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## Torts and Workmen's Compensation: Torts

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# Torts and Workmen's Compensation

## TORTS

*Wex S. Malone\**

Only a few decisions involving relatively important matters of general interest to the profession were handed down by the Supreme Court during the past term. There was, of course, the usual quota of controversies in which findings of fact were reviewed.<sup>1</sup>

### NEIGHBORING LANDOWNERS — DANGEROUS ACTIVITIES

In numerous decisions during recent years courts throughout America have been imposing absolute liability on persons who brought onto their property highly dangerous substances which, upon escaping, inflicted injury on neighboring landowners. Included in such activities are fumigation with noxious gases and the dusting of crops with poisons.<sup>2</sup> Recovery is usually based upon the doctrine first announced in the English decision, *Rylands v. Fletcher*, and which has been adopted in about twenty American jurisdictions. The gist of the *Rylands v. Fletcher* doctrine is that a person who engages in an "ultra-hazardous" activity is liable for resulting damage to the property of another although the utmost care was exercised to prevent the harm.<sup>3</sup> The doctrine has the support of the Restatement of Torts.<sup>4</sup>

An activity is said to be "ultra-hazardous" if it "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the utmost care, and is not a matter of common usage."<sup>5</sup> The ultra-hazardous activity doctrine has been applied to the use of dynamite and other ex-

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1. *Calvert Fire Ins. Co. v. Lewis*, 231 La. 859, 93 So.2d 194 (1957) (intersection collision); *Leonard v. Holmes & Barnes, Ltd.*, 232 La. 229, 94 So.2d 241 (1957) (collision with overtaking vehicle); *Washington Fire & Marine Ins. Co. v. Fireman's Ins. Co.*, 232 La. 379, 94 So.2d 295 (1957) (defendant failed to establish contributory negligence).

2. *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

3. 2 HARPER & JAMES, *THE LAW OF TORTS* § 14.3 (1956); PROSSER, *THE LAW OF TORTS* § 59 (2d ed. 1955).

4. RESTATEMENT, *TORTS* §§ 519, 520 (1938).

5. *Ibid.*

plosives,<sup>6</sup> to gas,<sup>7</sup> and the blowing out of oil wells,<sup>8</sup> as well as to the spreading of dangerous fumes or substances as suggested above. It has frequently been pointed out<sup>9</sup> that even jurisdictions which purport to deny the application of the ultra-hazardous activity doctrine do in fact reach the same conclusion by denominating the activity as a "nuisance" or by purporting to discover negligence through the use of "res ipsa loquitur."<sup>10</sup>

From the standpoint of judicial administration a desirable feature of the ultra-hazardous doctrine is its plasticity. Most modern industrial activities involve an appreciable element of danger, but this is not enough to justify their being classified as "ultra-hazardous." In the absence of a statute, for example, the escape of fire or sparks from the boiler of a factory or a locomotive does not result in liability unless negligence or fault on the part of the operator can be shown.<sup>11</sup> Furthermore, an activity which is a matter of common usage in the community usually escapes the category of ultra-hazardousness.

As indicated above, injuries to a neighbor's crops through the use of poisonous dust distributed by airplane have generally given rise to liability under the *Rylands v. Fletcher* doctrine, without reference to the fault or negligence of the person engaged in the operation. This same conclusion — that the defendant should be liable — was reached by the Louisiana Supreme Court during the past term in *Gotreaux v. Gary*.<sup>12</sup> The decision of the Louisiana court, however, did not rely upon the principle of ultra-hazardous activity. Instead, it rested on Article 667 of the Louisiana Civil Code:

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6. *Exner v. Sherman Power Const. Co.*, 54 F.2d 510 (2d Cir. 1931).

7. *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.*, [1936] A.C. 108 (P.C.). It is noteworthy that with reference to gas the application of the doctrine may be rejected when small quantities of gas are piped onto the premises for domestic use. *Miller v. Robert Addie & Sons Collieries*, Sess. Cas. 150 (Scotland 1934).

8. *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952 (1928).

9. Prosser, *The Principle of Rylands v. Fletcher*, in PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 135, 159-77 (1954).

