\footnote{216}{Aikens, 542 S.E.2d at 583. \textit{See also} 57A Am. Jur. 2d Negligence § 87 (2001) (quoted in Harris, 513 S.E.2d at 176 (Maynard, J., dissenting))}

2. The Duty Analysis in \textit{Aikens} Should Not Be Limited to Cases Involving Only EconomicDamages

\textit{Aikens} must be taken in the context that it involved only economic damages, and courts have been extremely reluctant to extend liability when only economic damages are involved.\footnote{217}{\textit{See generally} Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) (holding that a dry dock owner could not recover for lost use of a vessel because of a third party’s act of negligence during the ship’s refurbishing). In this decision, Justice Holmes articulated the rationale that a tortfeasor cannot be held liable for indirect economic damages. \textit{Id. See also}, Michael P. Sullivan, Annotation, \textit{Robins Dry Dock Limiting Economic Recovery for Economic Losses Due to Unintentional Maritime Torts}, 88 A.L.R. Fed. 295 (1988). However, the \textit{Robins} rule has been criticized on the grounds that such a rigid rule unnecessarily prevents innocent victims who would otherwise have a cause of action from being compensated for their losses and that it causes courts to manufacture exceptions to the rule that inevitably mitigate any judicial efficiency that the rule was intended to create. \textit{See, e.g.}, La. \textit{ex rel.} Guste, Jr. v. M/V Testbank, 752 F.2d 1019, 1035-36 (5th Cir. 1985) (Rubin, J., dissenting).} The rationale is based upon the element of remoteness between the injury and the act of negligence that is the source of the injury.\footnote{218}{\textit{Aikens}, 541 S.E.2d at 584.} Further, it is feared that permitting economic damages would lead to theoretically limitless liability.\footnote{219}{\textit{Id.} at 586.} Yet nothing in \textit{Aikens} suggests that the actual duty analysis in \textit{Aikens} should be so narrowly restricted.\footnote{220}{\textit{See id.} at 581 (“the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system’s protection”).}

\begin{quote}
A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting to impose new duties and, concomitantly, liabilities, regardless of the economic and social burden. Thus, the courts have generally recognized that public policy and social considerations, as well as foreseeability, are important factors in determining whether a duty will be held to exist in a particular situation.
\end{quote}
sis illustrates a balancing approach that recognizes the need to authorize recovery for meritorious claims while also providing a barrier against limitless liability.\textsuperscript{221} The type of damages involved is only one factor that courts should consider when determining whether a duty exists in a particular circumstance.\textsuperscript{222} The policy considerations involved in \textit{Aikens} - the social consequences of extending duty, the economic consequences to the defendant, both parties' ability to bear the loss - do not change merely because the plaintiffs suffered real property damage as opposed to only economic damages. To say that the defendant owed the plaintiff a duty merely because the plaintiff suffered property damage as opposed to only economic damage leads to the same result the court cautioned against in \textit{Aikens} - because there was an injury, there must be a duty.\textsuperscript{223}

3. Applying the Duty Analysis in \textit{Aikens} to the Flood Cases in Southern West Virginia

In the pending flood cases, when determining whether the defendants owe a duty to particular plaintiffs, courts should consider not only the foreseeability of the harm, but also social and public policy ramifications of expanding the defendants' duty of care.\textsuperscript{224} These social and public policy considerations should include "the likelihood of the injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant."\textsuperscript{225}

This is not meant to be a draconian rule that only permits liability for adjacent landowners, nor is it meant to simply curtail duty when expanding duty would result in crushing economic liability for defendants.\textsuperscript{226} Indeed, such an inflexible rule could have the negative effect of actually rewarding defendants whose negligence affects many people as opposed to just a few.\textsuperscript{227} Rather this is meant to be a balancing approach that recognizes the need to compensate the victims for meritorious claims while protecting defendants against limitless liability.\textsuperscript{228}