10. A particularly interesting example in Louisiana is *Watkins v. Gulf Refining Co.*, 206 La. 942, 20 So.2d 273 (1944). The court shelved the application of *Rylands v. Fletcher* as an academic question and proceeded to hold defendant for its "negligence" by applying the doctrine of *res ipsa loquitur*, although evidence suggesting "fault" was practically non-existent. The writer has discussed this case in *The Work of the Louisiana Supreme Court for the 1944-1945 Term — Torts*, 6 LOUISIANA LAW REVIEW 601 (1946).

11. Excellent discussion and collection of Louisiana cases in Comment, 15 LOUISIANA LAW REVIEW 163 (1954).

12. 232 La. 373, 94 So.2d 293 (1957).

"Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

The conclusion that the crop duster in this case should be liable to his neighbor without reference to any fault or negligence is indisputably sound. This writer, however, has serious misgivings concerning the appropriateness of the rule or maxim selected by the court to support its conclusion. The same argument — that one person should arbitrarily be made liable whenever he so uses his land as to injure his neighbor — had been used the previous year in *Fontenot v. Magnolia Petroleum Company*.<sup>13</sup> Defendants in that case had used explosives for geophysical observation and in so doing had inflicted concussion and vibration damage on the plaintiffs. Here again, the court properly imposed absolute liability. Only a handful of American jurisdictions would deny recovery under such facts, irrespective of an absence of negligence; and the case falls properly under the *Rylands v. Fletcher* doctrine.<sup>14</sup> But the court observed, unfortunately as I see it, that the action was not one in tort; that recovery rested on a rule of property law — Article 667 of the Civil Code.

The proposition that a proprietor cannot use his property in such a way as to injure his neighbor, irrespective of how careful he may be, is simply too broad for general usage. The court's

13. 227 La. 866, 80 So.2d 845 (1955). See Professor Campbell's excellent discussion of this case in *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Torts and Workmen's Compensation*, 16 LOUISIANA LAW REVIEW 267 (1956).

14. It is interesting to note that strict liability was imposed from earliest times upon the blaster who cast rocks or debris upon his neighbor's property. The suit was regarded as one in trespass and the fault element was ignored. *Hay v. Cohoes Co.*, 2 N.Y. 159 (1849). However, many courts refused to impose a similar strict liability for concussion damage. It was felt that "care" not "trespass" was the proper form of action, and in "actions on the care" a showing of fault had traditionally been required. Cases distinguishing between concussion damage and the casting of rocks and other substances are now, fortunately, comparatively few. PROSSER, *THE LAW OF TORTS* 56, § 13 (1955). RESTATEMENT, *TORTS* § 158, Comment (h) (1938); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

It is of particular interest that in the first Louisiana case to consider concussion damage by blasting the court of appeal denied liability and dismissed Civil Code Article 667 by observing that the plaintiff's property was removed a considerable distance from the site of defendant's operations, and that they were therefore not "neighbors." *McIlhenny v. Roxana Petroleum Corp.*, 122 So. 165 (La. App. 1929). In an earlier decision of the Supreme Court, *Egan v. Hotel Grunewald Co.*, 129 La. 163, 55 So. 750 (1911), defendant was held liable for damage to adjacent property inflicted through pile driving. Negligence was clearly indicated. The court relied indiscriminately both on Article 667 and Article 2315.

unguarded announcement is certain to rise to plague it in later controversies. For example, we observed earlier that railroads have consistently been exonerated from liability for fire caused by sparks that escaped from locomotives, provided that every reasonable precaution was used.<sup>15</sup> Yet clearly in such instances the railroad has innocently used its land so as to damage its neighbor. The same would be true of the spread of fire from a well-operated industrial plant or the accidental escape of impounded water from a properly constructed swimming pool.<sup>16</sup>

It seems inescapable that as cases arise the court will be obliged to sort out the types of damaging activities for which non-fault liability will be imposed from those for which it will *not* be so imposed. Article 667 provides no such leeway.

The substance of Article 667, "*Sic utere tuo ut alienam non laedas*," has been pressed upon common law courts as a reason for imposing absolute liability for many years. Occasionally, it is received with favor in controversies where the activity was of an ultra-hazardous character, and it has sometimes been regarded as synonymous with the doctrine of *Rylands v. Fletcher*.<sup>17</sup> Where, however, the activity that resulted in damage was not of an ultra-hazardous character or where it was one in common usage in the community, the courts have put the *sic utere* doctrine aside with the observation that it is clear that a person must not enjoy his property in a *negligent* manner so as to injure his neighbor (i.e., he must not be guilty of fault).<sup>18</sup> As so interpreted, the *sic utere* rule is not an announcement of any new principle. In truth, more flexibility is needed in the cases involving neighboring owners than can be afforded by Article 667 or its common law counterpart.<sup>19</sup>

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15. Comment, 15 LOUISIANA LAW REVIEW 163 (1954).

16. Clearly to be distinguished is the situation where the proprietor of a pool intentionally releases the water or diverts it onto his neighbor's property. This is a clear deliberate invasion of his neighbor's land, and is actionable. See *Adams v. Town of Ruston*, 194 La. 403, 193 So. 688 (1940) (damages allowed, although injunction denied).

17. See, e.g., *Green v. General Petroleum Co.*, 205 Cal. 328, 270 Pac. 952 (1928) (oil well blow out); *Kall v. Carruthers*, 59 Cal. App. 555, 211 Pac. 43 (1922) (escape of large quantities of impounded water with knowledge of defendant).

18. See, e.g., *Rose v. Socony-Vacuum Oil Corp.*, 54 R.I. 411, 173 Atl. 627 (1934) (escape of polluted water from refinery in industrial community). See also *Erle, J.*, in *Bonomi v. Backhouse*, El. B. & E. 622, 120 Eng. Rep. 643 (Q.B. 1858): "The maxim, *sic utere tuo ut alienum non laedas*, is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous."

19. In *Jeansonne v. Cox*, 96 So.2d 557 (La. 1957), the court denied the application of Article 667 to the construction of a drainage canal in the absence of

Although this reviewer does not doubt that our court with characteristic ingenuity can manage to manipulate this broad platitude so as to avoid injustice, yet I suggest that it can avoid much entanglement by a forthright adoption of the ultra-hazardous activity doctrine in its stead. It is also noteworthy that the contractor operating the airplane in *Gotreaux v. Gary* was held liable under the *sic utere* maxim, although he was not a proprietor of land; nor was Gotreaux his "neighbor." Yet the contractor was engaged in an ultra-hazardous activity, and, of course, he was properly held. Distortion of the *sic utere* maxim, however, was essential even to reach this conclusion.

#### INTERFERENCE WITH CONTRACT

There is considerable difference of opinion concerning the extent of protection, if any, that should be afforded a contracting party against interference by a third person with his contract rights. The interference may take the form of an intentional procurement of a breach of the contract. In most jurisdictions, both in this country and abroad, such deliberate inducement of a breach of contract is an actionable tort.<sup>20</sup> Only in Louisiana<sup>21</sup> and, possibly Kentucky,<sup>22</sup> is interference of this kind permitted. Where, however, the third person is not motivated by a desire to bring about a breach of contract, or where he acts without knowledge of the existence of the contract, recovery is generally denied everywhere. Similarly, when the conduct of the third person consists merely in some negligent act which increases the burden of the plaintiff's contract or which in some way lessens the benefit of the agreement to the plaintiff, recovery is universally denied.<sup>23</sup> This same conclusion was reached recently by the Louisiana Supreme Court in *Forcum James Co. v. Duke Transportation Company*.<sup>24</sup> In that case plaintiff, a pub-

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any evidence of a physical invasion of the property or a nuisance. Similarly, it was held in *Modica v. Employer's Casualty Co.*, 231 La. 1065, 93 So.2d 659 (1957), that irrespective of the theory of recovery, plaintiff must show that some conduct or activity on the part of the defendant was the cause of his neighbor's damage.

20. The doctrine that liability exists for the nonprivileged intentional interference with contracts was first announced in *Lumly v. Gye*, 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853). The doctrine has since been adopted, developed, and enlarged in this country and in England. Harper, *Interference with Contract Relations*, 47 N.W.U.L. REV. 873 (1953); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923); RESTATEMENT, TORTS, § 766 (1938).

21. *Cust v. Item Co.*, 200 La. 515, 8 So.2d 361 (1942).