\begin{itemize}
  \item \textsuperscript{221} See \textit{id.} at 590.
  \item \textsuperscript{222} See \textit{id.} at 581-82
  \begin{quote}
    In the area of harm to one's body, the reach of what is recoverable is very great. Where one's property is injured, the extent of legal liability is considerable, but not to the same extent as with bodily injury. Where pure economic loss is at issue ... the reach of legal liability is quite limited . . .
  \end{quote}
  \item \textsuperscript{223} \textit{id.} at 583.
  \item \textsuperscript{224} \textit{id.} at 581.
  \item \textsuperscript{225} \textit{id.}
  \item \textsuperscript{227} See \textit{id.}
  \item \textsuperscript{228} See \textit{Aikens}, 541 S.E.2d at 590.
\end{itemize}
Under such an approach, foreseeability of the harm is not eliminated from the analysis, and indeed, in some instances the specific topography might make the damage so likely to occur that a court might very well find that the defendant owes a duty to such a plaintiff.\(^{229}\) However, this approach also permits a judge to consider policy concerns, such as the feasibility of protecting against such a disaster, the defendant industries’ impact on the area, the number of persons employed in those industries, society’s need for the resources produced by the defendants, the likelihood that the losses might be passed on to the general public in the form of utility rate increases, as well as who is better able to bear the cost of the harm.\(^{230}\) Finally, such an approach does not preclude a judge from factoring into the analysis the type of damages involved.\(^{231}\)

Some might argue that the balancing approach merely permits a judge to arbitrarily draw a line that would certainly preclude some plaintiffs from recovering against the defendants.\(^{232}\) However, the fact remains that duty is a necessary element in tort law, and judges have the burden of defining the existence and extent of that duty.\(^{233}\) Furthermore, while the temptation may be to let a case proceed to the jury in every instance of resulting harm, judges must also consider whether the consequences of such an approach would be socially and economically ruinous.\(^{234}\) The balancing approach to duty defined in Aikens is an equitable approach that considers the plaintiffs’ right to recovery, the importance of the defendant industries to the already burdened part of the state, and the consequences that expanding the duty of care might have on the industries as well as the general public.

V. CONCLUSION

Thousands of people were seriously affected during the floods on July 8, 2001 in southern West Virginia. Many had their homes destroyed and have had to relocate, and the economic consequences of this single natural disaster have been estimated at around $500 million.\(^{235}\) However, holding the defendant

\(^{229}\) See In Re Flood Litig., 607 S.E.2d 863, 870 (W. Va. 2004).

\(^{230}\) As part of this consideration, courts might consider that the Federal Emergency Management Agency (FEMA) has already paid over $330 million to victims of the 2001 and 2002 floods in southern West Virginia. Editorial, Floods, CHARLESTON GAZETTE, June 17, 2004, at A4. In addition, one of the plaintiff’s attorneys, Stuart Calwell, has indicated that one of the defendant companies has sufficient liability insurance to handle whatever the outcome of the litigation. Terry, supra note 7, at 21.

\(^{231}\) See Aikens, 541 S.E.2d at 582.

\(^{232}\) Tort scholar William Prosser was exceptionally critical of duty. See Goldberg & Zipursky, supra note 215 at 1758. Prosser felt that any notion of duty was helplessly vague, and that a court desirous of finding liability could always find the necessary relationship to impose a duty. Id.

\(^{233}\) See Aikens, 541 S.E.2d at 583.

\(^{234}\) Id.

\(^{235}\) See Coleman, supra note 2, at C1.
companies liable for all of the damages could be economically ruinous for them and could further worsen the conditions in that region. In addition, the implications of the pending flood litigation will not be limited to only the July 8, 2001 floods, as hundreds of plaintiffs have already filed lawsuits for damages sustained during subsequent floods. Holding the defendant companies liable for all damages incurred each time there is a flood creates an unstable economic environment.\footnote{See Terry, supra note 7, at 21.}

In order to find the defendant companies liable, courts must first determine that the companies owed a duty of care to the plaintiffs. The court suggested that duty in these cases will be predicated upon the foreseeability of the harm. In other jurisdictions though, courts have considered social and public policy considerations, as well as the economic consequences of expanding duty, when deciding whether a duty existed. This Note argues that West Virginia courts should address these same considerations when determining whether the defendants owe a duty to the plaintiffs in the pending flood litigation. Such an approach allows courts the flexibility to balance the plaintiffs' need to collect damages for meritorious claims while also protecting the defendants from limitless liability.

\textit{Seth P. Hayes}\footnote{Winner, West Virginia Law Review Most Outstanding Student Note, 2005. J.D. Candidate 2006. The author would like to thank Professor John Taylor for his insightful comments as well as his probing questions regarding this Note. The author would also like to thank his father for inspiring him to go into the legal profession and his mother for demonstrating to him the patience and kind heart that a true legal advocate needs to succeed. Most importantly, the author would like to thank his wife, Emily, for her love, patience, and careful eye for detail.}