22. *Chambers v. Probst*, 145 Ky. 381, 140 S.W. 572 (1911).

23. See the excellent discussion in PROSSER, *THE LAW OF TORTS* 732 (1955).

24. 231 La. 953, 93 So.2d 228 (1957).

lic road construction firm, was under a contract to repair and maintain a temporary bridge owned by the State of Louisiana. It claimed that the bridge was damaged through the negligence of defendant trucking company, thus putting plaintiff to the expense of repairing the structure. In denying recovery for the defendant's alleged misconduct, the court relied largely on the leading authority of the United States Supreme Court in *Robbins Dry Dock and Repair Co. v. Flint*.<sup>25</sup>

#### NEGLIGENCE — ASSURED CLEAR DISTANCE RULE

In earlier installments of this survey of the torts decisions of the Supreme Court it has been noted that the arbitrary duty to stop within the range of vision has been so substantially relaxed in recent decisions that the duty could now be appropriately described as one merely obliging the driver to maintain such control and speed as will enable him to bring his car to a *reasonable* stop if faced with a sudden obstruction in his path of travel.<sup>26</sup>

The reviewer has ventured the opinion that the reasons for this relaxation of the older rule are fairly clear.<sup>27</sup> The situations have involved rear-end collisions. Nearly always the claim has been against the owner or operator of a vehicle that has unreasonably obstructed the open highway by being parked on the thoroughfare without lights or other warning. The typical defense in this kind of suit is that the vehicle approaching from the rear should have been in a position to come to a complete stop arbitrarily and that failure to drive within the range of vision was contributory negligence barring recovery. Should this contention universally prevail, the open highway obstructor (who affords one of the greatest perils experienced in modern traffic) would escape liability almost automatically by casting upon the rest of the traveling public the unqualified duty of avoiding his obstruction. In order to avoid such an indefensible result, the courts have whittled away at the arbitrary duty to stop within the range of vision, bringing about a much more equitable (although concededly more uncertain) state of affairs.

When, however, the controversy is not one between the ob-

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25. 275 U.S. 303 (1927).

26. *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Torts and Workmen's Compensation*, 17 LOUISIANA LAW REVIEW 345, 348-47 (1957).

27. *Ibid.*

structor and the operator of the following vehicle the problem assumes a different aspect. It may happen that the driver who finds the way ahead suddenly obstructed will seek to avoid a rear-end collision by turning into the opposite lane of traffic where he collides with a carefully driven oncoming vehicle. When this is the situation it can be fairly argued that the driver's duty toward the man in the opposite lane is higher than his duty toward the owner of the obstructing vehicle, and that his conduct should not be so readily excused. In such case he is being charged with *primary* negligence, not merely with contributory fault; his adversary is an innocent oncomer, rather than a guilty highway obstructor. This was the type of fact situation before the court last term in *Noland v. Liberty Mutual Insurance Company*.<sup>28</sup> The court of appeal had reversed the trial court's finding that the driver approaching the obstructing vehicle was negligent, and in so doing the appellate court relied on the line of cases referred to above involving rear-end collisions between the operator of the obstructing vehicle and the driver of the car approaching from the rear.<sup>29</sup> The reader's particular attention is called to the interesting dissent of Judge Tate, in which he carefully distinguishes the two kinds of accident situations discussed above, and he observes that the same piece of conduct may be regarded as negligent in one factual context and as non-negligent in another.<sup>30</sup> Upon appeal of the case to the Supreme Court, the decision of the trial judge on this issue was reinstated. The interesting distinction drawn by the dissenting opinion was not referred to by the court, which observed that the situation did not fall within any of the exceptions to the "assured clear distance" rule. One may surmise, however, that the Supreme Court's findings on the facts may have been influenced by the same considerations that prompted the dissent in the court of appeal.

A second controversy involving the same apposition of parties as in the *Noland* case came before the Supreme Court shortly thereafter in *Rizley v. Cutrer*.<sup>31</sup> In this case the obstruction consisted of a dangerous highway condition. The paved portion of the road suddenly ended without warning, resulting in a depression which had been caused by the repeated contact of motor traffic with the shoulder of the unpaved portion of the road.

28. 232 La. 569, 94 So.2d 671 (1957).

29. 89 So.2d 428 (La. App. 1956).

30. *Id.* at 432.

31. 232 La. 655, 95 So.2d 139 (1957).



Cutrer, upon suddenly encountering this road condition, lost control of his car, which swerved into the opposite traffic lane and collided with an oncoming vehicle in which plaintiffs were riding. Again, the court of appeal, relying upon the recent exceptions to the "assured clear distance" rule, found that Cutrer was not guilty of any negligence.<sup>32</sup> Again, the Supreme Court reversed and gave judgment for plaintiff. This time the excellent opinion of Justice McCaleb clearly distinguished the duty of the driver approaching the obstruction in those cases where suit is against the obstructor from the duty owed by the same driver to the occupants of an oncoming vehicle in the opposite lane of traffic. The opinion emphasized that a driver who leaves his own traffic lane is presumed guilty of negligence. "In other words, it was his burden to show that he was not guilty of any dereliction, however slight, which may have had causal connection with the accident."

This decision affords new evidence of what is becoming an increasingly prominent theme in traffic cases: Highway obstruction, however it may be brought about, is dealt with severely by the courts in civil litigation. If *A*, by leaving his car unattended on the highway without warning, causes *B*, who is approaching from the rear, to collide with the rear end of *A*'s vehicle, *A* will not be permitted to excuse himself readily by relying upon *B*'s failure to avoid *A*'s obstruction. However, if *B*, in his effort to avoid the obstruction, passes into the opposite lane of traffic, with a resulting collision, then *B*, in turn, has become an obstructor of oncoming traffic, and *B*'s obstruction will not be dismissed lightly. Of course, if *A*, the original obstructor, is made party defendant, the ultimate liability should fall upon him. The same manifest aversion to highway obstruction probably accounts in large part for the strict attitude of courts everywhere toward the motorist who becomes involved in an accident while attempting to make a left-hand turn across the opposite lane of traffic.

#### DEFAMATION

In *Nagim v. Morrison*,<sup>33</sup> a suit for libel was instituted against defendants, Mayor of the City of New Orleans and the former Superintendent of Police of that city. The alleged cause of action

32. *Mershon v. Cutrer*, 85 So.2d 639 (La. App. 1956). This case was decided by the court of appeal prior to the *Noland* controversy.

33. 232 La. 826, 95 So.2d 326 (1957).

was based upon the institution of a proceeding before the Louisiana Board of Tax Appeals for the revocation of beer and liquor permits issued to Nagim. In fact, Nagim had notified the New Orleans miscellaneous revenue department that he no longer operated the establishment, and a notation to that effect was made in the record. It was conceded that Nagim's recovery would depend upon his ability to show that statements made by defendants in the revocation proceeding were made maliciously and without probable cause. The evidence failed to establish this. Plaintiff had failed to notify the State Department of Revenue of his retirement from the operation, and the revocation action was instituted in part in reliance upon the records of that department.

## WORKMEN'S COMPENSATION

*Wex S. Malone\**

### PURCHASER'S COMPENSATION LIABILITY TO SELLER'S EMPLOYEES

For many years our courts have maintained the position that the employee of the person who sells and delivers timber to a buyer is not entitled to workmen's compensation from the latter under R.S. 23:1061 (the provision of the statute subjecting a principal to the compensation claim of his contractor's employee).<sup>1</sup> This position has resulted in numerous hardships among those employed in the lumber industry. There has developed a fairly common practice by the Louisiana lumber buyer of interjecting a middleman between himself and the owner of the standing timber. Ownership of the timber is transferred to this intermediary who, in turn, agrees to sever it and deliver it by way of resale to the ultimate purchaser. Usually it is this ultimate purchaser who initiates the entire transaction. Such purchases are almost universally made solely on the credit of the ultimate buyer. Usually such buyer withholds from money due the intermediary a sum sufficient to pay the owner of the standing timber, and this sum is paid directly to the latter. In practical effect, the intermediary is no more than a contractor who is paid for severing and hauling the timber. Yet, since the title passes through him, the courts have felt compelled to exclude him from the classification of contractor, because he is regarded as a "seller." Apparently it is assumed that such a

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1. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE* § 123 (1951).